

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE: ROUNDUP PRODUCTS )  
LIABILITY LITIGATION )  
 ) NO. 16-md-02741 VC  
 )  
 )  
 )

---

San Francisco, California  
Wednesday, February 13, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

ANDRUS WAGSTAFF PC  
7171 W. Alaska Drive  
Lakewood, Colorado 80226  
BY: AIMEE H. WAGSTAFF, ATTORNEY AT LAW  
DAVID J. WOOL, ATTORNEY AT LAW

ANDRUS WAGSTAFF PC  
6315 Ascot Drive  
Oakland, California 94611  
BY: KATHRYN M. FORGIE, ATTORNEY AT LAW

WEITZ & LUXENBERG PC  
700 Broadway  
New York, New York 10003  
BY: ROBIN L. GREENWALD, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Marla F. Knox, RPR, CRR  
Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
Official Reporters

1 **APPEARANCES:** (CONTINUED)

2 For Plaintiffs:

3 MOORE LAW GROUP  
4 1473 South 4th Street  
5 Louisville, Kentucky 40208

6 **BY: JENNIFER MOORE, ATTORNEY AT LAW**

7 THE MILLER FIRM LLC  
8 108 Railroad Avenue  
9 Orange, Virginia 22960

10 **BY: BRIAN BRAKE, ATTORNEY AT LAW**

11 LAW OFFICES OF TESHAYE W. TSADIK  
12 The California Building  
13 1736 Franklin Street - 10th Floor  
14 Oakland, California 94612

15 **BY: TESHAYE W. TSADIK, ATTORNEY AT LAW**

16 BAUM HEDLUND ARISTEI GOLDMAN PC  
17 12100 Wilshire Blvd. - Suite 950  
18 Los Angeles, California 90025

19 **BY: ROBERT BRENT WISNER, ATTORNEY AT LAW**

20 ANDRUS ANDERSON LLP  
21 155 Montgomery Street - Suite 900  
22 San Francisco, California 94104

23 **BY: LELAND H. BELEW, ATTORNEY AT LAW**

24 AUDET & PARTNERS LLP  
25 711 Van Ness Avenue - Suite 500  
San Francisco, California 94102

**BY: MARK E. BURTON, ATTORNEY AT LAW**

**APPEARANCES:** (CONTINUED)

For Defendant:

WILKINSON WALSH ESKOVITZ LLP  
2001 M Street, NW - 10th Floor  
Washington, D.C. 20036

**BY: BRIAN L. STEKLOFF, ATTORNEY AT LAW**  
**RAKESH N. KILARU, ATTORNEY AT LAW**  
**TAMARRA MATTHEWS JOHNSON, ATTORNEY AT LAW**  
**JULIE RUBENSTEIN, ATTORNEY AT LAW**

COVINGTON & BURLING LLP  
One City Center  
850 Tenth Street, NW  
Washington, D.C. 20001

**BY: MICHAEL X. IMBROSCIO, ATTORNEY AT LAW**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 Wednesday - February 13, 2019

9:37 a.m.

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

3 ---000---

4 **THE CLERK:** Calling Case Number 16-MD-2741, in Re:  
5 Roundup Products Liability Litigation.

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

8 **MS. WAGSTAFF:** Good morning, Your Honor. Aimee  
9 Wagstaff on behalf of Plaintiffs.

10 **THE COURT:** Good morning.

11 **MS. WAGSTAFF:** And with me, I have Brent Wisner, Robin  
12 Greenwald, Kathryn Forgie, Brian Brake, David Wool, Jennifer  
13 Moore and Tesfay Tsadik and Mark Burton.

14 **THE COURT:** Good morning.

15 **MR. STEKLOFF:** Good morning, Your Honor. Brian  
16 Stekloff on behalf of Monsanto. Along with me I have Rakesh  
17 Kilaru, Tamarra Matthews Johnson, Julie Rubenstein and Michael  
18 Imbroscio.

19 **THE COURT:** Good morning. Okay. So first on my  
20 agenda is the statute of limitations issue, but if people want  
21 to talk about -- if anybody has any burning issue they want to  
22 talk about first, that's fine. Let's talk about statute of  
23 limitations.

24 So, Mr. Tsadik, let me start with you. I don't understand  
25 how I could conclude that there is a genuine fact issue on the

1 question whether the clock started running. When Mr. Gebeyehou  
2 was talking to his doctor about -- about whether Roundup caused  
3 his NHL -- or in the month preceding that really because he  
4 watched the TV show -- he told his doctor by e-mail that he was  
5 90 percent sure that his NHL was caused by Roundup, and -- and  
6 he -- in his deposition he was asked whether he told his wife  
7 about the Dr. Oz Show, and his response was, I don't think I  
8 talked to her about that show because she already knew that I  
9 had been researching this very heavily, right.

10 So in light of -- I don't see how there is a genuine --  
11 there could be a genuine fact dispute on that question. It  
12 seems clear that he subjectively believed -- and strongly  
13 believed -- maybe not to a certainty but strongly suspected at  
14 a minimum, that Roundup caused his cancer.

15 And so one of your arguments seems to be that there is a  
16 genuine fact dispute on that issue -- on whether the clock  
17 should start -- should -- should start at that time; and if  
18 that is indeed one of your arguments, I don't understand it.

19 So let's start with that.

20 **MR. TSADIK:** Thank you. Your Honor, I have two really  
21 main points. One is really if the Court accepts in this case  
22 340.8 applies here.

23 **THE COURT:** Okay.

24 **MR. TSADIK:** And if you analyze the case based on  
25 that, aware or should have been aware standard, you know, that

1 is the standard in the statute, you know. When the statute is  
2 so clear, the plain language really is important. You can't go  
3 interpreting the statute if the plain language says aware or  
4 should have been aware. I mean, you can't impose suspicion  
5 standard on that.

6 **THE COURT:** Well --

7 **MR. TSADIK:** I say that because if you look --

8 **THE COURT:** Let me interrupt you, just to make sure I  
9 understand what you are saying.

10 **MR. TSADIK:** Yeah.

11 **THE COURT:** So give me a second. I'm pulling up the  
12 statute.

13 **MR. TSADIK:** I have a copy if you want --

14 **THE COURT:** No. I have it.

15 (Whereupon, a brief pause was had.)

16 **THE COURT:** So you are saying that if 340.8 applies --

17 **MR. TSADIK:** Yes.

18 **THE COURT:** -- the standard is that he has to be aware  
19 of it?

20 **MR. TSADIK:** Yes. And should have been aware.

21 **THE COURT:** But certainly that cannot mean that he  
22 needs to be aware of it to a certainty.

23 **MR. TSADIK:** No. I mean, he should --

24 **THE COURT:** Otherwise nobody could ever sue on  
25 Roundup.

1           **MR. TSADIK:** I understand. You see, he should have  
2 been aware, not to a certainty. At least you know that there  
3 is causation information in terms of what he had. If you look  
4 at his deposition testimony, I will refer you to page 54 and  
5 page -- I believe -- 66 -- 21 to -- 21 to 24 and page 54 -- he  
6 refers to all of these as rumors, rumors, repeating them. I  
7 have to send these rumors to Dr. Oz, that kind of statement he  
8 is making.

9           **THE COURT:** Well, but the undisputed evidence in the  
10 record is that he told his doctor he was the 90 percent sure  
11 that Roundup caused his cancer, and he stated that his wife --  
12 he had been doing tons of research on the issue, and his wife  
13 was aware of all the research that he was doing on the issue.

14           **MR. TSADIK:** I will --

15           **THE COURT:** So he -- at a minimum, he had a very  
16 strong suspicion that Roundup caused his cancer, and so what  
17 you seem to be saying is that having a very strong suspicion  
18 that something caused your cancer is not enough to start the  
19 clock under Section 340.8?

20           **MR. TSADIK:** You have to be aware. Standard -- I  
21 mean, the quantum of information you need under suspicion or  
22 strong suspicion is quite different from the quantum of  
23 information you need to have knowledge, okay.

24           **THE COURT:** So are you saying that the standard is  
25 different under Section 340.8 than it is under Section 335.1?

1           **MR. TSADIK:** Absolutely.

2           **THE COURT:** Okay. Do you have any case law to support  
3 the idea that the standard is different? The typical discovery  
4 rule does not apply in the 340.8 context.

5           **MR. TSADIK:** Okay. I will refer you to *O'Connor*  
6 *versus Boeing* case, which is 311 F.3d --

7           **THE COURT:** O'Connor versus what?

8           **MR. TSADIK:** Boeing Airlines.

9           **THE COURT:** And what is the cite again?

10          **MR. TSADIK:** 311, 149. That's the -- you will see  
11 there --

12          **THE COURT:** At 311 F.3d?

13          **MR. TSADIK:** Yes.

14          **THE COURT:** 149?

15          **MR. TSADIK:** Yes. 1149, I'm sorry.

16          **THE COURT:** 1149. Hold on a second. This is not my  
17 normal courtroom. I don't know how equipped I am to pull up  
18 that case. Just give me a second.

19          (Whereupon, a brief pause was had.)

20          **THE COURT:** 1139?

21          **MR. TSADIK:** 1149, Your Honor.

22          **THE COURT:** I think it is 1139.

23          **MR. TSADIK:** 39, I'm sorry.

24          **THE COURT:** Okay. One moment.

25          **MR. TSADIK:** There you see --



1           **THE COURT:** Let me make sure I have the right --

2           **MR. TSADIK:** Sure.

3           (Whereupon, a brief pause was had.)

4           **THE COURT:** Okay. So show me where, where is your  
5 language in this case?

6           **MR. TSADIK:** You will see there in the -- on page -- I  
7 have here.

8           **THE COURT:** This is a CERCLA case?

9           **MR. TSADIK:** Yes, the standard you see here.

10          **THE COURT:** What does that have to do --

11          **MR. TSADIK:** Let me explain to Your Honor. You will  
12 understand why I take this position.

13          **THE COURT:** Okay.

14          **MR. TSADIK:** You will see there the statute class  
15 there is Plaintiff knew or should have known standard.

16          **THE COURT:** Okay.

17          **MR. TSADIK:** And the district court in Los Angeles  
18 applied the California suspicious standard. You will see there  
19 on the -- I believe, you know, on page 1146.

20          **THE COURT:** Okay. The district court made an error in  
21 twofold. First, in concluding the federal discovery rule  
22 commences -- to California discovery rule, which is suspicious  
23 rule, you know, okay, and apply the California rule.

24          The Court was saying, you know, the suspicious standard is  
25 much, much lower than what knew or should have known standard

1 would provide. That is what essentially the Court is saying in  
2 there. That is making it --

3 **THE COURT:** I understand what you are saying, but I  
4 just -- I'm not sure I understand how that helps you because  
5 that's -- that's a case in which the Court said, look, the  
6 discovery rule under CERCLA preempts the State discovery rule,  
7 and the federal statute has a different rule than California  
8 law has; but here we have two different statutes under  
9 California law, and what is the reason that I should assume --  
10 on what basis should I assume that the discovery rule is not  
11 the same under these two statutes?

12 **MR. TSADIK:** You see, because the knew or aware or  
13 should have been aware standard is much higher than suspicious  
14 standard. I mean, that's really -- it is the common sense  
15 determination.

16 **THE COURT:** Well, but you say -- you know, you keep  
17 saying "suspicion standard."

18 **MR. TSADIK:** Yeah.

19 **THE COURT:** I don't think it is exactly right to say  
20 that it is a suspicion standard. As I understand the standard  
21 under California law, you either have to have a subjective  
22 belief that this caused your injury or you have to be on  
23 inquiry notice, which means there is enough information from  
24 which a reasonable person would conclude that they need to  
25 conduct an investigation, right. And -- do you agree that is

1 the discovery rule?

2 **MR. TSADIK:** I think --

3 **THE COURT:** In California?

4 **MR. TSADIK:** That is one element there.

5 **THE COURT:** Okay. So in this case he subjectively  
6 believed that Roundup caused his cancer and so -- so you seem  
7 as to be saying that that is not -- that is the normal  
8 discovery rule in California, but it is not the test under  
9 340.8.

10 **MR. TSADIK:** That is one. And the other thing is even  
11 under the suspicion standard, Courts are saying, you know, that  
12 the subjective belief can also be somehow compromised by  
13 objective evidence. You can have any kind of subjective  
14 evidence, a belief, but the objective evidence in this case, a  
15 clear medical opinion from the doctor, controverts your point  
16 of view. That should be taken into account.

17 **THE COURT:** But one thing I don't understand -- what I  
18 don't understand about that argument, right, is that if you  
19 have a subjective belief that something caused your injury and  
20 you start investigating it, and then somebody tells you, no,  
21 no, it didn't cause your injury, and then later you find out  
22 some other information that suggests that it did cause your  
23 injury, I don't -- I don't understand why that would cause the  
24 clock to start running from the beginning again.

25 I mean, it sounds more like a tolling argument that you

1 are making. I mean, none of it changes the fact that at the  
2 outset as applied to this case, what you are saying is, okay --  
3 it seems like what you are saying is my client had a subjective  
4 belief that his Roundup was -- that his cancer was caused by  
5 Roundup, and then the doctor told him something that threw him  
6 off the trail; and then later he found out about the IARC  
7 report, IARC classification.

8 And, therefore, the clock should start running again from  
9 the start when he learned about the IARC classification. Now,  
10 I don't really understand that because the clock starts running  
11 when you have the test -- the clock starts running when you  
12 have a subjective belief that your injury was caused by this  
13 product.

14 **MR. TSADIK:** I see. At the time -- you see, there are  
15 two issues in this case you should also take into account  
16 which, I believe, is indicated in the deposition. I believe we  
17 pointed out in our opposition to his statement that 95 percent,  
18 I'm sure is simply an exaggeration to get the attention of the  
19 doctor. That's what he said, you know.

20 **THE COURT:** I understand that, but he said --

21 **MR. TSADIK:** Meaning he didn't subjectively believe.  
22 Because he didn't subjectively believe and he didn't hear from  
23 the doctor, he continued to use Roundup after that,  
24 continuously. Okay. And that is consistent that -- with his  
25 belief, subjective belief, that he did not really believe that

1 Roundup causes his cancer. Why would he otherwise continue to  
2 use the thing, you know?

3 **THE COURT:** But that's -- I mean, I don't see how --  
4 he sent an e-mail saying he is 95 percent sure it was caused by  
5 Roundup, and he was doing extensive investigation on the topic.  
6 And I just -- I don't understand how I could conclude that  
7 there is a -- in light of that, that there is a genuine issue  
8 of fact on whether he subjectively believed that Roundup caused  
9 his cancer.

10 I mean, yes, you can -- I understand the idea -- yeah, I  
11 was overstating my -- the strength of my belief because I  
12 wanted to get my doctor's attention. But, I mean, all of the  
13 conduct, when you look at it together, I don't see how any  
14 reasonable juror could conclude that he did not believe that  
15 Roundup was causing -- that Roundup had caused his cancer at  
16 that time.

17 **MR. TSADIK:** So to me sometimes it could be a  
18 credibility question, whether you believe him when he said he  
19 is exaggerating.

20 **THE COURT:** No. I'm saying let's assume he was  
21 exaggerating. Still --

22 **MR. TSADIK:** Also the other thing which really came to  
23 my mind is when you talk about investigation, one should ask,  
24 what would have investigation yielded at that time. We are  
25 talking about really a window period of 12 days, from

1 September 24 to October 7. That's when he filed his complaint.

2 So in that window period, 12 days window period, he  
3 investigated. You think, you know, he has all the information  
4 he needed to make a conclusion at that time. I mean, that's  
5 really highly difficult to conclude based on the record here.

6 **THE COURT:** You are saying he couldn't have -- he  
7 couldn't have sued on his belief until the IARC classification  
8 came out?

9 **MR. TSADIK:** No. I would say during the window  
10 period. The window period is from October 24, when you  
11 conclude that he was suspicious and he started investigation,  
12 from that part, time period. You see he filed on October 7, 12  
13 days later, his claim. So that is the time period we are more  
14 concerned.

15 What information did he have during that time period to  
16 believe -- make anyone believe, you know, that the  
17 investigation during that time period --

18 **THE COURT:** No. The point is that you have to sue  
19 within two years of either believing that the injury was caused  
20 by the Defendant or -- or being on sufficient notice, inquiry  
21 notice -- you have to sue within two years, and he didn't sue  
22 within two years.

23 **MR. TSADIK:** What we are saying is if you say he  
24 actually had suspicion on September 24th and started  
25 investigation, you are assuming that on September 24, the

1 investigation concluded on September 24, he should have filed  
2 his complaint to meet his two-year standard. That's what you  
3 are saying. That is really not possible.

4 **THE COURT:** You are saying he needed 12 more days?

5 **MR. TSADIK:** No. What I'm saying is somebody has to  
6 point out what the investigation would have shown at that point  
7 for any reasonable person to file a lawsuit during that time  
8 period, because the fact is disputed.

9 **THE COURT:** Showing the same thing that he knew 12  
10 days later when he filed the lawsuit. I mean, I don't  
11 understand what you are talking about.

12 **MR. TSADIK:** I think really the standard is -- really,  
13 to me, if you are actually talking about investigation, one has  
14 to look into what the investigation would have shown --

15 **THE COURT:** It would have shown the same thing that it  
16 showed --

17 **MR. TSADIK:** -- before he filed.

18 **THE COURT:** It would have shown the same thing that it  
19 showed when he filed 12 days later. In other words, he didn't  
20 learn any new information in the 12 days after the limitation  
21 period ran, arguably.

22 **MR. TSADIK:** Because, you know, IARC really is sort of  
23 the scientific consensus that established at that time --

24 **THE COURT:** Yeah, but the point is that he was on --  
25 he believed that Roundup caused his cancer in September of

1 2014. The IARC classification came out when? In the spring  
2 of --

3 **MR. TSADIK:** Yeah, March of 2015.

4 **THE COURT:** 2015?

5 **MR. TSADIK:** Yes.

6 **THE COURT:** So all he needed to do was sue before  
7 September of 2016, but he didn't. He sued in October of 2016.  
8 So he arguably blew the limitations period.

9 **MR. TSADIK:** What I'm saying is when you look at the  
10 limitation period, you know, you look at -- in terms of really  
11 he has the right to file his complaint two years from the date  
12 he knew.

13 **THE COURT:** Right.

14 **MR. TSADIK:** Okay. So the point is, in this case, the  
15 statute expired for 12 days. That's what happened in this  
16 case. The question to ask is really what would somebody have  
17 to get to to file on September 14, his complaint, 2007? Does  
18 he have all the --

19 **THE COURT:** 2000 when?

20 **MR. TSADIK:** 2014 -- I'm sorry, September 14, 2016.  
21 He has to file it. Okay. But in this case, the delay was  
22 only, in terms of the information for the statute to expire,  
23 was only 12 days, you know.

24 **THE COURT:** I don't understand that argument. But I  
25 would have thought that you would have come in here and argued,



1 okay, let's assume for the sake of argument that my client had  
2 a subjective belief in September of 2014 that Roundup caused  
3 his cancer. And let's assume for the sake of argument that the  
4 clock started ticking in September of 2014. It was told -- the  
5 limitations period was told at the time my client's doctor  
6 suggested to him that it wasn't Roundup, and the time  
7 between -- so his doctor, my client's doctor, threw him off the  
8 scent essentially.

9 And the time from -- the period between the doctor  
10 throwing him off the scent and the time your client's other  
11 doctor friend sent your client the news about the IARC  
12 classification, that that -- that there should be tolling  
13 during that period because he was thrown off the scent.

14 But you don't seem to be making that argument. You seem  
15 to be arguing that --

16 **MR. TSADIK:** I mean --

17 **THE COURT:** -- that the doctor -- that the fact that  
18 the doctor threw him off the scent means that he -- that my  
19 client never really truly suspected that he had -- that Roundup  
20 caused his cancer and, therefore, the clock never started in  
21 the first place.

22 **MR. TSADIK:** But the question really is also we still  
23 have to examine, you know, the issue of what facts, what facts  
24 would have been the -- would the investigation have revealed in  
25 terms of the causation until he came across IARC. It is just

1 like, you know, a tobacco causing cancer. I mean, we have been  
2 talking about this --

3 **THE COURT:** But the IARC, the IARC is not a -- the  
4 IARC classification is not based on a new study. The IARC  
5 concluded that glyphosate was -- is a probable carcinogen, as  
6 IARC defines that term, based on a review of preexisting  
7 studies for the most part, right. And all the epidemiological  
8 studies that the experts in this case rely on were in existence  
9 before the IARC reached its conclusion.

10 So I -- I don't --

11 **MR. TSADIK:** I would say --

12 **THE COURT:** I don't understand why -- by the way,  
13 people sued -- including, I believe, Mr. Hardeman -- people  
14 sued on -- people sued Monsanto alleging that Roundup caused  
15 their NHL before the IARC announced its classification  
16 decisions.

17 **MR. TSADIK:** That may be. The only thing I would say,  
18 Your Honor, is my client was not aware of that information.  
19 The question is: Is there, in toxicology evidence, before IARC  
20 came -- I think, you know, it is almost close to that point,  
21 you know, that the toxicology evidence came up. You know, and  
22 confirming -- it is just after -- after September, I would say,  
23 you know. I mean -- September 2014.

24 So the point I'm really making is I think really his  
25 subjective belief, which was couched in doubt, saying he is

1 exaggerating, saying it is a rumor and continuing to use  
2 glyphosate, you know, that simply negates, you know, his  
3 subjective belief, you know. This should be -- the jury  
4 question, you know, to believe him or not to believe him, you  
5 know. I mean, we can't just simply --

6 **THE COURT:** Okay. I understand your argument on that  
7 point, but let me ask you --

8 **MR. TSADIK:** Yeah.

9 **THE COURT:** -- just because I want to give you every  
10 chance to make every point you could possibly make for your  
11 client -- do you have a tolling argument? Do you have an  
12 argument -- I mean, if I disagree with you that the clock  
13 didn't start -- your position is that the clock never started,  
14 right, the clock never started until your client learned of the  
15 IARC classification?

16 **MR. TSADIK:** Yes.

17 **THE COURT:** If I disagree with you about that, do you  
18 have an argument that even if the clock started in  
19 September 2014, it stopped -- it paused when Mr. Gebeyehou's  
20 doctor kind of suggested that there is no firm evidence of a  
21 link between Roundup and NHL and then didn't start again until  
22 Mr. Gebeyehou learned of the IARC classification. Do you have  
23 a tolling argument?

24 **MR. TSADIK:** Yes, I do.

25 **THE COURT:** And what is your case law to support that

1 sort of tolling argument?

2 **MR. TSADIK:** I provided you yesterday two cases,  
3 Your Honor.

4 **THE COURT:** But those cases were not about tolling.  
5 Those cases were about whether somebody developed a sufficient  
6 level of subjective belief in the first place.

7 **MR. TSADIK:** That's very true, but it also talks about  
8 that subjective belief being negated by the --

9 **THE COURT:** Right.

10 **MR. TSADIK:** -- objective medical evidence.

11 **THE COURT:** But those cases -- on that point --

12 **MR. TSADIK:** Yes.

13 **THE COURT:** -- I don't think those cases help you. I  
14 mean, first of all the one that is unpublished, you described  
15 it as unpublished.

16 **MR. TSADIK:** Yes.

17 **THE COURT:** It was ordered de-published by the  
18 California Supreme Court. And I think the reason is that there  
19 are a lot of problems with those type of cases.

20 But -- but the published case, the one that starts with  
21 the K.

22 **MR. TSADIK:** *Kitzig*.

23 **THE COURT:** What is it?

24 **MR. TSADIK:** *Kitzig*.

25 **THE COURT:** *Kitzig*. I mean, that case I don't think

1 really helps you on this point that you are trying to argue  
2 because the main point of the *Kitzig* case was that she -- that  
3 was the one about the dentists, right?

4 So she -- the main point is that she suspected that there  
5 was something wrong with her, but it turned out that -- that  
6 there was not something -- that that particular thing was not  
7 wrong with her, and then she later sued the dentist based on  
8 different injuries. So that's -- so -- so the fact that she  
9 went to a second dentist in Los Angeles to explore the first  
10 problem is no evidence at all that she believed that she had  
11 the second problem that she later sued the dentist on.

12 So I don't understand how that case helps you. And even  
13 if they were the same problems, which they weren't, the  
14 strength of Mr. Gebeyehou's belief is indisputably much more  
15 than the sort of level of suspicion that Ms. Kitzig had in that  
16 case. And so that's why when I read that case, I said, well,  
17 that's the best he has on, you know, negating the idea that his  
18 clients had a subjective belief that Roundup caused his NHL?

19 That's when I turned to the question of, well, does he --  
20 that can't be right. But does he have a tolling argument? And  
21 those cases that you cited in your letter from yesterday or the  
22 day before, whenever it was, are not about tolling.

23 So I'm wondering if you have any cases that would stand  
24 for the proposition that your client is entitled to tolling  
25 during that period between the time his doctor communicated

1 with him about it and the time he discovered the IARC  
2 classification.

3 **MR. TSADIK:** I mean, I don't have specific case on  
4 this one, Your Honor. I think I still would go back to the  
5 argument that -- two arguments. One is that his subjective  
6 belief that is really based on the deposition testimony to --  
7 in my opinion, it is equivocal; meaning, it is not really for  
8 sure. It is doubtful, you know what I mean. I would say that.

9 And, number two, Your Honor, with respect to the  
10 investigation you raised, you know, I mean, I think you know I  
11 would submit, Your Honor, listening from all this expert  
12 testimony here, the toxicology evidence were not publicly  
13 available at that time until IARC came out with that -- you  
14 know, was not publicly available. So even if he had to  
15 research the cause of his injury, I think one of the biggest  
16 strand of his causation period would be the finding of  
17 toxicology studies. So that did not really exist publicly, and  
18 he could not have investigated, you know.

19 And also to me, it would be a huge burden to impose on  
20 Plaintiff to do investigation of really -- of a complicated,  
21 scientific causation. And also at the same time, changing --  
22 science publications keep changing, you know. Even Monsanto, I  
23 mean, couldn't point out to a single evidence against  
24 Mr. Gebeyehou to show that the glyphosate actually was causing  
25 concern during that time period. Of course they could not do

1 that to disprove him because that would be undermining their  
2 position.

3 So really normally the Defendant has the duty to point out  
4 to a specific document what investigation would have shown to  
5 establish causation as a -- as part of their having this motion  
6 filed in this case. That, they did not do. That's --

7 **THE COURT:** Ms. Rubenstein.

8 **MS. RUBENSTEIN:** I just want to respond to the  
9 theoretical tolling argument that could be made because  
10 Your Honor has referred to it a number of times. This idea  
11 that Mr. Gebeyehou's doctor threw him off the scent, that is  
12 just not at all borne out by the record here. It is  
13 undisputed.

14 **THE COURT:** All right. But I'm happy for you to  
15 answer that question, but if his doctor did throw him off the  
16 scent -- hypothetically, if his doctor said, Look, I can tell  
17 you I have looked at this really carefully. I'm an expert in  
18 this; and I can tell you, Roundup did not cause your cancer,  
19 would there be tolling?

20 **MS. RUBENSTEIN:** I don't think so because the only --  
21 the only scenario in which I have seen that come up, and it is  
22 not even on all fours, are the two cases that Mr. Tsadik  
23 submitted to the Court. I have not seen --

24 **THE COURT:** But I think those Courts -- I mean, I  
25 think maybe that was one of the problems with the

1 unpublished -- published decision, is that they were thinking  
2 of it in terms of restarting the clock, but they should have  
3 been thinking of it in terms of tolling. And that's what -- so  
4 that -- and maybe that's one of the reasons that the opinion  
5 was de-published. I don't know.

6 But -- but it made me wonder is there a tolling argument  
7 like that. So, for example, in the case, in the unpublished  
8 decision whose name I can't remember --

9 **MS. RUBENSTEIN:** It is *Duncan*, Your Honor.

10 **THE COURT:** -- they eventually found a staple -- the  
11 doctor left a staple in her, right. So you -- you have your  
12 first surgery; the doctor leaves the staple in there. You  
13 don't know that the doctor left a staple in there. You are  
14 experiencing discomfort. You suspect that the doctor messed  
15 up. Maybe the doctor committed malpractice, okay, and so the  
16 clock starts running.

17 Then you have the second exploratory surgery to see what  
18 is wrong in there. The doctor -- you wake up, and the doctor  
19 says it is just scar tissue. You don't need to worry about,  
20 you know, anything more serious having happened as a result of  
21 the first surgery. So I would think at that point the statute  
22 of limitations, the limitations period would be tolled.

23 And then you are continuing to have problems, and you have  
24 your third surgery; and they find the staple that the first  
25 doctor left in there. And when they find that, then the clock



1 starts running again, right. I would think that it would have  
2 to be that the -- that the -- that there is tolling during that  
3 period.

4 I would not say that it negates, you know, the subjective  
5 belief the person had at the outset, but there would have to be  
6 tolling during that period. So that's why I ask you the  
7 hypothetical, if the doctor -- if Mr. Gebeyehou's doctor said,  
8 I'm an expert and I can guarantee you, I have read all the  
9 studies; and I can guarantee you that Roundup doesn't cause  
10 NHL, how could there not be tolling in that circumstance?

11 **MS. RUBENSTEIN:** So it is a good question, and I  
12 thought a lot about this in reading through those cases. What  
13 I can say is that that -- the idea that a doctor can provide  
14 this objective medical opinion that allays -- I think is the  
15 term that is used in the case -- allays someone's suspicion,  
16 even to start the tolling period seems to be applicable in  
17 these med-mal cases where there is a fiduciary relationship  
18 between the Plaintiff and the Defendant.

19 **THE COURT:** I understand -- in a lot of med-mal cases  
20 it is like that, but not in this case, though, that we are  
21 talking about. In this case we are talking about the Plaintiff  
22 went to the second doctor and did the exploratory surgery. And  
23 it was the second doctor, not the Defendant, who said you have  
24 nothing to worry about here.

25 **MS. RUBENSTEIN:** Right. Understood. But there is

1 something -- the cases seem to be applying that standard only  
2 in -- in fact, in the two cases that Mr. Tsadik cited are  
3 expressly interpreting 340.5, which is a limitation period that  
4 we agree doesn't apply in this case.

5 So I -- I don't see a basis in the law to apply that  
6 standard here. I think it's clear from cases such as *Norgart*  
7 and *Jolly*, which we have cited in our papers that a different  
8 standard applies.

9 **THE COURT:** And on that point -- I know I have  
10 distracted you about telling me from the evidence and what the  
11 doctors said, and I do want to give you a chance to get to  
12 that; but on that point, Mr. Tsadik says that the standard is  
13 different for 335.1 than 340.8. Is there authority on that  
14 issue?

15 **MS. RUBENSTEIN:** I confess, I haven't read the  
16 *O'Connor* case. I don't think it is cited in his papers.

17 **THE COURT:** It doesn't seem like it is on point.

18 **MS. RUBENSTEIN:** I haven't seen anything to suggest --  
19 and we can go back and research this, but I haven't seen  
20 anything to suggest that 340.8 and 335.1 are different.

21 **THE COURT:** Have you seen anything to suggest that  
22 they are treated the same?

23 **MS. RUBENSTEIN:** Other than -- I guess -- I don't -- I  
24 can't cite to anything that is exactly on point. I just -- the  
25 answer is in short no. We can go back and research it, but my

1 understanding is that the Court is generally applying the same  
2 rule, the same discovery rule.

3 **THE COURT:** Okay. Now, I will let you get to your  
4 point.

5 **MS. RUBENSTEIN:** Sure. So this idea that  
6 Mr. Gebeyehou's doctor somehow threw him off the scent is not  
7 at all supported by the factual record. We know it is  
8 undisputed that Mr. Gebeyehou sent the e-mail on the 24th.  
9 Mr. Gebeyehou testified under oath that the doctor did not  
10 respond on the substance of that. He responded, you know, I  
11 think with some administrative points, but did not respond on  
12 the substance of it.

13 Mr. Gebeyehou also testified that he never raised it with  
14 the doctor, and there is a snip that I can point you to --

15 **THE COURT:** You mean, he testified that he never  
16 followed up on that aspect of his e-mail with the doctor?

17 **MS. RUBENSTEIN:** That's correct, Your Honor.

18 **THE COURT:** Okay. Where is that?

19 **MS. RUBENSTEIN:** That is at -- I can hand you actually  
20 a full copy of the deposition transcript.

21 **THE COURT:** I was going to ask --

22 **MS. RUBENSTEIN:** I think we only submitted an excerpt.

23 **THE COURT:** I was going to ask for the full copy.

24 **MS. RUBENSTEIN:** And I can point you to pages --

25 page 54 at lines 12 through 23. And then again at pages 76 to

1 78.

2 (Whereupon, a brief pause was had.)

3 **THE COURT:** Okay. So -- but his doctor testified that  
4 he did have some sort of discussion with Mr. Gebeyehou about  
5 it, right?

6 **MS. RUBENSTEIN:** Actually, Your Honor, what the doctor  
7 testified -- and I can also hand up a copy of that, if you  
8 would like -- is that he didn't recall one way or another  
9 whether he had a follow-up discussion with Mr. Gebeyehou. He  
10 said in a typical case he might have that conversation, but he  
11 emphatically said, and I can give you the cite, I don't recall  
12 if I had a conversation with Mr. Gebeyehou.

13 **THE COURT:** Do we have the full transcript?

14 **MS. RUBENSTEIN:** Yes, I can hand that to you as well.

15 (Whereupon, a brief pause was had.)

16 **THE COURT:** File those both on the docket also just so  
17 that it is part of the record.

18 **MS. RUBENSTEIN:** Sure.

19 **THE COURT:** Okay. Now, where? Show me where that is.

20 **MS. RUBENSTEIN:** Yep. Give me one moment.

21 (Whereupon, a brief pause was had.)

22 **MS. RUBENSTEIN:** That is at page 49, Your Honor,  
23 starting at line 17, and it goes through the middle of the next  
24 page.

25 (Whereupon, a brief pause was had.)

1           **THE COURT:** Okay.

2           **MS. RUBENSTEIN:** So there is really just no evidence  
3 that Mr. Gebeyehou was, you know, thrown off the trail. In  
4 fact, his doctor simply, according to Mr. Gebeyehou's sworn  
5 testimony, didn't respond one way or the other.

6           I think the -- I know Your Honor just read it, but the  
7 part on page 76 he says, he didn't tell me no. He didn't tell  
8 me yes. He didn't respond one way or the other.

9           So this idea that the period would be tolled is just based  
10 on a factual scenario that doesn't exist here.

11           **THE COURT:** Can I ask you another question about  
12 tolling?

13           **MS. RUBENSTEIN:** Absolutely.

14           **THE COURT:** I understand you may not be prepared to  
15 answer it because he has not really focused on a tolling  
16 argument, but is it a judge question or a jury question?

17           **MS. RUBENSTEIN:** I think it is a judge question  
18 because I don't think there is any undisputed facts here. I  
19 don't see what fact the jury would --

20           **THE COURT:** If there were a disputed fact question on  
21 tolling, would that be a jury question?

22           **MS. RUBENSTEIN:** Honestly, Your Honor, I haven't  
23 researched it so I can't say for sure. But I just don't see  
24 what the dispute would be over tolling because we agree -- I  
25 mean, it is undisputed when he sent the e-mail. It is

1 undisputed what his doctor said in response. So I don't know  
2 what the predicate would be for tolling to take place.

3 **THE COURT:** If you assume that Mr. Gebeyehou  
4 subjectively believed that Roundup caused his cancer in  
5 September 2014.

6 **MS. RUBENSTEIN:** Correct, which I think we have to  
7 believe based on his -- based on the documentary evidence.

8 **THE COURT:** Okay. Do you -- let me -- I mean,  
9 obviously, you know, statute of limitations issues are  
10 difficult because on the one hand, you know, the results are  
11 very harsh. But on the other hand, you know, Courts are  
12 required to apply statute of limitations harshly sometimes. It  
13 is a decision that the Court makes. But somebody has to bring  
14 a lawsuit, and, you know, unless there is a real tolling  
15 argument, you know, the Court -- the Court can't extend the --  
16 the limitations period that the legislature has decided upon  
17 and -- but it is a big deal to throw a case out on statute of  
18 limitations.

19 So let me ask you: Do you want another opportunity to  
20 brief this tolling issue that I have raised --

21 **MR. TSADIK:** Yes, I would.

22 **THE COURT:** -- and to try to identify cases that might  
23 stand for the proposition that Mr. Gebeyehou is entitled to  
24 tolling from the period that he talked to his doctor to the  
25 period that he discovered the IARC classification?

1           **MR. TSADIK:** Yes, Your Honor. I would appreciate very  
2 much.

3           **THE COURT:** Okay. And -- so you can brief that  
4 question. You can brief the question of whether the same  
5 discovery rule applies to 340.8?

6           **MR. TSADIK:** That's good, Your Honor.

7           **THE COURT:** As 335.1? Do I have the numbers right?

8           **MR. TSADIK:** Yes, you are right. 335.1, yeah.

9           **THE COURT:** So that's Question Number 2 that you can  
10 file supplemental briefing on.

11           And Question Number 3 is: Would this be a -- if there is  
12 a disputed issue of fact on the tolling question, would that be  
13 for a jury to resolve or would it be for the judge to resolve?

14           So those are the three questions that you can address in  
15 supplemental briefing.

16           **MR. TSADIK:** Thank you.

17           **THE COURT:** When would you like to file your  
18 supplemental brief?

19           **MR. TSADIK:** I would say by the end of this month,  
20 Your Honor.

21           **THE COURT:** Sorry?

22           **MR. TSADIK:** By the end of this month. Would that be  
23 all right?

24           **THE COURT:** By the end of this month?

25           **MR. TSADIK:** Yes.

1           **THE COURT:** That would be fine.

2           **MR. TSADIK:** Thank you.

3           **THE COURT:** So what date is that? You want to say  
4 March 1st? Friday, March 1st?

5           **MR. TSADIK:** Yes, thank you, Your Honor.

6           **THE COURT:** And then Monsanto can respond in, I don't  
7 know, a week later, March 8th.

8           And then I will deem it under submission after that.

9           One question, I guess -- one practical question I have  
10 is -- I mean, I assume you are working around the clock.

11           **MR. TSADIK:** Absolutely, Your Honor.

12           **THE COURT:** Preparing your client's case for trial.

13           **MR. TSADIK:** Yes.

14           **THE COURT:** You know, I'm wondering if we should press  
15 the pause button on that until I issue a ruling on the statute  
16 of limitations question.

17           **MR. TSADIK:** That would help, Your Honor.

18           **THE COURT:** So what -- so why don't you -- why don't  
19 you meet and confer with opposing counsel about how to provide  
20 you with some relief in terms of your workload, and I would be  
21 fine with -- even if it means that the -- that Mr. Gebeyehou's  
22 case is not ready to go to trial in May, I would be fine  
23 with -- if you-all agree to stop all other proceedings until I  
24 issue a ruling on this.

25           **MR. TSADIK:** Yes.



1           **THE COURT:** So why don't you confer about that and  
2 submit a stipulation, if you can agree to something.

3           **MR. TSADIK:** Thank you, Your Honor. I appreciate it.

4           **THE COURT:** Thank you.

5           Why don't we talk about the Plaintiffs' specific causation  
6 experts, and I will want to talk -- I will want to start with  
7 Monsanto's lawyer on that.

8           **MR. STEKLOFF:** Your Honor, understanding that I may  
9 not be -- may not show you a single slide in this deck that I  
10 have prepared because you may just have questions, we have  
11 prepared a deck, and I have -- I just gave it to you -- and I  
12 have multiple copies. We labeled it Exhibit 2200, just for  
13 purposes of the hearing.

14           **THE COURT:** Thank you. So I guess my tentative view  
15 on the Plaintiffs' specific causation experts is similar to my  
16 view on general causation, which is that I think that their  
17 opinions are of pretty low quality. I think that they, you  
18 know, have some credibility issues.

19           I think the -- particularly as it relates to Mr. Hardeman,  
20 but probably as it relates to all three of the Plaintiffs, the  
21 evidentiary basis for a conclusion that Roundup caused their  
22 NHL seems fairly weak, but particularly given the way the Ninth  
23 Circuit approaches Daubert questions, you know, it is not clear  
24 that the experts' opinions fall so far outside the range of,  
25 you know, acceptable possible expert opinions that I should --

1 that I should exclude them.

