

1 Michael J. Miller (appearance *pro hac vice*)
mmiller@millerfirmllc.com
2 Curtis G. Hoke (SBN: 282465)
choke@millerfirmllc.com
3 **The Miller Firm, LLC**
108 Railroad Ave.
4 Orange, VA 22960
Tel: (540) 672-4224
5 Fax: (540) 672-3055

Kelly A. Evans (*pro hac vice*)
kevans@efstriallaw.com
Jay J. Schuttert (*pro hac vice*)
jschuttert@efstriallaw.com
Evans Fears & Schuttert LLP
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Tel: (702) 805-0290
Fax: (702) 805-0291

6 R. Brent Wisner, Esq. (SBN: 276023)
rbwisner@baumhedlundlaw.com
7 Pedram Esfandiary (SBN: 312569)
pesfandiary@baumhedlundlaw.com
8 **Baum, Hedlund, Aristei & Goldman,**
P.C.
9 12100 Wilshire Blvd. Suite 950
Los Angeles, CA 90025
10 Tel.: (310) 207-3233
Fax: (310) 820-7444

Tarek Ismail (*pro hac vice*)
tismail@goldmanismail.com
Joe Tomaselli (*pro hac vice*)
jtomaselli@goldmanismail.com
Goldman Ismail Tomaselli Brennan & Baum
564 West Randolph Street, Suite 400
Chicago, IL 60661
Tel: (312) 881-5970
Fax: (312) 881-5191

Attorneys for Monsanto Company

Attorneys for Plaintiffs

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

15 PILLIOD, et al.

16 Plaintiffs,

17 vs.

18 MONSANTO COMPANY,

19 Defendant.

Case No. RG17862702

ASSIGNED FOR ALL PURPOSES TO
JUDGE WINIFRED SMITH
DEPARTMENT 21

**PLAINTIFFS' AND MONSANTO'S
JOINT SUBMISSION OF PROPOSED
JURY INSTRUCTIONS**

Complaint Filed: June 2, 2017
Trial Date: March 18, 2019

1 Plaintiffs and Defendant Monsanto Company hereby submit the parties' proposed jury
2 instructions. The joint submission includes the parties agreed-upon instructions and the parties
3 competing contested jury instructions. Both parties reserve the right to submit any additional jury
4 instructions as needed based on the evidence or the conduct of the trial, or to modify or withdraw
5 any requested instruction. The submission of these instructions is without prejudice to either party
6 moving for the exclusion of any evidence.

