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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF ALAMEDA**

16 COORDINATION PROCEEDING
SPECIAL TITLE (Rule 3.550)
17 ROUNDUP PRODUCTS CASES

JCCP NO. 4953

ASSIGNED FOR ALL PURPOSES TO
JUDGE WINIFRED SMITH
DEPARTMENT 21

18 THIS DOCUMENT RELATES TO:

19 *Alva Pilliod, et al. v. Monsanto*
20 *Company, et al.*, Case No. RG17862702

**MONSANTO COMPANY'S NOTICE OF
MOTION AND MOTION TO EXCLUDE
TESTIMONY OF JAMES MILLS ON SARGON
GROUNDS**

21
22 Hearing Date: March 7, 2019
Time: 10:00 a.m.
23 Department: 21
Reservation No.: R-2048312

24 PARTY: Defendant MONSANTO COMPANY
25 RESPONDING PARTY: Plaintiff ALBERTA PILLIOD
SET NO.: ONE
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1 **TO EACH PARTY AND THEIR ATTORNEY(S) OF RECORD:**

2 PLEASE TAKE NOTICE that on March 7, 2019, at 10:00 a.m., or as soon thereafter as
3 counsel may be heard, in Department 21 of the above-entitled court, located at 1221 Oak Street,
4 Oakland, California, Defendant Monsanto Company hereby moves this Court pursuant to *Sargon*
5 *Enterprises, Inc. v. University of Southern California*, 288 P.3d 1237 (Cal. 2012), and California
6 Evidence Code §§ 720(a), 801, 802, and 803 for an order excluding the testimony of Mr. James Mills.

7
8 Dated: February 12, 2019

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1 **INTRODUCTION**

2 Defendant Monsanto moves to exclude the testimony of plaintiffs’ expert James Mills on the
3 issue of Mrs. Alberta Pilliod’s future expenses for the prescription drug Revlimid. Mr. Mills’
4 opinion should be excluded for three independent reasons. First, Mr. Mills assumed a price for
5 Revlimid different than that Mrs. Pilliod and her insurer actually pay for the drug. Specifically, his
6 opinion is based on Revlimid prices for *uninsured customers* listed on the website “drugs.com.” Mrs.
7 Pilliod has insurance and thus these prices are irrelevant to the future costs she will incur or that will
8 be paid on her behalf. Second, Mr. Mills’ opinion relies on unsupported assumptions concerning
9 Mrs. Pilliod’s life expectancy. Third, Mr. Mills – who is not a physician and has no independent
10 basis to inform his calculations – simply assumed that Mrs. Pilliod would require Revlimid for the
11 rest of her life. Accordingly, Mr. Mills’ opinion concerning Mrs. Pilliod’s future drug costs should
12 be excluded as speculative and unreliable.

13 **MR. MILLS’ EXPERT REPORT AND DEPOSITION TESTIMONY**

14 Plaintiffs Alva and Alberta Pilliod designated James Mills as an economic expert to testify
15 concerning Mrs. Pilliod’s future expenses for the prescription drug Revlimid (lenalidomide). Mr.
16 Mills opines that Mrs. Pilliod will incur \$3,943,628 in future Revlimid costs. Ex. A, Mills Report at
17 22. Mr. Mills’ opinion is based on 1) the annual cost of Revlimid listed on drugs.com for uninsured
18 customers; 2) a projection of life expectancy for Caucasian women born in 1944; and 3) an
19 assumption that Mrs. Pilliod will require use of the drug for the remainder of her life.

20 To determine the cost of Revlimid, Mr. Mills relied exclusively on the expert report of
21 another plaintiffs’ expert, Dr. Chadhi Nabhan:

22 Q: And just to be clear, the -- the basis for the pricing information for Revlimid cited in
23 your report comes exclusively from Dr. Nabhan?

24 A: Correct.

25 Ex. B, Mills 2/5/19 Dep. at 54:21-24. Dr. Nabhan guessed at Mrs. Pilliod’s Revlimid cost, not by
26 looking at what her actual cost has been for the medication, but instead by looking at the listed price
27 on a website called drugs.com:

28 Q: How did you determine the cost [of Revlimid]?

1 A: This is the price, not the cost. So the price. The price of 21 -- of lenalidomide, you
just can go on drugs.com, and you can look at the cost, at the price.