2 My -- I think the two biggest concerns with the opinions  
3 are, you know, one as it relates to Mr. Hardeman, you know,  
4 kind of blowing off -- blowing off hep C. And as it relates,  
5 I guess, to all of them -- but, again, perhaps particularly  
6 Mr. Hardeman -- the idea that just because you rule out other  
7 things kind of automatically means that it must be Roundup that  
8 caused the NHL. I mean, it seems like a more reasonable  
9 conclusion given the current state of the science is that we  
10 simply don't know what caused these people's NHL.

11 But whether those flaws rise to the level of a  
12 methodological defect in their opinion such that I should  
13 exclude it, that seems -- that's tough. And I'm sort of  
14 tentatively inclined to say that the -- the problems that I  
15 have identified with those opinions -- those expert opinions  
16 are more -- they are flaws for you to point out to the jury,  
17 not reasons for me to exclude the opinions on methodological  
18 grounds, so --

19 **MR. STEKLOFF:** So just responding to what Your Honor  
20 said, and I think it actually might be helpful, at least by  
21 starting to walk through the slide deck that I have prepared.  
22 But I think there are two methodological flaws that even under  
23 Ninth Circuit law demonstrate that they have not engaged in a  
24 proper differential diagnosis. And I think -- I'm going to  
25 walk through the admissions that I think establish those flaws.

1 I think there are two flaws.

2 One is I think that all three experts have demonstrated  
3 that general causation equals specific causation. That, if  
4 they -- because based on your PT045, they have in some way,  
5 whether individually or holistically, survived general  
6 causation that that allows them to automatically rule in  
7 Roundup.

8 **THE COURT:** And I will tell you, that -- that causes  
9 me some discomfort, but I wonder if it's the product of your  
10 insistence and my agreement that the proceedings should be  
11 bifurcated, right. I wonder if it is kind of an unfortunate  
12 byproduct of that because the opinions that the Plaintiffs'  
13 experts offered at the general causation stage were not merely  
14 that glyphosate is capable of causing cancer, right. The  
15 opinions that they offered was that there is a very strong  
16 association, a very strong link, between Roundup and NHL,  
17 right. And I think that's one of the reasons why I said that  
18 I -- you know, the Plaintiffs' experts have credibility  
19 problems, right, because, you know, it seems rather dubious to  
20 say -- you know, it is one thing to say there is an association  
21 or there is a potential link. It is another thing to say, I  
22 know to a certainty that there is a very strong link and that  
23 Roundup is causing cancer, you know, across the country with  
24 regularity, right, which is the -- effectively the opinions  
25 that they gave and the opinions that I allowed them to give,

1 right, even though I had tendency to disagree with it.

2 And then -- so now we fast forward to specific causation,  
3 and we said, well, the specific causation experts are allowed  
4 to piggyback off of those general causation opinions. So if  
5 the general causation opinions had been Roundup is a risk  
6 factor, but it is a fairly weak risk factor because we don't  
7 know that much yet, the science hasn't developed enough yet,  
8 then I would be inclined to agree with you that to the extent  
9 the expert merely piggybacks on the general -- to the extent  
10 the specific causation expert merely piggybacks on the general  
11 causation expert's testimony -- opinion, and concludes that  
12 because there is general causation, there must be specific  
13 causation after having ruled out all these other factors, I  
14 think that would be a problem. But given the -- their opinion  
15 about how strong the link was, maybe it's not a problem.

16 **MR. STEKLOFF:** What I would say is that we know under  
17 California law that at that -- even if they can survive the  
18 general causation hurdle, even if this had not been bifurcated  
19 -- so it had all been at once and they are trying to survive  
20 the general causation hurdle first, and they are hearing  
21 everything at once, and they come in with the opinion there is  
22 a strong association, Your Honor, in PT045 that disagrees with  
23 them and says it goes to the weight of their opinion.

24 I'm not trying to characterize your words, but it tends to  
25 seem it is a weaker association than the Plaintiffs' experts

1 have said. We know in the specific causation phase, and you  
2 cite this in footnote 30 of PTO45, and there is case law  
3 demonstrating that at the specific causation phase you need  
4 more. You need to show a doubling of the risk because you  
5 cannot say more likely than not in an individual that he or she  
6 had his non-Hodgkin's lymphoma caused by glyphosate unless you  
7 can show a doubling of the risk -- and I'm going to touch on  
8 that -- where in this context they are relying only on  
9 unadjusted numbers.

10 And so they can't show that 2.0, but I think more  
11 fundamentally that demonstrates that even this had been done at  
12 once, it is not enough, even if your opinion is the association  
13 is strong, which is based not just on the epidemiology, all of  
14 their experts admitted, I think, that the epidemiology did not  
15 get them there alone. So that's why they had to tie in the  
16 animal data and the genotoxicity data.

17 So I think as a fundamental foundation of California law,  
18 regardless of whether you bifurcate the proceedings, they have  
19 more to do at the specific causation phase.

20 Now, going back to where I started. The other fundamental  
21 point that I want to flag for you, that is a flaw in their  
22 methodology, is that even if the Ninth Circuit accepts  
23 differential diagnosis, we had different versions about the  
24 experts, what they do in clinical practice versus the law about  
25 differential diagnosis. There is no dispute that a

1 differential diagnosis requires a proper ruling in of risk  
2 factors and a proper ruling out of risk factors, and what their  
3 methodology demonstrated was that they are unwilling, even once  
4 they rule in Roundup -- and I'm going to talk about why that  
5 was improper.

6       Once they rule it in, there was no room in their  
7 methodology whatsoever to consider ruling it out in any single  
8 case because either they say, Well, if it's the only thing  
9 left, and otherwise this might be idiopathic because I don't  
10 think the association is so strong that in a hundred out of a  
11 hundred or a thousand out of a thousand cases it is the  
12 substantial contributing factor; and I could never say it is  
13 idiopathic. And that --

14       **THE COURT:** At least given the exposure level that the  
15 three Plaintiffs experienced.

16       **MR. STEKLOFF:** Well, I will talk about that because I  
17 think that's where Dr. Weisenburger tried to come in after we  
18 had fairly clean testimony from Dr. Shustov and Dr. Nabhan  
19 about the floor that they set. We had a lot of back-and-forth  
20 with Dr. Weisenburger about that he was somehow considering  
21 their individual exposure. I think where we ended up at the  
22 end of the day when you said, should you have said that, you  
23 are saying that -- you are comparing Mr. Hardeman to the people  
24 in *McDuffie* and *Eriksson* and saying that their exposure -- his  
25 exposure is so much higher. He, Dr. Weisenburger, took that

1 back and said, I probably shouldn't have said that. And so he  
2 is exactly in the same place as Dr. Shustov and Dr. Nabhan on  
3 that, and they're --

4 **THE COURT:** Well -- I'm happy to explore this  
5 potential difference between Shustov and Nabhan on the one hand  
6 and Weisenburger on the other, but I don't think you are  
7 accurately characterizing Dr. Weisenburger's testimony.

8 Dr. Weisenburger did not say that it doesn't matter  
9 whether somebody is exposed for ten lifetime days or, you know,  
10 a thousand lifetime days. I mean, he did not -- when he said,  
11 I take that back, I shouldn't have said that, he wasn't saying  
12 there is no difference between those two. What he is saying  
13 is, I should not have assumed that Mr. Hardeman was at -- had a  
14 risk factor of greater than 2.0 because he was exposed more  
15 than ten lifetime days. That is different from saying -- I  
16 mean, he is assuming -- he continues to believe, at least my  
17 interpretation of his testimony, is that he continues to  
18 believe, and it is reasonable to continue to believe, that  
19 somebody who is exposed to ten lifetime days of Roundup, has  
20 ten lifetime days of exposure to Roundup, is a lot less at risk  
21 than somebody who is exposed to -- who has a thousand lifetime  
22 days of exposure to Roundup. That's certainly an obvious  
23 point, I think. I don't think he took that back.

24 **MR. STEKLOFF:** Okay. I will try to show you this. I  
25 will jump ahead in my presentation to try to convince you that

1 he took that back.

2 The deck is frozen. But, Your Honor, if you can turn to  
3 Slide 15 of the hard copy. So this, Your Honor, on Slide 15 is  
4 the testimony in the *Gordon* deposition. The *Gordon* deposition  
5 is a Missouri case, but he used the same methodology there.  
6 And he was asked: Okay. So is it -- just to push a little bit  
7 on that, is it fair to say that you would -- that your minimum  
8 exposure would be at least two times --

9 **THE COURT:** I know what he said in his deposition,  
10 and -- but what he was -- and he took that -- and he took that  
11 back. He said -- in his testimony he said, look, if somebody  
12 was only exposed for ten lifetime days, I would not conclude  
13 that -- I would not be comfortable concluding that they got  
14 their NHL from that. He took that back. I understand that.

15 But, of course, Mr. Hardeman was not merely exposed  
16 over -- for ten lifetime days. He was exposed a lot more than  
17 that.

18 **MR. STEKLOFF:** Either was Ms. Gordon. And in the  
19 Gordon deposition he said that even in the hypothetical where  
20 she was only exposed two days per year and ten lifetime days --

21 **THE COURT:** Well, I understand that, but are you  
22 saying that his opinion should be excluded because he took back  
23 something he said in a prior deposition in a different case?

24 **MR. STEKLOFF:** Well, I think that that prior  
25 deposition in a different case demonstrates his methodology.



1 It demonstrates -- so we have a history here, right.

2 Dr. Shustov comes in and says, two days per year, ten days.

3 I don't think there is any hesitation there. If someone  
4 hits that, he is going to rule it in and we can talk about it  
5 but then automatically keep it in. I think Dr. Nabhan did the  
6 same thing. He said there was a strong association, but he  
7 said two days, ten days, that is the minimum. I'm going to  
8 rule it in. And my argument is he is never going to rule it  
9 out.

10 I think Weisenburger then --

11 **THE COURT:** That's not what they said. All right.  
12 They didn't say they would never rule it out.

13 **MR. STEKLOFF:** Well, that's where I think that the  
14 problem is -- they say essentially -- I mean, they were never  
15 asked directly, would you never rule it out; but their other  
16 admissions demonstrate that they would never rule it out  
17 because there are two scenarios.

18 There is a scenario where someone is otherwise idiopathic  
19 and either because they say this person didn't have all these  
20 viruses -- this person never had HIV; this person was never  
21 exposed to hepatitis C -- so I have ruled in Roundup, and I am  
22 not considering age or risk factor so Roundup is it. Roundup  
23 is automatic.

24 **THE COURT:** Right. So given the fact that they are  
25 permitted to rely on expert opinions, that -- that there is a

1 very, very strong link between Roundup use and NHL, and that  
2 the more -- you know, the more you are exposed, the stronger  
3 the association is, why is that not okay?

4 **MR. STEKLOFF:** Because --

5 **THE COURT:** In other words, it seems like the general  
6 causation opinions stand for the proposition that, you know,  
7 you can almost think of it like smoking and lung cancer, right.  
8 So if you had -- if you had no other -- if the person is  
9 otherwise idiopathic, but they have smoked a half a pack a day  
10 for ten years, you would opine in a hundred out of a hundred  
11 cases, I would think, that the smoking caused their lung  
12 cancer, right?

13 **MR. STEKLOFF:** Because that, Your Honor, is saying  
14 that even if they have a very flawed methodology to survive  
15 general causation with that opinion, but for all the -- shaky  
16 and it is weak, but that's a question for the jury under Ninth  
17 Circuit precedent, that then can't be enough. They have to do  
18 more.

19 And the problem here is what more have they done. Now, I  
20 understand they have reviewed the medical records, but they  
21 have done nothing beyond saying, I think there is a strong  
22 association; and I'm allowed to say that because we are -- some  
23 of our experts have --

24 **THE COURT:** In my smoking example, would you be making  
25 the same argument? Would you be saying that if there are

1 general causation opinions saying that there is a very strong  
2 link between tobacco and lung cancer, and a specific causation  
3 expert comes in and piggybacks off of that general causation  
4 expert and says, the person is otherwise idiopathic. Smoking a  
5 half a pack a day for ten years is the only thing that I have  
6 been able to identify as a risk factor. Therefore, I conclude  
7 that the smoking caused this person's lung cancer. Would you  
8 be sitting here and saying, Well, under California law they  
9 have to be doing something more?

10 **MR. STEKLOFF:** I think they -- well, I have two  
11 comments.

12 **THE COURT:** And if the answer is yes, what more do  
13 they have to do in that hypothetical?

14 **MR. STEKLOFF:** I have -- I have three responses.

15 First, is I don't think that's a -- the right analogy  
16 because here we have admissions that 70 to 90 percent of NHL is  
17 idiopathic, and I don't think in lung cancer there is a  
18 position that 70 to 90 percent of lung cancer in the clinical  
19 practice is idiopathic.

20 The second thing is that I think even in that scenario,  
21 under a proper differential diagnosis, the experts would in  
22 some way have to recognize that they would be willing to rule  
23 out smoking if there were other reasons based on the  
24 individual. I don't -- here --

25 **THE COURT:** But they said that here. I mean, the

1 Nabhan case law said --

2 **MR. STEKLOFF:** Yeah.

3 **THE COURT:** -- I would -- depending on the individual  
4 circumstances, I might be willing to rule it out, depending on  
5 the circumstances of the particular individual.

6 **MR. STEKLOFF:** They said that, but what their  
7 methodology demonstrates is they actually wouldn't do that.  
8 I mean, I guess hypothetically if someone was exposed to  
9 radiation for 15 years every day, they might say in that  
10 .00001 percent chance -- I think Dr. Shustov said that --  
11 absent that they are saying, I never need to rule it out  
12 because if I can't identify any other risk factors in the real  
13 world, which would be idiopathic, I, nonetheless, am just going  
14 to say this is the only thing left, so it is in.

15 I think the hepatitis C in Mr. Hardeman demonstrates two  
16 things. One, they treat other risk factors like hepatitis C  
17 that are known causative risk factors differently. So they go  
18 to leaps of logic, would be our position, to try to excuse  
19 those risk factors. Take Dr. Shustov and his argument to  
20 excuse hepatitis C; that Mr. Hardeman didn't even have chronic  
21 hepatitis C, despite medical record -- medical record and the  
22 other experts admitting that he was exposed to 25 to 40 years.

23 The other thing is that when they are caught with that --  
24 so Dr. Weisenburger is a good example of this. Says, well, you  
25 know what, they are both comparative causes. They are both

1 substantial and contributing factors, so I don't need to rule  
2 out the Roundup; and I think all three of them gave that. So  
3 we have a scenario where --

4 **THE COURT:** That is an issue that I'm going to want to  
5 discuss further with you when we get to jury instructions, but  
6 anyway --

7 **MR. STEKLOFF:** Okay. And I think that there is an  
8 analogous situation -- and I can show you the case in another  
9 litigation I have been involved in -- where -- which is  
10 hormonal therapy litigation. Hormonal therapy was subject to  
11 litigation about breast cancer. Breast cancer is largely  
12 analogous to non-Hodgkin's lymphoma in that it is considered  
13 widely idiopathic, absent one gene, the BRCA, B-R-C-A, gene,  
14 sort of, doctors will tell you it is idiopathic. So I think it  
15 is very similar.

16 In that litigation there was a double-blind controlled --  
17 randomized controlled trial run by the National Institutes of  
18 Health that demonstrated an increased relative risk. So I  
19 think sort of the general causation hurdle was surpassed.

20 But the experts there, nonetheless -- and I will get you  
21 the case. It is called *Scroggin*. It's an Eighth Circuit  
22 case -- that validates the methodology of the specific  
23 causation expert, looked at the individual plaintiffs; and what  
24 the Court -- what the specific causation expert did there was  
25 they had tested the tumors of the women who developed breast

1 cancer, and there were hormone receptors that were positive.

2 So they said there, well, we know that these cancers are  
3 dependent on hormones. Where are the Plaintiffs getting the  
4 hormones from? They are either getting it internally or they  
5 are getting it from some other source.

6 They were willing to rule out hormone therapy as the  
7 cause, even though there was a general cause link, unless they  
8 could show that there were no endogenous hormones, that the  
9 women -- the plaintiffs could not have been developing breast  
10 cancer with their own hormones and, therefore, the hormones --  
11 the breast cancer had to be caused by outside hormones.

12 I use that as an analogy because there is nothing similar  
13 here. They have done general causation, and then they can't  
14 point to anything in any of the individual plaintiffs that  
15 somehow ties to Roundup. They can't tie anything in their  
16 tumors. They can't tie anything in their medical records.  
17 They can't tie any sort of specific genetic mutation like we  
18 could with hepatitis C.

19 And so I understand maybe the science hasn't --

20 **THE COURT:** That can't be -- I mean, that can't be a  
21 reason in itself to -- I mean, that means -- that simply means  
22 that nobody -- I mean, I think your argument stands for the  
23 proposition that nobody could ever get past specific causation  
24 or general causation with respect to Roundup because there's no  
25 marker you can identify that associates the NHL with the

1 Roundup.

2 **MR. STEKLOFF:** I'm not conceding the general causation  
3 ruling here, but I think you can view that you can get past  
4 general causation. I think the point is you have to do  
5 something more with the individual to get past specific  
6 causation. They have the burden. They haven't done that.

7 They have simply said because we get past the general  
8 causation hurdle --

9 **THE COURT:** But on the theory that you're articulating  
10 now, nobody could ever get past specific causation. On the  
11 theory you're articulating now, even if you could get past  
12 general causation and have an admissible opinion that  
13 glyphosate is capable of causing NHL, nobody could ever get  
14 past specific causation even if they were, you know, showering  
15 in Roundup every day for 20 years; right? Because there's no  
16 marker linking the NHL to the glyphosate.

17 **MR. STEKLOFF:** Well, I don't think that the marker is  
18 the only way I'm using it as an example, but maybe they  
19 could -- you know, Dr. Weisenburger --

20 **THE COURT:** Why is that Eighth Circuit case relevant  
21 then? I don't understand.

22 **MR. STEKLOFF:** Because I think it demonstrates that  
23 even where there was general causation, it demonstrates that to  
24 establish specific causation, the experts were able to do  
25 something more and were willing to consider ruling out hormone

1 therapy despite hormone therapy being ruled in in every case  
2 because the plaintiffs all used hormone therapy, that was  
3 undisputed, and there was an increased risk that the experts  
4 there thought was a strong risk.

5 **THE COURT:** Okay.

6 **MR. STEKLOFF:** They here haven't done anything other  
7 than saying "I think there's a strong risk so in every single  
8 case I am going to then rule it in and I don't need to rule it  
9 out," and that is the problem.

10 I agree that it seems like a very challenging hurdle for  
11 them, but that also was expressed in PTO 45, that this was a  
12 daunting hurdle. And now that daunting hurdle has been, "You  
13 know what? I'm not really relying on data" -- even if you take  
14 Dr. Weisenburger that he didn't somehow pull this back -- "I'm  
15 just speculating that somehow Mr. Hardeman's risk is higher  
16 than these people in the studies. I think it's strong. You've  
17 told me I'm allowed to say that it's strong. That's enough."

18 That really is their methodology at the end of the day.  
19 And I think that, again, the hepatitis C, it is specific to  
20 Mr. Hardeman but I view it as a more fundamental problem  
21 across -- that applies to all the cases and their methodology  
22 holistically because it demonstrates that they are treating  
23 other risk factors different than Roundup.

24 How is it that those -- you know, we heard  
25 Dr. Weisenburger say "I think hepatitis C is a very, very weak



1 risk factor." I don't remember -- "You know, it's one in this  
2 many cases." Well, he's not treating Roundup in the  
3 epidemiology there the same.

4 You know, they have these problems of mechanism of action.  
5 So they'll just --

6 **THE COURT:** Yeah, and that gets back to my point that  
7 it's kind of a by-product of this bifurcation procedure, you  
8 know. Because they're allowed -- the specific causation  
9 experts are allowed to piggyback on these general causation  
10 opinions that have already been allowed in.

11 **MR. STEKLOFF:** But that's not -- I mean, I wasn't part  
12 of the proceedings when that happened, but let's say that you  
13 had done it all back in 2018. You still would have had the  
14 same experts come through: Dr. Portier and Dr. Ritz,  
15 Dr. Nabhan, Dr. Weisenburger, Dr. Neugut. They would have all  
16 offered their opinions. You would have had to gauge whether  
17 the general causation experts survived general causation. Then  
18 they still would have had to do the exact same thing that they  
19 did here at the same time, and you could have made a ruling at  
20 that time.

21 I think that actually -- I don't agree that it's strong,  
22 but I think that they probably survive general causation if you  
23 look at the way they treated the *Bradford Hill* criteria and you  
24 look at Ninth Circuit precedent, but that doesn't mean that  
25 that alone allows them to survive specific causation.

1           So I don't think that -- I mean, had you treated it all at  
2 the same time, you would have been dealing with these issues  
3 back in 2018. They still would have had to do more at the  
4 specific causation phase, and it can't be that they're just  
5 saying "Because I think this is strong." Whether it's  
6 Dr. Weisenburger, who believes it's strong; whether it's  
7 Dr. Nabhan, who believes it's strong but his opinions were  
8 excluded and he still can't separate himself from them; or  
9 whether it's Dr. Shustov who says, "I actually don't even know  
10 whether it's strong or weak." He says, "I'm not even weighing  
11 the risk factors. I'm just doing this 2 day/10 day thing.  
12 I've been told to rule it in because you're going to allow this  
13 in general causation."

14           So there's also a difference between the three, but I  
15 don't think that you can treat the three of them equally even  
16 in that regard. I think Dr. Weisenburger, you know, because he  
17 survived general causation still has as much of a problem  
18 because he hasn't done anything more in specific causation, but  
19 I think also they should be treated individually.

20           **THE COURT:** Okay.

21           **MR. STEKLOFF:** So I guess -- I mean, I defer to  
22 Your Honor -- I mean, I think there are a couple -- I guess  
23 there are some admissions that I think are quickly worth  
24 walking through in this slide that I'd like to try to  
25 demonstrate this, but --

1           **THE COURT:** If you want to take a couple minutes to do  
2 that, go ahead.

3           **MR. STEKLOFF:** Okay. So --

4           **THE COURT:** Let me ask you a question. How much do  
5 you care about -- this is a time management question. How much  
6 do you care about my tentative ruling about your specific  
7 causation experts? Like, are you guys going to want to be  
8 spending a chunk of time discussing that or are you --

9           **MR. STEKLOFF:** Oh.

10          **THE COURT:** I can imagine you saying "We can live with  
11 that," we can deal with it.

12          **MR. STEKLOFF:** Mr. Kilaru is arguing that. I think we  
13 want to deal with your ruling on the margins is what I would  
14 say. So I don't think it is a long argument at all.

15          **THE COURT:** Okay. Okay. So go ahead.

16          **MR. STEKLOFF:** Okay. And I'll see if this works both  
17 on the screen and in the hard copy. I'm going to start  
18 actually back at the beginning.

19          All right. So if we can start -- I won't remind you about  
20 the language in PTO 45 but we have that in here.

21          If we can skip to page 4, I think this demonstrates from  
22 Dr. Weisenburger that general causation carries the day, that  
23 he didn't do more. And obviously the whole quote is here, but  
24 if you look at his final answer, when you were pushing him  
25 hypothetically, he says (reading):

1           "And I think it goes back to the initial  
2           interpretation of all of the general causation data; and  
3           if you believe that Roundup causes NHL -- can cause NHL,  
4           then -- and you believe that there is strong evidence,  
5           which I think there is, then you would use that to -- in  
6           your interpretation of specific causation, sure."

7           And so I think that demonstrates -- I mean, I'm going to  
8           show more why he didn't do more, but this is sort of his  
9           starting point. I think it's strong. I think general  
10          causation is enough.

11          **THE COURT:** And before -- I'm happy to let you go  
12          through this, but just while it's on my mind, for the  
13          proposition that this is not enough in this context where we've  
14          already kind of established that there isn't -- you know,  
15          there's an expert opinion that's admissible that the link is  
16          strong, you cited this Eighth Circuit case.

17          **MR. STEKLOFF:** Yes.

18          **THE COURT:** Are there any other cases you want to cite  
19          for that specific proposition just to make sure I read them?

20          **MR. STEKLOFF:** Yes, Your Honor. There is the *Lipitor*  
21          case that we cite in our brief, and the -- there's another case  
22          in here that I would like to cite. I think that *In Re Bextra*  
23          *and Celebrex* at 524 F.Supp. 2d 1166 here in the  
24          Northern District of California also supports this point.

25          **THE COURT:** Okay.

1           **MR. STEKLOFF:** So those are the two cases that I would  
2 focus on.

3           **THE COURT:** Okay.

4           **MR. STEKLOFF:** I also want to at some point  
5 distinguish *Wendell*, which I think is sort of the case that you  
6 have to consider in the Ninth Circuit, but I think through  
7 Dr. Shustov's testimony we demonstrated why the circumstances  
8 of *Wendell* are very different than those here.

9           **THE COURT:** Okay.

10          **MR. STEKLOFF:** If you turn to Slide 5, Your Honor,  
11 Slide 5 then is where Dr. Weisenburger takes it to the next  
12 step. And, again, this is you questioning him and sort of  
13 going back to the premise of your question is (reading):

14                 "I'm trying to remember what you did at the general  
15 causation phase."

16          And he says (reading):

17                 "Well, I think when you do the differential etiology,  
18 whether it is a strong link or even a weak link, in the  
19 end, when you go through your list and it is the only link  
20 left, then you know the conclusion is more likely than not  
21 that was the cause."

22          And I think -- so there he's not even completely relying  
23 on the strong link. He is saying, "Even if it is a weak  
24 link" -- so, Judge, even if you were right in PTO 45, so this  
25 isn't the smoking-lung-cancer analogy; this is very

1 different -- "I would still rule it in automatically and then  
2 never rule it out and say it was the substantial contributing  
3 factor." I think that is a real problem for them.

4 Slide 6 I think we can hit on quickly, which just shows  
5 that Dr. Nabhan claimed to not be offering general causation  
6 opinions; but I think he demonstrated that despite being  
7 excluded by Your Honor at the general causation phase, he  
8 nonetheless cannot escape his own personal views of the general  
9 causation evidence, and that's demonstrated on page 7. He  
10 doesn't say "I'm relying on Dr. Ritz or Dr. Portier or  
11 Dr. Weisenburger. I -- you know, it is my opinion that the  
12 evidence actually is very strong between NHL and Roundup and,  
13 as a clinician, I cannot ignore that."

14 Then he goes on to make this, like, speculative  
15 smoking-to-lung cancer comparison saying I think -- you know,  
16 which is just -- I don't think I should even have to go into  
17 the differences between the two here and now because -- but it  
18 really, I think, undermines both his methodology and his  
19 credibility that that is the basis for his opinions to rule in  
20 Roundup and then never rule it out.

21 And then, finally, Dr. Shustov on Slide 8, again, simply  
22 assumes Roundup is the cause. And to be clear to the question  
23 that Your Honor asked, which is, "Well, they're all saying that  
24 this is a very strong association," he actually makes clear  
25 that he is not doing that. He says (reading):

1           "I was not asked to opine on the strength of the  
2           association."

3           So he's simply saying, "I'm allowed to say it's a general  
4           cause." So he's a little more similar to what I think we saw  
5           from Dr. Weisenburger a few slides ago. Whether it's weak or  
6           whether it's strong, he's automatically going to rule it in;  
7           and then there is no room for him, even if it is weak, because  
8           he's not opining on the strength, to rule it out. He is not  
9           including that whole second half, the rule-out part of his  
10          differential diagnosis, which is required under any case that  
11          requires a differential diagnosis, Ninth Circuit or otherwise.

12          Jumping to Slide 10, and I raised this earlier, how is it  
13          that we know that you have to do more at specific causation  
14          whether the proceedings are bifurcated or not? This is just  
15          taking Your Honor's language from PTO 45 in Footnote 30 that  
16          you -- where there was an argument in the general causation  
17          phase about needing a 2.0 doubling of the risk.

18          But the case that you cite, which I'm also pointing  
19          Your Honor to, which is *In Re Bextra and Celebrex*, explains  
20          that that, while not relative -- you know, not necessary for  
21          general causation is necessary for specific causation.

22          We know --

23                 **THE COURT:** That's not how I described the case, but  
24                 you're saying the case itself says that?

25                 **MR. STEKLOFF:** Well, it's saying it's probative. But

1 I do think it is necessary between -- if you turn to the next  
2 slide, under the *Cooper* case, that you must show a relative  
3 risk greater than 2.0 to be useful to the jury. So I think  
4 California law, that case makes clear that at the specific  
5 causation stage, experts must meet the 2.0 standard.

6 **THE COURT:** Okay.

7 **MR. STEKLOFF:** And it makes sense, Your Honor, because  
8 they're trying to say more likely than not, which is, you know,  
9 50.1 percent. So you need a doubling of the risk to be able to  
10 say that. It makes sense in the specific causation context.

11 So what did all three of the experts here do? They relied  
12 on two studies.

13 **THE COURT:** You don't need to explain the fact that  
14 they relied on studies that were not adjusted for pesticide --  
15 the other pesticides, they relied on numbers that were not  
16 adjusted. I understand all that.

17 **MR. STEKLOFF:** I understand, but it is -- but we do  
18 think it is a problem, to be clear, Your Honor.

19 So if you jump ahead back to 15, I do think it is quickly  
20 worth walking through, and I won't belabor it, Dr. --

21 **THE COURT:** It's pretty amazing actually, I mean, just  
22 on that point. I mean, given all of the time that we spent at  
23 general causation establishing that numbers unadjusted for  
24 other pesticide use are much less helpful than numbers adjusted  
25 for other pesticide use and given that even the plaintiffs'



1 experts all admitted that, as I recall, that they would  
2 choose -- that the lawyers would choose to put in the expert  
3 reports, the unadjusted numbers. I mean, it was pretty  
4 amazing.

5 **MR. STEKLOFF:** Well, I agree that it's remarkable but  
6 let me explain to you why that happened. It's because they  
7 know they have to meet the 2.0 hurdle and they can't meet the  
8 2.0 hurdle absent relying on unadjusted numbers. If they could  
9 meet the 2.0 hurdle relying on adjusted numbers, then we would  
10 have seen adjusted numbers. They knew that they could only  
11 point to studies that met 2.0.

12 **THE COURT:** Okay. Anything else?

13 **MR. STEKLOFF:** I'll try --

14 (Pause in proceedings.)

15 **MR. STEKLOFF:** You know, I do want to raise just  
16 quickly -- I mean, I'll more explain what we have in here. I  
17 think we have admissions, if you turn to page starting  
18 Slide 23, that establish that they will never rule out Roundup  
19 because the first set of admissions starting on page 24 with  
20 each of the three experts demonstrates that Roundup is always  
21 going to be a substantial factor under their methodology.

22 Starting at page 28, that's sort of a little bit more in  
23 the idiopathic context. We demonstrate with admissions that  
24 even considering other causative risk factors that they  
25 acknowledge, they will still nonetheless necessarily rule out

1 Roundup. And so I think we have clean admissions from all  
2 three experts on that point.

3 I won't belabor the hepatitis C point, but I do think that  
4 it demonstrates that they are not treating Roundup in the  
5 rule-out phase the same -- in the same way, both from an  
6 epidemiological standard but also in their review of the  
7 medical records, in any way the same that they are treating  
8 Roundup, which calls into question the entire methodology for  
9 all three of them.

10 I think Slide 39 distinguishes from Dr. Shustov the  
11 *Wendell* case, which I'm sure, you know, is a focus of  
12 plaintiffs' brief and is Ninth Circuit precedent that is  
13 binding on this Court. But in that case they were dealing with  
14 a very rare cancer, 1 in 6 million were the odds of that  
15 individual plaintiff developing that cancer absent -- in any  
16 other circumstance absent the medicines. And Dr. Shustov, as  
17 you heard, had treated this more than anyone else, that  
18 specific type of cancer.

19 **THE COURT:** Yeah. I mean, on that point, I'll sort of  
20 give you a chance maybe to answer this: You know, it's not --  
21 I don't view the *Wendell* case as somehow binding with respect  
22 to this question. However, I think when you take the totality  
23 of Ninth Circuit law on *Daubert* questions on expert opinions,  
24 you come away with -- and I will admit to you that I haven't  
25 gone back and read all the cases that I read at the general

1 causation stage, but when I did that at the general causation  
2 stage -- so if something's changed about Ninth Circuit law, you  
3 should let me know -- but when I did that at the general  
4 causation stage, you come away with a pretty strong feeling  
5 that, you know, the Ninth Circuit is more tolerant of shaky  
6 expert opinions than other circuits; and that the Ninth Circuit  
7 is more likely to -- let me put it this way: The Ninth Circuit  
8 ties judges' hands -- trial judges' hands a little more tightly  
9 than other circuits when it comes to excluding things. Do you  
10 agree with that?

11 **MR. STEKLOFF:** I would not -- I would agree with that  
12 on a macro basis in respect to *Daubert*. I don't think that  
13 there is Ninth Circuit precedent that says as part of a  
14 differential diagnosis, you can just rely on your general  
15 causation and ignore the rule -- completely ignore the rule-out  
16 step even under California law.

17 Slide 43, Your Honor, references another case that I think  
18 you should -- it's up to Your Honor, but we would point you to  
19 that sort of touches on these issues generally, which is in the  
20 Eastern District of Washington and it's talking about specific  
21 causation analyses in the context of largely idiopathic  
22 diseases and the need to factor that in. And I think, then, we  
23 lead to a series of admissions from all three experts that  
24 demonstrate that they did not do that.

25 I sort of think we have a series of admissions from

1 Dr. Nabhan that sort of -- I've never heard such a definition  
2 of "idiopathic," especially when you pushed him on the heart  
3 attack analogy, even though he said that -- you said, "Well,  
4 what if someone drank a little bit but didn't exercise as much  
5 as they should have" -- I'm paraphrasing -- "and didn't have  
6 the most perfect diet. Would you say that that caused their  
7 heart attack?"

8 And he basically said, "Yes, you cannot call that  
9 idiopathic." I mean, that is not how -- I think we had  
10 testimony and just common sense tells you -- doctors would  
11 treat that.

12 His strange definition of "idiopathic" is that it's only  
13 idiopathic if you can't even identify, like, a minor, minor,  
14 minor hypothetical risk factor. He specifically says in  
15 page 46 (reading):

16 "Idiopathic in that example would be somebody who is  
17 in their late 30s who exercises, who is fit, who is not  
18 overweight at all, who has never smoked, who has no family  
19 history of heart attack. That is idiopathic."

20 So, again, that is a problem where you have to consider  
21 idiopathic under precedent. He is just not doing it properly.  
22 I think that is also true with respect to Dr. Weisenburger and  
23 Dr. Shustov, which we have in here.

24 And at the end of the day what we would say is that their  
25 methodology is really *ipse dixit*: We've survived general

1 causation. I say Roundup is a strong factor. I'm ruling it  
2 in, and so -- and because I say so and because I want to just  
3 dismiss hepatitis C or anything else, it's a substantial  
4 contributing factor.

5 I just want to raise one last point in differentiating  
6 between the three of them. I don't think you can ignore that,  
7 one, Dr. Nabhan has been excluded on general causation but just  
8 can't separate himself from that; and, two, I don't think that  
9 you can ignore Dr. Shustov's plagiarism. I mean, when he came  
10 in here and said --

11 **THE COURT:** Well, but, I mean, the problem with that  
12 is that -- you call it plagiarism. I really take strong issue  
13 with that.

14 The way expert opinions usually work is that the lawyer  
15 drafts the expert report and sends it to the expert and the  
16 expert reviews it and makes changes, and they go back and forth  
17 on the drafts until it's something that both the lawyer and the  
18 expert can get behind.

19 So in that respect, virtually every expert report is,  
20 quote/unquote, "plagiarized." And so, you know, to say that  
21 Shustov used, you know, a partial cut-and-paste job or even a  
22 full cut-and-paste job as a starting point for his report, I  
23 just -- you know, I don't know why you spent so much time on  
24 that, to be honest.

25 **MR. STEKLOFF:** Well, I think it calls into question

1 whether the methodology that he's engaging in in the sense of  
2 whether he's doing an independent review, for example, of  
3 the --

4 **THE COURT:** Well --

5 **MR. STEKLOFF:** -- risk factors.

6 **THE COURT:** -- maybe we should have a rule that all  
7 experts should just do the first draft of their opinions.  
8 Actually, that probably should be a good rule, but the reality  
9 is that in the vast majority of cases, lawyers do the first  
10 draft of expert reports.

11 **MR. STEKLOFF:** Except that he said -- I mean, we  
12 didn't get into the detail -- he said he wrote every word in  
13 his report. So in a world in which he said "I went back and  
14 forth with the lawyers," maybe that would be okay, but he  
15 didn't say that. Both in his deposition and here before  
16 Your Honor he did not say that.

17 **THE COURT:** Okay.

18 **MS. WAGSTAFF:** So we've been going an hour and a half.  
19 Could we take a few-minutes break?

20 **THE COURT:** Well, I have to -- I have -- that would be  
21 fine if you want to do that. I have a lunch appointment at  
22 11:45 so I was planning on going till then and then breaking;  
23 but if you want to take a five-minute break now, that will be  
24 fine.

25 **MS. WAGSTAFF:** Yeah, that will be great.

1           **THE COURT:** Okay.

2           **MR. STEKLOFF:** Your Honor, I'll just hand a copy of  
3 the *Scroggin* case that I referenced, two copies to Your Honor  
4 and opposing counsel.

5           **THE COURT:** Sure.

6           So let's make it real quick and just come back at 10  
7 after. Okay?

8           **MS. WAGSTAFF:** Okay.

9           **THE CLERK:** Court is in recess.

10                           (Recess taken at 11:06 a.m.)

11                           (Proceedings resumed at 11:12 a.m.)

12           **MR. WISNER:** I think she just went to the restroom so  
13 can I bring up something while she's in the restroom?

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

15           **MR. WISNER:** Your Honor, I'd like to give the Court  
16 something that was published last week. It's a brand new  
17 meta-analysis that looks at the AHS and glyphosate. It was  
18 actually published -- if I may -- it was actually published by  
19 people who participated in the Scientific Advisory Panel for  
20 Roundup -- or for glyphosate, and --

21           **THE COURT:** You mean for the IARC?

22           **MR. WISNER:** No, no. For EPA.

23           **THE COURT:** Oh, okay.

24           **THE CLERK:** Mr. Wisner, do you have a second copy for  
25 our law clerk?

1           **MR. WISNER:** Yes, I do.

2           This just got published and it's really relevant to the  
3 issues of strong evidence or weak evidence as these authors  
4 conclude that there is a compelling link between GBH,  
5 glyphosate-based herbicides, and an increased risk for NHL.

6           So I just wanted to bring that to the Court's attention.  
7 It's something that I think defense counsel and I have been  
8 discussing.

9           Do you want to talk about the issues with Dr. Portier  
10 right now?

11           **MR. STEKLOFF:** I defer to the Court. I have an issue  
12 to raise with this paper, but I defer to the Court the timing.

13           **THE COURT:** Sure. Whatever you want to do.

14           **MR. WISNER:** Why don't we just do it now and get it  
15 out of the way.

16           **THE COURT:** Use our time efficiently. Whatever you  
17 want to talk about.

18           **MR. STEKLOFF:** Okay. So our -- well, there are  
19 numerous flaws, methodological flaws, that probably are not --  
20 this is probably not the time to debate them with Your Honor,  
21 so we were -- so this paper was published online, became  
22 available online this Monday, so on the 11th, and that's the  
23 accepted version of the paper.

24           We learned that in the Pilliod case, which is the state  
25 case in Oakland set to go to trial before Judge Smith in March,



1 that a version of the paper was used in a deposition last  
2 week --

3 **THE COURT:** Okay.

4 **MR. STEKLOFF:** -- which threw red flags in our world  
5 because it was not publicly available.

6 And so Mr. Wisner and I have been having, to be clear,  
7 very transparent and productive discussions about the  
8 Dr. Portier deposition since it's coming up and we're trying to  
9 coordinate on that; and he has told me that he is going to use  
10 this paper not only with Dr. Portier to support Dr. Portier's  
11 opinions but I think, I'm sure, Dr. Ritz and others will also  
12 want to rely on this paper.

13 I think we have concerns about, given that this was used  
14 at a deposition last week, how it is that plaintiffs' counsel  
15 had the paper early and how -- and, therefore, whether there  
16 was any involvement from plaintiffs' experts in the paper  
17 itself or plaintiffs' counsel is strange to us.