7
8 Dated: May 1, 2019

Respectfully submitted,

9
10 THE MILLER FIRM LLP

11 By: Curtis Hoke (with consent)
12 Curtis G. Hoke
13 Attorney for Plaintiff

14
15 EVANS FEARS & SCHUTTERT LLP

16 By: Kelly Evans
17 Kelly A. Evans
18 Attorney for Defendant
19 Monsanto Company
20
21
22
23
24
25
26
27
28

1 **INDEX FOR PROPOSED JURY INSTRUCTIONS**

2 **PLAINTIFFS’ AND MONSANTO’S AGREED UPON JURY INSTRUCTIONS**

3 INSTRUCTION NO. 1 DUTIES OF THE JUDGE AND JURY 1

4 INSTRUCTION NO. 2 INSURANCE 3

5 INSTRUCTION NO. 3 EVIDENCE 4

6 INSTRUCTION NO. 4 WITNESSES 5

7 INSTRUCTION NO. 5 MULTIPLE PARTIES 7

8 INSTRUCTION NO. 6 NONPERSON PARTY 8

9 INSTRUCTION NO. 7 OBLIGATION TO PROVE – MORE LIKELY TRUE
10 THAN NOT TRUE 9

11 INSTRUCTION NO. 8 HIGHLY PROBABLE – CLEAR AND CONVINCING
12 PROOF 10

13 INSTRUCTION NO. 9 DIRECT AND INDIRECT EVIDENCE 11

14 INSTRUCTION NO. 10 EVIDENCE APPLICABLE TO ONE PARTY 12

15 INSTRUCTION NO. 11 DEPOSITION AS SUBSTANTIVE EVIDENCE 13

16 INSTRUCTION NO. 12 REQUESTS FOR ADMISSION 14

17 INSTRUCTION NO. 13 EXPERT WITNESS TESTIMONY 15

18 INSTRUCTION NO. 14 EXPERTS – QUESTIONS CONTAINING ASSUMED
19 FACTS 16

20 INSTRUCTION NO. 15 CONFLICTING EXPERT TESTIMONY 17

21 INSTRUCTION NO. 16 INTRODUCTION TO TORT DAMAGES – LIABILITY
22 CONTESTED 18

23 INSTRUCTION NO. 17 ECONOMIC AND NONECONOMIC DAMAGES 19

24 INSTRUCTION NO. 18 ITEMS OF ECONOMIC DAMAGE 20

25 INSTRUCTION NO. 19 ARGUMENTS OF COUNSEL NOT EVIDENCE OF
26 DAMAGES 21

27 INSTRUCTION NO. 20 DAMAGES ON MULTIPLE LEGAL THEORIES 22

28 INSTRUCTION NO. 21 JURORS NOT TO CONSIDER ATTORNEYS FEES AND
COURT COSTS 23

INSTRUCTION NO. 22 PRE-DELIBERATION INSTRUCTIONS 24

INSTRUCTION NO. 23 TAKING NOTES DURING THE TRIAL 26

INSTRUCTION NO. 24 READING BACK OF TRIAL TESTIMONY IN JURY
ROOM 27

1	INSTRUCTION NO. 25 INTRODUCTION TO SPECIAL VERDICT FORM.....	28
2	INSTRUCTION NO. 26 INSTRUCTIONS TO ALTERNATE JURORS ON	
3	SUBMISSION OF CASE TO JURY.....	29
4	INSTRUCTION NO. 27 POLLING THE JURY	30
5	INSTRUCTION NO. 28 QUESTIONS FROM JURORS.....	31
6	INSTRUCTION NO. 29 DEMONSTRATIVE EVIDENCE	32
7	INSTRUCTION NO. 30 FINAL INSTRUCTION ON DISCHARGE OF JURY	33
	<u>PLAINTIFFS' AND MONSANTO'S DISPUTED INSTRUCTIONS</u>	
8	PLAINTIFFS' PROPOSED INSTRUCTION NO. 1 PARTY HAVING POWER TO	
9	PRODUCE BETTER EVIDENCE.....	34
10	PLAINTIFFS' PROPOSED INSTRUCTION NO. 2 FAILURE TO EXPLAIN OR	
11	DENY EVIDENCE	35
12	PLAINTIFFS' PROPOSED INSTRUCTIONS NO. 3 STATEMENTS OF A PARTY	
13	OPPONENT.....	36
14	PLAINTIFFS' PROPOSED INSTRUCTION NO. 4 CAUSATION: SUBSTANTIAL	
15	FACTOR.....	37
16	MONSANTO'S PROPOSED INSTRUCTION NO. 1 CAUSATION:	
17	SUBSTANTIAL FACTOR	38
18	PLAINTIFFS' PROPOSED INSTRUCTION NO. 5 CAUSATION: MULTIPLE	
19	CAUSES	39
20	PLAINTIFFS' PROPOSED INSTRUCTION NO. 6 CAUSATION FOR CANCER	
21	CLAIMS	40
22	PLAINTIFFS' PROPOSED INSTRUCTION NO. 7 STRICT LIABILITY -	
23	ESSENTIAL FACTUAL ELEMENTS.....	41
24	PLAINTIFFS' PROPOSED INSTRUCTION NO. 8 STRICT LIABILITY - DESIGN	
25	DEFECT - CONSUMER EXPECTATION TEST.....	42
26	PLAINTIFFS' PROPOSED INSTRUCTION NO. 9 STRICT LIABILITY --	
27	FAILURE TO WARN	43
28	MONSANTO'S PROPOSED INSTRUCTION NO. 2 STRICT LIABILITY -	
	FAILURE TO WARN - ESSENTIAL FACTUAL ELEMENTS	44
	PLAINTIFFS' PROPOSED INSTRUCTION NO. 10 NEGLIGENCE - ESSENTIAL	
	FACTUAL ELEMENTS	47
	PLAINTIFFS' PROPOSED INSTRUCTION NO. 11 NEGLIGENCE - BASIC	
	STANDARD OF CARE	48
	PLAINTIFFS' PROPOSED INSTRUCTION NO. 12 NEGLIGENCE	
	MANUFACTURER OR SUPPLIER - DUTY TO WARN	49

1 MONSANTO’S PROPOSED INSTRUCTION NO. 3 NEGLIGENCE -
2 MANUFACTURER OR SUPPLIER - DUTY TO WARN 50

3 PLAINTIFFS’ PROPOSED INSTRUCTION NO. 13 ITEMS OF NONECONOMIC
4 DAMAGES..... 52

5 MONSANTO’S PROPOSED INSTRUCTION NO. 4 ITEMS OF NONECONOMIC
6 DAMAGES..... 53

7 PLAINTIFFS’ PROPOSED INSTRUCTION NO. 14 UNUSUALLY SUSCEPTIBLE
8 PLAINTIFF..... 54

9 PLAINTIFFS’ PROPOSED INSTRUCTION NO. 15 LIFE EXPECTANCY 55

10 PLAINTIFFS’ PROPOSED INSTRUCTION NO. 16 PUNITIVE DAMAGES -
11 ENTITY DEFENDANT - TRIAL NOT BIFURCATED..... 56

12 MONSANTO’S PROPOSED INSTRUCTION NO. 5 PUNITIVE DAMAGES -
13 ENTITY DEFENDANT - TRIAL NOT BIFURCATED..... 58

14 MONSANTO’S PROPOSED INSTRUCTION NO. 6 STRICT LIABILITY
15 - DEISGN DEFECT - RISK BENEFIT TEST 60

16 **PLAINTIFFS' AND MONSANTO'S PROPOSED SPECIAL INSTRUCTIONS**

17 PLAINTIFFS’ PROPOSED SPECIAL INSTRUCTION NO. 1 DEFINITION OF
18 ROUNDUP 61

19 PLAINTIFFS’ PROPOSED SPECIAL INSTRUCTION NO. 2 REGISTRATION OF
20 A PESTICIDE..... 62

21 FAILURE TO WARN – LACK OF WARNINGS MUST BE CAUSE OF INJURY..... 63

22 PUNITIVE DAMAGES – FINDING OF MALICE OR OPPRESSION CAN ONLY
23 BE BASED ON CONDUCT THAT GAVE RISE TO LIABILITY 64

24 MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 3 PUNITIVE
25 DAMAGES – COMPLIANCE WITH LEGAL, REGULATORY, OR INDUSTRY
26 STANDARDS..... 65

27 MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 4 PUNITIVE
28 DAMAGES – NOT COMPENSATION 66

MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 5 PUNITIVE
DAMAGES – MITIGATING EVIDENCE..... 67

MONSANTO'S PROPOSED SPECIAL INSTRUCTION NO 6 SPECULATIVE OR
CONJECTURAL RISKS..... 68

MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 7 EPA
REGISTRATION 69

MONSANTO'S PROPOSED SPECIAL INSTRUCTION NO 8 CLEAR
EVIDENCE EPA WOULD HAVE REJECTED CANCER WARNING..... 70

1 MONSANTO'S PROPOSED SPECIAL INSTRUCTION NO. 9
2 JOINDER OF THE CLAIMS OF MR. PILLIOD AND MRS. PILLIOD.....71

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 1**

2 **DUTIES OF THE JUDGE AND JURY**

3 Members of the jury, you have now heard all the evidence. The attorneys will have one last
4 chance to talk to you in closing argument. But before they do, it is my duty to instruct you on the law
5 that applies to this case. You must follow these instructions as well as those that I previously gave
6 you. You will have a copy of my instructions with you when you go to the jury room to deliberate. I
7 have provided each of you with your own copy of the instructions.

8 You must decide what the facts are. You must consider all the evidence and then decide what
9 you think happened. You must decide the facts based on the evidence admitted in this trial.

10 Do not allow anything that happens outside this courtroom to affect your decision. Do not
11 talk about this case or the people involved in it with anyone, including family and persons living in
12 your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any
13 research on your own or as a group. Do not use dictionaries or other reference materials.

14 These prohibitions on communications and research extend to all forms of electronic
15 communications. Do not use any electronic devices or media, such as a cell phone or smart phone,
16 PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging
17 service, any Internet chat room, blog, or website, including social networking websites or online
18 diaries, to send or receive any information to or from anyone about this case or your experience as a
19 juror until after you have been discharged from your jury duty.

20 Do not investigate the case or conduct any experiments. Do not contact anyone to assist you,
21 such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved
22 in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear
23 the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.
24 You must not let bias, sympathy, prejudice, or public opinion influence your decision.

25 If you violate any of these prohibitions on communications and research, including
26 prohibitions on electronic communications and research, you may be held in contempt of court or
27 face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other
28 punishment for that violation.

1 I will now tell you the law that you must follow to reach your verdict. You must follow the
2 law exactly as I give it to you, even if you disagree with it. If the attorneys have said anything
3 different about what the law means, you must follow what I say.