2 Q: Did you use Google essentially?

3 A: Yeah. I mean, you just -- drugs.com . . .

4 Ex. C, Nabhan 1/19/19 Dep. at 128:24-129:5.¹ He did not determine how much Mrs. Pilliod actually
5 pays:

6 Q: In terms of cost, did you ask her how much she pays out-of-pocket?

7 A: I didn't ask her how much she pays.

8 Q: So you don't know?

9 A: I don't know how much she's paying.

10 *Id.* at 129:14-18. But the single webpage referenced by Dr. Nabhan, on its face, does not apply to
11 Mrs. Pilliod. Instead, the drugs.com page relied on by Dr. Nabhan expressly states that the Revlimid
12 prices "are for cash paying customers only and are not valid with insurance plans." Ex. D, Revlimid
13 Prices, drugs.com. There is no dispute Mrs. Pilliod has an insurance plan:

14 Q: And did Mrs. Pilliod have an insurance plan that she's operating under?

15 A: Yes, she did have an insurance plan. Just don't know how much she paid versus the
16 insurance versus out-of-pocket, et cetera.

17 Ex. C, Nabhan 1/19/19 Dep. at 204:21-25.

18 Next, using the drugs.com Revlimid price for uninsured customers of over \$20,000 for a 28-
19 day supply, Mr. Mills calculated Mrs. Pilliod's per annum cost for the remainder of the average life
20 expectancy of a Caucasian woman born in 1944. Ex. A, Mills Report at 24. Based on that assumed
21 life expectancy, Mr. Mills projected that Mrs. Pilliod will live to age 87.8. Ex. B, Mills 2/5/19 Dep.
22 at 51:24-52:14. As a result, in his analysis, Mr. Mills did not take into consideration any of Mrs.
23 Pilliod's existing medical conditions or morbidities. *Id.* at 52:20-53:1. After adjusting for inflation,
24 wages and wage growth, and reducing to present value, Mr. Mills opines that Mrs. Pilliod's future
25 medical costs for Revlimid total \$3,943,628. Ex. A, Mills Report at 22.

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¹ The transcript of the deposition of Dr. Nabhan has been excerpted due to volume.

1 **LEGAL STANDARD**

2 In California, the trial court “has the duty to act as a ‘gatekeeper’ to exclude speculative
3 expert testimony.” *Sargon Enterprises, Inc. v. Univ. of S. California*, 55 Cal. 4th 747, 753 (2012). A
4 trial court must exclude expert opinion testimony that is “(1) based on matter of a type on which an
5 expert may not reasonably rely, (2) based on reasons unsupported by the material on which the
6 expert relies, or (3) speculative.” *Id.* at 771-72. In other words, “[w]here an expert bases his
7 conclusion upon assumptions which are not supported by the record, upon matters which are not
8 reasonably relied upon by other experts, or upon factors which are speculative, remote or
9 conjectural, then his conclusion has no evidentiary value. In those circumstances the expert’s
10 opinion cannot rise to the dignity of substantial evidence.” *Borger v. Dep’t of Motor Vehicles*, 192
11 Cal. App. 4th 1118, 1122 (2011) (citations omitted in original). In short, the court’s role is to make
12 certain that an expert “employs in the courtroom the same level of intellectual rigor that
13 characterizes the practice of an expert in the relevant field.” *Sargon*, 55 Cal. 4th at 772 (citation
14 omitted).

15 **ARGUMENT**

16 Mr. Mills bases his opinion for future medication costs on a drug price that is irrelevant to the
17 actual cost incurred by Mrs. Pilliod or paid on her behalf. That alone is sufficient to exclude his
18 testimony concerning Mrs. Pilliod’s future drug costs. Moreover, with no factual support, Mr. Mills
19 opines Mrs. Pilliod will live to age 87.8 and take Revlimid for the rest of her life. These
20 unsubstantiated assumptions provide additional independent reasons to exclude Mr. Mills’ opinion
21 on Mrs. Pilliod’s future drug costs.