18 And so one thing that we would --

19 **THE COURT:** It doesn't sound particularly strange to  
20 me, but anyway what are you -- we're not going to decide any  
21 issue relating to this paper today so what do you want to --

22 **MR. STEKLOFF:** What we have requested is that, at  
23 least initially with respect to Dr. Portier because his  
24 deposition is coming up, if he has had -- and I will concede  
25 that our requests yesterday were broader than this, but I think

1 if he has had communications with either authors on the  
2 paper -- and we have testimony from him in this proceeding back  
3 in 2018 where he had communications with one of the authors,  
4 Dr. Sheppard, about both -- other studies and his testimony  
5 before Your Honor, but if he now has communications about this  
6 paper, we think we are entitled to those before we go in and he  
7 relies on this paper, and we need to understand whether in some  
8 way he was involved in any way in this paper.

9 So we are asking as an initial matter for discovery  
10 associated with this paper from Dr. Portier. I think we'd also  
11 be entitled to it from plaintiffs' other experts; and maybe if  
12 plaintiffs' counsel has had interactions that would not be  
13 privileged with either the editors of the journal or the  
14 authors of the journal about the paper, I think we'd be  
15 entitled to those.

16 I also think we're entitled to know how it is that they  
17 obtained a version of this article before it was publicly  
18 available. I mean, we've had a lot of issues about academic  
19 privilege and other things in the history of this litigation.  
20 How is it that they received the paper of -- an early version  
21 of this paper?

22 **THE COURT:** I don't know if you're entitled to know  
23 that. I'm sure -- I'm guessing Mr. Wisner is going to happily  
24 tell us how he got the paper.

25 But the other stuff, I mean, my gut reaction is that stuff

1 seems discoverable.

2 **MR. WISNER:** Well, Your Honor, I mean, when the AHS  
3 came out, they didn't have to produce every communication  
4 between Lorelei Mucci and every single author, editor.

5 **THE COURT:** Did you ask for it?

6 **MR. WISNER:** Well, no, because it's irrelevant. I  
7 mean, unless we have factual basis to presume that she was  
8 somehow associated with that article, then it's just a pure  
9 fishing expedition. It's an invasion of --

10 **THE COURT:** But I think they could have -- you could  
11 have asked her about that. Don't you think -- all of those --  
12 he's saying "We're entitled to discovery of documents on this  
13 topic and that topic and the other topic." Maybe he is, maybe  
14 he isn't, but they could certainly ask Portier all those  
15 questions, couldn't they --

16 **MR. WISNER:** Sure.

17 **THE COURT:** -- at the deposition?

18 **MR. WISNER:** I don't have any objection to him asking  
19 the question. They're going to get the answer he didn't have  
20 anything to do with this paper so it's all just for naught.

21 I'll tell you how I got it, Your Honor, if you want.

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

23 **MR. WISNER:** Sure. The editor of the manuscript  
24 reached out to one of our experts in this case and said, "Hey,  
25 you recently published an article on glyphosate. I'd like a

1 copy of it so I can share it with the authors of this paper."  
2 It was going through the peer-review process. So he gave them  
3 a copy and said, "Can you please give us a copy when this  
4 article comes out?" And he said, "Sure."

5 And when it came out, they sent it to him, and that was --  
6 as you can see, it was accepted February 5th. They sent it to  
7 him on February 6th, and then we used it in the deposition.

8 **THE COURT:** And who's the expert?

9 **MR. WISNER:** Benbrook, Dr. Benbrook.

10 **THE COURT:** Dr. Benbrook.

11 **MR. WISNER:** So, I mean, there's nothing  
12 particularly -- none of the plaintiffs' counsel have had any  
13 communications with these editors. This is all just a bunch of  
14 smoke with no fire. I mean --

15 **THE COURT:** I mean, look, I think that -- I'm not  
16 going to rule on anything with respect to this paper that was  
17 just handed to me.

18 **MR. WISNER:** Sure.

19 **THE COURT:** I had an initial gut reaction that they  
20 might be entitled to get those documents -- get documents as  
21 described. I certainly think they can ask Dr. Portier about it  
22 at deposition. If there's -- I may be wrong that they're  
23 entitled to those documents. I'm not sure. I just gave you my  
24 gut reaction. It sounds like it wouldn't be hard to respond to  
25 those document requests based on what you've said.

1           **MR. WISNER:** Well --

2           **THE COURT:** But, in any event, if there's a discovery  
3 dispute, tee it up for me and I'll resolve it; but other than  
4 that, just go forward and enjoy -- I look forward to reading  
5 this paper.

6           **MR. WISNER:** Okay, Your Honor.

7           The real issue that I had was that the document requests  
8 were very broad, and so maybe we can meet and confer and see  
9 if --

10          **THE COURT:** I mean, it didn't sound broad. I mean, he  
11 said they were broader than what he just described here so  
12 maybe you-all can narrow it.

13          **MR. WISNER:** Okay. We can talk about it and see if we  
14 can work it out.

15          **MR. STEKLOFF:** Can I raise one issue, Your Honor?  
16 Because I want to hand you the exhibit that was used at the  
17 deposition last week, and I'll pass out multiple copies. It is  
18 not -- but I just --

19          **THE COURT:** I don't really care. I don't need you to  
20 hand it up to me. If it becomes part of a discovery dispute or  
21 an evidentiary dispute, you can submit it then. I don't really  
22 care right now.

23          **MR. STEKLOFF:** Can I just clarify the record, though,  
24 Your Honor? It is not the public version of the document. It  
25 is -- so what -- so what you were just told is not accurate.

1 You can look at it on its face and it has significant  
2 differences than the publicly available version that you were  
3 handed by Mr. Wisner.

4 **MR. WISNER:** It's identical.

5 **THE COURT:** As I sit here today, I don't care whether  
6 it's identical or not.

7 **MR. WISNER:** Okay.

8 **THE COURT:** Okay? It doesn't -- it's not obvious to  
9 me why that would matter; but if there's an issue that you need  
10 to tee up for me later on, a discovery issue or whatnot, you're  
11 obviously free to do so.

12 **MR. WISNER:** Thank you.

13 **THE COURT:** Okay. Ms. Wagstaff?

14 **MS. WAGSTAFF:** Yes. Thank you, Your Honor.

15 So as a general proposition, the plaintiffs agree with  
16 Your Honor's initial reaction that Monsanto's request to  
17 bifurcate this matter has created some unique procedural issues  
18 in this matter.

19 And as Your Honor will recall, we spent two years  
20 basically ruling in Roundup. That's sort of what the general  
21 causation phase was.

22 And now, as Your Honor acknowledged in PTO 74 that was  
23 issued a few days ago, plaintiffs' specific causation experts  
24 are relying on the testimony of our general causation experts,  
25 which includes, as Your Honor has acknowledged today, an

1 opinion that the association between Roundup exposure and  
2 non-Hodgkin's lymphoma is a strong association.

3 So Mr. Stekloff suggests that a 2.0 doubling of the risk  
4 is necessary to prove specific causation; and, in fact, in his  
5 slide, I think he pointed out Slide Number 10 in which he was  
6 quoting Your Honor, he said that it was necessary. And when  
7 Your Honor pushed him, he said, "Okay. In fact it's  
8 probative."

9 And then the cite that he gave you was to a *Cooper* cite,  
10 and I'd like Your Honor to -- I'm sure Your Honor is familiar  
11 with that case, but if not, in fact what the *Cooper* -- they did  
12 not have mechanistic data. They did not have toxicology. And  
13 so it was almost that the 2.0 requirement, the 2.0 --

14 **THE COURT:** Those are based on whether one study  
15 could --

16 **MS. WAGSTAFF:** Exactly. That's exactly what it was.  
17 It was just saying that you could prove specific causation  
18 alone on a 2.0 doubling of the risk.

19 First of all, we have a 2.0 doubling of the risk in  
20 De Roos '03 from our general causation experts, which is one of  
21 the reasons, as Your Honor heard in 2016 and '17 and the  
22 beginning of '18 as to why they thought the causation was  
23 strong. And so our specific causation opinions are relying on  
24 that testimony through this creation of the bifurcation; right?

25 **THE COURT:** In your explanation of the reports, why

1 would you choose to emphasize the unadjusted odds ratios that  
2 are over 2.0 rather than sort of the totality of the evidence  
3 that we considered at the general causation phase?

4 **MS. WAGSTAFF:** Yeah, sure. So if Your Honor will  
5 recall, there's a never/ever analysis in epidemiology, which is  
6 you've used it or you haven't used it and then there's sort of  
7 a dose-response; right?

8 And so these numbers from the McDuffie and the Eriksson  
9 are because these are the studies that looked at a  
10 dose-response that our experts in the general causation ruled  
11 in, and so they're not ignoring the adjusted numbers. What  
12 they're doing is saying "For us to say now that we have ruled  
13 in those papers because they consider unadjusted numbers, we're  
14 now ruling that into our specific causation opinion; and they  
15 are the only ones that show an association in line with our  
16 strong causation opinion that show a dose-response."

17 So it would be difficult to say never/ever; right? I  
18 mean, those don't tell -- those don't give you any sort of  
19 information on threshold use. So that's why the Eriksson and  
20 the McDuffie papers were utilized in that fashion.

21 They weren't to say that the association is stronger or  
22 weaker; right? That was considered by our general causation  
23 opinions who considered all of the evidence as Your Honor has  
24 already ruled on. They were to help identify once those cases  
25 had been ruled in and once that opinion had been confirmed by



1 Your Honor's PTO 45 that it was sufficient to go to the jury.

2 **THE COURT:** Okay.

3 **MS. WAGSTAFF:** Does that make sense?

4 **THE COURT:** Anything else?

5 **MS. WAGSTAFF:** Yeah.

6 So also Mr. Stekloff talked about that we used -- that our  
7 experts used a difference methodology in ruling out hep C, then  
8 ruling out Roundup, and that's actually just not true. I think  
9 the two factors will show that our experts looked at the  
10 exposure to, in this case it would be the virus -- right? -- at  
11 the time of the NHL and the latency, and we talked at length  
12 about all of the latency. And so I think that's the same thing  
13 that they considered with respect to the NHL.

14 With respect to whether or not our experts automatically  
15 ruled in Roundup, I would like to just, in the interest of  
16 time, point to a few citations in the *Daubert* testimony from  
17 Dr. Shustov. I would point you to page 176:15 to 177:10.

18 **THE COURT:** Can you give me that one more time?

19 **MS. WAGSTAFF:** 176:15 to 177:10, and that's where he  
20 states that he relied on the general causation opinions.

21 And then you asked him on page 177:22 to 180:8 -- 180  
22 colon 8 -- you ask him (reading):

23 "Just to understand your methodology, but once you  
24 established that a plaintiff exceeded that floor --  
25 okay? -- is it then automatically your conclusion that

1 Roundup was a substantial factor in causing their NHL, or  
2 is there any other analysis that needs to be conducted  
3 before you reach that conclusion?

4 "No, Your Honor, I would not make it a substantial  
5 contributing factor because then I have to go through my  
6 differential diagnosis or deductive method and see what  
7 else patient -- excuse me -- what else patients were  
8 exposed to or whether there are any other factors that I  
9 believe would be more significant than the Roundup  
10 exposure."

11 **THE COURT:** Right. But my recollection of that  
12 exchange is that I then responded by saying something to the  
13 effect of, no, you're not answering my question. My question  
14 is: Once you've already gone through and determined that there  
15 are no other risk factors affecting this patient and all you  
16 have is, you know, Roundup at this floor, would your conclusion  
17 be that it was the Roundup that caused their NHL?

18 And I don't remember what he said in response to that, but  
19 I think he said something to the effect of yes.

20 **MS. WAGSTAFF:** Okay. Well, I don't have that in here  
21 too so we can look that up, but I would just direct Your Honor  
22 to look at that area. And that was page 177:21 to 180:8.

23 **THE COURT:** Okay.

24 **MS. WAGSTAFF:** I would also request that the Court  
25 look at 182:2 to 14, also 180:15 to 181:2, also 220:1 to

1 221:25.

2 With respect to Dr. Nabhan, I would request that the Court  
3 look at page 6 of his expert report and also page 7.

4 I would request that with respect to his testimony, that  
5 you look at page 93:5, 95:2, also 93:3 to 101:19, 242:1 to 14,  
6 250:20 to 252:19, and then 257:16 to 262:12.

7 And then with respect to Dr. Weisenburger -- I think this  
8 is actually one of their slides, but I don't have a quote from  
9 it because the transcript came out after hours yesterday, but  
10 when you asked -- I think Mr. -- or Dr. Weisenburger was pretty  
11 clear when you asked him whether or not a person who only had  
12 the risk factor of two days a year for five years, so 10 total  
13 days, if that would be enough, one, he said he would tell the  
14 lawyers to settle that case because it wasn't good; two, he  
15 said that he would probably say "We don't know." And he would  
16 probably say "Which is another way for saying idiopathic";  
17 right?

18 **THE COURT:** Right. I remember that. And so I guess  
19 one question I have is if Weisenburger had answered the  
20 question differently, if Weisenburger had said, "No, Your Honor  
21 there are no -- there were no other risk factors that I  
22 identified. The only risk factor -- potential risk factor that  
23 I have left is Roundup and I see that the patient was exposed  
24 to Roundup only for 10 lifetime days, I would conclude that the  
25 Roundup caused their cancer," if he had given that opinion,

1 would it be an admissible expert opinion?

2 **MS. WAGSTAFF:** I believe it would be, Your Honor,  
3 because we spent years discussing the association between the  
4 two -- between Roundup exposure and NHL; right? And we came to  
5 the conclusion -- or you came to the conclusion that that  
6 testimony was admissible, and we have experts that will say it  
7 is strong. And, in fact, Dr. Ritz, I think -- or I think  
8 Mr. Stekloff said that none of our experts alone will say that  
9 epidemiology is enough, but I believe that Dr. Ritz actually  
10 does say that epidemiology alone is enough.

11 But we spent years --

12 **THE COURT:** One of the many ways in which the  
13 plaintiffs' experts opinions have changed over time.

14 **MS. WAGSTAFF:** So we spent a couple of years talking  
15 about whether or not that was admissible evidence, and it turns  
16 out that Your Honor found that we could take that to a jury.

17 So, yeah, I do think it would still be admissible opinion  
18 because, as you started off this discussion, is that there is  
19 admissible testimony on our side that the association is  
20 strong. And so I think our specific causation experts are  
21 allowed to rely on that.

22 And ironically, if you play --

23 **THE COURT:** But I'm asking a different question.

24 **MS. WAGSTAFF:** Okay.

25 **THE COURT:** Okay? I get that point.

1           **MS. WAGSTAFF:** Uh-huh.

2           **THE COURT:** But to say that it's strong is different  
3 from saying that if there are no other risk factors and the  
4 person was only exposed for 10 lifetime days, I'm going to  
5 conclude that the NHL caused their cancer -- that Roundup  
6 caused their cancer.

7           **MS. WAGSTAFF:** Sure, and --

8           **THE COURT:** That's a very different opinion; right?

9           **MS. WAGSTAFF:** Well, I think that --

10          **THE COURT:** Because, as we discussed with  
11 Dr. Weisenburger on Monday, you know, that was just the cutoff  
12 for the -- I can't remember if it was the Eriksson study or the  
13 McDuffie study, but that -- or both, but that was just the  
14 cutoff; right?

15          The people in that universe who showed, pursuant to those  
16 studies, an elevated risk of NHL or an elevated association  
17 with Roundup and NHL, the people in that pool didn't all get  
18 exposed only for 10 lifetime days. Presumably most of the --  
19 the vast majority of the people in that pool got exposed a lot  
20 more.

21          And so what Weisenburger is saying is, "Yeah, that's a  
22 good point. You're right. I shouldn't have said otherwise;  
23 and if somebody was only exposed for 10 lifetime days and  
24 didn't have any other risk factor, I would conclude that we  
25 don't know what caused their cancer. I would not conclude that

1 Roundup caused their cancer."

2 And so I'm asking you if somebody gave a different opinion  
3 and said, "Yes, I would conclude -- if there are no other risk  
4 factors and the person only was exposed to 10 lifetime days of  
5 Roundup, I would conclude that Roundup caused their cancer,"  
6 you're saying that that would be an admissible expert opinion?

7 **MS. WAGSTAFF:** Yeah. I think that -- yes, I think  
8 that it would be, and I think that it would be subject to  
9 cross-examination at trial.

10 And I think what Dr. Weisenburger was saying, and I  
11 remember the question and answer between the two of you, was he  
12 had said, you know, Mr. Hardeman actually would have a higher  
13 risk factor than that shown in Eriksson and McDuffie.

14 **THE COURT:** Right.

15 **MS. WAGSTAFF:** And when Your Honor pushed him back and  
16 you said, "Well, hang on a second. It's not like every single  
17 person in this" --

18 **THE COURT:** Right.

19 **MS. WAGSTAFF:** -- "thing had the 2 and 10 days," and  
20 he said, "You're probably right." But Dr. Weisenburger never  
21 said that those were inaccurate numbers to use in terms of a  
22 dose-response.

23 And in terms of once a specific causation -- or general  
24 causation expert -- excuse me -- has gone through all of the  
25 literature -- unadjusted, adjusted, toxicology -- you know,

1 we're doing the weight of the analysis as well if you'll  
2 recall -- and done the toxicology, mechanistic data, and  
3 established a strong opinion, I don't think any of our experts  
4 have said that those numbers are inappropriate to use to rule  
5 it in; right?

6 And so then I think on cross-examination at trial, sure,  
7 Mr. Stekloff --

8 **THE COURT:** Well, Weisenburger said, "No, if there's  
9 no other risk factor and it's only the 10 lifetime days, I  
10 would not conclude that the Roundup caused the NHL." He was  
11 very clear about that, at least in his testimony, I don't know  
12 what he said in his deposition; but in his life testimony here.

13 **MS. WAGSTAFF:** Well, I don't remember him being as  
14 definitive as that, but --

15 **THE COURT:** But you're saying that that -- if he had  
16 answered the opposite, his opinion would be admissible because  
17 the evidence of the link between Roundup and NHL is so strong,  
18 that if there are no other risk factors that we've identified  
19 at the specific causation stage and we've identified that they  
20 were -- the patient was exposed only 10 times to Roundup, that  
21 we can conclude that the Roundup caused their NHL as opposed to  
22 simply saying we don't know what caused their NHL.

23 **MS. WAGSTAFF:** Yes.

24 **THE COURT:** Okay. And what's your best case for that?

25 **MS. WAGSTAFF:** Can I submit it to you this afternoon?

1           **THE COURT:** Sure.

2           Okay. Anything else you want to discuss on this issue?

3           **MS. WAGSTAFF:** No, Your Honor.

4           **MR. STEKLOFF:** I'd like to just briefly respond.

5           **THE COURT:** Okay. You're taking away -- you're going  
6 to have ten minutes to discuss Monsanto's specific causation  
7 experts so you're taking away from that time.

8           **MR. STEKLOFF:** I'll use one minute.

9           Slide 25 -- so you're pointing out a problem, which is  
10 that if you're -- if you agree that 10 days/2 days per year is  
11 not enough, Dr. Weisenburger has, if you accept his shifting  
12 testimony, has completely undermined Dr. Nabhan and  
13 Dr. Shustov. They clearly just relied on the 2 days/10 days.

14           **THE COURT:** But you can put up experts who have  
15 different opinions; right? You can put up experts who disagree  
16 with each other. The question is whether one of them has such  
17 a deep methodological flaw that they need to be excluded.

18           **MR. STEKLOFF:** Right, and I understand that they are  
19 trying to defend the methodology. I think it's a  
20 methodological flaw.

21           I also think that even accepting -- I mean,  
22 Dr. Weisenburger made very clear in his deposition that 2 days  
23 per year and 10 days was enough. I understand he came in here  
24 and changed his testimony having a preview of what happened  
25 with Dr. Nabhan and Dr. Shustov.



1           But then even where he says it's more, and he walked it  
2 back, which is Slide 20 in the back, he said, "I have no data  
3 to support" -- you know, there was this colloquy with him where  
4 you pushed him on whether or not he -- what his position really  
5 was. And the end of his answer is, "Well, I guess I'm saying  
6 there's more, but I don't have data to support that." That is  
7 not a proper methodology, to base that on something without  
8 data.

9           The last point I just want to make, Your Honor, is if you  
10 go back in their reports, what happened here with hep C and  
11 with general causation is not what they have testified to. So  
12 I understand that they have seized on the October hearing where  
13 there was a colloquy that Mr. Kilaru is about to discuss with  
14 you about relying on it, but their reports all walk through  
15 general causation in detail.

16           That is a problem for them because now they're just coming  
17 and trying to say "I'm assuming," but they did something very  
18 different in their reports.

19           They also just dismissed hep C out of hand. So when  
20 Ms. --

21           **THE COURT:** I understand the argument.

22           **MR. STEKLOFF:** -- Wagstaff comes up here and says  
23 they've done the same methodology, that's just not true.

24           **THE COURT:** Okay.

25           **MR. STEKLOFF:** Okay.

1           **MS. WAGSTAFF:** Your Honor, before we move on, the  
2 discussion that he's talking about with respect to  
3 Dr. Weisenburger and his --

4           **THE COURT:** I don't need to hear any more argument on  
5 this. Thanks.

6           **MS. WAGSTAFF:** Well, it was cleaned up in redirect, so  
7 if --

8           **THE COURT:** I understand.

9           **MS. WAGSTAFF:** Okay.

10          **THE COURT:** Okay. What do you want to discuss with  
11 respect to -- the first thing I want to say on this issue of  
12 Monsanto's specific causation experts is that I would like to  
13 take part of the blame for the confusion.

14          I should have been more definitive earlier on about how we  
15 were going to treat specific causation in light of the fact  
16 that we'd already done general causation for two years. And so  
17 I apologize for not being more clear about that.

18          But when October of last year rolled around -- so part  
19 of -- that's part of why I asked you --

20          **MR. KILARU:** Right.

21          **THE COURT:** -- in my order how is Monsanto prejudiced  
22 by any of this.

23          **MR. KILARU:** Right. So --

24          **THE COURT:** So October rolls around. I make this  
25 statement about how it's going to go. Why isn't it -- why

1 shouldn't it go that way?

2           **MR. KILARU:** Very briefly, Your Honor, I think just on  
3 the past point, I think we did understand under PTO 7 that new  
4 general causation experts would be permitted.

5           But that being said, I don't think that actually matters  
6 for the debate about what our specific causation experts would  
7 do.

8           I do want to be clear coming out of that October hearing,  
9 it is not our intent and would not be our intent, and I  
10 understand you wouldn't permit it, but it wasn't our intent to  
11 have these specific causation experts come in and substitute  
12 for or replace what the general causation experts did. So, for  
13 example, Dr. Grossbard we would not have proffered to come in  
14 and basically do the epidemiological analysis that Dr. Mucci or  
15 Rider did.

16           Where we have -- and I think Mr. Stekloff said this  
17 correctly -- concerns on the margins of the order, I think that  
18 addresses the point I just made, the end of your order where  
19 you talk about the time wasting.

20           Where I think we have concerns on the margins is with what  
21 we wanted our specific causation experts to do and the  
22 testimony we would hope to elicit from them is looking at the  
23 question of what caused these particular plaintiffs' NHL from  
24 the perspective of a clinician. And one of the things that  
25 they did in doing that was look at in some cases the general

1 causation literature, in some cases whether there are tumor  
2 markers or whatever the case may be. But those are the types  
3 of things that a clinician would do in evaluating that point.

4 To give you a hypothetical -- not a hypothetical, a real  
5 example, when talking about hepatitis C, some of the experts  
6 talk about epidemiological literature. And so I think our  
7 concern would be, as the order is phrased, it seems to suggest  
8 that the expert would have to say "For Roundup, I don't think  
9 it's a risk factor basically because someone I haven't met says  
10 it's not a risk factor, the general causation expert."

11 I don't think we want to go substantially beyond that, but  
12 I do think they should be allowed to explain to the jury what  
13 they would explain to a patient, which is, "When confronted  
14 with something new that I don't think is a risk factor, I've  
15 looked at the literature and here's what I think about that."  
16 It wouldn't be a laborious presentation, but I do think it's  
17 important to avoid giving the jury a misimpression.

18 **THE COURT:** Well, why couldn't it be something as  
19 simple as "I was not brought here to testify about the  
20 epidemiological literature. I'm relying on the testimony that  
21 others have provided for the proposition that it's not capable  
22 of causing cancer. I agree with that based on my review of the  
23 literature, but I'm not here to -- I've not been brought here  
24 to provide an opinion about that"? I mean, isn't that --  
25 wouldn't that be enough? I mean, they may object to that but

1 wouldn't that be enough?

2           **MR. KILARU:** More or less, Your Honor, but I think it  
3 then gets into, like, when they're talking about that risk  
4 factor versus another risk factor, does it look like they did a  
5 real methodology for that as opposed to something like  
6 hepatitis C. When you put the two side by side, it looks like  
7 in one instance they're taking this new thing that actually all  
8 the experts agree they wouldn't tell a patient about in  
9 clinical practice and just saying, "I assume because someone  
10 else told me it's not in, and" --

11           **THE COURT:** No, not because somebody else told me. I  
12 assume that what they would do is they would say, "You know,  
13 I'm not here to provide an opinion on this because I've been  
14 brought here to provide a more limited opinion, but I'm relying  
15 on the conclusion that it's not capable of causing cancer,  
16 which I happen to agree with. Even if it were capable of  
17 causing cancer in this particular instance, I would rule it out  
18 and here's why."

19           **MR. KILARU:** Because I think in them explaining the  
20 method they would use to a patient and in them explaining the  
21 analysis they would do, they, A, shouldn't have to testify to  
22 something that is a little bit of a fiction, which is that they  
23 didn't do as much analysis as they did. But even more  
24 importantly than that, because I recognize what you just said  
25 would allow them to say in a limited way "I did some of this

1 analysis" --

2 **THE COURT:** Yeah.

3 **MR. KILARU:** -- I think the concern we would have is  
4 with when they're describing the methodology that they used to  
5 the jury, it's giving the jury kind of an artificially limited  
6 perspective of how and how thoroughly they considered the risk  
7 factor that we're really here to discuss as opposed to the risk  
8 factor that plaintiffs are ruling in.

9 **THE COURT:** "I considered the risk factor thoroughly,  
10 and I agree with the general causation opinions and I don't  
11 believe it's a risk factor." But, again, I mean, I think this  
12 is an awkward by-product of the bifurcation process.

13 **MR. KILARU:** Right.

14 **THE COURT:** I'm sort of curious, you know, in these  
15 MDLs or these other product liability cases, how many cases get  
16 past the general causation phase; right? It seems like a good  
17 idea to do general causation because, you know, it might not  
18 get past the general causation phase. The case may be over and  
19 save everybody a bunch of money and time and stuff like that.

20 You know, I'm interested someday in doing a study of all  
21 the cases where it got past general causation, how challenging  
22 did that make it for the trial. Somebody should write an  
23 article on that, but I guess I don't -- there is a degree of  
24 artificiality to it, I agree with you.

25 **MR. KILARU:** Right.

1           **THE COURT:** But in the context -- I mean, experts do  
2 that sort of thing all the time; right? Experts get up and  
3 they offer opinions and they say, "You know, I'm adopting this  
4 assumption and I'm adopting that assumption." And what I'm  
5 saying to you is not only could they potentially say "I'm  
6 adopting this assumption and I'm adopting that assumption,"  
7 like I said, experts do that all the time and then the jury  
8 gets to decide whether the assumption is valid, and you're  
9 going to have other experts who are going to testify in support  
10 of that assumption that the specific causation expert is using.

11           So in general I'm not sure how different it would be from  
12 any trial where we have expert testimony where experts are  
13 using assumptions; but what I'm saying to you is that  
14 additionally they can say, "And I've done my own independent  
15 analysis and I agree with it."

16           You know, I just don't understand how that -- you know,  
17 how that would -- if you allow that, how that would render one  
18 of your experts' opinions independent or weaker, or something  
19 like that, or less convincing.

20           **MR. KILARU:** Again, I think we really are talking  
21 largely on the margins here. I mean, to the hypothetical  
22 point -- and I think a lot of the cases where they assume a  
23 hypothetical, they didn't do the underlying analysis. They're  
24 just sort of presented with a hypothetical.

25           **THE COURT:** Right.

1           **MR. KILARU:** So it is different in that regard.

2           **THE COURT:** Right.

3           **MR. KILARU:** As to the second point, I do think for  
4 the sake of thoroughness and for explaining to the jury what  
5 they did, they should at least be allowed to say what they  
6 looked at in coming to that conclusion.

7           And, again, I don't think we ever envisioned them going  
8 point by point through AHS or any of the studies, but at least  
9 being able to explain to the jury what it was that they looked  
10 at themselves to get to that point so the jury doesn't think  
11 that they're sort of artificially and unrealistically, given  
12 what they did, taking Roundup off the table and then, you know,  
13 doing a very comprehensive literature search for something else  
14 or, you know, assuming what someone else told them is the sole  
15 basis for their opinion.

16           But, again, I don't think it's very different from what  
17 you propose, but we do think that there has to -- we believe  
18 that to avoid the jury thinking that our experts, you know,  
19 aren't very good clinicians or didn't approach this in a very  
20 responsible manner, it is important for them to be able to  
21 provide at least some more context than the tentative permits  
22 as to what they did without necessarily getting into a detail  
23 or replicating wholesale and wasting time with what other  
24 experts would do if we do indeed call those experts.

25           **MS. WAGSTAFF:** So, Your Honor, by definition that



1 would be cumulative of their general causation experts, and we  
2 would need to then explore their analysis of every single one  
3 of those papers if they're going to be putting on what McDuffie  
4 means or what De Roos means or what the AHS is or maybe put  
5 more weight on the AHS than they would put on some other paper.  
6 I mean, we spent two years doing this.

7         And I understand and appreciate because it applies to our  
8 experts as well but, you know, I think you'll see Dr. Shustov  
9 says in there we didn't ask him to do a general causation  
10 opinion because we were operating under what Your Honor has  
11 been telling us to operate under.

12         So now if they come in and they're allowed to have their  
13 specific causation experts opine, then I think that plaintiffs  
14 are unfairly prejudiced. And I think what Your Honor has said  
15 is fair, that they can't offer new general causation opinions  
16 or new general causation experts.

17         **THE COURT:** Yeah, I understand your point and I  
18 suspect that it's generating a fair amount of discomfort among  
19 your experts; right? What? I have to go and I can't --

20         **MR. KILARU:** Right.

21         **THE COURT:** I understand that. But I think the  
22 concern -- it may be kind of a big deal to them but, you  
23 know -- but I think from the standpoint of presenting a full  
24 picture to the jury, I really don't -- I don't think it's a big  
25 deal.

1           **MR. KILARU:** I guess --

2           **THE COURT:** If you want to sort of propose, you know,  
3 a few sentences that they might -- you know, that they might  
4 want to say about it or you think they should be allowed to say  
5 about it just as an example, you know, you could do that and  
6 I'll look at it.

7           **MR. KILARU:** Okay.

8           **THE COURT:** But I'm just -- I'm not seeing why they  
9 need to do it.

10          **MR. KILARU:** I guess, if I get to make two brief  
11 points, I think -- we will do that.

12           I do think if there's going to be cross-examination into  
13 their evaluation of Roundup, then at that point they certainly  
14 have to be able to explain what they did.

15          **THE COURT:** Of course.

16          **MR. KILARU:** And so that -- I guess the only other  
17 point I'd make just very briefly, this is what Mr. Stekloff  
18 said at the end, but their experts --

19          **THE COURT:** If you-all want to take this up a little  
20 bit after lunch, we could finish the conversation.

21          **MR. KILARU:** That's fine, if you prefer that,  
22 Your Honor.

23          **THE COURT:** So why don't we resume at 12:30 and we'll,  
24 you know, finish up this conversation; and then other than  
25 that, I think it's just all pretrial stuff.

1 Oh, no. There are a couple of nonspecific causation  
2 experts that I guess we need to chat about.

3 **MR. KILARU:** Yeah.

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

5 **MR. KILARU:** Thank you.

6 **MS. WAGSTAFF:** Thank you, Your Honor.

7 (Luncheon recess taken at 11:48 a.m.)

8 **AFTERNOON SESSION**

**12:43 p.m.**

9 **THE COURT:** Okay. Anything -- do you want to continue  
10 that discussion briefly? I will offer one observation that  
11 came to me as I was leaving the courtroom before lunch, which  
12 is you know, you are taking Nabhan to task for saying that he  
13 can't really separate out his opinions on the epidemiology,  
14 sort of from a general causation standpoint, from his specific  
15 causation opinion. You are taking him to task for that, and  
16 you are saying he should be excluded for that reason; but you  
17 are saying that your experts need to be able to say something  
18 along the lines of what Nabhan has said.

19 **MR. KILARU:** I don't think it is inconsistent for a  
20 couple reasons. I think one reason it is not inconsistent is  
21 that the opinions that Dr. Nabhan is, we think, attempting to  
22 bootstrap in has been excluded as unreliable. I think that is  
23 a distinction.

24 I think the second one is that we don't have the burden of  
25 proof here. I think rebutting what their experts are trying to

1 do is part of what our experts are entitled to do as well, and  
2 the point I was going to make right before lunch, which I think  
3 goes to this point is, I actually don't think that there is --  
4 if you look at the reports that the Plaintiffs' experts filed  
5 on specific causation, Nabhan, Weisenburger, and Shustov, it is  
6 not as if the reports take general causations as a given and  
7 just do a rule in and rule out. There is an analysis of the  
8 epidemiological literature --

9 **THE COURT:** That's fine -- they are not going to be  
10 able to provide that -- with the exception of Weisenburger,  
11 right, they are not going to be able to provide that at trial.

12 **MR. KILARU:** I think that is helpful. I think --  
13 other than that, Your Honor, I think all we would say is we  
14 would welcome an opportunity to craft something like you  
15 suggested, perhaps more proximate in time to those witnesses.  
16 And beyond that I don't think we have anything more on this.

17 **THE COURT:** Okay. Sounds good.

18 **MS. WAGSTAFF:** Just as long as we are -- have the  
19 opportunity to respond whatever they craft to Your Honor, we  
20 will rest on our papers.

21 **THE COURT:** Okay. Sounds good. So I want to bring up  
22 the topic of the jury questionnaires briefly, just to give you  
23 all an update. 98 prospective jurors filled out  
24 questionnaires. What we are going to do -- I would be shocked  
25 if we needed to bring in more than 98 people.

1           However, what we thought we might do internally, in  
2 chambers, is take a break about two hours from now and spend  
3 like 20 minutes going through the questionnaires to see -- very  
4 sort of surface review, to see how many people disqualified --  
5 might have disqualified themselves in their written responses  
6 so that we -- and if a lot of them have, then we might call  
7 more jurors in tomorrow to fill out more questionnaires because  
8 we still have people left in the jury pool who didn't call in.

9           So at about -- what is it now -- quarter to 1:00. So  
10 about a quarter to 3:00, we will take about a half-hour break  
11 to allow us to do that; and you all get the questionnaires at  
12 the end of the day, okay.

13           And I heard that there was a concern because you all  
14 wanted more than one copy or something like that. Fine to give  
15 you more than one copy as long as it is controlled by the  
16 appropriate confidentiality protections. I was a little bit  
17 nervous about transmitting them electronically. I would rather  
18 not do that if we can avoid that.

19           **MS. MOORE:** I understand that, Your Honor. I  
20 appreciate the concern about the privacy. I did check with my  
21 IT person this morning. There is a way to encrypt the  
22 questionnaires and send it password protected. My staff is in  
23 Kentucky, and I was planning on them reviewing the  
24 questionnaires, and that would be really helpful if we were  
25 able to do that. I can sign an affidavit that we did encrypt

1 the material; that they will not print the material; that they  
2 will only used the scanned copy that is password protected.  
3 I'm happy to do an affidavit to that effect.

4 We talked about an affidavit that we would be happy to do  
5 as far as the number of copies. We don't want to put that  
6 burden on you all, on the Court, and that we would return all  
7 sets of the copies to the Court.

8 **THE COURT:** Okay. Why don't you put something  
9 together?

10 **MS. MOORE:** Okay. Thank you so much.

11 **MR. WISNER:** Your Honor, quick clarification. You  
12 said you, as in your chambers, are going to take a look to see  
13 if any are disqualified?

14 **THE COURT:** We are not going to make any decisions.  
15 We are just going to flip through and see, you know, what  
16 percentage of these 98 people seem like they might have real  
17 problems.

18 **MR. WISNER:** Got it.

19 **THE COURT:** Okay. What I would like to do, I know  
20 that we still have the specific -- the nonspecific causation  
21 experts to talk about, but I would like to jump to motions in  
22 limine if possible because I think to the extent that we run  
23 out of time, it is more important that we go through the  
24 motions in limine. It is less important that I hear argument  
25 on those nonspecific causation experts, I think.

1           So, motions in limine.

2           **MS. WAGSTAFF:** Your Honor, would you like to just --  
3 how would you like to organize this?

4           **THE COURT:** Well, I think that it might be best to go  
5 through it roughly in the order that we categorized it in the  
6 guidance document that we put out last night or early this  
7 morning or something. That's the way my brain has started  
8 working on these. Maybe that's the best way to do it.

9           Is that okay?

10          **MR. STEKLOFF:** That works for us.

11          **MS. WAGSTAFF:** That works for us.

12          **THE COURT:** Okay. So then the first issue is the --  
13 what foreign regulators have done, what the EPA has done, and  
14 what IARC has done. And you saw my tentative about that. I  
15 would say that this idea of, you know, at least as to --  
16 particularly as to Phase One, the fact of the approval or the  
17 fact of the conclusion and the fact that EPA has approved  
18 Roundup, the fact that IARC has classified it as a probable  
19 carcinogen comes in, but not the documents. It is sort of an  
20 idea -- thought that just came to me yesterday. I don't know  
21 how -- I don't know if it will work, but I wanted to float it  
22 with you all and see what you think.

23          **MS. WAGSTAFF:** So, Your Honor, the way that we --

24          **THE COURT:** I will say that I don't need to hear  
25 argument on whether IARC and the EPA's conclusions come in.

1 I believe that it is appropriate -- it would be inappropriate  
2 to entirely bootstrap those, and I don't need to hear argument  
3 on that. It is just a question of how do we limit it.

4 **MS. WAGSTAFF:** Yeah. So, Your Honor, with respect to  
5 the IARC Monograph itself, we are okay with treating it as a  
6 peer-reviewed literature in the respect that the agreement that  
7 I believe we have come to -- I'm not sure if we have come to  
8 it -- but Mr. Stekloff proposed it on Monday, that we can  
9 publish it but it doesn't go back as an exhibit. And I'm not  
10 quite sure if that is what Your Honor was contemplating in this  
11 guidance, but Plaintiffs are okay treating the actual IARC  
12 Monograph in that respect.

13 **THE COURT:** So, in other words, you all have come to  
14 an agreement or you have made a proposal that -- that the  
15 peer-reviewed literature upon which the experts rely will be --  
16 can be shown to the jury -- excerpts of it can be shown to the  
17 jury but they won't actually be admitted as exhibits?

18 **MR. STEKLOFF:** With -- I'm not conceding this with  
19 respect to the IARC Monograph, but say the *McDuffie* study. I  
20 think that can be shown to the jury under Rule 803-18,  
21 published in the sense that some expert wants to call out  
22 portions and show a table and show the odds ratios, that is  
23 allowed. It would just not be admitted as an exhibit that  
24 would then go back to the jury during their deliberations. And  
25 I think the reasoning behind that is that you need experts to



1 explain those types of things so experts can rely on them, but  
2 the jury shouldn't then be trying to interpret scientific  
3 literature on their own without expert testimony.

4 **THE COURT:** It is the expert's opinion that they  
5 should be thinking about back in the jury room, not the 10,000  
6 papers that the experts cited or relied upon.

7 **MR. STEKLOFF:** Yes. And trying to interpret parts of  
8 literature that is very complicated that has not been discussed  
9 by experts, for example.

10 **THE COURT:** Okay. And that sounds like a good plan  
11 with respect to the peer-reviewed literature.

12 So then the question is why might -- why wouldn't it be  
13 okay to treat the IARC Monograph that way?

14 **MR. STEKLOFF:** Well, because --

15 **THE COURT:** And by the way, the EPA papers as well.

16 **MR. STEKLOFF:** Okay.

17 **THE COURT:** I mean, I assume -- I assume that we would  
18 treat both in a similar way.

19 **MR. STEKLOFF:** Okay. Having said that, then I have a  
20 less of a concern. My concern was that somehow the IARC  
21 Monograph would be treated differently than -- I mean, I still  
22 want to address a little bit about the foreign regulatory  
23 issue. But I think if the EPA -- we just want equal treatment  
24 one way or the other. So I think if the EPA paper is about  
25 approval, including the EPA paper's post-IARC, which

1 specifically addressed the IARC decision can be displayed to  
2 the jury, I think that that is fair.