4 In reaching your verdict, do not guess what I think your verdict should be from something I
5 may have said or done.

6 Pay careful attention to all the instructions that I give you. All the instructions are important
7 because together they state the law that you will use in this case. You must consider all of the
8 instructions together.

9 After you have decided what the facts are, you may find that some instructions do not apply.
10 In that case, follow the instructions that do apply and use them together with the facts to reach your
11 verdict.

12 If I repeat any ideas or rules of law during my instructions that does not mean that these ideas
13 or rules are more important than the others. In addition, the order in which the instructions are given
14 does not make any difference.

15
16 Source: CACI 5000

INSTRUCTION NO. 2

INSURANCE

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

Source: CACI 5001

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
26
27
28

1 **INSTRUCTION NO. 3**

2 **EVIDENCE**

3 You must decide what the facts are in this case only from the evidence you have seen or
4 heard during the trial, including any exhibits that I admit into evidence. Sworn testimony,
5 documents, or anything else may be admitted into evidence. You may not consider as evidence
6 anything that you saw or heard when court was not in session, even something done or said by one
7 of the parties, attorneys, or witnesses.

8 What the attorneys say during the trial is not evidence. In their opening statements and
9 closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say
10 may help you understand the law and the evidence, but their statements and arguments are not
11 evidence.

12 The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You
13 should not think that something is true just because an attorney's question suggested that it was true.
14 However, the attorneys for both sides have agreed that certain facts are true. This agreement is called
15 a stipulation. No other proof is needed and you must accept those facts as true in this trial.

16 Each side had the right to object to evidence offered by the other side. If I sustained an
17 objection to a question, ignore the question and do not guess as to why I sustained the objection. If
18 the witness did not answer, you must not guess what he or she might have said. If the witness
19 already answered, you must ignore the answer.

20 During the trial I granted a motion to strike testimony that you heard. You must totally
21 disregard that testimony. You must treat it as though it did not exist.

22
23 Source: CACI 5002
24
25
26
27
28

1 **INSTRUCTION NO. 4**

2 **WITNESSES**

3 A witness is a person who has knowledge related to this case. You will have to decide
4 whether you believe each witness and how important each witness's testimony is to the case. You
5 may believe all, part, or none of a witness's testimony.

6 In deciding whether to believe a witness's testimony, you may consider, among other factors,
7 the following:

- 8 (a) How well did the witness see, hear, or otherwise sense what he or she described in
9 court?
- 10 (b) How well did the witness remember and describe what happened?
- 11 (c) How did the witness look, act, and speak while testifying?
- 12 (d) Did the witness have any reason to say something that was not true? For example, did
13 the witness show any bias or prejudice or have a personal relationship with any of the
14 parties involved in the case or have a personal stake in how this case is decided?
- 15 (e) What was the witness's attitude toward this case or about giving testimony?

16 Sometimes a witness may say something that is not consistent with something else he or she
17 said. Sometimes different witnesses will give different versions of what happened. People often
18 forget things or make mistakes in what they remember. Also, two people may see the same event but
19 remember it differently. You may consider these differences, but do not decide that testimony is
20 untrue just because it differs from other testimony.

21 However, if you decide that a witness did not tell the truth about something important, you
22 may choose not to believe anything that witness said. On the other hand, if you think the witness did
23 not tell the truth about some things but told the truth about others, you may accept the part you think
24 is true and ignore the rest.

25 Do not make any decision simply because there were more witnesses on one side than on the
26 other. If you believe it is true, the testimony of a single witness is enough to prove a fact.
27
28

1 You must not be biased in favor of or against any witness because of his or her disability,
2 gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

3
4 Source: CACI 5003

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 5

MULTIPLE PARTIES

There are two plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claims.

Source: CACI 5005

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
26
27
28

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
26
27
28

INSTRUCTION NO. 6

NONPERSON PARTY

A corporation, Monsanto, is a party in this lawsuit. Monsanto is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like “person” or “he” or “she” in these instructions to refer to a party, those instructions also apply to Monsanto.

Source: CACI 5006

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
26
27
28

INSTRUCTION NO. 7

OBLIGATION TO PROVE - MORE LIKELY TRUE THAN NOT TRUE

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

Source: CACI 200

1 **INSTRUCTION NO. 8**

2 **HIGHLY PROBABLE - CLEAR AND CONVINCING PROOF**

3 Certain facts must be proved by clear and convincing evidence, which is a higher burden of
4 proof. This means the party must persuade you that it is highly probable that the fact is true. I will
5 tell you specifically which facts must be proved by clear and convincing evidence.

6
7 Source: CACI 201
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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
26
27
28

INSTRUCTION NO. 9

DIRECT AND INDIRECT EVIDENCE

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone’s opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as “circumstantial evidence.” In either instance, the witness’s testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

Source: CACI 202

INSTRUCTION NO. 10

EVIDENCE APPLICABLE TO ONE PARTY

During the trial, I explained that certain evidence could be considered as to only one party.
You may not consider that evidence as to any other party.

Source: CACI 207

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
26
27
28

1 **INSTRUCTION NO. 11**

2 **DEPOSITION AS SUBSTANTIVE EVIDENCE**

3 During the trial, you received deposition testimony that was read from the deposition
4 transcript or shown by video. A deposition is the testimony of a person taken before trial. At a
5 deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider
6 the deposition testimony that was presented to you in the same way as you consider testimony given
7 in court.

8
9 Source: CACI 208

1 **INSTRUCTION NO. 12**

2 **REQUESTS FOR ADMISSION**

3 Before trial, each party has the right to ask another party to admit in writing that certain
4 matters are true. If the other party admits those matters, you must accept them as true. No further
5 evidence is required to prove them.

6
7 Source: CACI 210
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 13**

2 **EXPERT WITNESS TESTIMONY**

3 During the trial you heard testimony from expert witnesses. The law allows an expert to state
4 opinions about matters in his or her field of expertise even if he or she has not witnessed any of the
5 events involved in the trial.

6 You do not have to accept an expert's opinion. As with any other witness, it is up to you to
7 decide whether you believe the expert's testimony and choose to use it as a basis for your decision.
8 You may believe all, part, or none of an expert's testimony. In deciding whether to believe an
9 expert's testimony, you should consider:

- 10 a. The expert's training and experience;
11 b. The facts the expert relied on; and
12 c. The reasons for the expert's opinion.