22 First, the Revlimid price Mr. Mills uses in his damages calculation is unrelated to the actual
23 cost incurred by Mrs. Pilliod or her insurer. To be recoverable, a plaintiff’s medical expenses “must
24 be both incurred and reasonable.” *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541,
25 555 (2011). In *Howell*, the California Supreme Court held that “an injured plaintiff whose medical
26 expenses are paid through private insurance may recover as economic damages no more than the
27 amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at
28 the time of trial.” *Id.* at 566. The court explained that because medical providers typically enter into

1 agreements with private insurers in which insurers pay discounted prices, evidence of a higher billed
2 amount is irrelevant “on the issue of past medical expenses.” *Id.* at 567. The court rejected the
3 plaintiff’s collateral source rule argument, holding that it “has no bearing on amounts that were
4 included in a provider’s bill but for which the plaintiff never incurred liability because the provider,
5 by prior agreement, accepted a lesser amount as full payment. Such sums are not damages the
6 plaintiff would otherwise have collected from the defendant.” *Id.* at 548-49. This holding was
7 extended to future medical expenses in *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308 (2013). In
8 *Corenbaum*, the court held that “[e]vidence of the full amount billed for past medical services
9 provided to plaintiffs [] cannot support an expert opinion on the reasonable value of future medical
10 services.” *Id.* at 1331 (citation omitted). The court further explained that permitting an expert to base
11 an opinion on a full amount billed for medical expenses would violate the collateral source rule
12 because it “would lead to the introduction of evidence concerning the circumstances by which a
13 lower price was negotiated with that plaintiff’s health insurer.” *Id.* at 1332 (citation omitted).

14 Contrary to the mandates in *Howell and Corenbaum*, Mr. Mills’ damages analysis is not
15 based on expenses Mrs. Pilliod or her insurer actually incurred. In fact, Mr. Mills never even
16 inquired about the amount billed for Mrs. Pilliod’s Revlimid, let alone her actual costs:

17 Q: Do you know what Mrs. Pilliod’s co-pay is on her Revlimid?

18 A: No.

19 Q Do you know how much her insurance company, if any, is covering for her 28-day
20 Revlimid prescription?

21 A: No.

22 Q: Have you reviewed any type of explanation of benefit information from Mrs. Pilliod’s
23 insurer company – insurance companies regarding her Revlimid?

24 A: No.

25 Ex. B, Mills 2/5/19 Dep. at 51:3-14. Instead, Mr. Mills relies on Dr. Nabhan, who estimated Mrs.
26 Pilliod’s Revlimid costs based on a drugs.com listing for “cash paying customers” without “valid
27 insurance plans.” As Dr. Nabhan acknowledged in his deposition, however, Mrs. Pilliod has
28 insurance. Ex. C, Nabhan 1/19/19 Dep. at 204:21-25. Thus, the drugs.com price is, by its own terms,

1 irrelevant to the actual cost to be incurred by Mrs. Pilliod or her insurer for Revlimid in the future.²
2 As such, Mr. Mills’ opinion lacks a reasonable foundation and it should be excluded under Evidence
3 Code § 801.³

4 Likewise, the life expectancy assumption utilized by Mr. Mills is not based on Mrs. Pilliod’s
5 particular circumstances and is inconsistent with the pleadings and evidence provided in the record
6 thus far. Mr. Mills testified: “[T]here’s nothing specific that I have to Mrs. Pilliod and her medical
7 conditions.” Ex. B, Mills 2/5/19 Dep. at 52:25-53:1. Consequently, Mr. Mills assumes Mrs. Pilliod
8 will live to age 87.8, the average life expectancy of a Caucasian female born in 1944. However, in
9 prior pleadings filed in connection with the application for trial preference, Mrs. Pilliod asserted her
10 health has been “going downhill” since her 2016 cancer relapse. Ex. F, Alberta Pilliod 10/12/18
11 Decl. at ¶ 8. Likewise, Dr. Nabhan opined that Mrs. Pilliod “remains at a substantially high risk for
12 disease recurrence, progression, and relapse,” and should she relapse, “the disease is likely to be
13 fatal.” Ex. G, Nabhan 8/30/18 Decl. at ¶ 6. Based in large part on Mrs. Pilliod’s uncertain health and
14 the fear she might “die before trial,” plaintiffs moved for – and the court granted – trial preference
15 for the Pilliods. Plaintiffs’ 8/30/18 Motion for Trial Preference at 7. Whereas plaintiffs’ lawyers, Dr.
16 Nabhan, and Mrs. Pilliod all claim she is in fragile health, Mr. Mills ignores these assertions in his
17 analysis. Relying on a national statistic to determine life expectancy without any consideration of