3           **THE COURT:** And the question will be on that -- and  
4 the reason why I proposed that the fact of the EPA's decisions  
5 and the fact of the IARC's decisions could go in but maybe we  
6 shouldn't put in the documents is because they are not primary  
7 source documents so to speak, right. They are not actual  
8 studies. They are reviews of the literature, and reviews of  
9 the literature are less important than the actual studies  
10 themselves.

11           So it may be that if we have the -- the Monograph and the  
12 EPA papers available to display to the jury, so that the  
13 experts can call out portions of it, it may be that that  
14 becomes a 403 issue, and that we should not be -- we should not  
15 do that for either document because it just -- the parties are  
16 going to not be able to help themselves. They are not going to  
17 be able to help but spend excessive time on those papers.  
18 Distracting the jury from the primary inquiry, so that's the  
19 issue we should be discussing, I think.

20           **MS. WAGSTAFF:** So Mr. Wisner is going to address the  
21 EPA documents. We sort of split it that way. I think one  
22 notable difference, however, is I do understand that the IARC  
23 Monograph is sort of review, but we are bringing a primary  
24 reviewer. We are bringing Dr. Jameson to talk about his  
25 review. He participated in it. He has been deposed as a fact

1 witness. He has been deposed as an expert witness. He has  
2 offered testimony in this chair.

3 **THE COURT:** I can't remember. Jameson was excluded  
4 from general causation, not because he wasn't -- not because he  
5 gave a bad opinion but just because it wasn't enough, right?

6 **MS. WAGSTAFF:** He relied -- in your opinion he relied  
7 too much on IARC, so we are bringing him to testify about his  
8 experience at IARC. He is the reviewer who actually  
9 participated, who voted, who -- you know, he voted unanimously  
10 in the entire 2A decision and that sort of thing. So in  
11 that --

12 **THE COURT:** I assume that would be during Phase Two.

13 **MS. WAGSTAFF:** Well, we were planning on bringing him  
14 during Phase One.

15 **THE COURT:** I don't think so. I mean, why? Given  
16 what I just said about the secondary importance of the IARC's  
17 conclusion, why would we get into a big trial about what  
18 happened at IARC?

19 **MS. WAGSTAFF:** Well, we are bringing in somebody who  
20 has actually reviewed all of the literature that IARC has  
21 reviewed, that he has reviewed that and has come to a  
22 conclusion -- and he has actually someone who has --

23 **THE COURT:** But his opinion, his conclusion, was  
24 excluded.

25 **MS. WAGSTAFF:** I don't think it was excluded in total.

1           **THE COURT:** Because --

2           **MR. WISNER:** He was admitted for --

3           **THE COURT:** I didn't exclude the opinion. That's  
4 right. I said he could talk about the animal studies.

5           **MS. WAGSTAFF:** Right.

6           **THE COURT:** Is that right?

7           **MS. WAGSTAFF:** So we have identified him -- we have  
8 identified him in our witness list, and we have told Monsanto's  
9 attorneys for weeks now that we intend to bring him to testify  
10 in Phase One. I was just told this morning that they plan to  
11 make some sort of a motion.

12           **THE COURT:** I assume you could have him testify at  
13 Phase One about the animal studies, but I'm not sure this war  
14 that you guys are having about, you know, the IARC process and  
15 how honest or dishonest the IARC process was, you know, I don't  
16 think that's for Phase One. Just like a war about how honest  
17 or dishonest the EPA approval process was would not be for  
18 Phase One.

19           **MS. WAGSTAFF:** Well, sure. However, if the IARC  
20 Monograph is coming in -- you know, so if we come in and bring  
21 it in, then can't they attack IARC in Phase Two? That's sort  
22 of the way I put it in my head is that we would be able to --  
23 the same way that other hairs are being split in this case.  
24 The bifurcation procedure has created these hurdles that aren't  
25 sometimes the most intuitive thing, but we are saying that here

1 is a guy who has reviewed all of this literature. He is going  
2 to come in. You have allowed him to testify as an expert with  
3 respect to toxicology, but he is also a fact witness that they  
4 have moved to compel to depose as a fact witness. So he has  
5 actually been rendered a fact witness in this case.

6 Now, they are going to say yeah --

7 **THE COURT:** A fact witness about how things went down  
8 at IARC?

9 **MS. WAGSTAFF:** In part, yeah -- his opinion --

10 **THE COURT:** How things went down at IARC is, you know,  
11 if anything, for Phase Two.

12 **MS. WAGSTAFF:** Sure. Exactly. But I think that  
13 when -- when he comes and testifies to his opinion, I think  
14 that we could ask him about his experience with this material  
15 and his experience with IARC.

16 **THE COURT:** You can establish that he worked on the  
17 IARC -- on the IARC committee or whatever you call it. I mean,  
18 I would think you would be able to establish that as part of  
19 establishing his qualifications.

20 **MS. WAGSTAFF:** Sure.

21 **THE COURT:** But Phase One is not for the big fight  
22 that you are all having about whether the IARC process was pure  
23 or impure, shall we say.

24 **MS. WAGSTAFF:** Sure, yeah.

25 **MR. WISNER:** So, Your Honor, I think that's -- I think

1 you are right. I think that's -- but here is the problem --  
2 and this happened in *Johnson*. So whether it be the EPA or  
3 IARC, we believe that the fact that IARC has concluded what it  
4 concluded is -- strengthens the opinions of our experts that  
5 have gone farther than IARC, but they did conclude what they  
6 conclude; and so insofar that IARC came to the conclusion that  
7 they know about it, the basis of it, it supports their opinion.  
8 I understand you don't want what happened at IARC -- it sounds  
9 like a bad '80s flick, what went down at IARC -- but I think  
10 here is where the problems start.

11 **THE COURT:** It is actually kind of interesting what  
12 went down at IARC. Actually be an interesting '80s flick,  
13 caucusing and deciding if we are going to change our votes and  
14 stuff. Anyway, go ahead.

15 **MR. WISNER:** Southern beach in France.

16 All right. So, but with EPA, here is what happened -- and  
17 this is why I think it is really a 403 question, and that is --  
18 for Portier, for example, 90 percent of his cross-examination  
19 in *Johnson* was, well, the EPA doesn't agree with you, right.  
20 That was the cross.

21 **THE COURT:** Right. It's going to have to be  
22 different.

23 **MR. WISNER:** Fair enough. And that was a large part  
24 of the directs of their experts, was the EPA agrees with me.  
25 So if we are not going to be able to go into the details of

1 EPA, then it causes a separate problem.

2 The approval in and of itself we believe is wrong, all  
3 right. And we have -- we have evidence to support why it is  
4 wrong. We have scientific evidence, right. We have the  
5 scientific advisory panel. We have, for example, this recent  
6 publication, the Benbrook article that came out earlier this  
7 year comparing the genotox analysis. We have scientific  
8 evidence --

9 **THE COURT:** That is what we are going to talk about is  
10 the scientific evidence. We are not going to talk about -- we  
11 are not going to focus on whether there was anything  
12 problematic about the process by which EPA reached its  
13 conclusion or anything problematic about the process by which  
14 IARC reached its conclusion. We are going to talk about the  
15 evidence.

16 **MR. WISNER:** Sure.

17 **THE COURT:** If you want to couch it in terms of who is  
18 right and who is wrong, that is not that big of a deal, I would  
19 think; but we are going to -- we are going to talk about the  
20 actual evidence, not the process by which those agencies  
21 reached their conclusions.

22 **MR. WISNER:** Okay. So that's what I started getting  
23 at. So they are allowed to say, ladies and gentlemen, the EPA  
24 said it doesn't cause cancer, in Phase One. I understand that  
25 by your ruling they are allowed to do that, right. It seems

1 like there is a fundamental handicap for us to say, well, hold  
2 on, there is some scientific reasons why that answer -- that  
3 conclusion was wrong.

4 **THE COURT:** I know, but that gets us to the jury  
5 instructions and the proposed draft jury instructions that I  
6 put out, which is regulatory agencies and other health  
7 organizations have reviewed the science surrounding glyphosate  
8 and reached conclusions about it. These evaluations, I might  
9 say these conclusions, are not a substitute for your own review  
10 of the scientific evidence.

11 **MR. WISNER:** Okay. I guess I think then -- the  
12 problem that I'm trying to cure, whether it be for IARC or  
13 EPA -- I really goose-gander here at this point -- is just if  
14 they are allowed to say, the EPA says it doesn't cause cancer,  
15 right, that opens up a whole line of questioning -- of  
16 scientific questioning about the EPA, about whether or not they  
17 followed the guidelines, whether or not they counted tumors  
18 over a thousand --

19 **THE COURT:** Yeah, and maybe you will choose to use  
20 your time at Phase Two to get into that, but you are not  
21 getting into it in Phase One.

22 **MR. WISNER:** Well, that is what I am suggesting, is  
23 maybe we shouldn't allow it at all, right, and simply say -- or  
24 maybe have an instruction that says you are going to hear  
25 evidence --



1           **THE COURT:** Not allow any information about EPA or  
2 IARC?

3           **MR. WISNER:** No, no.

4           **THE COURT:** Just EPA?

5           **MR. STEKLOFF:** We will take that, Your Honor.

6           **MR. WISNER:** No, no, no. This is good for both sides.  
7 This is what I'm suggesting, that there be a curative  
8 instruction in addition to what you have that says the parties  
9 are not going to spend time explaining why one agency or  
10 another is right or wrong. That will be something that may be  
11 discussed later.

12           Just so that is not left as a hanging fruit. And so if I  
13 was a defense lawyer, I would say, ladies and gentlemen, we  
14 told you the EPA causes cancer, and you know what they didn't  
15 do, they didn't tell you why they were wrong. And that's what  
16 they are going to say, and that's a couple hours of testimony.

17           **THE COURT:** If either one of you says that, you will  
18 be upstairs in the holding cell --

19           **MR. WISNER:** Okay. Good.

20           **THE COURT:** -- on the 20th floor. So it doesn't seem  
21 to me to be necessary to give an instruction like that because  
22 you are not going to do it.

23           **MR. WISNER:** Sure. Right.

24           **THE COURT:** And it would be inconsistent with my  
25 entire ruling. So, you know, it doesn't seem to me that an

1 instruction like that is necessary, but I'm happy to entertain  
2 one if somebody wants to propose one.

3 **MR. WISNER:** Okay. I think we will propose something  
4 that sort of hits that point because I think if we do that,  
5 then we can spare both sides considerable time. They don't  
6 have to explain why IARC is wrong, and we don't have to explain  
7 why EPA is wrong. It is just it happened and then we move on.

8 **THE COURT:** So where does that leave us on the  
9 question we started talking about, which is --

10 **MR. WISNER:** Publication.

11 **THE COURT:** -- whether experts can call out excerpts  
12 from the IARC Monograph and the EPA papers?

13 **MR. WISNER:** I would think under that -- sorry -- our  
14 position would be then with this understanding -- and assuming  
15 we can work this out -- that it should not be published because  
16 it will then become, let's look at all 89 pages of the EPA or  
17 IARC report.

18 **MR. STEKLOFF:** I'm fine with that, Your Honor. But  
19 there is one part -- I think one part of your tentative ruling  
20 that I still -- we still need to address, which is --

21 **THE COURT:** The foreign regulatory agencies?

22 **MR. STEKLOFF:** Well, that -- two parts. Sorry, on the  
23 IARC portion, if we are now trying to keep it pretty clean,  
24 there was an IARC ruling and there was an EPA ruling, and we  
25 support the instruction that you just read from.

1           The problem is -- and I just want to refer to this  
2 sentence, which is, but the experts can explain why they relied  
3 on part on the IARC classification to reach their own  
4 conclusions.

5           So that's taking the IARC classification and bolstering  
6 their opinion, which should be independent of IARC. I think --  
7 I think that they should not be allowed to do that.

8           I understand the concerns the Plaintiffs have raised and  
9 that -- and I'm not pushing back on whether IARC should come in  
10 at all, but it should be clean. It should be factually like  
11 one witness says, by the way, yes, we say we get to bring out  
12 that EPA has approved this -- and then I will touch on foreign  
13 regulatory in a moment, put that to the side -- and then they  
14 get to say there is this group, IARC, and IARC made this  
15 decision. And then your instructions will allow the jury to  
16 consider that, period.

17           If they, then, are allowed to say we are right because  
18 we -- because IARC supports us, and you can just go to their  
19 brief to see how they are going to do this. Their brief on the  
20 IARC issue says the jury should be permitted to hear that  
21 Plaintiffs' experts opinion are supported by the conclusions of  
22 a prestigious research organization when deciding how much  
23 weight to afford Plaintiffs' scientific evidence.

24           That is a problem for us because then we don't get to show  
25 under, where we are discussing this now, all of the regulatory

1 agencies that have disagreed with IARC since IARC and --

2 **THE COURT:** I see your point, and -- so let me ask:  
3 What is it that the Plaintiffs' experts would be prevented from  
4 explaining if they could not rely on the IARC's analysis? If  
5 they were -- if we said, look, we are going to have a clean  
6 rule. You know, the experts -- IARC didn't conduct any new  
7 studies; IARC just examined what was out there. And the EPA  
8 didn't conduct any new studies; it just examined what was out  
9 there. So what would be wrong with limiting the Plaintiffs'  
10 experts to discussing what was out there? What -- in other  
11 words, why isn't he right on that point?

12 **MR. WISNER:** Let's give a very crystal-clear example:  
13 The AHS, they are going to go up and tell this jury that the  
14 National Cancer Institute, the National Institute of Health,  
15 the most premier organization of the United States, they  
16 conducted the most amazing --

17 **THE COURT:** I got it.

18 **MR. WISNER:** So they are going to bolster --

19 **THE COURT:** We have a lot to talk about today.

20 **MR. WISNER:** -- by citing the credibility of their  
21 reliances. We have the right to say, IARC is actually more  
22 credible. It has been around longer, and it's world renowned.

23 **THE COURT:** But the AHS was an actual direct study.  
24 The IARC is -- you know, is a bunch of scientists reviewing the  
25 existing studies. EPA is a bunch of scientists reviewing the

1 existing studies. You think there is something wrong with  
2 those scientists and their process; they think there is  
3 something wrong with the IARC scientists and their process.

4 **MR. WISNER:** They are actually different. So IARC  
5 actually did a meta-analysis. They actually did one. They  
6 actually did the science and numbers. They ran statistical  
7 numbers on all the annual studies that they have in front of  
8 them. They actually did something that is different than just  
9 what was publicly out there. They created new data.

10 **THE COURT:** So I had forgotten about that. I thought  
11 that they -- I thought they looked at three meta-analyses.  
12 This is a long time for me, so forgive me if I'm misremembering  
13 it. But I thought they looked at three meta-analyses that were  
14 already out there and decided to throw one of them out, but  
15 relied on the other two. I did not recall that they conducted  
16 their own meta-analysis.

17 **MR. WISNER:** They did. They conducted their own  
18 meta-analysis. It was --

19 **THE COURT:** Where is that in the Monograph?

20 **MR. WISNER:** I can find it. I don't have the page.  
21 My mind says page 48, but I don't know if that's right.  
22 Sometimes I'm good at that. But my instinct is that -- and it  
23 was a big issue with Dr. Blair because they said, Well, if you  
24 would have included the AHS updated data, would that have made  
25 it no longer statistically significant. And he says, I don't

1 know.

2       And so that was a big fight we had with Dr. Blair about  
3 that exact point. My understanding is that they actually  
4 weighted the studies like in a meta-analysis and actually  
5 conducted a statistical analysis of it.

6       I know they also did a statistical analysis of the mouse  
7 and rat studies that they had in front of him, specifically  
8 looking for Knezevich & Hogan, which is the mass or tumor  
9 study. They actually said, no, there is an elevated rate for  
10 kidneys here, as an example. That disagreed obviously with the  
11 EPA, but they disagreed with the study and they actually looked  
12 at the data that was available.

13       So there is a little bit more than just a review, but I  
14 mean, that all said, that's not something we need to spend a  
15 whole lot of time on. I mean, what I'm trying to work through  
16 here is, you know, this idea that, I don't think we should  
17 publish the IARC Monograph. We don't have to have that at this  
18 time. If they can't publish the EPA, we can't publish the  
19 IARC. That's fine.

20       And because we have a proceeding, we have to figure out a  
21 way to sort of make sense; and I think the way it makes sense  
22 is our experts say, yeah, I relied on IARC. This is what it  
23 means. This is what they looked at, and that's it, right.

24       We don't have to go into a lengthy discussion of what did  
25 you talk about when you were there and who are the scientists

1 and all that kind of stuff. I think there's -- we can do it  
2 relatively quickly, like ten minutes. But this shows that for  
3 what it is worth, these opinions from IARC are opinions that  
4 both Dr. Portier and Dr. Jameson, you know, were exposed to  
5 before they were ever involved in this litigation. So it goes  
6 straight to their credibility. It goes to their experience  
7 researching the molecule. It has a lot more factual -- they  
8 don't have anyone from the EPA, I believe --

9 **THE COURT:** Well, all of your -- so other than the  
10 part about IARC doing its own independent meta-analysis, I  
11 think all of -- all of the other aspects of that, they can  
12 bolster their credibility by saying that they, you know, are  
13 part of the IARC committee, and that this is -- you know, a  
14 famous, well-respected international body of scientists and all  
15 of that; but they can -- in explaining their opinion for why  
16 glyphosate is capable of causing NHL or why Roundup caused NHL  
17 in Mr. Hardeman's particular case, they don't need to say, you  
18 know, the IARC concluded this; the IARC concluded that.

19 They can say, I conclude this; I conclude that based on  
20 all of the studies that are out there.

21 **MR. WISNER:** Sure.

22 **THE COURT:** If one of the studies is an IARC study,  
23 then maybe they can. I just -- I didn't remember that IARC  
24 conducted its own independent meta-analysis; but if that is  
25 indeed the case, then maybe they can say, IARC did its own

1 meta-analysis, which I agree with. That may be right.

2 **MR. WISNER:** Okay. I think that's fair. And I think  
3 that's kind of the -- we don't want to spend much time on it  
4 because of these 403 issues in Phase One. Whether or not we do  
5 a much more -- what went down in the IARC in Phase Two, I think  
6 is a conversation we can probably have later.

7 **THE COURT:** And part of that might be in Phase Two a  
8 lot of it is going to be simply how you all decide to budget  
9 your precious time.

10 By the way, I thought you weren't doing this trial. Has  
11 that changed?

12 **MR. WISNER:** I'm not doing any openings or closing,  
13 Your Honor. I will be doing the direct of Portier in  
14 Australia. I'm leaving on Saturday.

15 **THE COURT:** Oh, in Australia. You get to go to  
16 Australia. They all have to stay in this courtroom and  
17 actually try the case.

18 **MS. MOORE:** That's correct, Your Honor.

19 **MR. WISNER:** The sacrifices we make, Your Honor.

20 **MR. STEKLOFF:** Okay. So I think there is a 403  
21 problem if we go beyond where I was before.

22 **THE COURT:** Is it right that the IARC did its own  
23 meta-analysis?

24 **MR. STEKLOFF:** There is seven paragraphs that is  
25 very -- I'm not so sure how robust it was, but I think it is



1 true that they claim to do their own meta-analysis.

2 **THE COURT:** Okay.

3 **MR. STEKLOFF:** I think the problem is once you start  
4 to open the door beyond where I was, then for context --

5 **THE COURT:** Did the EPA do its own meta-analysis?

6 **MR. STEKLOFF:** EPA did its own statistical analysis.  
7 I will concede I don't know the answer. But put that aside,  
8 Your Honor. I want to focus -- I think this really comes down  
9 to Portier and Jameson. I don't think that this IARC and  
10 EPA -- and I still want to be able to touch briefly on foreign  
11 regulatory, comes in on Phase One with any other experts.

12 When we talk specifically about Dr. Portier -- and  
13 depending on how far he can go -- the problem with Dr. Portier  
14 is that Dr. Portier did post-IARC and -- I'm going to try to  
15 use a non-pejorative verb -- he tried to convince regulators  
16 around the world that they should follow IARC. And then  
17 regulators around the world -- and it is not every regulator.  
18 To be clear, it is Europe. It included things to the EPA, and  
19 then there recently where Health Canada -- objections to Health  
20 Canada -- I don't know whether Dr. Portier was involved or not,  
21 but his -- his letter that was sent to Europe was attached. So  
22 Canada certainly was considering his criticisms of their  
23 regulatory review. And he is trying to bolster the IARC  
24 opinion and saying, you need to follow IARC. They all come  
25 back and say, no. Canada comes out and says we left no stone

1 unturned. They are considering his letter that he sent to  
2 Europe.

3 And I guess -- my problem is I'm fine not getting into any  
4 of that; but I think once we get past where I was before, it  
5 seems very unfair to say --

6 **THE COURT:** If IARC has conducted its own  
7 meta-analysis, why is it not okay to say here are the, you  
8 know, sources that I'm relying on to conclude that Roundup  
9 causes cancer? The *McDuffie* study, the *Eriksson* study, the *De*  
10 *Roos* meta-analysis and the IARC meta-analysis, what is wrong  
11 with that?

12 **MR. STEKLOFF:** Let me just check something.

13 (Whereupon, a brief pause was had.)

14 **MR. STEKLOFF:** I can now tell you with the Monograph,  
15 it is one paragraph on page 30. It says 2.4 meta-analysis --  
16 and it so short that I can read it to you. I will try to read  
17 slowly.

18 Schinasi and Leon conducted a systematic review and  
19 meta-analysis of NHLs and occupational exposure to agricultural  
20 pesticides, including glyphosate. The meta-analysis for  
21 glyphosate included six studies, and it lists *McDuffie* --

22 **THE COURT:** Schinasi and Leon are people within the  
23 IARC working group?

24 **MR. STEKLOFF:** No. It is a separate meta-analysis  
25 that their experts relied upon and they can talk about it

1 separately.

2 It then goes on to say: And yielded a meta-risk ratio of  
3 1.5. The working group noted that the most fully adjusted risk  
4 factor from the articles by *Hardell* and *Eriksson* were not used  
5 in the analysis. After considering the adjusted estimates of  
6 the two Swedish studies in the meta-analysis, the working group  
7 estimated, and then they give them risk.

8 That is the entire discussion. I mean --

9 **THE COURT:** In other words, it sounds like what you  
10 are saying is they kind of tweaked the Schinasi and Leon by  
11 adding the data from *Hardell* and *Eriksson*?

12 **MR. WISNER:** Adjusted data.

13 **THE COURT:** Oh, right, because Schinasi and Leon used  
14 the unadjusted data from *Hardell* and *Eriksson*. The working  
15 group was not comfortable with that so they put in the adjusted  
16 data -- so basically to say they conducted their own  
17 meta-analysis seems like an overstatement to me. It seems like  
18 they took the data and they kind of adjusted -- they tweaked  
19 the Schinasi and Leon data to make it more reliable.

20 **MR. WISNER:** Well, they would have to do a full  
21 statistical regression on it. So they have a model and a  
22 statistical software, and they have a statistician in there.  
23 And, I believe, Dr. Blair testified that they did do their own  
24 meta-analysis. So while I agree --

25 **THE COURT:** What you are talking about is that the

1 experts would simply -- among the things they rely on would be  
2 Schinasi and Leon. It would be *Hardell* and *Eriksson* and  
3 *McDuffie* and *De Roos* and this paragraph from the IARC  
4 Monograph.

5 **MR. WISNER:** I think that's right.

6 **THE COURT:** And to -- if Jameson was involved in it, I  
7 gather he probably wasn't because he was a -- a tox person,  
8 right. And maybe Portier was not involved in this part of it  
9 either. But, you know, if they were capable of explaining in  
10 more detail what they did, you know, in terms of adjusting the  
11 numbers or whatever, maybe they can talk about that. But  
12 that's a far cry from calling out any other part of the IARC  
13 Monograph, which is simply a review of the literature, review  
14 of the studies.

15 **MR. WISNER:** That's right. I think we are okay with  
16 that.

17 **THE COURT:** Okay.

18 **MR. WISNER:** And just for what it is worth, my concern  
19 is can we say IARC concluded X, Y and Z, which we should be  
20 allowed to say what they concluded if they are allowed to say  
21 EPA concluded.

22 **THE COURT:** Well, I understand the arguments. I will  
23 give it a little thought in the morning. We will talk about  
24 the foreign regulators.

25 **MR. STEKLOFF:** I want to touch on Dr. Jameson very

1 quickly, which is that they have disclosed Dr. Jameson in the  
2 joint pretrial statement and witness list, and then in the  
3 description that is required only as a fact witness. So I  
4 agree that you allowed him after the general causation  
5 testimony to testify -- you limited his testimony, but then  
6 allowed him to testify on animal studies. Whether they can now  
7 re-visit it, they -- based on you sort of limiting their  
8 ability to call him, they did not disclose him in this case  
9 that -- it is clear that they only intended on calling him as a  
10 fact witness. We have concerns about that, and I have told him  
11 we are planning on filing a motion because his opinions -- I  
12 mean, if they had called him as an animal studies expert, we  
13 would have been fine.

14 **THE COURT:** Weren't the motions in limine supposed to  
15 be filed already?

16 **MR. STEKLOFF:** The joint pretrial statement and the  
17 witness list came out -- and that description came out after  
18 the motions in limine exchange had already happened.

19 **THE COURT:** Okay.

20 **MR. STEKLOFF:** To be clear, they had told me on a  
21 phone call that they intended on calling Dr. Jameson as a fact  
22 witness, but the most -- we didn't know what your ruling on  
23 IARC would be, and the actual descriptions and whether they  
24 were calling him also as an expert was not clear to us.

25 **THE COURT:** Okay. So they haven't disclosed him as a

1 toxicology expert witness for Phase One of the trial?

2 **MR. STEKLOFF:** Correct. And --

3 **THE COURT:** Okay.

4 **MR. WISNER:** And I think -- well -- I guess it doesn't  
5 sound like he can come in as a fact witness in Phase One, which  
6 we agree with it. So maybe we don't need to litigate that.

7 To the extent they are now trying to call him as an animal  
8 expert, I guess, the question is just the timing issue. If we  
9 were -- if he was going to be allowed to come in and go into  
10 detail about the IARC process, we would --

11 **THE COURT:** He is definitely not testifying as a fact  
12 witness in Phase One. There is no question about that.

13 **MR. STEKLOFF:** So we will find out what they are going  
14 to do with him as an expert witness.

15 **MR. WISNER:** I think your Court's ruling, whatever  
16 comes out will guide us on what we do.

17 **MR. STEKLOFF:** On the foreign regulatory issue,  
18 Your Honor, just very briefly. I think that it can be short.  
19 It does not have to go into detail. We do not have to show  
20 documents. But to suggest -- I think there is a very  
21 incomplete story that is suggested to the jury, if they only  
22 hear about EPA and then the World Health Organization, they are  
23 told in 2015 came out with this probable carcinogen finding, it  
24 leaves an open question. And, I mean, I don't know what will  
25 be in the juror's minds of, well, was this the first decision

1 by the rest of the world beyond the EPA.

2 So I do think that it is necessary for us to be able to  
3 bring out that the world -- the other regulatory bodies around  
4 the world had similarly approved glyphosate, and continue to  
5 approve glyphosate. I mean, it doesn't cut off at 2015, to be  
6 clear, including post-IARC.

7 **THE COURT:** I mean, you know, I hadn't thought about  
8 this concern, but I think you are right that it is a concern.  
9 I mean, a lot of people, you know -- you often hear people  
10 say -- and I'm not -- I remember -- I'm not talking about  
11 Roundup, although I probably have heard it in the context of  
12 Roundup also, but with respect to chemicals or things that  
13 might be harmful to people, you often hear people say, I wish  
14 we could be more like the Europeans, right? So there could be  
15 this assumption if you just have IARC and EPA, the natural  
16 assumption may be that Europe is like IARC, right? So I hear  
17 what you are saying.

18 The question is: Could it be done in a way that is fair  
19 and appropriately cabined?

20 **MR. STEKLOFF:** And subject to your limiting  
21 instruction, Your Honor.

22 **MR. WISNER:** So, I mean, I think that concern you just  
23 voiced, Your Honor, is directly handled by your curative  
24 instruction on foreign agencies. You said don't make up your  
25 own mind. They are just an opinion to look at.

1           If we start bringing in foreign regulatory agencies, and  
2 there is a lot of them, there are factual issues about each one  
3 of them that we --

4           **THE COURT:** Is there a foreign regulatory agency that  
5 has banned glyphosate or required a warning?

6           **MR. WISNER:** Yeah.

7           **THE COURT:** Which?

8           **MR. WISNER:** I believe Sri Lanka. Canada. Denmark  
9 has banned it. I think France is phasing it out. Germany is  
10 about to get rid of it. I mean, I can walk into a --

11          **THE COURT:** Germany is about to get rid of it?

12          **MR. WISNER:** Yeah, they passed a law. They are  
13 phasing it out by 2020. That's my understanding.

14          So for what it is worth, we can get into this fight, but  
15 it is a long fight; and it is an unnecessary one. And then  
16 when you throw in the fact that, wait, we are going to be  
17 talking about New Zealand but not about the California EPA, now  
18 we are getting into, I think, really prejudicially unfair  
19 territory. If they are going to want to bring in New Zealand,  
20 I can say, Well, California EPA looked at it too and agreed  
21 with IARC. That's what they said.

22          **THE COURT:** They didn't look at it. It is by  
23 operation of law that it has to go --

24          **MR. WISNER:** I actually think Your Honor needs to take  
25 a look closely at that because there is actually two issues.



1 One is the initial listing.

2 **THE COURT:** Okay. But we are not going to argue that.  
3 I don't need to hear argument about Prop 65. Prop 65 isn't  
4 coming into this trial. All the experts have to be instructed  
5 very clearly that Prop 65 is not coming in. If I hear a lawyer  
6 mention Prop 65, 20th floor.

7 **MR. WISNER:** Upstairs?

8 **THE COURT:** Yeah.

9 **MR. WISNER:** Is there really a holding room up there,  
10 Your Honor?

11 **THE COURT:** Oh, yeah. It is for the lawyers.

12 It is for the defendants because the defendants are housed  
13 mostly in Alameda County Jail, and they are brought here for  
14 appearances. Lawyers have been sent -- I have seen lawyers get  
15 sent up there actually.

16 **MR. WISNER:** Have you ever?

17 **THE COURT:** I have never done it. Don't make it a  
18 first.

19 So, okay. I understand the issue. I will think about it  
20 and I will issue a ruling.

21 **MR. STEKLOFF:** Can I just ask you one other question?  
22 We have a -- we have the Portier -- Dr. Portier deposition next  
23 week. Understanding that it is -- you know, that -- that in  
24 Phase One that they shouldn't get into -- they should now,  
25 depending on what your ruling is, cabin their IARC testimony

1 appropriately, we will do the same with the regulatory  
2 information. They also shouldn't be attacking EPA in Phase One  
3 and its review.

4 There is this question of bias, which is that there are  
5 numerous instances post-IARC and post being retained -- so  
6 Dr. Portier is retained by Plaintiffs' counsel, nine days after  
7 the IARC decision. Then there are various instances in which  
8 he is taking steps to try to convince various bodies, either  
9 Parliament members or regulatory bodies or there are other  
10 areas as well, to agree with his view of the carcinogen -- the  
11 IARC view and his view of the carcinogenicity of glyphosate.  
12 And there are numerous instances in which he does not disclose  
13 that he has been retained as a Plaintiffs' lawyer, has received  
14 a retainer and is working with counsel. And so -- if I had a  
15 solution, I would tell you --

16 **THE COURT:** Isn't the answer to that, take your  
17 complaint to the regulator who Portier was trying to influence  
18 and say, Hey, Portier is trying to influence you and he didn't  
19 disclose he was working for the Plaintiffs? It is not clear to  
20 me why that is relevant to this trial, the fact that he didn't  
21 disclose to the European Union or whatever that he was working  
22 for the Plaintiffs.

23 **MR. STEKLOFF:** Well, I think it goes to his -- he is a  
24 true believer.

25 **THE COURT:** He is a true believer. He is an advocate.

1 You are going to be able to establish that.

2 **MR. STEKLOFF:** But I think that the fact that he felt  
3 the need to maintain -- in his mind -- and this is an argument  
4 and they will argue to the contrary to be clear -- but needed  
5 to take the steps of not disclosing his relationship with  
6 Plaintiffs' counsel, to maintain credibility as part of his  
7 advocacy is relevant to the jury's factoring of his credibility  
8 and bias.

9 **THE COURT:** Perhaps in a very peripheral sort of way,  
10 but it's probably -- I would say that -- my -- you know, if you  
11 want to submit something on it, you can. But my pretty strong  
12 gut reaction is that under Rule 403, that that should not be  
13 part of -- at least be part of Phase One.

14 That under Rule 403, you know, you then -- A, it is not --  
15 it is not terribly relevant to the trial. You will be able to  
16 establish that he is an advocate and a true believer without  
17 getting into the fact that he didn't disclose his -- his  
18 affiliation with the Plaintiffs' lawyers when he was advocating  
19 with regulatory bodies, and it sort of -- it seems like it  
20 would be a waste of time. So that's my pretty strong gut on  
21 that is that that nondisclosure issue would be excluded under  
22 403.

23 You will be able to, you know, establish that he is an  
24 advocate. And part of that will -- that will at least  
25 implicitly bring out the issue that -- you know, regulatory

1 bodies have not already banned glyphosate. I'm not sure there  
2 is anything that can done about that, other than my sort of  
3 limiting, preventing you from going too far down that road  
4 during cross-examination.

5 But, okay. I get the issues.

6 **MR. STEKLOFF:** I guess what I would just ask is that  
7 it would be helpful to clarify -- because I think we both have  
8 agreed we would like to not -- I won't be there. I will be  
9 here, but not call you during next week -- I mean, limit the  
10 calls as much as possible. So if there is any guidance about  
11 the extent to which we can, without getting into the details or  
12 showing the documents of the post-IARC reviews by regulators,  
13 demonstrate that he was engaged in that process and that they  
14 didn't agree with him, without going into the details.

15 **THE COURT:** Well, I don't know why you have to say  
16 that they didn't agree with him. Why not just say you are an  
17 advocate. You advocate with regulatory bodies that they should  
18 change their position on glyphosate, sort of leave it at that.  
19 Why do we have to get into whether they agree with him or not?

20 **MR. STEKLOFF:** I think it also goes to the credibility  
21 of his opinions.

22 **THE COURT:** But whether they agreed with him or not,  
23 that gets back to my point, which is that's not what -- the  
24 jury is not supposed to substitute, you know, an agency's  
25 judgment for its own. And if the jury is not supposed to

1 substitute an agency's judgment for its own, it doesn't matter  
2 that much whether the -- you know, Canada agrees with  
3 Dr. Portier or not. So okay, I get that.

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

5 **MR. WISNER:** There is a jury instruction about IARC.  
6 I would like to talk about that when we get to jury  
7 instructions.

8 **THE COURT:** You want to talk about it now since we are  
9 on the topic?

10 **MR. WISNER:** Sure. So, I mean, I have four issues  
11 with the proposed jury instructions, and I don't want to talk  
12 about all four of them, just talk about the IARC issue now.

13 **THE COURT:** That's fine.

14 **MR. WISNER:** But I can talk about all four if you  
15 want.

16 So Your Honor has prepared this instruction, and you are  
17 quoting portions of an out-of-date preamble.

18 **THE COURT:** What do you mean out-of-date? It is still  
19 on there.

20 **MR. WISNER:** No. They changed it.

21 **THE COURT:** Since when?

22 **MR. WISNER:** They changed it actually in January of  
23 this year I think largely in response to your analysis of it.  
24 That's my suspicion, because I think that they believe --

25 **THE COURT:** It is not my analysis of it. It is what

1 they said.

2 **MR. WISNER:** Sure.

3 **THE COURT:** I just quoted what they said.

4 **MR. WISNER:** Well, I mean, for example, there is a  
5 letter by Dr. Wilde explaining what this means saying, we do  
6 look at exposure, real-world exposures.

7 And I think putting aside the issue right now, my concern  
8 is about the factual question and a legal question. The  
9 factual question is IARC can identify something as a hazard  
10 without looking at real-world exposure to something. I will  
11 give you that premises. I don't know if I highly agree with  
12 that, but I will give you that.

13 That doesn't mean that's what they did with glyphosate.  
14 Okay. We know that because Dr. Wilde from IARC wrote a letter  
15 saying, that's not what we did here. We can do that.

16 **THE COURT:** That's not actually what he said.

17 **MR. WISNER:** Well, he came pretty close to saying  
18 that. He said, we have been accused of not looking at  
19 real-world exposures, but we did here because we were looking  
20 at the epidemiology. Those look at real-world exposures.

21 So this is a real hazard that is occurring in the real  
22 world, and that's -- I'm paraphrasing. I'm not trying to spin.  
23 I'm just trying my best to paraphrase it. So I think that, you  
24 know, quoting a hearsay document here, right, to the jury  
25 without providing the counter hearsay I think really is

1 factually a problem, right. And then from a legal perspective  
2 it creates way more focus on IARC, and specifically now the  
3 Court is basically saying something that Monsanto wants to say  
4 about IARC; and I think that's not really where it belongs. If  
5 they want to criticize IARC, they should do it with their  
6 witnesses.

7 And so we don't believe this is a proper jury instruction.  
8 They can argue it. They can use it if they want to go down  
9 this IARC path. But for Phase One this really is -- I mean,  
10 more words are given to it than the causation instruction, and  
11 I think that is probably a problem.

12 **THE COURT:** Is your issue with quoting the language  
13 from the Monograph, or is the -- is your issue with providing  
14 an instruction along these lines? I mean, I have issued a  
15 ruling in this case which you, of course, disagree with, which  
16 says that the IARC conclusion that glyphosate is a probable  
17 carcinogen is insufficient to get a Plaintiff to a jury on the  
18 issue of whether glyphosate caused their cancer.

19 **MR. WISNER:** Sure.

20 **THE COURT:** Right. More that they believe -- the IARC  
21 inquiry is too abstract or too high a level of generality, not  
22 grounded enough in people's everyday exposure levels, whatever  
23 it was that I said. And it seems to me that the jury should be  
24 instructed -- that is the law of this case, and it seems to me  
25 wise to instruct the jury on that law of this case.

1           And they -- you say it is wrong. Maybe I will be proven  
2 wrong in the end, but -- so I under -- I guess that is sort of  
3 the long way of saying I understand your concerns about quoting  
4 this document and giving it to the jury, but don't you think  
5 reserving all your objections to my ruling about what the law  
6 is of this case, don't you think it is an appropriate thing to  
7 instruct the jury on?

8           **MR. WISNER:** Well, no. First of all, until someone  
9 says to the jury, IARC is enough, right, the law isn't  
10 implicated, right. None of our witnesses are going to say IARC  
11 is enough. That's the Court's ruling.

12           Now if we overstep that, by all means, a curative  
13 instruction about the law makes sense. But going --  
14 preemptively striking that, crossing of a line that hasn't  
15 happened puts an undue emphasis on -- the Court is essentially  
16 saying, listen, IARC is too speculative to be really helpful by  
17 itself, right, and no one has actually said that.

18           **THE COURT:** So let me ask you this --

19           **MR. WISNER:** Sure.

20           **THE COURT:** What if we only gave the first sentence of  
21 that instruction, of my preposed instruction? In addition,  
22 IARC's decision to classify glyphosate as a probable  
23 carcinogen, even if you agree with it, is not sufficient on its  
24 own to support a conclusion that glyphosate is capable of  
25 causing non-Hodgkin's lymphoma at exposure levels similar to



1 what Mr. Hardeman experienced?

2 **MR. WISNER:** Okay. We obviously object to that, but  
3 playing this down the rabbit hole, wouldn't the EPA also apply  
4 there? New Zealand? I mean, you are basically reiterating  
5 what you say in the previous paragraph, is you cannot  
6 substitute your opinion with that of any agency or group.

7 **THE COURT:** Right, but even if you agree with -- you  
8 can't substitute your opinion, but even if you come to the same  
9 opinion as IARC, it's not enough for you to vote for -- rule  
10 for the Plaintiffs.

11 **MR. WISNER:** Sure. But what about EPA? I mean, you  
12 are singling out --

13 **THE COURT:** The problem is if you end up agreeing with  
14 EPA, then that is enough to rule for the defendants, because  
15 EPA has concluded that glyphosate is not a hazard. So I'm --

16 **MR. WISNER:** I'm confused about that, Your Honor.