13
14 Source: CACI 219
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 14**

2 **EXPERTS - QUESTIONS CONTAINING ASSUMED FACTS**

3 The law allows expert witnesses to be asked questions that are based on assumed facts. These
4 are sometimes called “hypothetical questions.” In determining the weight to give to the expert’s
5 opinion that is based on the assumed facts, you should consider whether the assumed facts are true.
6

7 Source: CACI 220
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 15**

2 **CONFLICTING EXPERT TESTIMONY**

3 If the expert witnesses disagreed with one another, you should weigh each opinion against
4 the others. You should examine the reasons given for each opinion and the facts or other matters that
5 each witness relied on. You may also compare the experts' qualifications.

6
7 Source: CACI 221
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 16**

2 **INTRODUCTION TO TORT DAMAGES - LIABILITY CONTESTED**

3 If you decide that Mr. Pilliod and/or Mrs. Pilliod have proved their claims against Monsanto,
4 you also must decide how much money will reasonably compensate Mr. Pilliod and/or Mrs. Pilliod
5 for their individual harm. This compensation is called “damages.”

6 The amount of damages must include an award for each item of harm that was caused by
7 Monsanto’s wrongful conduct, even if the particular harm could not have been anticipated.

8 Mr. Pilliod and/or Mrs. Pilliod do not have to prove the exact amount of damages that will
9 provide reasonable compensation for the harm. However, you must not speculate or guess in
10 awarding damages.

11
12 Source: CACI 3900

1 **INSTRUCTION NO. 17**

2 **ECONOMIC AND NONECONOMIC DAMAGES**

3 The damages claimed by Mr. Pilliod and Mrs. Pilliod for the harm caused by Monsanto fall
4 into two categories called economic damages and noneconomic damages. You will be asked on the
5 verdict form to state the two categories of damages separately.

6
7 Source: CACI 3902
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 18**

2 **ITEMS OF ECONOMIC DAMAGE**

3 The following are the specific items of economic damages claimed by Mr. Pilliod:

4 1. Past Medical Expenses

5 To recover damages for past medical expenses, Mr. Pilliod must prove the reasonable cost of
6 reasonably necessary medical care that he has received.

7 The following are the specific items of economic damages claimed by Mrs. Pilliod:

8 1. Past and Future Medical Expenses

9 To recover damages for past medical expenses, Mrs. Pilliod must prove the reasonable cost
10 of reasonably necessary medical care that he has received.

11 To recover damages for future medical expenses, Mrs. Pilliod must prove the reasonable cost
12 of reasonably necessary medical care that she is reasonably certain to need in the future.

13 Source: CACI 3903, 3903A
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 19

ARGUMENTS OF COUNSEL NOT EVIDENCE OF DAMAGES

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

Source: CACI 3925

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
26
27
28

1 **INSTRUCTION NO. 20**

2 **DAMAGES ON MULTIPLE LEGAL THEORIES**

3 Mr. Pilliod and Mrs. Pilliod seek damages from Monsanto under more than one legal theory.
4 However, each item of damages may be awarded only once to each Plaintiff, regardless of the
5 number of legal theories alleged.

6
7 Source: CACI 3934.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 21**

2 **JURORS NOT TO CONSIDER ATTORNEYS FEES AND COURT COSTS**

3 You must not consider, or include as part of any award, attorneys' fees or expenses that the
4 parties incurred in bringing or defending this lawsuit.

5
6 Source: CACI 3964
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 22**

2 **PRE-DELIBERATION INSTRUCTIONS**

3 When you go to the jury room, the first thing you should do is choose a presiding juror. The
4 presiding juror should see to it that your discussions are orderly and that everyone has a fair chance
5 to be heard.

6 It is your duty to talk with one another in the jury room and to consider the views of all the
7 jurors. Each of you must decide the case for yourself, but only after you have considered the
8 evidence with the other members of the jury. Feel free to change your mind if you are convinced that
9 your position should be different. You should all try to agree. But do not give up your honest beliefs
10 just because the others think differently.

11 Please do not state your opinions too strongly at the beginning of your deliberations or
12 immediately announce how you plan to vote as it may interfere with an open discussion. Keep an
13 open mind so that you and your fellow jurors can easily share ideas about the case.

14 You should use your common sense and experience in deciding whether testimony is true
15 and accurate. However, during your deliberations, do not make any statements or provide any
16 information to other jurors based on any special training or unique personal experiences that you
17 may have had related to matters involved in this case. What you may know or have learned through
18 your training or experience is not a part of the evidence received in this case.

19 Sometimes jurors disagree or have questions about the evidence or about what the witnesses
20 said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see
21 any exhibits admitted into evidence that have not already been provided to you. Also, jurors may
22 need further explanation about the laws that apply to the case. If this happens during your
23 discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk
24 with the attorneys before I answer so it may take some time. You should continue your deliberations
25 while you wait for my answer. I will do my best to answer them. When you write me a note, do not
26 tell me how you voted on an issue until I ask for this information in open court.

27 Your decision must be based on your personal evaluation of the evidence presented in the
28 case. Each of you may be asked in open court how you voted on each question.

1 While I know you would not do this, I am required to advise you that you must not base your
2 decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in
3 advance to simply add up the amounts each juror thinks is right and then, without further
4 deliberations, make the average your verdict.

5 You may take breaks, but do not discuss this case with anyone, including each other, until all
6 of you are back in the jury room.

7
8 Source: CACI 5009

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 23**

2 **TAKING NOTES DURING THE TRIAL**

3 If you have taken notes during the trial, you may take your notebooks with you into the jury
4 room.

5 You may use your notes only to help you remember what happened during the trial. Your
6 independent recollection of the evidence should govern your verdict. You should not allow yourself
7 to be influenced by the notes of other jurors if those notes differ from what you remember.

8 At the end of the trial, your notes will be collected and destroyed.

9
10 Source: CACI 5010

1 **INSTRUCTION NO. 24**

2 **READING BACK OF TRIAL TESTIMONY IN JURY ROOM**

3 You may request in writing that trial testimony be read to you. I will have the court reporter
4 read the testimony to you. You may request that all or a part of a witness's testimony be read.

5 Your request should be as specific as possible. It will be helpful if you can state:

- 6 1. The name of the witness;
7 2. The subject of the testimony you would like to have read; and
8 3. The name of the attorney or attorneys asking the questions when the testimony was
9 given.

10 The court reporter is not permitted to talk with you when she or he is reading the testimony
11 you have requested.

12 While the court reporter is reading the testimony, you may not deliberate or discuss the case.

13 You may not ask the court reporter to read testimony that was not specifically mentioned in a
14 written request. If your notes differ from the testimony, you must accept the court reporter's record
15 as accurate.