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19 ² Even if this were the price paid by Mrs. Pilliod or incurred on her behalf, which again it is not, Mr.
20 Mills provides no basis for assuming a constant price of Revlimid in the future after its patent
21 protection expires:

22 Q: Have you done any research or analysis on the impact of a drug going generic on
23 pricing?

24 A: No.

25 Q: Does it stand to reason that if a drug goes generic there’s more competition and the
26 prices go down?

27 A: I mean, that’s certainly, you know, what -- what I’ve seen and what my understanding
28 is from a non-expertise point of view.

Q: Have you done any research or analysis to see how the historical price of Revlimid --
Revlimid has changed?

A: No.

Ex. B, Mills 2/5/19 Dep. at 58:1-13.

³ To the extent Plaintiffs may attempt to elicit similar opinions through Dr. Nabhan rather than Mr.
Mills, that opinion testimony should be excluded for similar reasons as set forth above.

1 Mrs. Pilliod’s specific circumstances, Mr. Mills does not employ “the same level of intellectual rigor
2 that characterizes the practice of an expert in the relevant field.” *Sargon*, 55 Cal. 4th at 772 (citation
3 omitted).

4 Equally speculative is Mr. Mills’ decision to calculate drug costs through the end of Mrs.
5 Pilliod’s life. Ex. A, Mills Report at 24. Contrary to the assumption in his report, Mr. Mills
6 acknowledged in his deposition that Mrs. Pilliod may not need Revlimid for her full lifetime and did
7 nothing to confirm his assumption one way or the other:

8 Q: Is it your understanding that she’ll need to take the Revlimid -- Revlimid for the rest
9 of her life?

10 A: Well, so what Dr. Nabhan said was for the foreseeable future. So it’s not well-
11 defined. It’s -- it’s not for a year, it’s not until the end of his -- her life, again, in terms
12 of what’s defined. But the foreseeable future. So if that’s anything other than her life
13 expectancy, he didn’t define it.

14 Ex. B, Mills 2/5/19 Dep. at 56:11-20. Rather than determining what Dr. Nabhan meant by
15 foreseeable future, Mr. Mills simply forged ahead without seeking any clarification whatsoever:

16 Q: Did you attempt to seek clarification on what he meant by the foreseeable future?

17 A: No.

18 *Id.* at 56:21-23. As a result, Mr. Mills’ entire analysis as to how long Mrs. Pilliod will require
19 Revlimid is based on a conjectural, speculative assumption that “foreseeable future” means her
20 entire lifetime.

21 At bottom, Mr. Mills bases his entire opinion as to Mrs. Pilliod’s future drug costs on one
22 three-sentence paragraph from Dr. Nabhan’s expert report. *See* Ex. E, Nabhan 1/18/19 Report at 22,
23 ¶ 19.⁴ Because Mr. Mills uses a Revlimid price in his damages calculation unrelated to any cost Mrs.
24 Pilliod has or ever will incur, speculates that “foreseeable future” equates to Mrs. Pilliod’s entire
25 lifetime, and calculates Mrs. Pilliod’s life expectancy without considering her actual medical
26 condition or circumstances, Mr. Mills’ opinion concerning Mrs. Pilliod’s future Revlimid costs is
27 unreliable, speculative, and should be excluded.

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⁴The expert report of Dr. Nabhan has been excerpted and attachments excluded due to volume.

1 **CONCLUSION**

2 For the reasons stated above, the court should exclude Mr. Mills' opinion on Mrs. Pilliod's
3 future Revlimid medication costs.

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5 Dated: February 12, 2019

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