17 **THE COURT:** This is a separate point about IARC that  
18 is different from EPA. In other words, if you agree with EPA,  
19 Defendant wins. If you agree with IARC, Plaintiff does not  
20 necessarily win. The Plaintiff has to show more. That's the  
21 point I'm trying to capture by this instruction.

22 **MR. WISNER:** But I mean you are trying to fix  
23 something that hasn't happened yet, right. I mean, this is a  
24 jury instruction that is singling out a specific finding, and  
25 it is going to be, according to them, the one that goes against

1 the regulatory agencies; and you are going to tell the jury  
2 that's not enough. That is going to make --

3 **THE COURT:** That's what I ruled in the case.

4 **MR. WISNER:** No, no. And the problem is, is that's  
5 assuming that we have argued that it's enough.

6 **THE COURT:** Okay. So I think the best way to handle  
7 this -- of course, this is not -- these substantive  
8 instructions are not being given to the jury before the start  
9 of trial.

10 **MR. WISNER:** Sure.

11 **THE COURT:** They are being given when they go  
12 deliberate, right?

13 **MR. WISNER:** Sure.

14 **THE COURT:** So when -- you know, you have sort of  
15 talked me into the idea of crossing out the remainder of that  
16 instruction and probably giving the first sentence, but we can  
17 make a decision on that, you know, when -- close to the close  
18 of evidence at Phase One.

19 **MR. WISNER:** I think at the very least, if we were to  
20 have the first sentence, you have to have the other side of  
21 that. That is --

22 **THE COURT:** The other side of that is if you agree  
23 with the EPA, Defendant wins. So you don't want the other side  
24 of that?

25 **MR. WISNER:** No. That -- I mean the other side of

1 IARC. So you are saying it is not enough, but you have to say  
2 but you are welcome to consider it in assessing the evidence of  
3 causation in this case.

4 **THE COURT:** Maybe.

5 **MR. WISNER:** I mean, you have to say it both ways.

6 **THE COURT:** You are welcome to consider IARC's, you  
7 know, independent number crunching.

8 **MR. WISNER:** Sure.

9 **THE COURT:** Maybe, yeah.

10 **MR. WISNER:** But, I mean, it definitely has to be  
11 balanced that way. With that all said, I don't think we need  
12 to do this unless someone goes up there and says, IARC is  
13 enough. By the way, on direct if they try to cross-examine  
14 with an impeachment, I do believe someone has testified that's  
15 not fair. They can't open the door and get the answer. So I  
16 mean, if we don't present a case, IARC gets you there.

17 **THE COURT:** Okay.

18 **MR. WISNER:** I think this really is prejudicial, and  
19 it doesn't serve --

20 **THE COURT:** I don't understand why -- as I have  
21 proposed to modify it, I don't understand how it can be  
22 prejudicial since it is the law of the case.

23 **MR. WISNER:** I mean, you also said some things in your  
24 order about the quality of our evidence.

25 **THE COURT:** That would be prejudicial.

1           **MR. WISNER:** Yeah, that's the law of the case, Your  
2 Honor.

3           **THE COURT:** No. That's not the law of the case. That  
4 is my view of the evidence, which I did not actually base my  
5 ruling on. I said, despite my view of the evidence, I'm  
6 allowing these experts to testify.

7           **MR. WISNER:** Fair enough. But this, Your Honor, is a  
8 weighing of evidence. You are weighing the value of IARC.

9           **THE COURT:** No. I made a legal determination that the  
10 IARC's classification is insufficient to get a Plaintiff to the  
11 jury --

12           **MR. WISNER:** Okay.

13           **THE COURT:** -- on causation. That is a legal  
14 determination.

15           **MR. WISNER:** I think we should see how it comes in,  
16 and maybe discuss this before reading it to the jury. You  
17 know, see if it needs to be done at all. I think we will be  
18 very good about not crossing the line.

19           **THE COURT:** But I might give it anyway. I think -- my  
20 strong leaning is that this should be given because it is too  
21 likely that the jury would assume otherwise.

22           **MR. WISNER:** I want to say one last thing, sorry.  
23 There have been many cancer trials done in the United States  
24 that involve IARC classifications. I have never seen this  
25 given.

1           **THE COURT:** I know. And I think that people tend to  
2 assume that the IARC classification is enough to conclude that  
3 something causes cancer, and I think that that assumption is  
4 incorrect. I think many Courts have been operating on an  
5 incorrect assumption with respect to IARC.

6           **MR. STEKLOFF:** What I would say is I agree with the  
7 concept of let's wait to see how the evidence comes in. I  
8 think something will be necessary, and it might be this whole  
9 paragraph because I think even if they don't bolster their  
10 opinions, we are going to hear so much about the elite 18  
11 scientists --

12           **THE COURT:** Well, you will not hear so much about it  
13 because I will put it a stop to it.

14           **MR. STEKLOFF:** That's what I hope.

15           **MR. WISNER:** That's what I'm saying. Based on what we  
16 have talked about today, I don't see how we will ever get close  
17 to this line, that he was invited to IARC, that he  
18 participated. That's about all we will say.

19           **THE COURT:** My tentative ruling at that point on this  
20 instruction is that I would cross out everything except for the  
21 first sentence, but that I would give the second sentence  
22 regardless of how -- sorry, give the first sentence regardless  
23 of how the evidence comes in, but when -- you know, when we put  
24 together the final jury instructions --

25           **MR. WISNER:** And when we get there, we might propose

1 an additional clause that we mentioned a second ago.

2 **THE COURT:** Okay. All right. That gets us through  
3 the first group of motions in limine, right?

4 **MR. WISNER:** Yes, Your Honor.

5 **THE COURT:** And the second group of motions in limine  
6 is about -- is the motions about Monsanto's conduct, a variety  
7 of conduct that Monsanto has engaged in. And so the -- what I  
8 wanted to -- the first motion I wanted to hear argument on is  
9 the -- the issue of marketing materials.

10 So for me on this one -- there are two different people up  
11 here all of the sudden.

12 **MS. MOORE:** There is a lot to cover, Your Honor.

13 **MR. KILARU:** You look down, there is someone new.

14 **THE COURT:** I don't -- I don't have a great  
15 understanding of the state of the evidence on this issue. If  
16 there is no testimony that a Plaintiff saw any marketing  
17 materials or relied on any marketing materials or was exposed  
18 to any marketing materials, then I guess I don't quite  
19 understand why it would be necessary to put in testimony and  
20 evidence about Monsanto's marketing materials in this case.

21 **MS. MOORE:** Your Honor, to cut to the chase, we are  
22 not saying that it would come in during Phase One unless they  
23 open the door.

24 **THE COURT:** Okay.

25 **MS. MOORE:** And what I mean by that obviously is if

1 they start talking about how, you know, the Plaintiffs failed  
2 to use PPE, protective equipment or gloves, then that is going  
3 to open the door to talk about marketing. So we don't  
4 anticipate that in Phase One.

5 With respect to Phase Two, we have a failure of warning  
6 claim in all three of these cases, and so I do think their  
7 marketing comes in a failure-to-warn situation. That is  
8 something we can re-visit if you want.

9 **THE COURT:** Why is it -- I mean, since we are on the  
10 topic now, we should deal with it now.

11 **MS. MOORE:** That's fine.

12 **THE COURT:** Why -- it will help you plan how to put  
13 together your case in Phase Two. If a Plaintiff has not been  
14 exposed to any marketing materials, why would the marketing  
15 materials be relevant in a -- for the failure-to-warn claim?  
16 Why would they be admissible?

17 **MS. MOORE:** The testimony will -- Ms. Stevick did  
18 testify she does recall an ad being seen. So there is  
19 testimony to that effect.

20 With respect to Mr. Hardeman and Mr. Gebeyehou -- their  
21 marketing over the last 40 years, they have never said, one,  
22 Roundup causes cancer. We know that for sure. They also  
23 have --

24 **THE COURT:** They will stipulate to that.

25 **MS. MOORE:** If they did, then I can go home,

1 Your Honor.

2 **THE COURT:** They will stipulate to the fact that  
3 they --

4 **MS. MOORE:** That they never did that. Fair point.  
5 Fair point.

6 If they will stipulate to that, then we are good.

7 But over the years, their marketing had -- they have ads  
8 where there is no gloves, there is no protective --

9 **THE COURT:** I don't understand that.

10 **MS. MOORE:** -- it goes to the failure-to-warn claim.  
11 It is evidence of that. If they are going to come in in  
12 Phase Two and say, these people should have been wearing  
13 gloves, we should be able to say, look at all your marketing  
14 over the years to the public, and just because the Plaintiff  
15 says I don't recall a particular ad --

16 **THE COURT:** But I don't think they're going to come in  
17 and say they should have been wearing gloves. Are you?

18 **MS. MOORE:** But we don't know that, Your Honor.

19 **THE COURT:** Are you?

20 **MR. KILARU:** I don't anticipate doing that,  
21 Your Honor. I think it will sort of depend on how the evidence  
22 comes in.

23 But I think the key point is the one you mentioned, which  
24 is if the plaintiff didn't see any of this material, there's no  
25 proximate causation or evidence that the failure to warn was



1 relevant to them. And the motion is targeted to advertisements  
2 and marketing they didn't see. So the Stevick example is  
3 actually set apart.

4 **THE COURT:** So on that point, putting aside Stevick  
5 for a moment, I guess, like, what the plaintiffs I think would  
6 say about that is: Yeah, I never gave any thought to wearing  
7 gloves when I was using Roundup because I've never seen anybody  
8 else use gloves when using Roundup. I've never heard of the  
9 idea of using gloves when using Roundup. And even if I have  
10 never seen any marketing materials that Monsanto disseminated  
11 that shows pictures of people using Roundup without gloves, the  
12 point is that if Roundup had been telling people to use gloves,  
13 then even without my having seen any particular advertisement,  
14 it would have -- that knowledge would have disseminated through  
15 the population and I would have known to wear gloves.

16 **MR. KILARU:** I guess that's different from what we're  
17 anticipating, Your Honor, which is them introducing the  
18 marketing materials that don't relate to the plaintiff in any  
19 way to say, "Look, how they're marketing it. It doesn't  
20 contain this warning."

21 I mean, the plaintiffs' testimony will be the plaintiffs'  
22 testimony, but I think that's different from the evidence  
23 that's the focus of this motion, which is introducing the  
24 marketing material that it's undisputed no one saw.

25 **THE COURT:** Okay. But if an issue at trial is

1 whether -- I mean, let me ask you this question: Is Monsanto  
2 going to stipulate that, you know, at the time Mr. Hardeman was  
3 using Roundup, it never told anybody to use gloves?

4 **MR. KILARU:** I'm not sure if I can stipulate to that  
5 at this point, Your Honor. I think we'd have to look back at  
6 sort of each of the individual ads and see what they have and  
7 what they don't. But I think the point is, none of the  
8 advertisements actually --

9 **MS. MOORE:** And, Your Honor, the ads actually show  
10 people in shorts.

11 **MR. KILARU:** I think our position would be that what's  
12 on the label is, you know, what was disseminated. And if  
13 there's advertising that says something the label doesn't say,  
14 we wouldn't get into that and say that that was told to people.

15 **THE COURT:** Okay. But let me try and put it a  
16 slightly different way.

17 If an issue in the trial is that the plaintiff could have  
18 protected themselves by wearing gloves -- right? -- and if  
19 Monsanto argues anything or presents any testimony to suggest  
20 that, well, the plaintiff could have protected themselves by  
21 using gloves, then surely at that point Monsanto's marketing  
22 materials would show people using Roundup without gloves would  
23 become relevant; right? Do you agree with that?

24 **MR. KILARU:** I believe so, Your Honor. I guess my  
25 point that I was making earlier is, if there's -- if the label

1 that was in effect at the time didn't say something about  
2 protective equipment, we're not going to say the plaintiff  
3 should have been wearing protective equipment.

4 **THE COURT:** Right.

5 **MR. KILARU:** I think that addresses the point you're  
6 making.

7 **THE COURT:** Well, I think so. But the question is --  
8 so you're saying the labels come in in Phase II?

9 **MR. KILARU:** Yeah.

10 **THE COURT:** And it's the marketing materials that  
11 don't come in, and the reason that the marketing materials  
12 don't come in is that no plaintiff was exposed to any of these  
13 marketing materials; but, of course, if we sort of try to lay  
14 blame at the feet of the plaintiffs for getting NHL because  
15 they didn't use the proper protective equipment, then our  
16 marketing materials would come in because the plaintiffs would  
17 be entitled to show that it's Monsanto's fault that nobody is  
18 using protective equipment.

19 **MR. KILARU:** Yes, Your Honor. I think if -- I think  
20 this won't arise because I don't think we're going to say the  
21 plaintiff should have done anything to prevent their NHL or  
22 alleged NHL -- I guess in Phase II it will be NHL -- based on  
23 something that's not in the warning label.

24 **THE COURT:** Okay.

25 **MR. KILARU:** So I don't think that would arise and the

1 marketing material would come in.

2 **THE COURT:** Okay.

3 **MS. MOORE:** And our position, Your Honor, with respect  
4 to this is that it was such a broad *motion in limine* when  
5 you're dealing with a failure to warn claim that we don't think  
6 it would be fair to say absolutely you can't.

7 **THE COURT:** Okay. But assuming that for  
8 Mr. Hardeman -- let's talk about Mr. Hardeman now. Assuming  
9 that they don't blame Mr. Hardeman for not wearing protective  
10 materials, why should the marketing materials come in?

11 **MS. MOORE:** Well, they have experts here that are  
12 going to testify about how you should be wearing long sleeves  
13 and have gloves on. That's not what the label said when  
14 Mr. Hardeman was using it. It's not what their ads show, and I  
15 think that's fair game especially, you know, when -- well, you  
16 were alluding to basically --

17 **THE COURT:** So they have experts who are going to come  
18 in and testify that when you use Roundup, you should be wearing  
19 long sleeves and gloves?

20 **MS. MOORE:** Their exposure expert, Dr. Sullivan, talks  
21 about how -- you know, if you wear -- I mean, that's the whole  
22 purpose of the exposure experts, which we haven't gotten to  
23 today, Your Honor. But, you know, it changes if you have long  
24 sleeves on and gloves, and --

25 **THE COURT:** It changes but if the testimony --

1 certainly if Monsanto says anything to suggest that Hardeman  
2 should have been wearing gloves and long sleeves, then we would  
3 revisit the issue.

4 But assuming Monsanto doesn't say anything to suggest that  
5 Hardeman should have been wearing gloves and long sleeves and a  
6 mask or whatever, what's your argument for why the marketing  
7 materials would come in?

8 **MS. MOORE:** Well, on that, I mean, going back to the  
9 failure to warn claim, what you were alluding to earlier is  
10 that it's really subliminal. So it permeates throughout  
11 society. They've been advertising for 40 years with people out  
12 there spraying, you know, in shorts.

13 **THE COURT:** But aren't they going to stipulate --  
14 aren't you going to stipulate that you didn't warn Hardeman  
15 about this, about --

16 **MR. KILARU:** What? I guess it depends on what.

17 **THE COURT:** NHL.

18 **MR. KILARU:** Yes.

19 **THE COURT:** And you didn't warn Hardeman about the  
20 need to wear protective gear?

21 **MR. KILARU:** I'd have to look at that version of the  
22 label in effect at the time. I can do that, but it sort of  
23 depends on -- again, it depends on what was in the version of  
24 the label that was on the product that he used.

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

1           **MS. MOORE:** So maybe we can revisit this, Your Honor.

2           **THE COURT:** Yeah. I mean, I think the --

3           **MS. MOORE:** And then --

4           **THE COURT:** -- answer will be then that the motion  
5 would be granted because it would only be if Monsanto opens the  
6 door that the marketing materials would come in.

7           **MS. MOORE:** And then the only other piece of it,  
8 Your Honor, is that we do have a punitive claim, and I do think  
9 that some of their marketing materials may come in with respect  
10 to punitive damages.

11           **THE COURT:** But the punitive damages -- I mean, I  
12 understand that it's -- you know, part of awarding punitive  
13 damages is to deter future conduct and to send a message, and I  
14 get that and I believe that you should be able to say things  
15 like that, but the punitive damages award still needs to be  
16 tied to the conduct that the defendant engaged in vis-a-vis the  
17 plaintiff.

18           So, again, if the plaintiff didn't see marketing  
19 materials, I don't -- I'm not sure why marketing materials  
20 would come in for that.

21           **MS. MOORE:** Well, here would be an example -- and we  
22 cite to this in our opposition brief, Your Honor -- is that the  
23 EPA -- and this is going back to 1988. And the Court will  
24 recall Mr. Hardeman used Roundup from approximately 1985 up  
25 until 2012.

1           And so in 1988 there was a letter from the EPA to Monsanto  
2 warning Monsanto about their advertisements that downplay the  
3 need to wear protective clothing while administering Roundup,  
4 and Monsanto assured the EPA that proper protective gear would  
5 be demonstrated in advertisements.

6           But they did not go ahead and start circulating those  
7 advertisements. And so -- and, again, those ads still never  
8 disclosed that it caused cancer. I mean, they don't do that  
9 today. So I do think that does go to the punitive claim, and  
10 we would ask that the Court reconsider that.

11           **THE COURT:** Well, if I recall correctly, EPA took that  
12 back; right?

13           **MS. MOORE:** Well, I mean, again, that's -- you know,  
14 going back to should they be wearing protective clothing, they  
15 never put that out in their ads; and maybe it is something that  
16 we will look at if they open the door, but my reading of their  
17 expert reports is that there will be experts who talk about  
18 that.

19           **THE COURT:** Okay. Let's see, what else did I -- what  
20 else in that category did I --

21           **MR. KILARU:** I think there's Motion 7, which is  
22 actually on, arguably, a somewhat related issue regarding  
23 post-use conduct.

24           **MS. MOORE:** We're going to switch people, Your Honor.  
25 Sorry.

1           **THE COURT:** That's fine.

2           **MR. KILARU:** I'll grab my notepad.

3                           (Pause in proceedings.)

4           **THE COURT:** Okay. So I guess the general ruling is  
5 that -- the general tentative ruling is that post-use conduct  
6 by Monsanto should not come in sort of for the same reasons  
7 that I just discussed.

8           So are you in agreement with that or --

9           **MR. WISNER:** Well, no, Your Honor.

10           So there's a practical issue and there's a factual legal  
11 issue. The practical issue is the vast majority of the  
12 discovery that has been conducted and provided by Monsanto is  
13 recent because their documents just don't go back that far.

14           But on a legal issue, all --

15           **THE COURT:** But I don't understand. We're not talking  
16 about what Monsanto has produced recently. We're talking about  
17 what Monsanto has done since Mr. Hardeman --

18           **MR. WISNER:** Stopped using it.

19           **THE COURT:** -- stopped using it.

20           **MR. WISNER:** Yes. That's the heart of the argument.

21           So what Monsanto has --

22           **THE COURT:** What argument?

23           **MR. WISNER:** What?

24           **THE COURT:** The Hardeman argument?

25           **MR. WISNER:** The heart of the argument.



1           **THE COURT:** The heart of the argument.

2           **MR. WISNER:** Sorry. The heart of Hardeman.

3           So the issue, Your Honor, is what Monsanto did following  
4 the IARC monograph was directly relevant to punitive damages.  
5 We got into it at length in the *Johnson* trial. And  
6 specifically they engaged in something called orchestrating  
7 outcry, and we have the documents. We have the testimony. And  
8 they did all these articles to sort of attack IARC and did all  
9 this stuff on the Hill and --

10           **THE COURT:** I'm guessing IARC has never experienced  
11 anything close to what Monsanto unleashed upon them.

12           **MR. WISNER:** No. I mean, it's unprecedented.

13           **THE COURT:** But why -- so if the punitive damages  
14 award is to be tied to the wrongdoing that was committed  
15 against Mr. Hardeman, why is that attack on IARC relevant to  
16 punitive damages?

17           **MR. WISNER:** So fair enough. So Hardeman and his  
18 family have undergone an incredible amount of stress bringing  
19 this lawsuit against Monsanto. Monsanto spokespeople are out  
20 there every day saying Monsanto -- the CEO said Monsanto --  
21 IARC is junk science. They're saying all these really harsh  
22 things to put pressure with their neighbors and their families  
23 related to "Are you bringing a frivolous lawsuit?"

24           **THE COURT:** Are you saying that it comes in for  
25 punitive damages because Monsanto's advocacy activities have

1 caused stress to the Hardemans? Is that your argument?

2 **MR. WISNER:** It comes -- in part.

3 **THE COURT:** What other arguments do you have?

4 **MR. WISNER:** Well, it shows punitive intent. We have  
5 to show malice, reckless disregard for human health.

6 **THE COURT:** With respect to the conduct that injured  
7 the plaintiffs.

8 **MR. WISNER:** Sure. The conduct that they were doing  
9 with regards to IARC is the same thing that they were doing in  
10 2012 with Seralini.

11 **THE COURT:** So then put on evidence of what they were  
12 doing in 2012.

13 **MR. WISNER:** Sure. And they -- okay. Fair enough,  
14 Your Honor.

15 We also have evidence that they did all this conduct  
16 specifically to influence regulators, to influence further  
17 assessments, to deter lawsuits.

18 **THE COURT:** And the stuff that they did before 2012 it  
19 seems can come in in support of your punitive damages claim.  
20 What's wrong -- I mean, the point that you're not responding to  
21 is, correct me if I'm wrong, but I thought that the idea was  
22 that the punitive damages award needs to be tied to the  
23 wrongdoing that harmed the plaintiff.

24 **MR. WISNER:** Sure.

25 **THE COURT:** And you agree with that?

1           **MR. WISNER:** Sure.

2           **THE COURT:** Okay. So then how is Monsanto's  
3 conduct -- after Monsanto stopped harming Mr. Hardeman, how is  
4 Monsanto's conduct admissible in support of your punitive  
5 damages?

6           **MR. WISNER:** Because it shows a ratification of the  
7 let nothing go, freedom to operate stuff that existed starting  
8 in the 2000s. And we can document --

9           **THE COURT:** Starting in the 2000s you can put all that  
10 stuff in.

11           **MR. WISNER:** Okay.

12           **THE COURT:** We're just talking about 2012 to 2018.

13           **MR. WISNER:** But what they did following IARC shows  
14 company misconduct directed not just to Mr. Hardeman, directed  
15 at every single person in the United States. It shows a  
16 reckless disregard for science.

17           They then went and --

18           **THE COURT:** But I thought we weren't supposed to be  
19 worried about what they were doing to the rest of the people in  
20 the United States. I thought we were supposed to be worried  
21 about the harm -- you know, punitive damages award I thought we  
22 were supposed to be worried about the harm they caused  
23 Mr. Hardeman.

24           **MR. WISNER:** Mr. Hardeman lives in the United States.  
25 He's part of the people that that conduct was directed at.

1 When they go out there and they say IARC's junk science and  
2 they haven't even read the monograph, when they attack  
3 Mr. Blair, Dr. Blair, when they do the things that they did --

4 **THE COURT:** I know what they did --

5 **MR. WISNER:** Okay.

6 **THE COURT:** -- in response to the Seralini --

7 **MR. WISNER:** When they do that and then they created  
8 the Intertek articles that all of their experts rely upon, the  
9 EPA relies upon it, they fabricate this data, they engage in  
10 this conduct, and it's not just limited to one person. It's  
11 limited to everybody.

12 **THE COURT:** You haven't said this, but I would have  
13 expected you to say, yes, it's the harm that -- punitive  
14 damages are about the harm that was caused to the plaintiff but  
15 punitive damages are also to deter future misconduct; and if  
16 punitive damages are in part about deterring future misconduct,  
17 then the jury ought to be able to learn that the misconduct is  
18 continuing. Even if the misconduct did not continue to hurt  
19 Hardeman because Hardeman stopped using Roundup, that the  
20 conduct -- the misconduct is continuing and so, you know, to  
21 the extent that you might think that sometime after 2012  
22 Monsanto changed its behavior, it hasn't.

23 **MR. WISNER:** Unfortunately, I think Mr. Hardeman  
24 stopped using in 2015; right?

25 **MS. MOORE:** No. 2012.

1           **MR. WISNER:** Is it '12? I'm sorry. I misunderstood  
2 that fact.

3           In any event, yes, Your Honor, that's a great argument.

4           **THE COURT:** Okay. What about that argument?

5           **MR. KILARU:** Okay. A couple things.

6           First, Your Honor, I think there isn't -- I don't know  
7 that -- well, I guess I won't -- there is the obvious point, I  
8 think, that there isn't sort of a freestanding claim  
9 Mr. Hardeman has for ongoing emotional distress that's related  
10 from post conduct.

11          **THE COURT:** Of course.

12          **MR. KILARU:** Okay. As to that point, I think two  
13 things. The first is that you are right, that punitive damages  
14 are supposed to be based on the conduct that actually injured  
15 the plaintiff and deterring that misconduct.

16          **THE COURT:** But there are also supposed to be -- when  
17 we say deterring that misconduct, we're not saying preventing  
18 them from doing it to Mr. Hardeman again. We are saying, by  
19 definition, deterring that misconduct means preventing them  
20 from doing it to others going forward.

21          **MR. KILARU:** Right. And I think on that there's two  
22 things. The first is that I think it's clear from the case law  
23 that a defendant isn't to be punished, if there's a basis for  
24 punishment, for just being sort of an unsavory person or  
25 general bad practices. It has to be tied to the plaintiffs.

1           And the concern with the approach that I think you've  
2 allowed is that that is what the cases talk about when they  
3 talk about the concerns of duplicative, triple, you know, four  
4 or five times down the line punitive damages recovery. Because  
5 if every plaintiff gets to argue there were bad things that  
6 happened after the things that happened to me, every plaintiff  
7 is going to recover for the same sort of conduct.

8           **THE COURT:** But the point -- but the purpose of a  
9 punitive damages award -- the thing that I can't -- I mean, I'm  
10 with you mostly, but the thing I can't get past is if the  
11 purpose of a punitive damages award is in part to deter future  
12 misconduct, why is it not highly relevant that the defendant is  
13 continuing to engage in that misconduct even after the  
14 defendant stopped hurting the plaintiff?

15           You know, when you think about your closing argument, you  
16 know, lest the jury -- lest you think that this company has  
17 changed the way it acts, let me show you all the things that  
18 it's continuing to do, all the same stuff that it did to  
19 Hardeman but worse.

20           **MR. KILARU:** Because, first, that isn't -- again, it's  
21 not actually related to the plaintiff; and the evidence -- as  
22 you said, there's a lot of evidence they can try to introduce,  
23 some of it we will likely object to, about the things that  
24 happened from 2000 to 2012, and the point of the punitive  
25 damages award is to deter that type of conduct from happening

1 in the future and introducing evidence of that conduct does  
2 that.

3 **THE COURT:** I don't know why it would be limited to  
4 2000.

5 **MR. KILARU:** Sorry. I just used the number that was  
6 thrown out, but it would be whatever year there's evidence for  
7 subject to our objections.

8 **THE COURT:** Okay.

9 **MR. KILARU:** But the second point I think, and also an  
10 important point, is this point about duplicative recovery.  
11 There are other plaintiffs who are going to bring this claim.

12 **THE COURT:** But we have a way for dealing with that at  
13 the back end -- right? -- which is *BMW versus Gore* and all  
14 that.

15 **MR. KILARU:** Right. But I think that if in every case  
16 we're introducing a whole panoply of evidence that doesn't  
17 relate to the plaintiff, you know, we are, even within the  
18 world of *BMW v. Gore*, I mean, those are outer due process. We  
19 still have a prospect of --

20 **THE COURT:** I understand your point. I do understand  
21 your point, but I still don't understand how we would say that  
22 the defendant's continuing conduct would not be relevant if  
23 part of punitive damages is to deter future misconduct, to put  
24 a stop to the conduct that the defendant is engaging in.

25 **MR. KILARU:** And I think the point of the award as to

1 the past conduct is to do that, and I don't think under the law  
2 the future conduct comes in as ratification. I think it's a  
3 separate claim that a future plaintiff affected by that conduct  
4 would bring.

5 **THE COURT:** Okay. I'll think about that.

6 I said that my tentative was that it would be excluded  
7 subject to a couple limitations. Do you have a beef with those  
8 limitations?

9 **MR. KILARU:** To the extent an expert... I think, as I  
10 understood this, and I don't know if this is exactly what's  
11 written on the paper, as I understood this would be a, for  
12 example, one of our experts relied on a study that they could  
13 then impeach with authorship. It wouldn't be that their  
14 experts could introduce a study.

15 **THE COURT:** Of course.

16 **MR. KILARU:** With that understanding, then, no.

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

18 I understand those arguments and will think a little  
19 further about that.

20 **MR. WISNER:** One issue, Your Honor, just on the expert  
21 issue I just want to point out is that a lot of the statements  
22 and admissions made by Monsanto's experts following IARC are --  
23 kind of go directly to some of the general causation issues as  
24 well. I mean, we're not going to bring it in in Phase I.

25 But we have -- here's a great example. I took Monsanto's



1 deposition a week and a half ago, and they took the position  
2 that there's no evidence across the board. So it's the  
3 opposite of our experts. They're saying there's no evidence at  
4 all that there's any association with non-Hodgkin's lymphoma.

5 **THE COURT:** You mean Monsanto is as unreasonable as  
6 your experts are? Is that what you're saying?

7 **MR. WISNER:** I have made no comment about that,  
8 Your Honor.

9 And they took this position and so I showed them study  
10 after study and they say still no evidence, still no evidence.  
11 And then one of the things that was pretty remarkable is I  
12 showed them Dr. Acquavella's e-mail where they're talking about  
13 the evidence and they say -- their experts say "We can't say  
14 that there's no evidence. There's obviously some evidence. We  
15 can say that it's not convincing evidence."

16 **THE COURT:** So how does this relate to the *Motion in*  
17 *Limine* Number 7 that we're talking about?

18 **MR. WISNER:** That e-mail and those conversations are  
19 all post-2012 is the problem. So this is a very sweeping  
20 *motion in limine* and it says anything after 2012 is out, and  
21 that's -- that's a problem because it's in a vacuum.

22 **THE COURT:** Well, no. It's about Monsanto's post-2012  
23 conduct; but if Monsanto made an admission post -- let's say  
24 Monsanto said -- you know, you got your hands on an e-mail from  
25 2015 that said, "You know, we all know this causes NHL," that

1 would be admissible. That wouldn't -- I would not -- I was  
2 certainly not envisioning that as falling within -- and I don't  
3 think they were either -- envisioning that as post-use conduct.  
4 That's an admission about the state of the evidence.

5 **MR. WISNER:** Okay. Fair enough, Your Honor. I just  
6 want to make sure because the motion as written is actually  
7 excluding all documents post-2012.

8 **MR. KILARU:** The topic is the limitation of the  
9 evidence inside. The topic is post-use corporate conduct.

10 **MR. WISNER:** Yeah, I know but corporate conduct --

11 **THE COURT:** I don't think that's true. I don't think  
12 the motion was to exclude all documents postdated --

13 **MR. WISNER:** If it's by a Monsanto employee, that's  
14 conduct. So I just want to make sure we understand what this  
15 is actually ruling on.

16 **THE COURT:** I think we do.

17 **MR. WISNER:** Okay. Could I raise one issue,  
18 Your Honor?

19 **THE COURT:** Sure.

20 **MR. WISNER:** You did not want to hear argument on  
21 Seralini, and I think that I just want to point out, because  
22 this is right on this exact issue, and that is I don't --

23 **THE COURT:** I don't want to hear argument on Seralini.

24 **MR. WISNER:** Fair enough. I just don't believe it was  
25 brought for causation purposes. I think Seralini is a punitive

1 damages/liability story primarily and you've put it under the  
2 causation header, and I actually think this goes right into  
3 2012 corporate conduct.

4 **THE COURT:** It's not admissible. The Seralini study  
5 is not admissible.

6 **MR. WISNER:** Well, it's not the study. It's what  
7 Monsanto did to Seralini.

8 **THE COURT:** Oh. Well, I don't know if that was  
9 necessarily subject of that *motion in limine*.

10 **MR. WISNER:** They're saying any reference to Seralini  
11 should be excluded, and that's what I'm saying I have a problem  
12 with. I actually --

13 **THE COURT:** I didn't interpret the motion to be about  
14 that --

15 **MR. WISNER:** Okay.

16 **THE COURT:** -- about what Monsanto did in response --  
17 what they did to Seralini. Am I misremembering?

18 **MR. KILARU:** Let me turn to my colleague who's  
19 handling that motion, Your Honor.

20 **THE COURT:** There's a lot. I might be misremembering.  
21 It's hard to keep track of all this.

22 **MS. MATTHEWS JOHNSON:** Right, Your Honor.

23 The heart of the issue with Seralini is the exclusion of  
24 the study and of the pictures, which are -- I think we've all  
25 heard about and are featured. And I can pull up the motion

1 further. I think we do have it. It wasn't slated for argument  
2 today, but we do have it here.

3 The concern is that Seralini itself was a discredited  
4 study, a study that Dr. Portier said it's a study --

5 **THE COURT:** Right. Again, I'm granting --

6 **MS. MATTHEWS JOHNSON:** -- and all those things.

7 **THE COURT:** I want to grant --

8 **MS. MATTHEWS JOHNSON:** Exactly.

9 **THE COURT:** I said your motion is going to be granted  
10 on that.

11 **MS. MATTHEWS JOHNSON:** Right.

12 **THE COURT:** But I don't remember in your motion a  
13 discussion of evidence about stuff Monsanto -- I think it  
14 probably is not admissible.

15 **MS. MATTHEWS JOHNSON:** And I believe it's in there,  
16 yes, and I think we define that as a continuation of a baseless  
17 study.

18 **THE COURT:** Monsanto's efforts to discredit it. On  
19 that I would say it sort of depends on what Monsanto did. I  
20 mean, if Monsanto sent somebody to threaten Seralini's family,  
21 then that might come in.

22 **MS. MATTHEWS JOHNSON:** Yes.

23 **THE COURT:** But if Monsanto was seeking to undermine  
24 Seralini's credibility, I don't think that comes in.

25 **MS. MATTHEWS JOHNSON:** I think that's right. I think

1 the efforts of Monsanto were to show that in fact it was a  
2 scientifically flawed and baseless study that did not involve  
3 extortion or any other threat.

4 **THE COURT:** So is there any particular thing that you  
5 have in mind that you want to introduce?

6 **MR. WISNER:** Yeah. I mean, in our motion we kind of  
7 walk through all of it, what they did, and that's why it's so  
8 relevant.

9 The conclusion of the Seralini study --

10 **THE COURT:** Do you want to tell me what -- give me an  
11 example something that they did to Seralini that you think  
12 should be admissible in the punitive damages phase.

13 **MR. WISNER:** Sure. Okay. So after the publication  
14 comes out, Monsanto had entered into a consultancy agreement  
15 with the editor in chief, Wally Hayes. I actually took his  
16 deposition last week. And Dr. Hayes was the one who made the  
17 decision to do the retraction.

18 And it's in the article. Your Honor, I actually have the  
19 testimony that I think hits everything. It's from the Monsanto  
20 deposition. They authenticated all the documents. I  
21 highlighted it. It's about 80 pages, but I think if you read  
22 it and you see this clearly is Phase II punitive damages stuff.

23 **THE COURT:** Why don't you tell me what -- give me an  
24 example of something they did to Seralini that you think should  
25 be admissible.

1           **MR. WISNER:** Okay. So Dr. Hayes says, "Listen, I'm  
2 getting -- I'm reading all these blog posts, but I need letters  
3 to the editor so I can substantiate a decision to retract." So  
4 CropLife America sends out the next day an e-mail to all these  
5 people saying "Listen, send a letter to the editor. Here's  
6 what you need to say. If you do this, Dr. Hayes will retract  
7 the article." Right?

8           **THE COURT:** Right, but your own expert said that the  
9 article is garbage.

10           **MR. WISNER:** That's not correct. That is not true at  
11 all, Your Honor. What Dr. Portier said was it doesn't help you  
12 with the causation.

13           Dr. Seralini never concluded it caused cancer. And this  
14 is part of the misinformation that Monsanto spread about this  
15 study. The conclusion of the Seralini study is that we need to  
16 study Roundup, the formulated product, not just glyphosate.  
17 That's his conclusion.

18           And if you look at the internal documents, Monsanto's  
19 response to that is "We're not going to do that because that  
20 would set a dangerous precedent. It would cost a million  
21 dollars, a million and a half to do the study. It would take  
22 three years, and we don't want to have to do that on all our  
23 products." And that's the admissions within the internal  
24 company. They have their argument about why that's wrong.

25           But if you read this testimony, Your Honor, it's

1 abundantly clear we're not using it to show causation. We're  
2 using it to show that the one time, the only time a long-term  
3 Roundup study was ever done on rats, Monsanto orchestrated  
4 essentially an attack against Seralini that got the publication  
5 retracted.

6 The letter to the editor -- the editor who retracted it  
7 issued a notice saying, "Actually I looked at all the raw data.  
8 This is all accurate. There's nothing false or misleading  
9 here. It's inconclusive so we're retracting it."

10 And then hundreds of authors said what Monsanto did to  
11 create this orchestrated outcry was scientifically invalid and  
12 it was improper, including Dr. Portier long before he was ever  
13 involved in this litigation.

14 **THE COURT:** I will -- since I put it in the category  
15 of general causation, Monsanto's specific scientific knowledge,  
16 you have said that you want to introduce it for a different  
17 purpose -- maybe I've put it in the wrong category -- I'll take  
18 another look at it, but I don't want to hear any more argument  
19 about it right now.

20 **MR. WISNER:** Would you like the testimony, Your Honor,  
21 that I --

22 **THE COURT:** No. Not right now.

23 **MR. WISNER:** Okay.

24 **THE COURT:** So --

25 **MR. WISNER:** And this testimony was after we briefed

1 so that's why I have it because you've never seen it.

2 **THE COURT:** Okay. If I need it, I'll let you know.

3 **MR. WISNER:** Okay.

4 **THE COURT:** So, anyway, moving on to the category of  
5 Monsanto -- motions regarding general causation and Monsanto's  
6 scientific knowledge, let me see, what did I want to hear  
7 argument about again?

8 Ah, nothing. Good.

9 And then -- so motions regarding specific causation.  
10 We've already discussed Plaintiffs' Motion Number 2 and  
11 addressed everything in that; right? We dealt with that  
12 already.

13 **MS. MATTHEWS JOHNSON:** Yes, Your Honor.

14 **MS. MOORE:** I think that's right, Your Honor. If I  
15 could just raise one brief thing.

16 On the *motion in limine*, and it is Number 7, it's the  
17 unrelated medical conditions, I understand the Court's ruling  
18 but basal cell carcinoma, none of the defendant's experts  
19 testified -- or not testified, but put in their reports that  
20 basal cell carcinoma either, one, contributed --

21 **THE COURT:** I don't believe it ever came up in  
22 anybody's deposition testimony. It's possible that I'm  
23 misremembering that.

24 **MS. MOORE:** Yeah. So the reports -- I went back and  
25 looked at their expert reports. It's my understanding from the



1 defense expert reports no one is going to testify that basal  
2 cell carcinoma either, one, contributed or caused  
3 Mr. Hardeman's NHL. That's why we believe it should be  
4 excluded. It's prejudicial, it will confuse the jury, and it's  
5 not relevant.

6 **THE COURT:** But couldn't the experts still --  
7 couldn't -- sorry.

8 Couldn't Monsanto still cross-examine your experts on  
9 whether they conducted any investigation into whether basal  
10 cell carcinoma was a cause?

11 **MS. MOORE:** But there's no basis for that, Your Honor.  
12 It's completely unrelated to NHL, and their own experts --

13 **THE COURT:** But why can't the plaintiffs' experts say  
14 that?

15 **MS. MOORE:** So the defense took -- cross-examined  
16 Dr. Turk, who is Mr. Hardeman's primary care physician, and  
17 they asked very clearly, and I have the testimony, Your Honor,  
18 it's on page 127 of Dr. Turk's deposition, and Monsanto's  
19 counsel said (reading):

20 "With respect to the 2018 carcinoma or melanoma, let  
21 me ask you" --

22 Well, let me go back to it. (reading)

23 "Is there any reason to think that the 2005 basal  
24 cell carcinoma that Mr. Hardeman was diagnosed with had  
25 anything to do with his later diagnosis of NHL?"