16
17 Source: CACI 5011
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 25**

2 **INTRODUCTION TO SPECIAL VERDICT FORM**

3 I will give you verdict forms with questions you must answer. I have already instructed you
4 on the law that you are to use in answering these questions. You must follow my instructions and the
5 forms carefully. You must consider each question separately. Although you may discuss the
6 evidence and the issues to be decided in any order, you must answer the questions on the verdict
7 forms in the order they appear. After you answer a question, the form tells you what to do next. At
8 least 9 of you must agree on an answer before you can move on to the next question. However, the
9 same 9 or more people do not have to agree on each answer.

10 All 12 of you must deliberate on and answer each question regardless of how you voted on
11 any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further
12 questions, every juror must deliberate and vote on all of the remaining questions.

13 When you have finished filling out the forms, your presiding juror must write the date and
14 sign it at the bottom of the last page and then notify the court attendant that you are ready to present
15 your verdict in the courtroom.

16
17 Source: CACI 5012
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 26**

2 **INSTRUCTIONS TO ALTERNATE JURORS ON SUBMISSION OF CASE TO JURY**

3 The jury will soon begin deliberating, but you are still alternate jurors and are bound by my
4 earlier instructions about your conduct.

5 Until the jury is discharged, do not talk about the case or about any of the people or any
6 subject involved in it with anyone, not even your family or friends, and not even with each other. Do
7 not have any contact with the deliberating jurors. Do not decide how you would vote if you were
8 deliberating. Do not form or express an opinion about the issues in this case, unless you are
9 substituted for one of the deliberating jurors.

10
11 Source: CACI 5015

1 **INSTRUCTION NO. 27**

2 **POLLING THE JURY**

3 After your verdict is read in open court, you may be asked individually to indicate whether
4 the verdict expresses your personal vote. This is referred to as “polling” the jury and is done to
5 ensure that at least nine jurors have agreed to each decision.

6 The verdict forms that you will receive ask you to answer several questions. You must vote
7 separately on each question. Although nine or more jurors must agree on each answer, it does not
8 have to be the same nine for each answer. Therefore, it is important for each of you to remember
9 how you voted on each question so that if the jury is polled, each of you will be able to answer
10 accurately about how you voted.

11
12 Source: CACI 5017

1 **INSTRUCTION NO. 28**

2 **QUESTIONS FROM JURORS**

3 If, during the trial, any of you had a question that you believed should be asked of a witness,
4 you were instructed to write out the question and provide it to me through my courtroom staff. I
5 shared your questions with the attorneys, after which I decided whether the question could be asked.

6 If a question was asked and answered, you are to consider the answer as you would any other
7 evidence received in the trial. Do not give the answer any greater or lesser weight because it was
8 initiated by a juror question.

9 If the question was not asked, do not speculate as to what the answer might have been or why
10 it was not asked. There are many legal reasons why a suggested question cannot be asked of a
11 witness. Give the question no further consideration.

12
13 Source: CACI 5019
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 29**

2 **DEMONSTRATIVE EVIDENCE**

3 During the trial, materials have been shown to you to help explain testimony or other
4 evidence in the case. Some of these materials have been admitted into evidence, and you will be able
5 to review them during your deliberations.

6 Other materials have also been shown to you during the trial, but they have not been admitted
7 into evidence. You will not be able to review them during your deliberations because they are not
8 themselves evidence or proof of any facts. You may, however, consider the testimony given in
9 connection with those materials.

10
11 Source: CACI 5020
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INSTRUCTION NO. 30**

2 **FINAL INSTRUCTION ON DISCHARGE OF JURY**

3 Members of the jury, this completes your duties in this case. On behalf of the parties and
4 their attorneys, thank you for your time and your service. It can be a great personal sacrifice to serve
5 as a juror, but by doing so you are fulfilling an extremely important role in California's system of
6 justice. Each of us has the right to a trial by jury, but that right would mean little unless citizens such
7 as each of you are willing to serve when called to do so. You have been attentive and conscientious
8 during the trial, and I am grateful for your dedication.

9 Throughout the trial, I continued to admonish you that you could not discuss the facts of the
10 case with anyone other than your fellow jurors and then only during deliberations when all twelve
11 jurors were present. I am now relieving you from that restriction, but I have another admonition.

12 You now have the absolute right to discuss or not to discuss your deliberations and verdict
13 with anyone, including members of the media. It is appropriate for the parties, their attorneys, or
14 representatives to ask you to discuss the case, but any such discussion may occur only with your
15 consent and only if the discussion is at a reasonable time and place. You should immediately report
16 any unreasonable contact to the court.

17 If you do choose to discuss the case with anyone, feel free to discuss it from your own
18 perspective, but be respectful of the other jurors and their views and feelings.

19 Thank you for your time and your service; you are discharged.

20
21 Source: CACI 5090
22
23
24
25
26
27
28

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
26
27
28

PLAINTIFFS' PROPOSED INSTRUCTION NO. 1

PARTY HAVING POWER TO PRODUCE BETTER EVIDENCE

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

Source: CACI 203

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
26
27
28

PLAINTIFFS' PROPOSED INSTRUCTION NO. 2

FAILURE TO EXPLAIN OR DENY EVIDENCE

If a party failed to explain or deny evidence against it when it could reasonably be expected to have done so based on what it knew, you may consider its failure to explain or deny in evaluating that evidence. It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.

Source: CACI 205

1 **PLAINTIFFS' PROPOSED INSTRUCTIONS NO. 3**

2 **STATEMENTS OF A PARTY OPPONENT**

3 A party may offer into evidence any oral or written statement made by an opposing party
4 outside the courtroom. When you evaluate evidence of such a statement, you must consider these
5 questions:

- 6 1. Do you believe that the party actually made the statement? If you do not believe that the
7 party made the statement, you may not consider the statement at all.
- 8 2. If you believe that the statement was made, do you believe it was reported accurately?

9 You should view testimony about an oral statement made by a party outside the courtroom
10 with caution.

11

12 Source: CACI 212

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 4**

2 **CAUSATION: SUBSTANTIAL FACTOR**

3 A substantial factor in causing harm is a factor that a reasonable person would consider to
4 have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be
5 the only cause of the harm.

6
7 Source: CACI 430
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MONSANTO'S PROPOSED INSTRUCTION NO. 1**

2 **CAUSATION: SUBSTANTIAL FACTOR**

3 A substantial factor in causing harm is a factor that a reasonable person would consider to
4 have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be
5 the only cause of the harm.

6 Conduct is not a substantial factor in causing harm if the same harm would have occurred
7 without that conduct.

8
9 Source: CACI 430.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 5**

2 **CAUSATION: MULTIPLE CAUSES**

3 A person's negligence may combine with another factor to cause harm. If you find that
4 Monsanto's negligence was a substantial factor in causing Plaintiffs' harm, then Monsanto is
5 responsible for the harm. Monsanto cannot avoid responsibility just because some other person,
6 condition, or event was also a substantial factor in causing Plaintiffs' harm.