1 And Dr. Turk testified no.

2 And so just like they've already agreed that glaucoma or  
3 sciatica or anything -- any other medical condition that has  
4 nothing to do with NHL is not relevant and shouldn't come in,  
5 it's the same for basal cell carcinoma and the same for  
6 melanoma. These are skin cancers and the plaintiffs' experts,  
7 if they were asked, they would say this is from sun exposure,  
8 but this is just not relevant.

9 **THE COURT:** But -- hold on one second. Whose  
10 testimony did you just cite for me that you said it was  
11 Hardeman's treating physician?

12 **MS. MOORE:** Dr. Turk, Your Honor.

13 **THE COURT:** Hardeman's treating physician?

14 **MS. MOORE:** Yes. Yes, Your Honor.

15 **THE COURT:** You were describing it as if it was like  
16 an admission by Monsanto or something, but it's Hardeman's --

17 **MS. MOORE:** No, I'm not saying that. I'm saying they  
18 asked Dr. Turk, Your Honor, it's on page 127, if there's any  
19 reason to think... It's line 16 through 20.

20 **MR. STEKLOFF:** Your Honor, Dr. Turk also doesn't think  
21 glyphosate has anything to do with the cancer. So if Dr. Turk  
22 carries the day, then we can all go home.

23 **MS. MOORE:** Your Honor, I'm not saying that. The  
24 whole point -- under 401, it's relevant evidence is what is  
25 supposed to come in at trial; and the fact that he had a skin

1 cancer, whether it's melanoma or basal cell carcinoma, has  
2 nothing to do with the question the jury is being asked to  
3 answer during jury instructions -- during jury deliberations,  
4 and that is whether Roundup caused -- was a substantial factor.

5 **THE COURT:** Okay. What about -- so what they say in  
6 their opposition brief is that the McDuffie study identifies  
7 risk factors for NHL and one risk factor for NHL is a personal  
8 history of cancer. This is a cancer and, therefore, they  
9 should be able to cross-examine your experts on whether they  
10 inquired whether basal cell carcinoma could have contributed to  
11 the NHL.

12 It sounds like the answer may be basal cell carcinoma is  
13 not a risk factor and it's going to be explained very quickly.  
14 But what's the big deal?

15 **MS. MOORE:** Well, it's jury confusion, Your Honor.  
16 And, first of all, it's no expert, plaintiff or defense is  
17 going to come into trial and say that basal cell carcinoma has  
18 anything to do with him getting NHL. It's simply not relevant.  
19 It's going --

20 **THE COURT:** You said their experts do not identify --  
21 I didn't read their expert reports that carefully because you  
22 didn't call them in to testify, but none of them identifies  
23 basal cell carcinoma as a potential risk factor?

24 **MS. MOORE:** None of them say that it is a contributing  
25 factor to Mr. Hardeman developing NHL or a substantial factor

1 or a cause of the NHL. It's simply not --

2 **THE COURT:** Did they identify it as a potential risk  
3 factor?

4 **MS. MOORE:** They talk about his past medical history.  
5 Dr. Levine goes through and analyzes his past medical history  
6 from her review of the medical records. She talks about  
7 eczema. She talks about the basal cell carcinoma and the  
8 melanoma. She talks about sciatica. But she doesn't conclude  
9 that any of that has anything to do with the NHL.

10 And they've agreed to exclude everything else except for  
11 this, and the reason they want to put that in front of the jury  
12 is because they want to be able to say he's eaten up with  
13 cancer. That's the argument they're going to make, Your Honor,  
14 and that is highly prejudicial. It goes right to the heart of  
15 403. It's a waste of time, it's confusing, and it's  
16 prejudicial.

17 **THE COURT:** It doesn't sound like it's going to be  
18 very prejudicial if all their experts said it wasn't a factor  
19 in causing NHL.

20 **MS. MOORE:** I understand, Your Honor, but I do  
21 think --

22 **THE COURT:** My ruling stands and, as I said, I didn't  
23 want to hear argument on that one.

24 **MS. MOORE:** Okay. Thank you, Your Honor.

25 **THE COURT:** Let's see, so I don't think -- was there

1 anything else on specific causation that I wanted to hear  
2 argument on? I think the answer to that is no.

3 That takes us to miscellaneous. Perhaps we should have  
4 put Seralini in miscellaneous but, in any event, let me see --  
5 oh, yeah, the benefits of glyphosate. I didn't really  
6 understand the argument for putting in evidence about the  
7 benefits of glyphosate other than a basic -- other than  
8 providing some basic background information.

9 I know that sometimes there's, like, a risk-benefit or a  
10 cost-benefit analysis that's conducted in negligence-type  
11 cases, but I think it's a case-by-case thing, and I don't  
12 think -- I don't see what role it has in this case. So I  
13 wanted to give you one more chance to explain to me why it's  
14 relevant that glyphosate has benefits.

15 **MR. KILARU:** Sure, Your Honor. Phase I I think  
16 actually the way you ruled is consistent with the way in which  
17 we'd intend to present it, which is basic mechanistic evidence  
18 and at a pretty high level.

19 At Phase II we have been talking about, and we've heard I  
20 think recently what the arguments will be, particularly with  
21 respect to punitive damages in terms of Monsanto's motive in  
22 the pre, I guess it would be, 2012 conduct of profiting, of  
23 basically putting money over the safety of a plaintiff, and so  
24 on and so forth. And I think the benefits of the product are  
25 actually relevant to rebutting that evidence of motive.

1 I agree with you that it doesn't --

2 **THE COURT:** Why?

3 **MR. KILARU:** Because it goes to explain what the  
4 actual motive was for any of the conduct that the plaintiffs  
5 are challenging. I mean, they're going to tell the jury  
6 presumably --

7 **THE COURT:** Well, do any -- let me ask. Do any of the  
8 claims stand -- do any of the plaintiffs' claims stand for the  
9 proposition that glyphosate should never have been put on the  
10 market?

11 Because if any of the claims stand for the proposition  
12 that glyphosate should not be on the market, then I would  
13 understand your point; but as I understand this lawsuit,  
14 they're not saying that glyphosate should not be on the market.  
15 They are simply saying that you need to warn people about  
16 glyphosate.

17 So if I'm wrong in my basic --

18 **MR. KILARU:** Well, there is a design defect claim,  
19 Your Honor. It's not just failure to warn.

20 **THE COURT:** Okay. And the design defect claim stands  
21 for the proposition that Roundup should simply not be on the  
22 market?

23 **MR. KILARU:** That's -- I understand the claim to be  
24 that it's defectively designed because it causes NHL, which is,  
25 I would think, a claim that it shouldn't be on the market

1 because of a design defect.

2 **THE COURT:** Okay. So if that's the case, then  
3 maybe -- so it wasn't clear to me that that's what that claim  
4 stood for. If it is what that claim stands for, then I think,  
5 then, maybe there is room for kind of a weighing of the costs  
6 and benefits.

7 But -- so let's put that aside for a second --

8 **MR. KILARU:** Okay.

9 **THE COURT:** -- and think about the other claims.

10 Would there be any reason to explain -- you know, pitch to  
11 the jury all the benefits of glyphosate absent that?

12 **MR. KILARU:** So I think in response to the point you  
13 raised earlier, I don't think it would enter into the  
14 traditional negligence, reasonableness, failure to warn test  
15 balancing. I agree with that. But to the extent in attempting  
16 to prove punitive damages, plaintiffs are adding on top of the  
17 substance evidence to the claim, and we think there's arguments  
18 they shouldn't be allowed to do this, but to the extent they're  
19 adding on top of the substance of evidence arguments about  
20 motive, about the company's financial profits and the desire to  
21 put profits over safety so often then to that effect, I think  
22 that's where the benefits come in as rebuttal to that argument  
23 of motive.

24 **THE COURT:** Why? I mean, because if the argument is  
25 not that glyphosate should not be off the market, so putting

1 aside the design defect claim, if the argument is they never  
2 should have done this but if the argument is merely they should  
3 have been more responsible about investigating the health  
4 effects of this and they should have done a better job in their  
5 marketing materials and they should have done a better job of  
6 warning people to wear protective gear and warning people of  
7 the risks, then I don't understand where the benefits of  
8 glyphosate come into that discussion.

9 **MR. KILARU:** Because I think it goes to why there  
10 was -- to the extent there was pushback, why there was pushback  
11 on a warning, and part of the answer is certainly that we  
12 didn't believe there was a science-based reason to do so.

13 But I guess it comes down to the question of how much is  
14 layered on top of what Your Honor talked about in terms of  
15 motive.

16 **THE COURT:** This product is great. This product is  
17 fantastic. It's very effective, but you've got to be careful  
18 when you use it because there's a risk that it causes NHL. I  
19 mean, I don't -- that's what -- they're saying that's what  
20 Monsanto should have said.

21 So, in other words, with the possible exception of the  
22 design defect claim, I don't see how any of the claims call  
23 into question the benefits of glyphosate -- of Roundup, and so  
24 I don't understand why it would become relevant.

25 **MR. KILARU:** Because the benefits could also



1 provide -- to some degree the benefits evidence could also  
2 provide a reason why a plaintiff might use the product  
3 independent of whether there's a warning or not. I mean, if  
4 it's a really good product and it works very well, which is our  
5 position, the plaintiff could say "I'm going to keep using it  
6 no matter what."

7 **THE COURT:** But if it caused Mr. Hardeman's NHL and  
8 there wasn't a warning, then why is it -- why is that question  
9 relevant whether the plaintiff would have -- whether a  
10 plaintiff -- are you going to argue that this product is so  
11 good that Mr. Hardeman would have used it anyway even if we had  
12 warned him about NHL?

13 **MR. KILARU:** I mean, I think it depends on how the  
14 testimony comes in. I don't anticipate that, but I think it  
15 would depend on how the testimony comes in.

16 **THE COURT:** Right. And so if you don't anticipate  
17 that, then why shouldn't the ruling be to grant the  
18 *motion in limine* subject to the door being opened?

19 **MR. KILARU:** I think --

20 **THE COURT:** I mean, subject to this defect claim that  
21 we've put aside.

22 **MR. KILARU:** Because I think -- so with that caveat  
23 and I think the caveat that it's rebuttal to plaintiffs putting  
24 in evidence of financial profit motive, outside of those two  
25 things, I think it would be a door-opening issue.

1           **THE COURT:** That part I don't understand, the part  
2 about the plaintiffs putting in evidence of profit motive. I  
3 mean, why are the benefits of glyphosate relevant to Monsanto's  
4 profit?

5           **MR. KILARU:** Because they're saying the motive --  
6 presumably they would be saying in that world that the motive  
7 for Monsanto's conduct, the reason they did it is because all  
8 they care about is money.

9           **THE COURT:** Right.

10          **MR. KILARU:** And a different motive for Monsanto's  
11 conduct is that they think it's a very effective product that  
12 has significant benefits to society.

13          **THE COURT:** But if they think it's a very effective  
14 product, they can still sell it. They should just be providing  
15 a warning. I mean, the decision not to provide a warning, I  
16 don't see how -- this is a great product so we're -- and we  
17 want to make sure that everybody can use it so we're not going  
18 to provide a warning that it might kill them.

19          **MR. KILARU:** Right. I guess, Your Honor, I'm not --

20          **THE COURT:** What are you talking about?

21          **MR. KILARU:** I'm talking about the fact that if  
22 they're bringing in evidence of why that was, we should be  
23 allowed to rebut it.

24          **THE COURT:** Because they're greedy.

25          **MR. KILARU:** Right. And we should be allowed to rebut

1 that with evidence --

2 **THE COURT:** They should have taken a lower profit and  
3 spent the money studying the issue objectively rather than  
4 constantly advocating and attacking everybody who raised  
5 questions about it, and they should have spent the money to  
6 warn people.

7 **MR. KILARU:** Right. And I think our rebuttal to that,  
8 which I think we're entitled to present, would be that, no, we  
9 believe that the product is safe, it's science supported, the  
10 science supports its safety, and it has great benefits to  
11 society and that's why we did what we did.

12 **THE COURT:** You believe it's safe, I get that part.  
13 No, we didn't have to do that. We didn't have to spend the  
14 money looking at this issue objectively. We didn't have to  
15 warn anybody because we believe the product is safe. I get  
16 that part.

17 But we didn't have to warn anybody that this product is  
18 dangerous because we believe that it's a really good product,  
19 that part I don't get and I have a feeling that you would not  
20 remotely even consider saying that to a jury.

21 **MR. KILARU:** Right. I think, Your Honor, again --

22 **THE COURT:** So, therefore, I don't understand how it's  
23 relevant.

24 **MR. KILARU:** I think it depends, I think I've been  
25 trying to say, on how they present this evidence of motive and

1 the arguments and the degree to which that evidence comes in  
2 and the nature of the arguments they make in support of that.

3 **THE COURT:** Well, I think the ruling would be --  
4 putting aside what is perhaps this very big issue of the design  
5 defect claim, the ruling stands, which is that it's not  
6 admissible. And with all *motions in limine*, it's subject to  
7 the door being opened, but it's not admissible as it stands  
8 now.

9 But what about the design defect claim?

10 **MR. WOOL:** Well, so for the design defect claim, I  
11 think there's a little bit of a debate as to which test should  
12 apply, whether it's the consumer expectations test in which I  
13 think it's fairly clear that it doesn't come in, or the  
14 risk-benefit test.

15 And I think it's important, and I don't think the Court  
16 has to decide that today, but I think it's important to  
17 consider if the Court does determine that the risk-benefit test  
18 applies, that Mr. Hardeman and all of the Tier 1 plaintiffs  
19 used Roundup for residential purposes, not agricultural  
20 purposes and not ITNO purposes.

21 And so what we are most concerned about is what I would  
22 call Monsanto's sort of feed-the-world argument, which is  
23 essentially that but for glyphosate, people would starve and  
24 the planet wouldn't survive or, you know, the Apocalypse would  
25 ensue or something like that. And I think that that argument

1 is highly prejudicial, it's irrelevant, and sort of that's the  
2 principal reason why, under the design defect claim, that it  
3 still shouldn't come in under that claim.

4 **THE COURT:** Well, but I guess it sort of begs the  
5 question of what if Monsanto -- I don't recall if you drew this  
6 distinction between feed the world and kill the poison oak in  
7 your motion, but I guess it begs the question of whether -- of  
8 what you would say if Monsanto wanted to say "This is the most  
9 effective thing ever at killing poison oak and not killing  
10 other plants."

11 **MR. WOOL:** Well, I think that we would be less  
12 concerned with that argument and just say that it's effective  
13 at killing poison oak. I think Mr. Hardeman would probably say  
14 I used it because it killed the poison oak.

15 **THE COURT:** Okay.

16 **MR. WOOL:** But --

17 **THE COURT:** So your motion is one to essentially  
18 preclude feed-the-world arguments?

19 **MR. WOOL:** Yes, arguments with respect to agricultural  
20 uses, GMO crops and that sort of thing.

21 **THE COURT:** Other than that basic background  
22 information.

23 **MR. WOOL:** Yes. And to be clear, I know Monsanto  
24 addressed that, but our argument was never that basic  
25 background facts about glyphosate are irrelevant. I think the

1 jury has to hear something about that.

2 **THE COURT:** Okay. I understand the arguments.

3 **MR. WOOL:** Thank you.

4 **MR. KILARU:** Your Honor, I think this goes without  
5 saying, but we do not agree that the consumer expectation  
6 exceptions apply. I think that's an issue for later.

7 **THE COURT:** Well, yeah, I actually was just going to  
8 say that.

9 **MR. KILARU:** Yeah.

10 **THE COURT:** I don't know at what point we need to  
11 decide that. Is it when we're putting together jury  
12 instructions for Phase II?

13 **MR. KILARU:** I think that would be right because I  
14 think that's when we're talking about the nature of the claim  
15 that's going to be submitted to the jury, but I just wanted to  
16 make clear that that --

17 **THE COURT:** I understand.

18 **MR. WOOL:** We agree with that.

19 **THE COURT:** Okay.

20 **MS. WAGSTAFF:** I think the next one is Monsanto's  
21 *Motion in Limine* Number 5.1.

22 **THE COURT:** So the only issue I want to hear argument  
23 on for that one is whether the exception should apply; that is,  
24 asking questions of the experts about their compensation. I  
25 don't think there's any serious question that references to the

1 other litigation, to the thousand other cases -- it's way more  
2 than a thousand; right? It's like -- that's not part -- the  
3 fact that there's been a thousand other cases is not part of  
4 this trial.

5 So really the only question I wanted to talk through was  
6 this exception -- should there be this exception and if so, how  
7 will it work.

8 **MR. IMBROSCIO:** Yeah, so I can speak to that first,  
9 Your Honor.

10 This is an issue, as you might imagine, that comes up in  
11 virtually every sort of mass tort type case.

12 **THE COURT:** Because -- you mean the general issue or  
13 the issue about asking experts about their compensation?

14 **MR. IMBROSCIO:** The expert issue. Exactly this issue.

15 **THE COURT:** Okay.

16 **MR. IMBROSCIO:** Because, you know, from the  
17 plaintiffs' perspective, you can't ask about any money except  
18 the time they walk through the door into this courtroom for  
19 this plaintiff. The defense perspective is every penny you've  
20 ever gotten from the time in the beginning.

21 And I think the concern that you make -- that you raise in  
22 your motion and that the plaintiffs raise -- in your order and  
23 the plaintiffs raised is, okay, where to draw that line.

24 I think how it -- how it's worked out recently -- we did  
25 this in *Pradaxa*; we did it in *Accutane* -- is distinguishing

1 between a general causation expert and a specific causation  
2 expert on one level. And so for the general causation expert,  
3 the work done to form their general causation opinion should  
4 all be -- should all be in play. That's the time they spent to  
5 come into court and offer that opinion.

6 If they happen to testify in another trial, so, for  
7 instance, to make a real-world example, *Johnson*, that time is  
8 not on the clock essentially. So it's all the work done for  
9 the general opinion but not a trial-specific case.

10 **THE COURT:** Okay.

11 **MR. IMBROSCIO:** And the parties can exchange limited  
12 information, which is how we do it in *Pradaxas*. You know,  
13 what's the total and what's the total minus any case-specific  
14 cases. That's the general causation rule, which tends to work  
15 pretty well.

16 **THE COURT:** Although presumably you can -- each side  
17 can cross-examine the other side's expert about testimony in  
18 other trials; right? I mean, it may not be that you're asking  
19 about their compensation in other trials, but wouldn't -- for  
20 example --

21 **MS. WAGSTAFF:** Your Honor, they did it in *Daubert*  
22 numerous times.

23 **MR. IMBROSCIO:** Yeah.

24 **THE COURT:** Right, but we're talking about the trial.  
25 So why would -- wouldn't it be appropriate for you to



1 cross-examine, you know, Dr. Nabhan and say, "Look, isn't it  
2 true that you've testified 20 times each time for the plaintiff  
3 in a case like this?"

4 **MR. IMBROSCIO:** That's certainly an examination that's  
5 done for other litigations.

6 **THE COURT:** Right.

7 **MR. IMBROSCIO:** "You've done 15 litigations, all for  
8 the plaintiff, common."

9 **THE COURT:** Right.

10 **MR. IMBROSCIO:** I do think it gets closer when you  
11 start saying "another Roundup plaintiff" or "a different  
12 Roundup plaintiff" because then I think it does lend the  
13 argument is that opening the door. At least we can talk about  
14 this other plaintiff.

15 I think that's a strategy decision that we have to make.  
16 If we decide to say "Didn't you testify across the Bay," then  
17 that, at least to some degree, might open the door and we fully  
18 acknowledge that's an issue that we'll need to make.

19 And as a typical matter, you know, if you have to impeach  
20 someone, you can use language like "Didn't you give testimony  
21 on a prior occasion or" -- without mentioning another specific  
22 plaintiff, which I think is probably how we would do it. So it  
23 doesn't open the door to another lawsuit but the testimony  
24 becomes something they can be impeached on, and they don't  
25 get -- you know, and the charge that they've charged for that

1 particular plaintiff or that particular trial isn't part of the  
2 total number. That's at least one way to work it out.

3 **THE COURT:** So you're saying there's sort of a model  
4 from other trials, there's sort of a model ground rule for this  
5 sort of thing?

6 **MR. IMBROSCIO:** I don't know if it's a model. I mean,  
7 it's something that's been worked out over time.

8 **THE COURT:** What would you point me to? Is there  
9 something in writing?

10 **MR. IMBROSCIO:** I'm trying to think. It's usually a  
11 stipulation between lawyers. I can submit what we -- what the  
12 lawyers have agreed to in the *Pradaxa* litigation where we've  
13 had six or seven trials. We're happy to do that afterwards.

14 So the way it's worked is before each trial, Dr. Plunkett,  
15 who is a repeat player, her current number is X, which is her  
16 general plus, you know, any work in this particular case, but  
17 maybe not the other two trials so the 10,000 or \$15,000 for  
18 coming to trial number three or trial number four.

19 **THE COURT:** And that's -- on a gut level, that sounds  
20 sensible for the general causation experts.

21 **MR. IMBROSCIO:** Okay.

22 **THE COURT:** What about the --

23 **MR. IMBROSCIO:** Yeah, so it's specific -- it's  
24 similar. So the work that's done generally to learn the case  
25 for sort of Plaintiff Number 1, that they would have to do for

1 any Plaintiff 2, 3, 4, or 5, that's part of -- that's in the  
2 mix, and then the work done for this particular plaintiff.

3 So let's say this is Plaintiff Number 3 or 4. Then it  
4 would be the beginning, the general set, plus the work done for  
5 Plaintiff Number 4, not the amount spent for 2, 3, 5, and 6,  
6 for instance.

7 And to be clear, these are -- these are agreements that  
8 the lawyers on both sides have reached as a compromise because  
9 it sort of balances it. I'm not sure I have a court order. I  
10 don't have any court order that imposes this, but it seems like  
11 a pretty -- that's a pretty good rule to have and it sort of  
12 balances their concern, which is a legitimate concern, and our  
13 concern that the jury has a right to hear about the money.  
14 That's what we would propose.

15 **MS. WAGSTAFF:** So, Your Honor, I'm not involved in  
16 *Pradaxa* so I tried to follow what he said but I'm not quite  
17 sure I can fully agree to that, but what I can agree to, I  
18 think this happened in the *Johnson* trial, I'm trying this case  
19 and I can work with the trial lawyers for Monsanto and we can  
20 try to reach a number that we agree to for each expert; and to  
21 the extent we want to ask them, we'll say, "Okay. You know,  
22 Dr. Weisenburger, you were paid this much for this case." And  
23 we can do that beforehand; and if we can't agree to it, we'll  
24 come bring it to you.

25 **THE COURT:** I think that's probably the best way to

1 handle this.

2 **MR. IMBROSCIO:** Yeah. So I'm happy to work that out.  
3 The one issue we have with Dr. Portier, which is next week, is  
4 it would be nice to have what his number -- what they're going  
5 to propose his number would be.

6 **THE COURT:** Why don't you-all try to work it out  
7 before next week?

8 **MR. IMBROSCIO:** We will do so.

9 **MS. WAGSTAFF:** We can try to do that.

10 **MR. IMBROSCIO:** We will do so. Thank you, Your Honor.

11 **THE COURT:** Okay.

12 **MS. WAGSTAFF:** I believe the next ones are 11.1 and  
13 11.2.

14 **THE COURT:** Oh, the magic tumor, the IBT/Craven  
15 studies.

16 **MS. MATTHEWS JOHNSON:** Yes, Your Honor.

17 I think on the magic tumor, the tentative ruling would put  
18 the onus on us to begin the argument.

19 **THE COURT:** Yes.

20 **MS. MATTHEWS JOHNSON:** And it's a very narrow point at  
21 this juncture.

22 **THE COURT:** It is, but it -- and let me just say at  
23 the outset, so this -- I'm almost reluctant to say this out  
24 loud. You know, the magic -- rhetoric like "magic tumor,"  
25 "champagne corks popping," I don't really know if there's

1 anything wrong with that, to be honest with you.

2 I mean, I -- you know, I think what is a real problem is  
3 to say -- is in your closing argument to say that champagne  
4 corks are popping and then to have an objection sustained and  
5 then to go back to champagne corks popping at the end; right?  
6 That's totally inappropriate. That's 20th floor stuff.

7 But, actually, I don't know. I mean, what's wrong with  
8 using colorful language like that to encapsulate your point?

9 **MS. MATTHEWS JOHNSON:** Well, Your Honor, let me say, I  
10 think you honed in on the issue. You're talking about closing  
11 and what people do in closing, and I probably have had some  
12 colorful phrases in my time in some closings, but what we're  
13 trying to head off is my understanding from the *Johnson*  
14 litigation was that this was excluded with reference to a  
15 particular expert who wanted to characterize this particular  
16 tumor that has been accepted to have existed.

17 This is the tumor that I believe plaintiffs asked for the  
18 slides about -- Mr. Wisner will correct me if I'm wrong -- and  
19 the slides came back and we never heard a word about there  
20 being a problem with the tumor being found in those slides.

21 **THE COURT:** But what's the big deal with -- I mean,  
22 you know, the lawyer calls it -- characterizes it as a magic  
23 tumor. The jury is reminded that lawyer argument is not  
24 evidence. And you get up and you say, "You know, he called it  
25 a magic tumor. That really creates some credibility problems

1 for him because, as you can see, the tumor was actually there.  
2 There's nothing magic about it." So what's the big deal?

3 **MS. MATTHEWS JOHNSON:** I think that's a closing  
4 posture. I want to be clear for the record, in closing I think  
5 people make those kinds of choices, will you draw an action.  
6 Our issue is the characterization in opening where you're  
7 talking about a statement, not an argument, and also  
8 potentially this use by experts.

9 **THE COURT:** That kind of thing went on -- sorry. I  
10 didn't understand -- I understood your motion to be to preclude  
11 reference to magic tumor altogether at the trial.

12 **MS. MATTHEWS JOHNSON:** And I read that.

13 **THE COURT:** Of course, it would not be appropriate to  
14 do that at opening.

15 **MS. MATTHEWS JOHNSON:** Okay.

16 **THE COURT:** Of course, that would not be appropriate.

17 **MS. MATTHEWS JOHNSON:** All right. And I'm not sure  
18 how well we tailored it. I went back and read it, but let me  
19 focus.

20 The idea that people use rhetoric in closing and you make  
21 your choice as to whether you're going to draw an objection  
22 that's going to be sustained or whether you're going to leave  
23 yourself open to a response is a fair point, but we're heading  
24 off an opening issue, use by experts.

25 And I think that was the ruling in *Johnson* too. I don't

1 believe experts were permitted to use that term.

2 **MR. WISNER:** I think we agreed not to use it in  
3 *Johnson*. Whether you call it "magic tumor," "ghost tumor,"  
4 "tumor that never existed," whatever, we call it what we call  
5 it. It's just a name.

6 I mean, what I drew -- what I got --

7 **THE COURT:** So you want to agree not to use the term  
8 "magic tumor"?

9 **MR. WISNER:** No. I'm not trying this case. I can't  
10 agree to that. And for what it's worth, we can use whatever  
11 language we want in closing and bear the -- you can come back  
12 and say, "It ain't magic. It's right here in black and white."  
13 You know, whatever they want to do. That's trial lawyering,  
14 and so we bear the risk of going there.

15 **THE COURT:** But that sort of thing, I mean, I think  
16 it's worth -- I mean, I think everybody on both sides of this  
17 case is an experienced trial lawyer, and so I'm not  
18 anticipating as many of these kinds of problems as I sometimes  
19 get in my trials; but, you know, that is certainly not an  
20 appropriate thing to say in opening statement.

21 **MR. WISNER:** Sure.

22 **THE COURT:** Right?

23 **MR. WISNER:** Sure.

24 **THE COURT:** Opening statement is about explaining what  
25 the evidence will show, not making argument; and lawyers

1 conflate the two all the time, but I'm anticipating that you  
2 will not.

3 Okay.

4 **MR. WISNER:** Is the issue just whether or not we call  
5 it the "magic tumor"? I mean, is that the issue here?

6 **THE COURT:** I'm sure -- I don't think that's the  
7 issue --

8 **MR. WISNER:** Okay.

9 **THE COURT:** -- because I think you can think of 10  
10 other names for it --

11 **MR. WISNER:** Sure.

12 **THE COURT:** -- that would be equally objectionable to  
13 them than "magic tumor."

14 Okay. And then what about the last one was the IBT/Craven  
15 studies.

16 **MR. WISNER:** The IBT and Craven Lab studies?

17 **THE COURT:** Yeah. I didn't really understand -- I  
18 didn't understand -- you know, I'm getting a little tired now  
19 and maybe it's -- but I would like to kind of plow through this  
20 before we take our break and go look at the questionnaires, but  
21 you seemed to be saying in your opposition to this motion that  
22 you had shown in the discovery dispute or in the -- I can't  
23 remember if it was the discovery dispute or -- the previous  
24 evidentiary issues where each side teed up three evidentiary  
25 issues, that you had already established the relevance of



1 the -- of this, and I did not take away from our discussion of  
2 those three prior evidentiary issues that this was relevant.

3 **MR. WISNER:** Sure. Fair enough. If that's --

4 **THE COURT:** I don't understand what --

5 **MR. WISNER:** Sure.

6 **THE COURT:** I'll need you to -- let me just give you  
7 another shot at explaining why these should be admitted.

8 **MR. WISNER:** Sure. Let's put Craven Laboratories  
9 aside for a second because that's sort of a different issue.  
10 Craven Labs is about food residue levels. I don't think we  
11 have a fight about that.

12 Let's talk about IBT. Mr. Hardeman started using it in  
13 1985. Between essentially when it was approved in 1974 and  
14 actually up until 1991, the approval of Roundup was based on  
15 the IBT Lab study, which the EPA has deemed to be invalid.  
16 Okay?

17 And it was a product of this whole fraudulent fabrication  
18 of data story around the IBT where this guy Paul Wright who  
19 worked at Monsanto, he goes to IBT. During that time, they  
20 conduct lots of studies for Monsanto, including Roundup, the  
21 carcinogenicity study.

22 Then he comes back to Monsanto after that and is the  
23 liaison between Monsanto and IBT. Five years later, he's  
24 indicted for fraud. He actually goes to jail because there's a  
25 six-month trial. It's a historic trial in Chicago.

1           So -- or maybe it was in New York.

2           In any event, so the whole purpose of the IBT story is to  
3 show that when Monsanto learned that this product -- the safety  
4 of it with regard to carcinogenicity was based on a bad,  
5 invalid study, they didn't take the stuff off the market. They  
6 kept selling it not knowing if it was safe or not. They kept  
7 saying it didn't cause cancer in its labeling. And so -- and  
8 that wasn't -- and that actually goes right up until 1985 when  
9 our client starts using it.

10           So putting aside the fraud issue and whether or not Paul  
11 Wright, you know, worked at Monsanto, I think they say "We're  
12 victims of it." I think if they go there, then we can come  
13 with the Paul Wright story; but simply saying that for the  
14 first 10 years it was based on an invalid study, I think that's  
15 what we want because it goes straight to the failure to warn  
16 and the value of science in Phase II; right?

17           And it also will come back --

18           **THE COURT:** Is the punitive damages because, as in  
19 every other case, it seems as if Monsanto has not responded to  
20 concerns objectively but, rather, as a fierce advocate for the  
21 safety of Roundup?

22           **MR. WISNER:** Precisely. And the door also opens very  
23 quickly if they say a 40-year record of safety because that's  
24 that crack. The first 10 years or so are not. It's unknown.  
25 And so that's where it comes in and that's what we would -- I

1 mean, I would be willing to work with defense counsel to work  
2 out, you know, provided they don't open doors, we don't have to  
3 get into Paul Wright, you know, working in for Monsanto and  
4 going to jail for fraud stuff, but at the very least that for  
5 the first 10 years it was based on an invalid study. I think  
6 that's relevant to Phase II.

7 **MS. MATTHEWS JOHNSON:** So, Your Honor, just to maybe  
8 set the table on this, this is a lab fraud situation, lab  
9 frauds that others have dealt with with toxicologists, with  
10 drugs, everything else. This was not an individual who was  
11 specifically linked to Monsanto and went over. Those links  
12 that he's making are temporally there, but not --

13 **THE COURT:** How do you respond to his point?

14 **MS. MATTHEWS JOHNSON:** This is a lab fraud  
15 situation --

16 **THE COURT:** Why don't you respond to his point, which  
17 is that this was an invalid study and that he is saying, we  
18 don't want the fraudster, at least Monsanto is saying the  
19 fraudster should come in. What we are saying is that this was  
20 an invalid -- for the first ten years' approval of glyphosate  
21 was based on an invalid study, and Monsanto's reaction to that  
22 was less than objective.

23 **MS. MATTHEWS JOHNSON:** Right. I think we would, first  
24 of all, dispute that arc of information, and that's why it  
25 began with a lab. Multiple companies used this laboratory.

1 Mr. Wright and three other scientists were tried in Chicago and  
2 convicted, and that is why it was a six-month trial because  
3 when you find labs were operating fraudulently, you have lots  
4 of victims. You are going to have lots of problems, leading to  
5 detail.

6 And so the connection he was trying to make in terms of  
7 what Monsanto did in response is simply not true. When the EPA  
8 brought it to Monsanto's attention, Monsanto re-did every  
9 single study that was drawn into question by IBT. I know  
10 Mr. Wisner knows these facts better than me. He can certainly  
11 correct me, but my understanding is they re-did every single  
12 study to the tune of millions of dollars.

13 So the notion that Monsanto as a part of a panoply of  
14 companies who finds out they had been victimized by a  
15 fraudulent laboratory, which has happened to prosecutors and  
16 everybody across the country, are suddenly now going to be  
17 hamstrung to the fact that they were lied upon or defrauded,  
18 re-did the studies, found they were still safe -- and this is  
19 going to come into court -- is squarely inadmissible is our  
20 position.

21 **THE COURT:** Well, but -- so -- do you have some  
22 specific conduct that you want to point to that Monsanto  
23 engaged in or some specific statements that Monsanto made in  
24 the wake of the realization that the study was invalid --

25 **MR. WISNER:** Sure.

1           **THE COURT:** -- that you think would go to punitive  
2 damages?

3           **MR. WISNER:** Sure. They didn't take it off the  
4 market. That's right there. They have a product that they are  
5 selling. The label says it doesn't cause cancer, and they  
6 don't know that. That's -- that's improper.

7           A responsible company would have said, you know what, we  
8 are taking this off the market until we know it is safe,  
9 studying it and then we will put it out when the EPA --

10           **THE COURT:** Was that the study that resulted in  
11 initial approval to put it on the market?

12           **MR. WISNER:** That's correct.

13           **THE COURT:** So --

14           **MR. WISNER:** And then the repeat study was the  
15 Knezevich & Hogan study. So that is the predicate for how we  
16 get to the '80s, and we are still fighting about whether or not  
17 it causes cancer.

18           **MS. MATTHEWS JOHNSON:** First, for the record, there  
19 were multiple studies, Your Honor. And it was not the case  
20 that all of the studies were invalidated, so that is not the  
21 situation.

22           I think there is -- you know, we can certainly dig into  
23 this even more, but there are reports that actually show which  
24 of the studies the EPA deemed needed to be replaced or not to  
25 be replaced. This is not every study. There is no basis. We

1 have no way of knowing this is safe. That is not the record.

2 **MR. WISNER:** To be clear, there was one cancer study  
3 ever done in the '70s. It was done by IBT. The EPA looked at  
4 it and declared it invalid. That is undisputed facts. There  
5 was no other carcinogenicity study done. Four of the five  
6 mutagenicity studies done by IBT were also deemed invalid.  
7 There was one mutagenicity study done by a different lab. I  
8 can go through the facts on this all day.

9 **THE COURT:** Well, no, what I was going to say -- I'm  
10 sure you can. But what I was going to suggest actually on this  
11 one is we know it is not coming in in Phase One. We know --  
12 and now -- and we know that what we are really talking about is  
13 the IBT study and not this guy going to jail -- what was his  
14 name?

15 **MR. WISNER:** Paul Wright.

16 **MS. MATTHEWS JOHNSON:** Wright, among others.

17 **THE COURT:** Not Wright going to jail and all that.  
18 The study was invalidated, and Monsanto's reaction to response  
19 to that fact, right, and so what -- what I would be happy to do  
20 is have you file another supplemental brief in support of that  
21 motion, or I guess it would be a supplemental brief in  
22 opposition to that motion in limine explaining sort of the --  
23 explaining in -- with precision what conduct it is that you  
24 think should come in, which of Monsanto's conduct in response  
25 to the invalidation of the study you think should come in.

1 Identify that with precision and explain why.

2 And then I will let you file -- you can file a response to  
3 that -- Monsanto can file a response to that supplemental  
4 brief, and I will decide it before we get to Phase Two. File  
5 that within seven days, and you file that within fourteen days;  
6 response within fourteen days.

7 **MS. MATTHEWS JOHNSON:** Thank you, Your Honor.

8 **THE COURT:** You want more time?

9 **MR. WISNER:** I'm going to Australia.

10 **THE COURT:** Oh, yeah. You can't write it on the  
11 plane?

12 **MR. WISNER:** I'm preparing for his testimony on the  
13 plane. As much as it sounds like a vacation, it really is not.

14 **THE COURT:** Can somebody else on your team do it?

15 **MR. WISNER:** Your Honor, I think seven days will make  
16 it work.

17 **MS. MOORE:** Could we have ten days, Your Honor?

18 **THE COURT:** Sure.

19 **MS. MOORE:** Thank you.

20 **THE COURT:** You can have ten days, and then seven days  
21 after Monsanto will file its response.

22 **MS. MATTHEWS JOHNSON:** Thank you, Your Honor.

23 **THE COURT:** Okay. So that gets us through the motions  
24 in limine, right.

25 So good time to take a break. I will be back in about a

1 half an hour. Do you have something else?

2 **MR. STEKLOFF:** I was going to say I don't think there  
3 is too much more -- I don't know if there is less. We wanted  
4 to ask you about the number of jurors, and I have one question  
5 about Dr. Portier's reliance list, heading into the deposition.  
6 But I'm not sure that there is --

7 **MR. WISNER:** We also have jury instructions.

8 **THE COURT:** So there is jury instructions, which we  
9 could talk about later. We could talk about on Friday. We are  
10 going to be back together on Friday, right?

11 So let's take -- let's figure out if we can knock out the  
12 rest of the stuff on Friday when we get back together.

13 So there is jury instructions. There is the verdict form.  
14 There is the issue of sealing -- and I will tell you now  
15 that -- I want to fix the over-sealing before the trial, okay.  
16 So this is a -- this is a case that has generated a lot of  
17 public interest, and I don't want the documents in this case to  
18 be over-sealed coming into trial.

19 So I was planning on -- I'm not sure I am quite ready to  
20 talk to you about that yet. But you are going to need to go  
21 back and fix all the over-redactions, and I think re-file  
22 everything. Unless -- you know, hopefully there will be a  
23 number of situations where we can just file -- you file a  
24 redacted and an unredacted version, and the redacted version  
25 you file under seal. Hopefully we can just -- sorry, the



1 unredacted version you file under seal. And hopefully we can  
2 just lift the seal on a lot of those documents so you don't  
3 have to go back through and do it again. I think that probably  
4 will be the case for a lot of them. That is something that is  
5 going to happen before the trial.

6 **MS. MOORE:** We can talk about that on Friday,  
7 Your Honor. It would be great if we go ahead and do the jury  
8 instructions and verdict forms after the break, and then we  
9 also have Dr. Sawyer and Dr. Sullivan left too.

10 **THE COURT:** Oh, yeah. Sawyer and Sullivan.

11 **MS. MOORE:** Just for planning purposes, it would be  
12 nice to have that today, Your Honor.

13 **MR. WISNER:** The reason on the jury instructions,  
14 Your Honor, is I will not be here on Friday; and I'm sort of  
15 taking the lead on that.

16 **THE COURT:** Okay. So let's take a half-hour break.  
17 Be back at 20 after. And I will hopefully be back at that time  
18 to report to you on the jury numbers, and we will talk about  
19 the rest of the stuff.

20 **MS. MOORE:** Thank you, Your Honor.

21 **THE COURT:** Thanks.

22 **THE CLERK:** Court is in recess.

23 (Whereupon, a short break was had.)

24 **THE COURT:** Okay. Just to give you an update, very  
25 loose -- I actually didn't look at any of them myself. The

1 clerks looked at them, but they came up with a very rough, you  
2 know, estimate that half the people either say they have a  
3 hardship, like their scheduling and they have to take the kids  
4 to school or something like that so they can't do it or they  
5 claim sort of that they couldn't be fair in a way where we  
6 might very well just kick them on the papers.

7       So I think actually the numbers will be fine, but in an  
8 abundance of caution we are going to have like 20 or 25 more  
9 people fill out questionnaires tomorrow and -- so that we will  
10 have a slightly larger pool to go through Friday.

11       I think it's -- like I said, I don't think it's going to  
12 be necessary. I think we might end up not calling any of those  
13 20 to 25 people in for jury selection on Wednesday, but we  
14 might as well have it in an abundance of caution. So that's  
15 that.

16       What do you all want to talk about next, jury  
17 instructions?

18       **MR. WISNER:** Yes, Your Honor.

19       **THE COURT:** Okay.

20       **MR. WISNER:** Do you have the instructions in front of  
21 you, Your Honor?

22       **THE COURT:** Yeah.

23       **MR. WISNER:** Okay. So there is -- other than we have  
24 talked about IARC, so there is really three issues that I want  
25 to raise.

1           **THE COURT:** Okay.

2           **MR. WISNER:** Two are not, I think, that serious, but  
3 we care about them; and the other one is probably a bigger  
4 issue. So we will start with the easy one.

5           In the second paragraph of opening guidance, it says,  
6 starting on the third sentence, In the first phase you will be  
7 asked to determine whether Mr. Hardeman can prove that his use  
8 of Roundup caused his non-Hodgkin's lymphoma.

9           **THE COURT:** Okay.

10          **MR. WISNER:** And we think that the way that that is  
11 phrased can be interpreted as creating a different burden.

12          **THE COURT:** Okay.

13          **MR. WISNER:** We will propose you will be asked to  
14 determine whether Mr. Hardeman's use of Roundup was a  
15 substantial factor in causing his non-Hodgkin's lymphoma, which  
16 I think is almost verbatim what the -- the jury instruction on  
17 causation.

18          **THE COURT:** Hold on. Let me re-read it with an eye  
19 towards all of that.

20          (Whereupon, a brief pause was had.)

21          **THE COURT:** I don't have strong feelings about it  
22 either way. I think it will probably be fine to say whether  
23 he -- whether his -- whether Roundup was a substantial factor  
24 in causing Hardeman's lymphoma. I think whether -- I think it  
25 would also be fine to say whether Roundup caused Mr. Hardeman's

1 lymphoma and then wait until -- and explain the -- you know,  
2 there may actually be an argument to wait to explain the  
3 meaning of causation when the jury gets its instructions when  
4 it goes back to deliberate so --

5 **MR. WISNER:** Our concern wasn't so much that as much  
6 as the --

7 **THE COURT:** Can prove.

8 **MR. WISNER:** -- can prove that.

9 **THE COURT:** Yeah.

10 **MR. WISNER:** So whether Mr. Hardeman's use of Roundup  
11 caused his non-Hodgkin's lymphoma would be preferable.

12 **MR. IMBROSCIO:** But that's what the burden is.

13 **THE COURT:** They will, of course, be instructed on the  
14 burden.

15 **MR. IMBROSCIO:** Yeah.

16 **THE COURT:** And I believe the burden is reflected in  
17 the special verdict form?

18 **MR. IMBROSCIO:** Yes.

19 **MR. WISNER:** That's correct.

20 **THE COURT:** So I think, though, for this instruction,  
21 I'm more interested in sort of being -- sort of short and  
22 direct with people. So I think it would be fine to say whether  
23 Roundup --

24 **MR. WISNER:** Mr. Hardeman's use of Roundup caused his  
25 non-Hodgkin's lymphoma.

1           **THE COURT:** Why not just say Roundup caused his --

2           **MR. WISNER:** That's fine.

3           **THE COURT:** Whether Roundup caused Mr. Hardeman's  
4 non-Hodgkin's lymphoma.

5           **MR. WISNER:** Yeah.

6           **MR. IMBROSCIO:** That's fine.

7           **THE COURT:** Okay.

8           **MR. WISNER:** Sort of another one, we would request the  
9 causation instruction.

10          **THE COURT:** Okay.

11          **MR. WISNER:** It says Mr. Hardeman must prove that  
12 Roundup caused his non-Hodgkin's lymphoma. We would only ask  
13 to throw in the burden of proof there. So Mr. Hardeman must  
14 prove by a preponderance of the evidence that Roundup causes  
15 lymphoma.

16          **THE COURT:** I think that sounds fine.

17          **MR. IMBROSCIO:** No objection to that. That's  
18 reasonable.

19          **MR. WISNER:** Okay. So there there's sort of the  
20 larger question, which I think is something that you probably  
21 anticipated would be the crux of the conversation.

22          **THE COURT:** Yeah.

23          **MR. WISNER:** And that is the issue of causation and  
24 multiple causation.

25          **THE COURT:** Yeah.

1           **MR. WISNER:** And you know last time we talked about  
2 this, I had the CACI instructions. I don't want to give them  
3 again to you, Your Honor, unless you want to look at them.

4           **THE COURT:** I think I have them too in here.

5           **MR. WISNER:** You have them too?

6           **THE COURT:** Yeah.

7           **MR. WISNER:** Okay. So when you look at the  
8 substantial factor, which is 430 instruction, I mean, the first  
9 issue is we have removed the last sentence on that instruction  
10 all together, right. So it says, it does not have to be the  
11 only cause of the harm, right. And that's actually not in here  
12 at all.

13           **THE COURT:** Right.

14           **MR. WISNER:** So I don't understand why we would take  
15 that out, regardless of multiple causations.

16           **THE COURT:** Well, I guess I thought of it as confusing  
17 in this context because -- I mean, you know, I'm obviously open  
18 to discussion about it, but my sense of the opinions offered by  
19 your experts are that this was not a multiple causation  
20 situation. Roundup caused the cancer.

21           So given that the evidence in the case from the Plaintiffs  
22 is that Roundup caused the cancer, we should remove any  
23 reference -- we should remove any language from the jury  
24 instructions that is designed to get at the issue of multiple  
25 causation.

1           And if the -- if the Plaintiffs had presented opinion from  
2 experts that this was a multiple causation situation, then it  
3 would probably make that -- make sense for that sentence to  
4 come in. But in every case, you have to tailor the model  
5 instructions to the facts of your own case. And it struck me  
6 that that sentence didn't fit given the evidence that the  
7 Plaintiffs have put forward and the expert opinions that the  
8 Plaintiffs have put forward on the causation of Mr. Hardeman's  
9 cancer.

10           So that's -- that was my thinking there.

11           **MR. WISNER:** Sure. So the issue is if it was just our  
12 experts testifying, I think you would be right. But they are  
13 having their experts testify that hep C was a substantial  
14 contributing factor to causing his cancer. That is clear as  
15 day in several of their expert reports.

16           **THE COURT:** Right.

17           **MR. WISNER:** And if they are raising the issue of  
18 multiple causation, then they don't get this instruction. So  
19 if they want to abandon hep C and these other causations and  
20 make it just about Roundup, great.

21           **THE COURT:** But I don't think they are issuing the  
22 raising the issue of multiple causation either, right. They  
23 are saying hep C caused it, not Roundup. So we have experts on  
24 one side saying Roundup caused it, not hep C. And experts on  
25 the other side saying hep C caused it, not Roundup. Nobody is

1 offering an opinion that it was caused by both, as far as I can  
2 tell.

3 **MR. WISNER:** Well --

4 **THE COURT:** If that's right, if I'm right about that,  
5 that nobody is offering an opinion that it is caused by both,  
6 then the question becomes why do we need that language -- that  
7 sentence, which is it does not have to be the only cause of the  
8 harm.

9 **MR. WISNER:** For a couple of reasons.

10 One, the first issue is they are going to hear evidence  
11 that there are two possible causes to his cancer, right. That  
12 is what the evidence is going to be presented to them. And  
13 when they are presented with that, it is easy to think, oh, if  
14 hep C was a possible cause, right, then you don't recover. And  
15 that's exactly why that sentence is in there.

16 If you look at the instructions on use, it actually talks  
17 about situations where the Defendant specifically created  
18 alternate causes. And when that happened, it created the issue  
19 of having to have this multiple causation instruction. So it  
20 actually contemplates --

21 **THE COURT:** Wait. I'm sorry.

22 **MR. WISNER:** Sure.

23 **THE COURT:** Are you talking about the sentence, it  
24 doesn't have to be the only cause of harm, or are you talking  
25 about the multiple causation instruction, or are you talking



1 about both?

2 **MR. WISNER:** Fair enough. Let's take it one at a  
3 time.

4 I don't think it has to be only cause. It has to be in  
5 there if they are going to raise the possibility of there being  
6 another cause, even if they think it is only one other cause.  
7 The jury is going to hear it is hep C and they are going to  
8 hear it is Roundup. It is easy to think, oh, well, if hep C  
9 was also a cause, then they don't win. And that is not the  
10 law. The law is was Roundup a substantial contributing factor.

11 So it doesn't have to be the only cause. So I think just  
12 on the facts of this case that sentence really needs to be in  
13 there.

14 **THE COURT:** Okay.

15 **MR. WISNER:** The second issue, though, is for what it  
16 is worth, I don't believe their experts say it is just hep C.  
17 I think they say obesity. They talk about a bunch of other  
18 things that they say. I think their experts offer multiple  
19 causation opinions.

20 For example, I have Dr. Levine, in the last sentence in  
21 her report, it is scientifically improper to dismiss the other  
22 factors which might have been contributors to Mr. Hardeman's  
23 DLBCL, including the history of hepatitis B infection, his  
24 obesity and obesity, neither of which should be excluded.

25 So their own experts are bringing in multiple causation,

1 for what it is worth.

2 **THE COURT:** I get the point about adding the sentence  
3 back in 430 --

4 **MR. WISNER:** Okay. So now the second issue.

5 **THE COURT:** Or the causation instruction that we give.

6 **MR. WISNER:** So then the second issue, Your Honor, is  
7 whether or not the last sentence, which is the --

8 **THE COURT:** Wait. Hold on. I want to make sure I  
9 understand what you are asking for now.

10 **MR. WISNER:** Sure.

11 **THE COURT:** What you are asking for and what you have  
12 been talking about up until now is to add that sentence back  
13 into -- add that sentence into the causation instruction that I  
14 drafted.

15 **MR. WISNER:** Correct.

16 **THE COURT:** The sentence being, it does not have to be  
17 the only cause of harm.

18 Okay. I think I'm with you on that. They can obviously  
19 have a chance to respond.

20 And what else?

21 **MR. WISNER:** Okay. So now the second issue is the  
22 next sentence in the instruction. It is exposure to a product  
23 is not a substantial factor in causing harm if the same harm  
24 would have occurred without exposure to that product.

25 And what we have here is that is the bracketed

1 instruction, the CACI instruction. And it says specifically,  
2 the but-for test, which is what it is referring to, of the last  
3 optional sentence does not apply to concurrent independent  
4 causes, which are multiple forces operating at the same time  
5 and independently, each of which would have been sufficient by  
6 itself to bring about the same harm.

7 Accordingly, do not include the last sentence in a case  
8 involving concurrent independent causes. And while  
9 Plaintiff --

10 **THE COURT:** That, I guess, is -- goes back to my  
11 question, which is I don't understand this to be about multiple  
12 concurrent independent causes. I don't understand anybody to  
13 be offering an opinion about that.

14 **MR. WISNER:** I think that's exactly what the  
15 Defendants have offered.

16 **THE COURT:** Do you have any experts who are offering  
17 an opinion to that effect?

18 **MR. WISNER:** I do believe Dr. Weisenburger's testimony  
19 pretty clearly says hep C is a potential risk factor but it is  
20 a less likely one.

21 **THE COURT:** Right. And some of your experts casually  
22 said on the stand maybe it's both. But did they ever -- has  
23 anybody actually offered an opinion that Mr. Hardeman's  
24 non-Hodgkin's lymphoma was caused by both hep C and Roundup?

25 **MR. WISNER:** Not that exact opinion, but they did say

1 that hep C is a risk factor.

2 **THE COURT:** Right. But then they discounted hep C.  
3 They ruled out hep C.

4 **MR. WISNER:** Precisely.

5 **THE COURT:** All of your experts ruled out hep C.

6 **MR. WISNER:** Sure. They ruled it out so far as saying  
7 it is not likely a cause, right.

8 **THE COURT:** Right.

9 **MR. WISNER:** And because of the latency and --

10 **THE COURT:** I assume they could have offered an  
11 opinion which said, I believe that Roundup caused the NHL. And  
12 at an absolute minimum, I believe that there were concurrent  
13 causes of the NHL, and both of them were substantial factors,  
14 right. One was hep C and the other was Roundup. I assume they  
15 could have, if they wanted to, if you had wanted them to,  
16 offered that opinion.

17 **MR. WISNER:** Well, I think -- I think it is a little  
18 too black and white, Your Honor. I think when you talk about  
19 specific causation it is a probability, right. I don't think  
20 anyone can say definitely that one thing was the cause of one  
21 person's cancer. Even in my lung cancer cases with tobacco,  
22 you can't say that, right. But you can say --

23 **THE COURT:** But couldn't -- my question is, couldn't  
24 they have offered that opinion?

25 **MR. WISNER:** Well --

1           **THE COURT:** Couldn't they have said, I think it is  
2 Roundup but I also think -- but even if hep C was a cause -- I  
3 think there is one or two possibilities. Either it was caused  
4 by Roundup or it was caused by a combination of Roundup and  
5 hep C. The could have -- my question to you is: Couldn't they  
6 have offered that opinion?

7           **MR. WISNER:** So by the way, the combination concept is  
8 not this, right. They have to be multiple independent causes,  
9 right.

10          **THE COURT:** Okay.

11          **MR. WISNER:** It can't be a synergistic type of thing.  
12 I just want to make sure we are talking about the same thing.

13           But they did offer that opinion by saying that hep C was a  
14 risk factor.

15          **THE COURT:** They ruled out hep C. They all ruled out  
16 hep C.

17          **MR. WISNER:** Hold on. They ruled in hep C as a risk  
18 factor.

19          **THE COURT:** As a risk factor, and ruled it out as a  
20 cause.

21          **MR. WISNER:** Then specifically as it relates to him,  
22 it is not likely the cause of his cancer.

23          **THE COURT:** Right.

24          **MR. WISNER:** So the rule out doesn't mean it had  
25 nothing to do with it whatsoever. It is less likely a cause

1 than Roundup, which is the most likely cause. That is all  
2 about probability.

3 So by virtue of saying it is a legitimate risk factor, and  
4 by virtue of saying Mr. Hardeman had this risk factor -- I'm  
5 considering obesity as well, right -- they are introducing  
6 concurrent causes as part of their analysis. And they are  
7 saying, you know what --

8 **THE COURT:** All of them offer an opinion that it was  
9 not hep C; it was Roundup.

10 **MR. WISNER:** I think that's a simplistic  
11 characterization of their opinion.

12 **THE COURT:** Show me where in their report that they  
13 say it might have been concurrent causes.

14 **MR. WISNER:** That's not what I said, Your Honor. They  
15 are saying it is not hep C. That is not how a scientist  
16 speaks. It is not fair.

17 **THE COURT:** Show me where in the report. You said  
18 that they offered up the possibility that there were concurrent  
19 causes. Show me where in their reports they offer up the  
20 possibility that it was concurrent causes.

21 **MR. WISNER:** Okay. My understanding is  
22 Dr. Weisenburger testified that hep C was a contributing factor  
23 but it was not a substantial contributing factor. That is my  
24 understanding of his testimony.

25 **THE COURT:** I seem to recall in passing him saying,

1 well, maybe hep C, maybe it was caused by both. But I don't  
2 remember him actually offering an opinion, either in his report  
3 or his deposition testimony or his Daubert testimony in court,  
4 that it was -- that it was -- that they were concurrent causes.

5 **MR. WISNER:** I can't cite to you the record right now.  
6 If you give me an opportunity, I will send you a letter about  
7 that.

8 **THE COURT:** Let's assume for argument's sake that none  
9 of your experts offered that opinion.

10 **MR. WISNER:** Great. That's where I wanted to go.

11 Okay. So assuming that's the case it is immaterial,  
12 because their experts have offered alternative causes  
13 independent causes saying this is what causes cancer, not  
14 Roundup.

15 **THE COURT:** Right.

16 **MR. WISNER:** When the jury is presented with two  
17 plausible, substantiated with expert testimony, opinions about  
18 what caused Mr. Hardeman's cancer, then you get the multiple  
19 instructions causation. We didn't get this in Johnson. He had  
20 no other risk factors. We argued that potentially it was, you  
21 know, his race or something like that that might have affected  
22 it. The judge said no, that doesn't count. That's not an  
23 alternative cause. So we actually didn't get the multiple  
24 causation instruction there.

25 But here the entire crux of their --

1           **THE COURT:** Okay. What are you asking for?

2           **MR. WISNER:** I'm asking for --

3           **THE COURT:** Are you asking to remove this sentence?  
4 You keep saying we get -- you seem like you are arguing for,  
5 quote, the multiple causation instruction.

6           **MR. WISNER:** Sure.

7           **THE COURT:** But you keep like changing what you seem  
8 to be arguing for. So can you be a little more clear what you  
9 are arguing for?

10          **MR. WISNER:** Maybe the background --

11          **THE COURT:** I thought you were arguing for the removal  
12 of the final sentence of my draft instruction.

13          **MR. WISNER:** Because if you read the instructions,  
14 Your Honor, it says you don't get that sentence when you have  
15 this multiple concurrent causes potential issue, factual  
16 evidence. And you get the multiple -- you have to give the  
17 multiple causation instruction, which is 431. That is why I  
18 keep -- I'm not changing conversations. They go hand in hand.

19          **THE COURT:** Okay.

20          **MR. WISNER:** If you read the instructions, it says, do  
21 not include the last sentence in a case involving concurrent  
22 independent causes. In cases of multiple concurrent causes,  
23 multiple causation should be given.

24          **THE COURT:** But that's the problem, is, again, I don't  
25 think anybody has argued that there are multiple concurrent



1 causes. There is -- there has been no suggestion that there  
2 are multiple concurrent -- nobody has offered an opinion that  
3 there are multiple concurrent causes.

4 **MR. WISNER:** Fair enough.

5 **THE COURT:** I don't know if that was a strategic  
6 misstep on your part to not get your experts to offer that, but  
7 not having offered opinions to that effect, I just don't  
8 understand why we would give that instruction.

9 **MR. WISNER:** Well, I do believe -- so, for example,  
10 Weisenburger on page 5 of his report says, obesity may have  
11 been a minor contributing factor.

12 **THE COURT:** But he ruled out obesity.

13 **MR. WISNER:** No, no. When you say ruled out --

14 **THE COURT:** Let's go to his report.

15 **MR. WISNER:** He is weighing -- okay.

16 **THE COURT:** Let's go to his report. Hang on a second.

17 **MR. WISNER:** Does anyone have a report?

18 **MS. WAGSTAFF:** Yeah.

19 (Whereupon, a brief pause was had.)

20 **THE COURT:** Let's go to his report in Hardeman.

21 **MR. WISNER:** It is not on page 5. It is only three  
22 pages long. I was told page 5. That is incorrect. What page  
23 is it?

24 For example, the second-to-last paragraph on the last  
25 page --

1           **THE COURT:** Hold on.

2           (Whereupon, a brief pause was had.)

3           **THE COURT:** Okay.

4           **MR. WISNER:** The last sentence on the first paragraph,  
5 that is mid-paragraph, it says, During adulthood Mr. Hardeman  
6 weighed on average 190 pounds with a height of 5 feet,  
7 9 inches, BMI of 28.1, and this may have been a minor  
8 contributing factor in this case.

9           And earlier he --

10          **THE COURT:** Right, not a substantial factor.

11          **MR. WISNER:** That's right. But that's not what we  
12 have to prove. That's my point.

13          If it is a minor contributing factor, right, that's simply  
14 because -- he explains why in his analysis. But that is an  
15 independent potential cause of his cancer. And the jury goes,  
16 well, hold on a second. I don't think Roundup was the only  
17 thing. You agreed obesity could have been part of it, so you  
18 don't win.

19          And that's exactly what the instructions are trying to  
20 avoid, is that misunderstanding of the law.

21          And so here we have -- and for what it is worth,  
22 Your Honor, putting aside whether or not any specific -- I read  
23 to you the sentence where their own expert specifically says  
24 there is two other causes, right. Putting that issue aside,  
25 you conform the instructions to the evidence presented and the

1 evidence presented to the jury is on one hand that it is caused  
2 by Roundup, by our experts, that is the primary cause. And  
3 then you hear from them saying, no, it is actually hep C and  
4 obesity.

5 **THE COURT:** Right, but the causation -- the multiple  
6 causation instruction you are asking me to give --

7 **MR. WISNER:** Sure.

8 **THE COURT:** -- is not appropriate for Weisenburger's  
9 testimony because he says that obesity is not a substantial  
10 cause. And the multiple causation instruction that you are  
11 asking me to give says that the Defendant cannot avoid  
12 responsibility that some other person was also a substantial  
13 factor in causing the harm.

14 **MR. WISNER:** Precisely. They are saying --

15 **THE COURT:** Not precisely. Precisely is wrong. What  
16 you said is precisely wrong, because what Weisenburger says in  
17 his report is that obesity is not a substantial factor.

18 **MR. WISNER:** Absolutely. I agree with you,  
19 Your Honor. Their experts say the opposite. That's my point.

20 **THE COURT:** Why are you talking to me about obesity?

21 **MR. WISNER:** Because he literally says right here that  
22 it is improper to dismiss other factors that could have been  
23 contributors to Mr. Hardeman's NHL, including hepatitis C and his  
24 obesity. Neither one should be excluded.

25 So they are raising the specter of another cause

1 factually. They are saying those experts are wrong,  
2 Weisenburger is wrong. Hepatitis B, hepatitis C, his eczema,  
3 whatever, those are all proximate causes. And if that's the  
4 case, the jury could conclude, you know what, I do think  
5 hepatitis played a role in his cancer. I do. I think it was a  
6 substantial contributing factor. But I also think Roundup was.

7 If they also think Roundup is, we win. And so that's why  
8 that instruction has to be given, because conceivably without  
9 that instruction they won't understand that.

10 **THE COURT:** Okay.

11 **MR. IMBROSCIO:** Let me begin with maybe a broad  
12 principle and then respond.

13 The Court in its general causation ruling made a point  
14 that the evidence was weak but allowed certain experts to  
15 proceed. The Court in its general causation ruling said the  
16 individual experts proving specific causation will be a  
17 daunting task, but it is a task --

18 **THE COURT:** I know what I said. Can we get to the  
19 point? We don't have a lot of time.

20 **MR. IMBROSCIO:** Fair enough, Your Honor.

21 What -- basically -- what we are concerned about, frankly,  
22 is that through this effort, they -- they essentially want the  
23 jury to have only one possible conclusion, and basically to  
24 avoid their burden of proof, which is to prove that it was the  
25 Roundup that caused their NHL, which is a difficult thing,

1 which is why I think they are fighting --

2 **THE COURT:** They have to prove that it was a  
3 substantial factor in causing their NHL.

4 **MR. IMBROSCIO:** Yeah, which substantial factor is the  
5 California standard for sure, but it's not just a factor. It  
6 is a substantial factor as defined by the law.

7 And I think the concern here is if you don't give the  
8 but-for instruction, which I hear Mr. Wisner say is not  
9 appropriate, and you give the competing contributing factors,  
10 then you end up in a situation where there is very little to  
11 prove because the average juror will say, well, it's kind of a  
12 big mix. You know, it could have played a little role. Could  
13 have played a role. They all played a role.

14 That's how they plan to argue the case. I think that is  
15 just fundamentally, from our perspective, unfair. It doesn't  
16 give us a fair shot.

17 We think the way Your Honor had it originally, even  
18 without that sentence, is important because it is confusing in  
19 this case that, you know, basically the law says, and we cite  
20 cases, that just because you point to a different cause doesn't  
21 mean they are independent substantial -- excuse me --  
22 concurrent independent causes, which has a unique definition  
23 under California law, which is laid out in our cases.

24 You have got to be -- you have to have evidence that that  
25 thing by itself is sufficient. And as Your Honor has

1 commented, no one has given that testimony that there were two  
2 things that were equally independently causing the NHL. They  
3 have their view.

4 Our experts principally just, you know, criticizing  
5 methodology, I think effectively what Plaintiffs are asking for  
6 is burden shifting, essentially asking -- putting the burden on  
7 us to disprove it, which I don't think is appropriate.

8 **THE COURT:** Well, but I guess what Mr. Wisner is  
9 saying is that they should be able to argue to the jury that  
10 even if you agree with Monsanto's experts that hep C was a  
11 substantial factor in causing Hardeman's NHL, it is also the  
12 case that Roundup was a substantial factor in causing his NHL.  
13 And so even if you buy -- even if you really liked that expert  
14 that Monsanto put up and you agree with them, you still must  
15 find in favor of Mr. Hardeman because we met our burden of  
16 proving that Roundup was also a substantial factor in causing  
17 the NHL.

18 **MR. IMBROSCIO:** But part of that burden in this  
19 medical causation case has got to be that he would not have  
20 gotten NHL without exposure to Roundup, because they don't have  
21 an expert to say, as Your Honor said, he would have gotten --  
22 he would have gotten NHL by virtue of obesity. He would have  
23 gotten NHL by virtue of his hep C. No one says that.

24 And they need to say that to demonstrate the concurrent  
25 independent causes; otherwise, they just -- it becomes very

1 squishy and you lose the fact that -- you lose the but-for  
2 aspect that really is incumbent in their burden.

3 That's -- I mean if they don't have that, there is very  
4 little to prove, and I think that impedes our ability to have a  
5 fair trial about whether Roundup actually caused Mr. Hardeman's  
6 NHL. That's -- if they can sort of devalue the burden of proof  
7 and what they he have to prove, it becomes very difficult to  
8 have, from our perspective, a fair trial.

9 **THE COURT:** Do you think they shouldn't be able to  
10 argue what I just said, which is --

11 **MR. IMBROSCIO:** I don't --

12 **THE COURT:** -- even if you think hep C was a  
13 substantial factor in the cause of Mr. Hardeman's NHL, we also  
14 met our burden of proving that Roundup is a substantial factor  
15 in the cause of his NHL.

16 **MR. IMBROSCIO:** I don't think so because they have to  
17 establish that Mr. Hardeman would not have gotten NHL without  
18 exposure.

19 **THE COURT:** No. That sort of begs the question, I  
20 think. I mean -- in other words, why can't they argue that  
21 this is a multiple causation situation, given that Monsanto is  
22 putting up -- is saying that this was a substantial factor and  
23 the Plaintiffs are saying that was a substantial factor.

24 **MR. IMBROSCIO:** Well, I guess, I would come back -- I  
25 would say no to your question and then come back to the point

1 that that was really not part of their expert's methodology.  
2 That's not how they approach the case. And it is their burden  
3 to prove this up, and so they should not be able to say, even  
4 though our own expert, you know, ruled out hep C, ruled out  
5 obesity, you can still throw it all into the big mix because --

6 **THE COURT:** Why not? Lawyers do that in trials all  
7 the time, right, in closing arguments. They say, even if you  
8 agree -- or even if you disagree with us that X, Y, Z happened,  
9 you still must find in our favor because A, B, C happened.

10 **MR. IMBROSCIO:** Well, I think --

11 **THE COURT:** What is difference about this?

12 **MR. IMBROSCIO:** Well, I think in many of those cases,  
13 you know, you sort of -- your example harkens into how this all  
14 got started, the two fires case. You have two people setting a  
15 fire and both would, you know, burn down the house.

16 When you are talking about a complex issue of medical  
17 causation, which is what we have here, that gets very, very  
18 dangerous to say that that same rule applies because of an  
19 idiopathic disease like NHL. I mean, it is idiopathic. No  
20 one -- their own experts agree 70 percent are unknown. And in  
21 the context of a trial where there is an injured person there,  
22 the tendency for the jury to say, well, it was all one big  
23 thing, that's our concern. And I don't think the law allows  
24 that.

25 **THE COURT:** I assume the quintessential case for the



1 model -- for this model multiple causation instruction would be  
2 like an asbestos case where somebody was exposed to asbestos  
3 from a lot of different companies, right. And so they -- you  
4 know, they have mesothelioma and they worked in five different  
5 locations and all five locations had asbestos they were exposed  
6 to, and, you know --

7 **MR. IMBROSCIO:** Those are five different tortfeasors.

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

9 **MR. IMBROSCIO:** But asbestos was the cause.

10 **THE COURT:** Right.

11 **MR. IMBROSCIO:** A different example may be --

12 **THE COURT:** You are resisting me, but I think I'm  
13 making a point that is helpful to you.

14 **MR. IMBROSCIO:** Yes, I'm sorry. Yes, please. I think  
15 that's -- I think that's right. I mean, I think it's just when  
16 you are talking about medical cause versus tortfeasor, I think  
17 that is where some of the confusion comes in.

18 **THE COURT:** Okay. Do you want to have the last word  
19 on this and I will go back and think about this?

20 **MR. WISNER:** Sure.

21 Two things, Your Honor. Look at the asbestos instruction  
22 on causation in CACI. It specifically says what I'm saying.  
23 So I think that this has been worked through the Courts.

24 And the last thing --

25 **THE COURT:** My point is that the asbestos situation is

1 different from this one.

2 **MR. WISNER:** Okay.

3 **THE COURT:** My point is that this is a situation where  
4 we know that asbestos causes mesothelioma. We know that this  
5 person has mesothelioma. We know they have been exposed to  
6 asbestos from five different tortfeasors. And, you know, the  
7 point of this instruction is they can't all point the finger at  
8 the other tortfeasor to get off, right, which is not this  
9 case.

10 **MR. WISNER:** Sure. I'm with you on that.

11 **THE COURT:** And so I don't -- I sort of feel like we  
12 are already -- at a minimum, we have moved away from the  
13 heartland of cases where this multiple causation instruction  
14 would be given.

15 **MR. WISNER:** Well, I think the multiple causation  
16 instruction -- there is a case on this. It couldn't be more on  
17 point. It is the *Logacz v. Limansky*, 1999, 71 Cal.App.4th  
18 1149.

19 **THE COURT:** Okay.

20 **MR. WISNER:** And in that case, Your Honor, it was a  
21 blood-clotting case. They were accusing -- they were trying to  
22 say that the blood clot was caused by some product or problem.

23 **THE COURT:** What was the cite again?

24 **MR. WISNER:** 71 Cal.App.4th 1149.

25 And the judge -- and the defendants had argued that it was

1 actually his obesity that caused the blood clotting. It wasn't  
2 their product. And the district -- the trial judge did not --  
3 this is obviously state court. The trial judge didn't give the  
4 multiple causation instruction, and it was reversed on appeal  
5 saying, no, you have to. They argued that the cause of the  
6 person's injury, you got to give the multiple causation  
7 instruction. That is the law, substantive law in California.

8 The idea of a but-for causation, I think he called it  
9 squishy, well, California has kind of squishy law on this  
10 point. And that is just how the law is. And we have to under  
11 *Erie* apply substantive California law on causation.

12 And while they don't like it, I'm sorry. They didn't  
13 waive lexicon. We could have done an out-of-state case here if  
14 we wanted to, but they chose to stick to California, in which  
15 cases and the California law -- and the California law is good  
16 for Plaintiffs. It is specifically good on causation, and  
17 that's just how it is. And I think that if you -- I think we  
18 have to remove the but-for causation sentence. And we should  
19 give the multiple causation instruction, as we proposed in our  
20 original jury instructions. I think that is required to get a  
21 proper jury impaneled.

22 **THE COURT:** Okay.

23 **MR. IMBROSCIO:** Just on that case, I was just showed  
24 it when I read it the first time, in that case you will see the  
25 Plaintiffs actually conceded that these additional factors may

1 have contributed to the decedent's death in that case, which I  
2 think is a very different situation than what we have here  
3 where they have, again, ruled out hepatitis C to give that as  
4 an example. It shouldn't be that because our experts offer  
5 differing views of causation that we back our way into what can  
6 be a very confusing situation on the multiple independent  
7 causation.

8           **THE COURT:** I agree it is confusing. I mean, I --  
9 certainly my gut is that, you know, this case -- it doesn't  
10 seem appropriate for this case, but we are -- I mean, we are  
11 applying California law, and he is right that California law  
12 can be squishy on these kinds of questions. So I will -- you  
13 know, I will go back and look at it one more time, and I will  
14 think about it a little more.

15           But in the meantime, I mean, at a minimum for opening  
16 statements, I don't think -- I'm assuming that the Plaintiffs  
17 are not planning on saying that this was caused by -- that  
18 Roundup was just one of the causes. Your focus is on what your  
19 expert -- the opinions that your experts gave, which is that  
20 Roundup is the cause.

21           **MR. WISNER:** That's correct. For opening I think we  
22 are okay.

23           **THE COURT:** And the other factors have been ruled out.

24           **MR. WISNER:** That's correct. And I think that --

25           **THE COURT:** And that's what your experts have

1 testified to.

2 **MR. WISNER:** That's correct. We are going to say what  
3 they are going to offer the opinions of. But I do believe,  
4 though, what -- I won't keep arguing.

5 **THE COURT:** Okay. I understand.

6 Anything else on jury instructions?

7 **MR. WISNER:** That was it for the Plaintiffs,  
8 Your Honor.

9 **THE COURT:** Anything from the Defendants?

10 Anything further?

11 **MR. IMBROSCIO:** Nothing further, Your Honor.

12 **THE COURT:** What about the verdict form? Do you want  
13 to -- do you want to argue -- do you want to argue for two  
14 questions?

15 **MR. WISNER:** Your Honor, I think we have made our  
16 record. We will move on from this.

17 **MR. IMBROSCIO:** We are fine with the verdict question  
18 that is written.

19 **THE COURT:** Okay. Let's see.

20 On the sealing -- I mean, that actually reminds me of  
21 another comment I had about the sealing is that I wonder -- so  
22 it strikes me that there are probably only two categories of  
23 information that can be sealed, and they are very small.

24 One is like personal identifying information, like a  
25 social security number or something. And the other is causes

1 of hep C.

2 Other than that, like -- I think all of the medical  
3 records should not be sealed. You might ask Mr. Hardeman if he  
4 is fine with just unsealing everything. I don't know how much  
5 he cares about this information. It is up to Mr. Hardeman,  
6 right.

7 Go ahead.

8 **MS. WAGSTAFF:** I have actually spoken to Mr. Hardeman  
9 about this, and it is his preference that the cause of the  
10 hep C remained under seal.

11 **THE COURT:** Okay.

12 **MS. WAGSTAFF:** Just because of the community he lives  
13 in and the stigma associated with some of that stuff.

14 **THE COURT:** Sure. That's fine.

15 So I mean I think what it's going to be -- and I may, you  
16 know, provide you with further guidance on this on Friday, but  
17 I think what it is going to be is everything needs to be  
18 unredacted, except for those two things. And I apologize. I  
19 know it -- it requires a lot of work, but you need to make it  
20 happen before the trial.

21 **MR. IMBROSCIO:** The one thing on -- you asked  
22 Ms. Rubenstein to file in the record Mr. Gebeyehou's deposition  
23 transcript. I think his lawyer has asked to have that filed  
24 under seal.

25 Would you be okay, given the briefing schedule in place,

1 that we work out the sealing with this guidance, and it may not  
2 be filed by today --

3 **THE COURT:** Yes. It sounds like a good idea.

4 Okay. Let's see what else do we need to talk about?

5 The Sawyer and Sullivan is the only remaining thing for us  
6 to talk about today?

7 **MS. MOORE:** I believe so, Your Honor.

8 **THE COURT:** My brain is pretty fried, so remind me.  
9 So Sawyer, if I recall correctly, Sawyer was a Plaintiff's  
10 expert?

11 **MS. MOORE:** That's correct, Your Honor.

12 **THE COURT:** And Sawyer had two things. One, he had a  
13 specific causation opinion about Stevick; is that right?

14 **MS. MOORE:** Yes, Your Honor. He did -- he did a dose  
15 analysis there with Ms. Stevick.

16 **MR. KILARU:** In Stevick he offers an opinion as to  
17 specific causation that it was a substantial factor.

18 **THE COURT:** Okay.

19 **MR. KILARU:** Not just dose.

20 **THE COURT:** Okay. And then his -- then he has a more  
21 general opinion, which is about how glyphosate is absorbed into  
22 the body if you don't use protective equipment. Did I remember  
23 that roughly correctly?

24 **MS. MOORE:** Essentially so, yes, Your Honor.

25 **THE COURT:** Okay. And what is the -- since he

1 didn't -- since we know that he -- about his opinion about how  
2 glyphosate is absorbed into the body without the use of  
3 protective equipment could not be offered if we considered that  
4 a general causation opinion because he didn't -- you didn't put  
5 him up at that stage -- what is the -- what is the reason for  
6 offering an opinion -- a general opinion on how glyphosate is  
7 absorbed into the body without the use of protective equipment?

8 **MS. MOORE:** Well, first of all, Your Honor, it is not  
9 a general causation opinion that we are tendering him for.

10 **THE COURT:** Okay. You can label it however you want,  
11 but my question to you is: What is the purpose of it?

12 **MS. MOORE:** Sure. Absolutely, Your Honor.

13 So the purpose of it is that we believe it is helpful for  
14 the jury, Mr. -- Dr. Sullivan -- Dr. Sawyer is a toxicologist.  
15 And it will be helpful for them to understand the various  
16 factors as far as, you know, if you are not wearing protective  
17 gear, if you are not using protective equipment, the way that  
18 you spray the Roundup, how then that actually absorbs into the  
19 skin. I mean, that is not something that is just simple to  
20 understand. And so that's why he is being tendered as an  
21 expert.

22 As the Court will recall that during the general causation  
23 phase of the litigation, and I quote, Plaintiffs need not  
24 establish any particular level of exposure. And that neither  
25 Monsanto nor the Plaintiffs disclosed an expert regarding



1 exposure during general causation. Neither Dr. Sawyer or their  
2 expert Dr. Sullivan offered --

3 **THE COURT:** Right. But you have experts about --  
4 there are experts about how Mr. Hardeman's exposure, right?  
5 There are competing expert witnesses on that, if I'm  
6 remembering correctly.

7 **MS. MOORE:** That's right. It is Dr. Sawyer and  
8 Dr. Sullivan.

9 **THE COURT:** On Mr. Hardeman's exposure. You have an  
10 expert on Dr. Hardeman's exposure.

11 **MR. IMBROSCIO:** Yes, they don't have an expert on  
12 Hardeman's exposure because Dr. Sawyer didn't do those  
13 calculations.

14 **THE COURT:** Okay. So this is what I'm trying to  
15 understand. We -- why -- if it is not an -- if it is not an  
16 opinion about Hardeman's exposure, what is it and why is it  
17 anything other than a general causation opinion.

18 **MS. MOORE:** Well, it is not a general causation  
19 opinion because he is not offering an opinion as to whether or  
20 not Roundup is capable of causing non-Hodgkin's lymphoma.

21 **THE COURT:** Okay. But there are three prongs to the  
22 general causation phase. The first was the epidemiology. The  
23 second was the toxicology. And the third was the mechanism by  
24 which Roundup affects the body. Right?

25 **MS. MOORE:** Right.

1           **THE COURT:** And the witnesses who testified on that  
2 third topic talked about how Roundup is absorbed into the body  
3 and then causes cell damage; right?

4           **MS. MOORE:** Right.

5           **THE COURT:** And they might have even said, if you wear  
6 protective gear, it is not being going to be absorbed into the  
7 body. But if you don't wear protective gear, it is going to be  
8 absorbed into the body.

9           And, again, we have these studies of all these people in  
10 Ecuador who were exposed to Roundup and we found that it was  
11 absorbed into the body, okay.

12           So far what you have described to me sounds a lot like  
13 what those people were testifying about in the general  
14 causation phase. So I will let you take another shot at it.  
15 Explain to me why this is different and what this goes to, if  
16 not general causation.

17           **MS. MOORE:** Okay. It goes to the exposure level of  
18 Roundup, of the formulation. And this is the same thing that  
19 happened in the *Whitlock versus Pepsi* case. Dr. Sawyer was an  
20 expert in that case as well, Your Honor.

21           And I have a cite for the Court. Actually I have a copy  
22 of the opinion if you would like it, Your Honor.

23           May I?

24           **THE COURT:** Sure.

25           **MS. MOORE:** And in this case the district court,

1 Your Honor, excluded Dr. Sawyer's testimony. And on appeal the  
2 Ninth Circuit reversed -- they granted summary judgment as a  
3 result of that. And the Ninth Circuit reversed, and they  
4 actually said that -- and this is on the second page of the  
5 opinion -- it is -- the pinpoint side is 661 to 662.