7
8 Source: CACI 431
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 6**

2 **CAUSATION FOR CANCER CLAIMS**

3 A substantial factor in causing harm is a factor that a reasonable person would consider to
4 have contributed to the harm. It does not have to be the only cause of the harm.

5 Plaintiffs may prove that exposure to Roundup was a substantial factor causing their illness
6 by showing, through expert testimony, that there is a reasonable medical probability that their
7 exposure was a substantial factor contributing to their risk of developing cancer

8
9
10 Source: CACI 435 (modified); *Bockrath v. Aldrich Chemical Co., Inc.*, 21 Cal.4th 71 (Cal.
11 1999)(extending the *Rutherford* standard of causation (CACI No. 435) to cancer caused by long-
12 term exposure to toxins); *Major v. R.J. Reynolds Tobacco Co.*, 14 Cal. App. 5th 1179, 1198 (Ct.
13 App. 2017), *review denied* (Nov. 15, 2017)(finding that there is no reason that *Rutherford* would
14 apply in cases of asbestos exposure but not exposure to other carcinogens).

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
26
27
28

PLAINTIFFS' PROPOSED INSTRUCTION NO. 7

STRICT LIABILITY – ESSENTIAL FACTUAL ELEMENTS

Mrs. Pilliod and Mr. Pilliod claim that they were harmed by a product distributed, manufactured and sold by Monsanto that:

1. was defectively designed; and
2. did not include sufficient warning of potential safety hazards during the time that

Mrs. Pilliod and Mr. Pilliod used the product.

Source: CACI 1200

1 **PLAINTIFFS’ PROPOSED INSTRUCTION NO. 8**

2 **STRICT LIABILITY – DESIGN DEFECT – CONSUMER EXPECTATION TEST**

3 Mrs. Pilliod and Mr. Pilliod claim that Roundup’s design was defective because Roundup
4 did not perform as safely as an ordinary consumer would have expected it to perform. To establish
5 that claim, Mrs. Pilliod and Mr. Pilliod must prove the following:

- 6 1. That Monsanto manufactured, distributed or sold Roundup;
7 2. That the Roundup used by Mrs. Pilliod or Mr. Pilliod did not perform as safely as an
8 ordinary consumer would have expected it to perform when used or misused in an
9 intended or reasonably foreseeably way;
10 3. That Mrs. Pilliod or Mr. Pilliod or both were harmed; and
11 4. That Roundup’s failure to perform safely was a substantial factor in causing Mrs.
12 Pilliod’s or Mr. Pilliod’s harm.

13
14
15 Source: CACI 1203
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 9**

2 **STRICT LIABILITY – FAILURE TO WARN**

3 Mrs. Pilliod and Mr. Pilliod claim that the Roundup products lacked sufficient warnings of
4 potential risks or side effects. To establish this claim, Plaintiffs Mrs. Pilliod and Mr. Pilliod must
5 prove all of the following:

- 6 1. That Monsanto manufactured, distributed or sold the Roundup products;
- 7 2. That the Roundup products had potential risks or side effects that were known or
8 knowable in light of the scientific knowledge that was generally accepted in the scientific
9 community at the time of manufacture, distribution, and sale;
- 10 3. That the potential risks or side effects presented a substantial danger when the Roundup
11 products were used or misused in an intended or reasonably foreseeable way;
- 12 4. That ordinary consumers would not have recognized the potential risks or side effects;
- 13 5. That Monsanto failed to adequately warn of the potential risks or side effects;
- 14 6. That Mrs. Pilliod or Mr. Pilliod or both were harmed; and
- 15 7. That the lack of sufficient warnings was a substantial factor in causing Mrs. Pilliod's or
16 Mr. Pilliod's or both's harm.

17 Source: CACI 1205

18

19

20

21

22

23

24

25

26

27

28

1 **MONSANTO’S PROPOSED INSTRUCTION NO. 2**

2 **STRICT LIABILITY – FAILURE TO WARN – ESSENTIAL FACTUAL ELEMENTS**

3 Mr. Pilliod and Mrs. Pilliod each claim that Roundup lacked sufficient warning of the risk of
4 developing Non-Hodgkin’s Lymphoma (“NHL”) with the use of Roundup. To establish this claim,
5 Mr. Pilliod and Mrs. Pilliod must each prove all of the following:

- 6
- 7 1. That Monsanto manufactured, distributed or sold Roundup;
 - 8 2. That there was an actual risk that Roundup could cause NHL that was known or
9 knowable in light of the scientific and medical knowledge that was generally
10 accepted in the scientific community at the times Mr. Pilliod or Mrs. Pilliod
11 purchased Roundup;
 - 12 3. That the risk Roundup could cause NHL presented a substantial danger when
13 Roundup is used in accordance with widespread and commonly recognized
14 practice;
 - 15 4. That ordinary consumers would not have recognized the risk that Roundup could
16 cause NHL;
 - 17 5. That Monsanto failed to adequately warn of the risk on the Roundup label;
 - 18 6. That Mr. Pilliod and Mrs. Pilliod were each harmed; and
 - 19 7. That Monsanto’s failure to warn was a substantial factor in causing Mr. and/or
20 Mrs. Pilliod’s harm.

21 Monsanto’s failure to warn is not a substantial factor in causing Mr. Pilliod’s or Mrs. Pilliod’s harm
22 if you find they would have developed NHL even if Monsanto had warned of the risk that Roundup
23 could cause NHL.

24 Source: CACI 1205 (modified). CACI 1205 is modified to (1) modify the phrase “potential risk” in
25 paragraph 2 to “actual risk,” (2) modify the phrase “used or misused in an intended or reasonably
26 foreseeable way” to “used in accordance with widespread and commonly recognized practice,” and
27 (3) make paragraph 7 state more explicitly that Monsanto is not liable to the Pilliods if their NHL
28 would have occurred even if Monsanto had warned Roundup could cause cancer.