6 It says, because Dr. Sawyer's opinion rests on reliable  
7 foundation and is relevant to the task at hand, what he offered  
8 in that case, in *Whitlock*, was exposure levels of a chemical  
9 were within a reasonable range of that known from several  
10 studies to induce the alleged injuries; and the Ninth Circuit  
11 to found that to be admissible testimony. It is not admissible  
12 for causation purposes. It is general applicability to help  
13 the jury understand what it is. And exposure --

14 **THE COURT:** I don't understand. I mean, this was not  
15 a case -- I gather this was not a case where it was bifurcated  
16 and there was this division between general causation and  
17 specific causation.

18 And I also gather -- hold on a second.

19 **MS. MOORE:** I'm not aware of that, Your Honor.

20 **THE COURT:** The opinion that Dr. Sawyer offered in  
21 this case was about the Plaintiff's exposure, and that the  
22 Plaintiff's exposure fell within a reasonable range of that  
23 known from several studies to induce the alleged injury. You  
24 are not offering Dr. Sawyer to talk about Hardeman's exposure;  
25 right?

1           **MS. MOORE:** That's correct, Your Honor.

2           **THE COURT:** So you are just talking generally about  
3 the ability -- he is talking generally -- in contrast to this  
4 case, Sawyer is talking generally about the ability of  
5 glyphosate to be absorbed in the body.

6           **MS. MOORE:** That's correct, Your Honor. And that's  
7 what he also testified to in Johnson. He talked about from a  
8 general standpoint, and he also talked about specifically  
9 related to Mr. Johnson. Here we are only having him testify to  
10 the jury with respect to the general applicability of the  
11 absorption.

12           **THE COURT:** Why can't your -- you had experts testify  
13 at the general causation phase about that. Why aren't you just  
14 calling them?

15           **MS. MOORE:** Well, that is a little different,  
16 Your Honor. So the exposure itself does not automatically  
17 equal the mechanistic data. So what we were talking about  
18 during general causation was oxidative stress, genotoxicity.  
19 He is not going to come up here and do that. We are not going  
20 to be cumulative whatsoever. He is not going to offer a  
21 general causation opinion, but exposure is different. As the  
22 Court will recall, there is four different aspects to IARC. So  
23 there is the Epi, the tox, mechanism and then exposure. And it  
24 was our understanding during the general causation phase that  
25 we would not have to offer an exposure expert. And that is

1 exactly what the defense did. The defense didn't offer a  
2 general causation expert either.

3 Dr. Sullivan, when we deposed him --

4 **THE COURT:** We heard testimony about how it is  
5 absorbed into the body, as I recall, at the general causation  
6 phase. It is possible I'm misremembering, but I thought we  
7 heard plenty of testimony about that from the mechanism people.

8 **MS. MOORE:** Right, but then there is also Monsanto has  
9 a number of dermal exposure studies, and we did not go through  
10 that during general causation. So when we are talking about  
11 the dermal -- the dermal exposure, that is relevant and it is  
12 helpful for the jury to hear that testimony. It is going to be  
13 very narrow, Your Honor.

14 **THE COURT:** What dermal exposure studies are you  
15 talking about?

16 **MS. MOORE:** Those are the ones from Monsanto. I  
17 wasn't part of general causation. I don't want to misspeak on  
18 that.

19 **MR. WISNER:** I can explain, Your Honor.

20 So, for example, there was a series of studies done here  
21 at the University of California San Francisco, where they had  
22 monkeys that they applied dosages dermally and then measured  
23 how much it was actually secreted in the urine and feces.  
24 There was another study done as well later on.

25 And there was also operator exposure studies where they

1 measure how much gets sprayed into -- how much gets absorbed  
2 into people when they are spraying with certain levels of  
3 protective gear. All of that is really about whether or not --

4 **THE COURT:** We talked about all of that stuff at  
5 general causation.

6 **MR. WISNER:** No, this stuff never came up in general  
7 causation.

8 **THE COURT:** I don't remember monkey studies, but I  
9 certainly remember the amount of glyphosate in people's urine  
10 and you were talking about --

11 **MR. WISNER:** Sure.

12 **THE COURT:** -- your experts were relying on the  
13 studies from South America where people were sprayed and --

14 **MR. WISNER:** Sure. That was looking at the  
15 genotoxicity of their cells and seeing how the -- how the  
16 actual DNA was damaged from exposure to Roundup. That's a  
17 mechanistic study. That is a very different issue.

18 So one of the arguments is that it doesn't absorb. They  
19 are going to say it washes off quickly. It is not something  
20 you even have to worry about when you are using it. That's why  
21 you don't have to wear gloves.

22 And he is going to say, no, no, you do because this is all  
23 the absorption that happens when it touches your skin. He  
24 actually diagrammed the skin, how it's a surfactant, how it  
25 penetrates. It is just sort of an overview how it gets into

1 the body, and that wasn't really part of causation because it  
2 really wasn't -- it depends on how the person is being exposed.

3 **THE COURT:** Okay.

4 **MS. MOORE:** Your Honor, so we asked Dr. Sullivan in  
5 his deposition, do you have an opinion on whether or not  
6 exposure to glyphosate causes cancer.

7 And his response, was on page 10, that's outside the scope  
8 of my work.

9 And similarly do you have an opinion on whether or not  
10 exposure to Roundup causes cancer.

11 Again, that is outside -- I'm not doing -- I'm not  
12 providing any opinion regarding causation.

13 So their expert, who is the counterpoint to Dr. Sawyer,  
14 testified that he is not providing causation opinion. As  
15 Mr. Wisner said, this is a dermal --

16 **THE COURT:** Who is -- whose testimony were you  
17 reading?

18 **MS. MOORE:** This is Dr. Michael Sullivan. It is  
19 page 10 of his deposition, Your Honor.

20 **THE COURT:** Okay.

21 **MS. MOORE:** And it goes on to the top of page 11 where  
22 he says, I am offering no causation opinion at all.

23 So, again, we think that it would be helpful to the jury  
24 to understand the general overview of how it absorbs into the  
25 skin. There was a great deal of time spent during

1 Mr. Hardeman's deposition about when did he take showers, when  
2 did he wash his hands, did he use the garden hose to wash his  
3 hands afterwards, or did he go back to the house. And so,  
4 again, it is not going to be case specific, but Dr. Sawyer will  
5 be able to testify -- should be able to testify to explain to  
6 the jury what does it mean when it lands on your hand, on your  
7 arm, on your leg? What does it actually do to your body.

8 And we are not talking about the cellular level there.

9 **THE COURT:** Okay.

10 **MR. KILARU:** Couple things, Your Honor.

11 First, that testimony can't actually be tied to  
12 Mr. Hardeman in anyway because Dr. Sawyer didn't do an analysis  
13 of that.

14 In Stevick's case, he did a calculation of dose --

15 **THE COURT:** No. I understand. I understand that.

16 **MR. KILARU:** So none of that actually ties to him.

17 **MS. MOORE:** And that's not what I am saying,  
18 Your Honor.

19 **MR. KILARU:** No, I know. I think there, then, is also  
20 a fit question of what that has to do with this case. If it is  
21 just general commentary of how Roundup works in the air, it is  
22 at that point general testimony. I don't think that because  
23 our expert disclaimed -- our rebuttal expert to Dr. Sawyer  
24 disclaimed an opinion as to causation that that means they get  
25 to introduce Dr. Sawyer as part of their case as to the issue



1 of causation.

2 **THE COURT:** Well, let me ask you this: This is part  
3 of Monsanto's case at trial that it rolls off the skin easily  
4 and it doesn't -- because of the surfactants or whatever, that  
5 it doesn't really absorb into the skin? Is that part of  
6 Monsanto's case at trial?

7 **MR. KILARU:** Well, I just -- the answer is I don't  
8 think it is part of Plaintiff's case either.

9 **THE COURT:** I know, but I'm asking whether it is part  
10 of your case.

11 **MR. KILARU:** I don't think we intend to get into that  
12 now, Your Honor. Again, sort of depending on how things  
13 unfold. But I will note that during the Daubert hearing  
14 Dr. Shustov, who is one of their causation experts, was asked  
15 if any of this matters to his analysis. He was asked -- and  
16 this is page 182 of the trial transcript.

17 Does it matter if glyphosate came into contact with skin?  
18 Does it matter if the Plaintiff showered? Does it matter how  
19 big of an area they were spraying? Does it matter what type of  
20 Roundup they used?

21 And their causation expert said, no, it doesn't matter.

22 So it is sort of general testimony --

23 **THE COURT:** This was here?

24 **MR. KILARU:** It was the video testimony with  
25 Dr. Shustov.

1           **THE COURT:** I don't remember that.

2           **MR. KILARU:** Yeah, and I can provide the transcript if  
3 you would like. But it is pages 182 through 184 of day one of  
4 the Daubert hearing. And so their experts are saying that the  
5 testimony Dr. Sawyer is providing doesn't advance the ball as  
6 to causation. We don't think it has any basis for coming in.

7           **MS. MOORE:** Except we don't know, Your Honor, the  
8 answer to your question, which is will Monsanto get into  
9 whether or not it -- it doesn't -- if it washes off the skin  
10 and there is actually no absorption to Roundup. He didn't  
11 answer that question.

12           So our problem is that in our case in chief we want to  
13 present Dr. Sawyer to talk about how it actually does absorb  
14 through the skin, and that would be helpful for the jury to  
15 hear.

16           **THE COURT:** Well, maybe the answer is that if Monsanto  
17 doesn't dispute that it absorbs into the skin, that there is no  
18 point in putting Sawyer up on that issue.

19           **MR. KILARU:** Your Honor, we don't intend to ask those  
20 questions, the questions that were talked about to  
21 Mr. Hardeman.

22           **THE COURT:** Say that one more time.

23           **MR. KILARU:** Sorry. We don't intend to ask the  
24 questions about Mr. Hardeman's use of gloves, any of that sort  
25 of stuff at trial.

1           **THE COURT:** But do you contend to contest the idea  
2 that -- do you intend to put on any evidence? Let's assume for  
3 the sake of argument that the Plaintiffs don't put on any --  
4 don't put on Sawyer, okay, or they are precluded from putting  
5 on Sawyer. Let's say that -- would Monsanto, then, in its case  
6 put on any evidence of the inability of the skin to absorb  
7 glyphosate or anything along those lines?

8           **MR. KILARU:** No, I don't think so, Your Honor, because  
9 what we -- the rebuttal to Dr. Sawyer is Dr. Sullivan who did a  
10 different exposure calculation about how much he thinks would  
11 have been absorbed. And that is not something we would have  
12 offered. It is a different calculation. It is not an outright  
13 denial of absorption, if that makes sense.

14           **MS. MOORE:** Your Honor, it is my understanding they  
15 argue it is less than 1 percent absorption rate. Dr. Sawyer  
16 testified that it is up to a 10 percent absorption rate.

17           **THE COURT:** It sounds like it is something that  
18 wouldn't come in. The thing that is weird about this is I do  
19 understand your, you know, explanation of the distinction  
20 between the mechanistic evidence that was put on in Phase One  
21 and the type of testimony that Dr. Sawyer wants to give, but  
22 it's not specific to Hardeman, right. He is not offering an  
23 opinion about -- about how much glyphosate Hardeman absorbed  
24 into his skin, and it sounds like they are not -- other than  
25 maybe in rebuttal -- they are not offering an opinion about how

1 much glyphosate Hardeman absorbed into his skin.

2 **MS. MOORE:** Well, my --

3 **THE COURT:** And if that's the case, then I'm left  
4 wondering whether there's -- whether Mr. Sawyer's testimony  
5 would be helpful to the jury within the meaning of the  
6 Rule 702.

7 **MS. MOORE:** Well, my understanding is that they have  
8 disclosed Dr. Sullivan to testify, that I thought they were  
9 bringing him live to testify here for that very reason, which  
10 is why we wanted Dr. Sawyer to testify. And our whole plan  
11 would be -- I don't want to get into trial strategy, but we  
12 would like him in our case in chief to cut him off at the pass.  
13 And so that's why we want him in Phase One.

14 **THE COURT:** Just as a parenthetical, I'm all in favor  
15 of cutting off at the pass if we -- you know, I don't think we  
16 need to be hyper-technical about, oh, you can't come in and do  
17 this, and so rebuttal, if it is a situation where we know  
18 Monsanto is going to put something on, you can cut it off at  
19 the pass in your case in chief. That's fine.

20 **MS. MOORE:** Well, I appreciate that, Your Honor.

21 **THE COURT:** The question is, is this something that  
22 you need to cut off at the pass. You probably -- your  
23 colleague is shaking his head --

24 **MR. KILARU:** I believe I said the answer is no  
25 already, that we don't intend -- Dr. Sullivan was styled as a

1 rebuttal witness to Dr. Sawyer. So if Dr. Sawyer doesn't  
2 testify, Dr. Sullivan wouldn't either.

3 **MS. MOORE:** That's the first I heard about that. So  
4 that does change some things, Your Honor.

5 **THE COURT:** We are doing a nice job of paring down.

6 **MS. MOORE:** That's what you said on Monday, so yes.

7 **THE COURT:** We have got -- I'm understanding why you  
8 might have had 50 hours in the Johnson case. I'm guessing you  
9 spent about 49 hours of those hours talking about what Monsanto  
10 did between 2012 and 2018, and maybe you spent -- maybe  
11 Dr. Sawyer's testimony --

12 **MS. MOORE:** And the marketing hours.

13 **MR. WISNER:** 49.5.

14 **MS. MOORE:** Your Honor, one other thing, though, is so  
15 we have been focused on Phase One.

16 For Phase Two, though, for Dr. Sawyer, as I mentioned  
17 earlier today, several hours ago, we have a failure-to-warn  
18 claim too. And so that goes to -- you know, what were they  
19 putting on the label and when. And that's why Dr. Sawyer's  
20 testimony would be important in Phase Two.

21 We would at least -- because, again, he goes back to  
22 absorption rate. And it would have made a difference if they  
23 had given a warning and Mr. Hardeman would have seen that, you  
24 know, if I don't wear gloves, this is going to get into my  
25 skin, that makes a difference. And that is the crux of the

1 failure-to-warn claim.

2 **THE COURT:** At Phase II, if they try to make it an  
3 issue that it wouldn't have mattered, I'm not getting the sense  
4 that they're going to argue this, but if at Phase II they argue  
5 it wouldn't have mattered if he wore protective gear or not,  
6 then I assume Dr. Sawyer's testimony would become helpful to  
7 the jury.

8 But, you know, I think as the case stands now, as the way  
9 the case is being teed up now, it seems like Dr. Sawyer's  
10 testimony, A, is not helpful to the jury within the meaning of  
11 702; and/or is kind of an unnecessary waste of time under  
12 Rule 403.

13 **MS. MOORE:** And the only thing I would bring to  
14 Your Honor's attention is obviously we're juggling lots of  
15 schedules with experts and bringing them live and being  
16 cognizant of that, and so my concern is we have Dr. Sawyer  
17 coming on a certain time period in Phase I, if you're going to  
18 allow him to testify in Phase I.

19 And so if the Court is inclined to say, "Well, let's see  
20 if they open up the door in their case-in-chief" or maybe they  
21 open up the door on cross-examination of one of our other  
22 experts, because that's feasible too, Your Honor, or if  
23 Mr. Hardeman is on the stand, they could open up the door that  
24 way, it's just, you know, we've got to be on standby to get an  
25 expert here, and so it creates a little bit of a scheduling

1 nightmare too.

2           **THE COURT:** So you want a ruling on that issue  
3 quickly?

4           **MS. MOORE:** Well, not -- well, I guess it depends on  
5 the ruling, Your Honor. So, I mean, you know, again where I  
6 was going with that, if you are inclined to say, "Well, you  
7 could bring him as a rebuttal," you know, our preference -- I  
8 mean, we want him to be able to testify so --

9           **THE COURT:** As I said, I mean, all in favor of cutting  
10 off at the pass, if we -- you know, if we know that it's going  
11 to be relevant at rebuttal, then you can bring somebody in  
12 their case-in-chief.

13           **MS. MOORE:** Right.

14           **THE COURT:** You know, there's -- we can order the  
15 trial testimony that way to make it as convenient as possible  
16 for everybody involved. It just doesn't seem to me, based on  
17 this discussion, that this is going to be one of those  
18 situations.

19           **MS. MOORE:** Okay. Well, and if they agree not to call  
20 Dr. Sullivan, then I'd like to confer with everyone too because  
21 it goes for all three cases, and just maybe we can come back on  
22 that. Because if they're going to withdraw Dr. Sullivan, that  
23 may change our position.

24           **THE COURT:** It sounds like they've only designated him  
25 as a rebuttal expert.

1           Is that true in all three cases?

2           **MR. KILARU:** I think the cases are a little different  
3 because the Stevick case, for example, there is -- I can't --  
4 for example, right now I don't think I can say we wouldn't call  
5 Sullivan in the Stevick case because in the Stevick case  
6 Dr. Sawyer did do a very complicated and extensive dose  
7 calculation that we think we'd have a right to rebut.

8           In Hardeman and Gebeyehou Dr. Sawyer did not do those  
9 things, and so I think to the extent that we've described  
10 Dr. Sullivan as a rebuttal witness, I don't think it's relevant  
11 in those cases.

12           **THE COURT:** Okay.

13           Okay. So do we have agreement at this point that at least  
14 in Gebeyehou's case and Hardeman's case that Sawyer and  
15 Sullivan should not be witnesses?

16           **MS. MOORE:** Well, for Phase I, Your Honor, you know,  
17 if they're not going to raise that issue in Phase I, then I  
18 think we can reach an agreement on that with the caveat if  
19 something -- if someone opens the door, if Monsanto opens the  
20 door --

21           **THE COURT:** As always.

22           **MS. MOORE:** -- you know, then we want to bring  
23 Dr. Sawyer, but we would want to be able to have him come in  
24 Phase II because of the failure to warn claim.

25           **THE COURT:** Yeah. Then that part I guess I'm not --



1 I'm not sure I understand. I mean, we could -- sorry.

2 **MR. WISNER:** Let me explain it really quickly.

3 So there's the failure to warn that it could cause cancer;  
4 right? That's a failure to warn claim and if they had done  
5 that, he wouldn't have used it, et cetera, et cetera. They're  
6 not disputing that. Different issue.

7 There's another --

8 **THE COURT:** Failure to warn by telling people to wear  
9 protective gear?

10 **MR. WISNER:** Exactly.

11 **THE COURT:** I understand.

12 **MR. WISNER:** And if they had told him to wear gloves,  
13 he would have worn gloves --

14 **MS. MOORE:** Right.

15 **MR. WISNER:** -- and then his exposure would have been  
16 down and he wouldn't have gotten cancer even though he was  
17 using it.

18 **THE COURT:** No, I get that. I understand that. But I  
19 assume what that means is that if they were to contend at  
20 Phase II that wearing gloves wouldn't have made a difference,  
21 then Sawyer's testimony would be relevant; right?

22 **MR. WISNER:** It's a little farther than that. They're  
23 going to contend they didn't need to make that warning because  
24 the data didn't support that requirement, and Dr. Sawyer will  
25 walk into the science saying, "Yeah, your studies did show it.

1 It says right here you're having this absorption rate and, in  
2 fact" --

3 **THE COURT:** So is your intention at Phase II to make  
4 that argument?

5 **MR. KILARU:** Your Honor, I think we talked about this  
6 earlier with the marketing material. I don't think we intend  
7 to get into this protective gear issue, and so I don't think  
8 this is an issue.

9 I mean, we have heard a lot about what we are apparently  
10 going to do, and I'm telling you that based on what I said  
11 earlier, I don't think that that's going to be an issue.

12 **THE COURT:** But the burden is on them; right? And so  
13 presumably as part of the failure to warn claim, they need to  
14 prove that it would have mattered, the warning would have made  
15 a difference. I haven't looked at those jury instructions  
16 yet --

17 **MS. MOORE:** That's correct, Your Honor.

18 **THE COURT:** -- but I assume they have to prove that  
19 the warning would have made a difference; right?

20 **MR. KILARU:** Uh-huh.

21 **THE COURT:** So maybe Dr. Sawyer's testimony is  
22 relevant on that front. Maybe Dr. Sawyer's testimony would be  
23 helpful within the meaning of 702 and not a waste of -- you  
24 know, not a waste of time under 403 for those purposes.

25 I mean, I'm not sure I've -- I'm not sure I've spent

1 enough time thinking about Phase II to be able to engage in a  
2 more meaningful discussion on it, and maybe everybody needs to  
3 go back and be giving -- and give that some more thought. But  
4 it sounds like we're in agreement that Sawyer and Sullivan are  
5 not testifying at Phase I.

6 **MS. MOORE:** And, Your Honor, just to clarify, and  
7 that's --

8 **THE COURT:** Does everybody agree on that? Everybody  
9 comfortable with that resolution?

10 **MS. MOORE:** That's fine, Your Honor. I just want to  
11 clarify that that has nothing to do with Dr. Sawyer's  
12 qualifications or the opinions he would be giving.

13 **THE COURT:** Oh, yeah.

14 **MS. MOORE:** It's just a matter of the evidence that's  
15 going to be presented or the defense has raised in this  
16 particular case.

17 **THE COURT:** That's right. I mean, it doesn't have  
18 anything to do either way with his qualifications or the  
19 methodology of his opinions because I don't think there's a  
20 need to get to that --

21 **MS. MOORE:** Okay.

22 **THE COURT:** -- to conclude. But thank you for asking  
23 that. That's an important question to ask.

24 **MS. MOORE:** It's an important for the expert. He  
25 would ask me.

1           **THE COURT:** Yeah. So I appreciate you asking that,  
2 and you're correct that it has nothing to do with either of  
3 those things.

4           **MS. MOORE:** Thank you, Your Honor.

5           And then on Phase II is the plan, then, that the Court  
6 will reserve ruling on Dr. Sawyer being able to testify and we  
7 could revisit that?

8           **THE COURT:** I think kind of -- I think given -- my  
9 sense is that maybe collectively we have not thought that issue  
10 through sufficiently to reach a conclusion on it now.

11          **MS. MOORE:** That's probably fair.

12          **MR. KILARU:** I think, as I think your order  
13 envisioned, we'll have another round of *Dauberts* if we get to  
14 Phase II with some of the other experts so perhaps we can just  
15 address that in connection with those. For example,  
16 Dr. Benbrook.

17          **THE COURT:** Yeah. I also think that one thing that  
18 this discussion really highlights is that you-all should give  
19 some careful consideration, and particularly Monsanto should  
20 give some careful consideration, to what you may be willing to  
21 stipulate to at Phase II; right?

22          Because this may be an example of something where it may  
23 not be appropriate for me to say that they can't call Sawyer at  
24 Phase II because it's their burden of proof, but there may be  
25 some stipulation Monsanto is willing to reach with the

1 plaintiffs that obviates the need to call Sawyer at Phase II;  
2 right? That's just the Court kind of thinking out loud.

3 **MR. KILARU:** Sure.

4 **THE COURT:** But I think there have been a number of  
5 examples of that today in this eight-hour long discussion that  
6 sort of highlight the need for Monsanto to think about what  
7 it's going to be willing to stipulate to at Phase II.

8 **MR. KILARU:** Fair enough.

9 **MS. MOORE:** Right. Thank you, Your Honor.

10 **MR. BRAKE:** Your Honor, if I may, one point of  
11 clarification. Brian Brake. I'm the primary counsel in  
12 Stevick.

13 The understanding about Mr. or Dr. Sawyer not testifying  
14 in Phase I, that's not an agreement we have with respect to  
15 Stevick because he has a specific dose calculation.

16 **THE COURT:** Right. And we'll --

17 **MR. BRAKE:** I just wanted to make sure the record was  
18 clear on that.

19 **THE COURT:** Yes.

20 **MR. BRAKE:** Thank you.

21 **THE COURT:** And we're putting off that issue.

22 **MR. BRAKE:** Yes, sir. Thank you.

23 **MR. KILARU:** We do have, as I think you know from the  
24 papers, a methodological challenge in that case as well, but we  
25 can take that when we need to.

1           **THE COURT:** Yes.

2           **MS. MOORE:** All right. Thank you, Your Honor.

3           **THE COURT:** Does that cover it for today?

4           **MS. MOORE:** I believe so, Your Honor.

5           **MR. IMBROSCIO:** Shall we talk about Portier?

6           **MR. WISNER:** Yeah.

7           **THE COURT:** Before you get to Portier, I'm already  
8 getting tired of hearing about Portier, but I want to talk  
9 about the questionnaires. Have you-all used the breaks to  
10 reach an agreement about the protocol for the use of the  
11 questionnaires?

12           **MS. MOORE:** I believe so, Your Honor.

13           **MR. STEKLOFF:** I think, Your Honor, we were going to  
14 propose each taking the copy that we have today, making 12  
15 copies internally, and then document -- Ms. Moore and I will  
16 both -- we will attest to the Court in whatever form you would  
17 like that we have --

18           **MS. MOORE:** We can draft a form if you want.

19           **MR. STEKLOFF:** -- that we complied to your order. To  
20 the extent something is scanned, it will be encrypted and  
21 everything will be destroyed and all 12 copies plus the  
22 original copy we receive today will be returned to the Court as  
23 necessary, and we will attest to whatever you need us to attest  
24 to, that no one is keeping anything.

25           **THE COURT:** So I put out -- I think I put out a draft

1 order governing this.

2 **MR. STEKLOFF:** Yeah.

3 **MS. MOORE:** Yes.

4 **THE COURT:** So is that -- should I make that -- should  
5 I issue that as a final order and you're saying that the at a  
6 station that you're contemplating would be consistent with  
7 that? I'm not remembering --

8 **MR. STEKLOFF:** It may need to be supplemented a little  
9 bit where we're attesting that -- because I think your draft  
10 order said we couldn't even make copies. So I think that this  
11 would say -- this might be a little bit different. We're happy  
12 to submit something to you quickly.

13 **MS. MOORE:** Your Honor, I mean, if you want --  
14 Ms. Mellen, if she wants to e-mail us your version, the parties  
15 could confer and then we could send back a version for  
16 Your Honor to review and sign if that's easier.

17 **THE COURT:** I'd like to issue an order concurrent with  
18 giving you the questionnaires.

19 **MS. MOORE:** Oh, okay.

20 I think on your order, I have it here, Your Honor -- here,  
21 you can look at it. That's fine.

22 But it says that -- is it on the first page?

23 **MR. STEKLOFF:** Yes. I think where it says --

24 **THE COURT:** I think I forgot to bring that one. So  
25 give me a second and let me pull it up.





1           **MS. MOORE:** I believe so.

2           **MR. STEKLOFF:** I think it just needs to contemplate  
3 that we can make whatever, a certain number of copies and can  
4 in encrypted format scan -- this is -- they want the scanning  
5 to be clear -- but encrypted format scan everything but that  
6 everything will be destroyed and the copies will be returned to  
7 the court. Unless you want us to just destroy them or we can  
8 bring the boxes back.

9           **THE COURT:** Destroy. Destroy.

10          **MR. STEKLOFF:** Okay.

11          **MS. MOORE:** That's fine.

12          **THE COURT:** So each side can make 12 copies?

13          **MS. MOORE:** Yes, Your Honor.

14          **THE COURT:** And create an electronic version that can  
15 only be -- it's password -- it's encrypted and password  
16 protected?

17          **MS. MOORE:** That's fine, Your Honor, yes.

18          **THE COURT:** And, Kristen, are you comfortable with  
19 saying just that they should destroy them as opposed to return  
20 them?

21          **THE CLERK:** Yes. I mean, they're officers of the  
22 court so...

23          **THE COURT:** Yeah.

24                Okay. Yes, and we'll say that you have to destroy them.

25          **THE CLERK:** We can file something after everything's

1 been destroyed electronically in hard copy attesting to that.

2 **THE COURT:** Okay.

3 Okay. We'll make those changes and put that on file so  
4 you can grab your questionnaires that I know you've been  
5 salivating over for the last few hours.

6 **MS. MOORE:** Thank you, Your Honor.

7 **THE COURT:** So what --

8 **MS. MOORE:** Your Honor, for the 20 or so jurors who  
9 are going to be completing questionnaires tomorrow, what  
10 process should we go through in order to get copies of those?

11 **THE COURT:** Do you want to send somebody to pick them  
12 up tomorrow afternoon?

13 **MS. MOORE:** That's fine. About what time do you  
14 think, Your Honor?

15 **THE CLERK:** 3:00.

16 **THE COURT:** 3:00.

17 **MS. MOORE:** 3:00? Okay. Thank you.

18 **MR. STEKLOFF:** And while we're on the topic of jury  
19 selection, is it your intent to pick eight jurors?

20 **THE COURT:** Good question. I was pondering nine  
21 jurors. Does that sound -- you're both nodding your head.

22 **MS. MOORE:** It's better than eight, Your Honor. I'm  
23 just nervous because of the length of the trial and, of course,  
24 obviously we have to have six at the end of the day. And so,  
25 you know.

1           **THE COURT:** And I haven't gone back to look at the  
2 rules. That doesn't give you any more peremptory challenges;  
3 right? Still three peremptories for each?

4           **MS. MOORE:** Can I get back to you on that Friday,  
5 Your Honor?

6           **MR. STEKLOFF:** Yeah, I don't know the answer.

7           **THE COURT:** In the criminal cases, as you know, it  
8 changes depending on how many jurors you have and alternates.  
9 You get more --

10          **MS. MOORE:** Right.

11          **THE COURT:** Not depending on how many jurors you have,  
12 but depending on how many alternate jurors you have. But, yes,  
13 so let's do nine either way.

14          **MS. MOORE:** Okay.

15          **THE COURT:** I'm going to assume it's three peremptory  
16 challenges per side unless you tell me that the rules require  
17 otherwise.

18          And what time are we getting together on Friday?

19          **MS. MOORE:** I believe it's 10:30, Your Honor.

20          **THE COURT:** Okay. That sounds good.

21          Anything else? Was there something about Portier?

22          **MS. MOORE:** Okay. I'm going to leave the podium then.  
23 Thank you, Your Honor.

24          **MR. IMBROSCIO:** Just quickly on that, since it may be  
25 our only time to talk until next week, I think three small

1 issues.

2 One is, given that we're going to Australia, it may be  
3 that --

4 **THE COURT:** Are you going to Australia?

5 **MR. IMBROSCIO:** Some people are going to Australia. I  
6 am. I'm going, Your Honor.

7 Given the fluid nature of the trial and how doors may be  
8 opened and closed and reopened and the like, I take it that if  
9 we end up asking questions that remain off limits, we just  
10 won't designate them. It's not a ground for stop the  
11 deposition. We're going to, you know, call.

12 **THE COURT:** Yes.

13 **MR. IMBROSCIO:** Okay. I want to make sure just so  
14 that's clear.

15 **THE COURT:** That's certainly what I was assuming, that  
16 in that respect it would be treated like depo designations.

17 **MR. IMBROSCIO:** Understood. Fair enough.

18 Two is just the timing of it. I think Mr. Wisner has  
19 given sort of his estimate of what the time is going to be. I  
20 just want to make sure we have time. We don't want to get  
21 squeezed out given we're going to be there. And I think that  
22 should not be an issue; but if it gets to be we're up to hour  
23 seven and Mr. Wisner is still going on his Phase I direct and  
24 he insists on proceeding, we may have to call the Court. We  
25 hope that doesn't happen, but we don't want to get squeezed out

1 given that we're starting the trial on Monday and we have  
2 basically three sessions of four to four and a half hours, as I  
3 understand it, which should be more than enough time by a long  
4 stretch, but we're just nervous about --

5 **THE COURT:** I didn't really understand anything that  
6 you said.

7 **MR. IMBROSCIO:** You sound like my wife. You sound  
8 like my wife, Your Honor.

9 Just we wanted to make sure we don't get squeezed out on  
10 the time since --

11 **THE COURT:** Squeezed out on what times?

12 **MR. IMBROSCIO:** That we have enough time to conduct  
13 the examination that we think we need to conduct for this  
14 trial, Your Honor.

15 **THE COURT:** Right. So what have you agreed to on it?

16 **MR. WISNER:** I don't know what problem we're trying to  
17 solve here.

18 **THE COURT:** You need to talk about this.

19 **MR. IMBROSCIO:** Here's the issue. The money. We do  
20 need to resolve that for him given --

21 **MR. WISNER:** Money.

22 **MR. IMBROSCIO:** And what I had proposed to Mr. Wisner  
23 is that we would think that a good compromise would be that  
24 Mr. -- or Dr. Portier's payments for everything except the  
25 *Johnson* trial should be the number that is used. I think

1 Mr. Wisner has taken the position it should not include the  
2 *Daubert* hearing in this court, and I think that's --

3 **MR. WISNER:** Both of them.

4 **MR. IMBROSCIO:** -- the dispute.

5 **MR. WISNER:** So it would actually be more than that.  
6 So we agreed that we would calculate the time he took before he  
7 prepared his expert report and then his second report on the  
8 AHS. But then having to come here twice and prepare for  
9 testimony twice, that is a considerable expense that was  
10 borne -- you know, the purposes of the general causation phase,  
11 that wasn't borne by Monsanto's expert. So it's going to  
12 inflate his fee higher than I think is appropriate. It was  
13 court ordered.

14 Also we're going to exclude -- he's been deposed many  
15 times in many other cases, and we're going to exclude all that.  
16 So we would agree to all that time plus whatever time he spent  
17 for this case, which I think is a fair compromise.

18 **THE COURT:** I need to get into Dr. Portier's will  
19 somehow. How much money has he made?

20 **MR. WISNER:** I actually don't know, but it's probably  
21 close to half a million over the last --

22 **THE COURT:** That's all? I would have guessed more.

23 **MR. WISNER:** It might be more than that, Your Honor.  
24 I actually don't know so I'm just guessing. And for what it's  
25 worth, half of it's been paid already or taxed to the *Johnson*

1 case.

2 **THE COURT:** Because you didn't get enough money in the  
3 *Johnson* case to pay for all of it?

4 **MR. WISNER:** Hey, man, there's a rule that says -- we  
5 said, "Pay us \$6 million, we'll go away." They said, "Go  
6 fish." And we said, "Okay."

7 **THE COURT:** All right. So you believe that -- so when  
8 you're -- for your experts, Mucci and the general causation  
9 experts, you're saying that the amount that we should say they  
10 are compensated for this case would include obviously any work  
11 that they've done to prepare to testify at trial and their  
12 trial testimony and their reports and the costs associated with  
13 coming to and testifying at the *Daubert* hearing?

14 **MR. IMBROSCIO:** Yeah.

15 **THE COURT:** And you say that that inflates Portier  
16 because he had to come back twice?

17 **MR. WISNER:** And Ritz, yeah.

18 **THE COURT:** What?

19 **MR. WISNER:** And Ritz.

20 **THE COURT:** And Ritz?

21 **MR. WISNER:** Yeah.

22 **THE COURT:** I think that is a fair point. So why  
23 don't we just have -- why don't we just say that their second  
24 trips don't count.

25 **MR. WISNER:** Okay. That's fine. We're not going to

1 include other cases obviously that were not in the MDL.

2 **THE COURT:** Right. And you are in agreement on that?

3 **MR. IMBROSCIO:** Yeah. I think that's fine. Yeah, the  
4 other testimony, we agree that that's a fair compromise.

5 **THE COURT:** Okay. So we have agreement on that.

6 **MR. WISNER:** We do. However, I will issue our --  
7 lodge our objection that if they're going to start hammering  
8 him on the amount of money he's gotten paid, I think it starts  
9 opening the door to him saying, "Well, hold on. I don't just  
10 represent Mr. Hardeman. I'm not just here for Mr. Hardeman.  
11 There's thousands of cases."

12 So they have to walk that line. If they want to hammer  
13 him on it, then, I'm sorry, they open the door, otherwise it's  
14 just unfair.

15 **MR. IMBROSCIO:** Well, it's --

16 **THE COURT:** But it's --

17 **MR. IMBROSCIO:** I'm sorry, Your Honor.

18 **THE COURT:** But it's what he's paid in -- we're  
19 reaching an agreement about what he's paid in connection with  
20 this case.

21 **MR. WISNER:** But, no. So I don't agree with that.  
22 This is what we're going to say to the jury. What he's gotten  
23 paid in connection to this case is not that. It's that divided  
24 by 10,000. That's the actual number. So if you want to do  
25 that number, fine, we'll do that; but I'm coming to some sort



1 of, you know, kind of untruth for the jury but they have to be  
2 careful about how far they go because if they did, they're  
3 going to open the door. He's going to say, "Hold on a second.  
4 I'm working for 10,000 people here. This is not just the  
5 Hardemans footing a half-a-million-dollar bill or whatever that  
6 is."

7 **THE COURT:** I think there's probably some line that  
8 they would cross, but I'm not sure I can predefine what that  
9 line is.

10 **MR. WISNER:** Yeah, I know.

11 **THE COURT:** Okay.

12 **MR. IMBROSCIO:** We got on Monday for Dr. Portier a new  
13 reliance list with 70-plus publications, about 20 or so of  
14 which were -- existed before he testified at the *Daubert*  
15 hearing. It puts us in a tough situation.

16 **THE COURT:** I'm sure they're all seared into your  
17 brains.

18 **MR. IMBROSCIO:** We don't -- what's not seared into the  
19 brains is what he's going to say about them, and --

20 **MR. WISNER:** That's not true.

21 **MR. IMBROSCIO:** -- like if we get -- the reason you do  
22 discovery and the reason that we had a *Daubert* hearing was to  
23 make sure that they're using these materials appropriately and  
24 within the realm of reliability, and now we've got, you know,  
25 70 articles that he's going -- we don't know what he's going to

1 say about them.

2 **THE COURT:** But you said 30 of them were -- so a bunch  
3 of them are new; right?

4 **MR. IMBROSCIO:** Yes, although 20 -- 50 of them roughly  
5 are since he testified at the *Daubert* hearing, 20 of them  
6 existed before he testified at the second time at the *Daubert*  
7 hearing; but none of which we have any discovery on how he's  
8 relying on them and what his views are on them, and that just  
9 presents a discovery challenge for us.

10 We're going to go into a trial. It's like someone dumping  
11 on us the day before someone goes on the stand, "Oh, these are  
12 20 more articles that he's going to talk about." That just  
13 seems to violate the fundamental basics of pretrial discovery.

14 **MR. WISNER:** That's just not true. He's been deposed  
15 repeatedly since *Daubert* in Missouri cases and elsewhere where  
16 they had an opportunity to ask him about these questions. I  
17 think the real question to be presented to the Court is how  
18 many are on this list that weren't on the last time they took  
19 his testimony. It's probably five or ten and they're all new.

20 So let's get our facts straight about what they've had the  
21 opportunity. They deposed this guy for days.

22 **THE COURT:** You're talking about all the cases  
23 throughout the country collectively and all the depositions  
24 collectively that he's submitted to?

25 **MR. WISNER:** Exactly. And every time he gets deposed

1 again, we give him a new reliance list to update it. We've  
2 added some stuff that was added to his reliance list, but  
3 they've had a chance to ask him questions about it. So if they  
4 think they don't know what his opinions are, that's madness. I  
5 think they have, like, four days' worth of testimony. I mean,  
6 it's absurd.

7 **THE COURT:** I don't think there's anything I can say  
8 about it now other than, you know, if he gives some testimony  
9 about new material that was only, you know, disclosed for the  
10 first time, you know, now, you know, and Monsanto finds that  
11 that testimony is particularly prejudicial to Monsanto's case,  
12 then Monsanto can take it up with me afterwards and move to  
13 strike that testimony and we can talk about it then.

14 **MR. WISNER:** Sounds good.

15 **THE COURT:** I sort of doubt it will come to that --

16 **MR. WISNER:** Yeah.

17 **THE COURT:** -- but we can -- but if it does, we can --  
18 you know, Monsanto can raise it.

19 **MR. IMBROSCIO:** That's fair, Your Honor. Thank you.

20 **THE COURT:** Anything else?

21 **MR. WISNER:** Would you like any souvenirs from  
22 Australia?

23 **THE COURT:** I will not construe that as a bribe offer.

24 **MR. WISNER:** Oh, Good Lord.

25 (Laughter)

1           **MR. WISNER:** That was a joke.

2           **THE COURT:** See you on Friday. Thank you.

3           **ALL:** Thank you, Your Honor.

4           **THE CLERK:** Court is adjourned.


5                   (Proceedings adjourned at 5:08 p.m.)

6                               ---oOo---

7  
8  
9                               **CERTIFICATE OF REPORTERS**

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

12  
13   DATE:   Wednesday, February 13, 2019

14  
15  
16  
17                               

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

20  
21                               

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

24  
25