1 First, the phrase “potential risk” in the standard CACI 1205 instruction will confuse the jury.
2 The phrase “potential risk,” ostensibly, means a known, but remote, risk that is unlikely to occur in
3 any product user. *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996) (observing that “when a
4 vaccine or other drug poses a severe known risk, albeit to a small proportion of patients” a duty to
5 warn may still exist). A jury, however, will misunderstand the phrase “potential risk” to mean risks
6 that are “speculative, conjectural, or tentative,” which would be improper under California law. *See*,
7 *e.g.*, *T.H. v. Novartis Pharm. Corp.*, 4 Cal. 5th 145, 164 (Cal. 2017) (“The manufacturer has no duty
8 to warn of risks that are “merely speculative or conjectural, or so remote and insignificant as to be
9 negligible.”) The California Supreme Court in *Carlin v. Superior Court* explained that a failure-to-
10 warn claim “necessarily involve[s] questions concerning whether the risk, in light of accepted
11 scientific norms, was more than merely speculative or conjectural, or so remote and insignificant as
12 to be negligible.” *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996). The Court made clear
13 that California law does not impose “a duty to warn of ‘every arguable risk.’” *Id.* n.5. Monsanto’s
14 modification of “actual” for “potential” is needed to properly convey California law on failure-to-
15 warn and prevent the jury from imposing liability for “speculative, conjectural, or tentative” risks.

16 Second, paragraph 2 is modified to conform to FIFRA’s misbranding provisions. FIFRA’s
17 express preemption clause prohibits the Court from instructing the jury on warnings requirements
18 that are “in addition to or different from” the requirements imposed by FIFRA. *See Bates v. Dow*
19 *Agrosciences LLC*, 544 U.S. 431, 444 (2005). Under FIFRA, Monsanto is only required to provide
20 warnings “adequate to protect health” when the pesticide is used “in accordance with a widespread
21 and commonly recognized practice.” 7 U.S.C. 136(q)(1)(F), (G).

22 Third, the final sentence of CACI 1205 is also modified to more clearly state that Monsanto
23 is not liable to the Pilliods if their NHL would have occurred even if Monsanto had warned Roundup
24 could cause cancer. *See Huitt v. Southern California Gas Co.* 188 Cal.App.4th 1586 (2010) (“To be
25 liable in California, even under a strict liability theory, the plaintiff must prove that the defendant’s
26 failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural
27 corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have
28 occurred even if the defendant had issued adequate warnings.”); *Ramirez v. Plough, Inc.*, 6 Cal. 4th

1 539, 555-56, 863 P.2d 167, 177 (Cal 1993) (“Plaintiff’s mother, who administered the SJAC to
2 plaintiff, neither read nor obtained translation of the product labeling. Thus, there is no conceivable
3 causal connection between the representations or omissions that accompanied the product and
4 plaintiff’s injury.”). Absent modification, the jury may not understand that it must find both that
5 Roundup caused Plaintiffs’ NHL and that the inadequate warning additionally caused their harm.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 11**

2 **NEGLIGENCE – BASIC STANDARD OF CARE**

3 Negligence is the failure to use reasonable care to prevent harm to others. A designer,
4 manufacturer, or supplier can be negligent by acting or failing to act. A designer, manufacturer, or
5 supplier is negligent if it fails to use the amount of care in designing or manufacturing the product
6 that a reasonably careful designer or manufacturer would use in similar circumstances to avoid
7 exposing others to a foreseeable risk of harm.

8 In determining whether Monsanto used reasonable care, you should balance what Monsanto
9 knew or should have known about the likelihood and severity of potential harm from the product
10 against the burden of taking safety measures to reduce or avoid the harm.

11
12
13
14 Source: CACI 401; CACI 1221
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 12**

2 **NEGLIGENCE – MANUFACTURER OR SUPPLIER – DUTY TO WARN**

3 Mrs. Pilliod or Mr. Pilliod claim that Monsanto was negligent by not using reasonable
4 care to warn about the dangerous condition of the Roundup products or about facts that made
5 the Roundup products likely to be dangerous. To establish this claim, Plaintiffs Mrs. Pilliod
6 or Mr. Pilliod must prove all of the following:

- 7
- 8 1. That Monsanto manufactured, distributed, or sold the Roundup products;
 - 9 2. That Monsanto knew or reasonably should have known that the Roundup
10 products were dangerous or were likely to be dangerous when used or misused in
11 a reasonably foreseeable manner;
 - 12 3. That Monsanto knew or reasonably should have known that users would not
13 realize the danger;
 - 14 4. That Monsanto failed to adequately warn of the danger of the Roundup products;
 - 15 5. That a reasonable manufacturer, distributor, or seller under the same or similar
16 circumstances would have warned of the danger of the Roundup products;
 - 17 6. That Mrs. Pilliod or Mr. Pilliod or both were harmed; and
 - 18 7. That Monsanto's failure to warn was a substantial factor in causing Mrs. Pilliod's
19 or Mr. Pilliod's or both's harm.

20 Source: CACI 1222

21

22

23

24

25

26

27

28

1 **MONSANTO’S PROPOSED INSTRUCTION NO. 3**

2 **NEGLIGENCE – MANUFACTURER OR SUPPLIER – DUTY TO WARN**

3
4 Mr. Pilliod and Mrs. Pilliod each claim that Monsanto was negligent by not using reasonable
5 care to warn about a dangerous condition of Roundup or about facts that made Roundup likely to be
6 dangerous. To establish this claim, Mr. Pilliod and Mrs. Pilliod must each prove all of the
7 following:

- 8
- 9 1. That Monsanto manufactured, distributed, or sold Roundup;
 - 10 2. That Monsanto knew or reasonably should have known that Roundup was
11 likely to cause NHL when used in accordance with widespread and commonly
12 recognized practice at the times Mr. Pilliod or Mrs. Pilliod purchased Roundup;
 - 13 3. That Monsanto knew or reasonably should have known that users would not
14 realize Roundup was likely to cause NHL when used in accordance with
15 widespread and commonly recognized practice;
 - 16 4. That Monsanto failed to adequately warn of the danger of Roundup on the label;
 - 17 5. That a reasonable manufacturer, distributor, or seller under the same or similar
18 circumstances would have warned that Roundup was likely to cause NHL;
 - 19 6. That Mr. and Mrs. Pilliod were each harmed; and
 - 20 7. That Monsanto’s failure to warn was a substantial factor in causing Mr. and/or
21 Mrs. Pilliod’s harm.

22 Monsanto’s failure to warn is not a substantial factor in causing Mr. Pilliod’s or Mrs. Pilliod’s harm
23 if you find they would have developed NHL even if Monsanto had warned of the risk that Roundup
24 could cause NHL.

25 Source: CACI 1222 (modified). First, paragraph 2 is modified to include the phrase “at the time
26 Mr. Pilliod or Mrs. Pilliod purchased Roundup.” This modification is consistent with standard
27 language in CACI 1205 and is needed to comport with California law that holds a manufacturer is
28 only liable for failure to warn based on its knowledge at the time of purchase. *Anderson v. Owens-*
Corning Fiberglas Corp., 53 Cal. 3d 987, 1002 (1991).

1 Second, paragraph 2 is modified to conform to FIFRA’s misbranding provisions. FIFRA’s
2 express preemption clause prohibits the Court from instructing the jury on warnings requirements
3 that are “in addition to or different from” the requirements imposed by FIFRA. See *Bates v. Dow*
4 *Agrosciences LLC*, 544 U.S. 431, 444 (2005). Under FIFRA, Monsanto is only required to provide
5 warnings “adequate to protect health” when the pesticide is used “in accordance with a widespread
6 and commonly recognized practice.” 7 U.S.C. 136(q)(1)(F), (G).

7 Third, the final sentence of CACI 1222 is also modified to more clearly state that Monsanto
8 is not liable to the Pilliods if their NHL would have occurred even if Monsanto had warned
9 Roundup could cause cancer. See *Huitt v. Southern California Gas Co.* 188 Cal.App.4th 1586
10 (2010) (“To be liable in California, even under a strict liability theory, the plaintiff must prove that
11 the defendant’s failure to warn was a substantial factor in causing his or her injury. (CACI No.
12 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the
13 injury would have occurred even if the defendant had issued adequate warnings.”); *Ramirez v.*
14 *Plough, Inc.*, 6 Cal. 4th 539, 555-56, 863 P.2d 167, 177 (Cal 1993) (“Plaintiff’s mother, who
15 administered the SJAC to plaintiff, neither read nor obtained translation of the product labeling.
16 Thus, there is no conceivable causal connection between the representations or omissions that
17 accompanied the product and plaintiff’s injury.”). Absent modification, the jury may not
18 understand that it must find both that Roundup caused Plaintiffs’ NHL and that the inadequate
19 warning additionally caused their harm.

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 13**

2 **ITEMS OF NONECONOMIC DAMAGES**

3 The following are the specific items of noneconomic damages claimed by Mrs. Pilliod and Mr.

4 Pilliod:

- 5 1. Past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement,
6 physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress and any
7 other similar damages.

8 No fixed standard exists for deciding the amount of these noneconomic damages. You must
9 use your judgment to decide a reasonable amount based on the evidence and your common sense.

10 To recover for future pain, mental suffering, loss of enjoyment of life, disfigurement,
11 physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress, Plaintiffs
12 must prove that they are reasonably certain to suffer that harm.

13 For future noneconomic damages, determine the amount in current dollars paid at the time of
14 judgment that will compensate Plaintiffs for future noneconomic damages.

15 Source: CACI 3905; CACI 3905A

1 **MONSANTO’S PROPOSED INSTRUCTION NO. 4**

2 **ITEMS OF NONECONOMIC DAMAGES**

3 Mr. Pilliod and Mrs. Pilliod are each seeking noneconomic damages for past physical pain,
4 mental suffering, and loss of enjoyment of life. No fixed standard exists for deciding the amount of
5 these noneconomic damages. You must use your judgment to decide a reasonable amount based on
6 the evidence and your common sense.

7 Mrs. Pilliod is also seeking noneconomic damages for future physical pain, mental suffering,
8 and loss of enjoyment of life. To recover for future pain, mental suffering, and loss of enjoyment of
9 life, Mrs. Pilliod must each prove that she is reasonably certain to suffer that harm. For future
10 noneconomic damages, determine the amount in current dollars paid at the time of judgment that
11 will compensate Mrs. Pilliod for future noneconomic damages.

12
13 Source: CACI 3905, 3905A. The instruction is modified to conform to the evidence. Bracketed
14 language permitting recovery of “disfigurement/physical impairment/inconvenience/grief/anxiety/
15 humiliation/emotional distress” has been omitted. Further, the instruction omits a claim for future
16 noneconomic damages for Mr. Pilliod to conform to the evidence in the case.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 14

UNUSUALLY SUSCEPTIBLE PLAINTIFF

You must decide the full amount of money that will reasonably and fairly compensate Mrs. Pilliod and Mr. Pilliod for all damages caused by the wrongful conduct of Monsanto, even if Mrs. Pilliod or Mr. Pilliod were more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

Source: CACI 3928

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
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 15**

2 **LIFE EXPECTANCY**

3 If you decide Plaintiffs have suffered damages that will continue for the rest of their life,
4 you must determine how long they will probably live. According to the National Vital Statistics
5 Report published by the National Center for Health Statistics:

- 6 1. A 77-year-old male is expected to live another 10 years; and
7 2. A 75-year-old female is expected to live another 13 years.

8 This is the average life expectancy. Some people live longer and others die sooner.

9 This published information is evidence of how long a person is likely to live but is not conclusive.

10 In deciding a person's life expectancy, you should also consider, among other factors, that person's
11 health, habits, activities, lifestyle, and occupation.

12
13 Source: CACI 3932
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PLAINTIFFS' PROPOSED INSTRUCTION NO. 16**

2 **PUNITIVE DAMAGES – ENTITY DEFENDANT – TRIAL NOT BIFURCATED**

3 If you decide that Monsanto's conduct caused Mrs. Pilliod and Mr. Pilliod's harm, you must
4 decide whether that conduct justifies an award of punitive damages. The purposes of punitive
5 damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage
6 similar conduct in the future.

7 You may award punitive damages against Monsanto only if Mrs. Pilliod or Mr. Pilliod prove that
8 Monsanto engaged in that conduct with malice, oppression, or fraud. To do this, Mrs. Pilliod or Mr.
9 Pilliod must prove one of the following by clear and convincing evidence:

- 10 1. That the conduct constituting malice, oppression, or fraud was committed by one or more
11 officers, directors, or managing agents of Monsanto, who acted on behalf of Monsanto; or
12 2. That the conduct constituting malice, oppression, or fraud was authorized by one or more
13 officers, directors, or managing agents of Monsanto; or
14 3. That one or more officers, directors, or managing agents of Monsanto knew of the conduct
15 constituting malice, oppression, or fraud and adopted or approved that conduct after it
16 occurred.

17 "Malice" means that Monsanto acted with intent to cause injury or that Monsanto's conduct
18 was despicable and was done with a willful and knowing disregard of the rights or safety of
19 another. A person acts with knowing disregard when he or she is aware of the probable dangerous
20 consequences of his or her conduct and deliberately fails to avoid those consequences.

21 "Oppression" means that Monsanto's conduct was despicable and subjected Mrs. Pilliod or
22 Mr. Pilliod to cruel and unjust hardship in knowing disregard of his rights.

23 "Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked
24 down on and despised by reasonable people.

25 "Fraud" means that Monsanto intentionally misrepresented or concealed a material fact and
26 did so intending to harm to Mrs. Pilliod or Mr. Pilliod.

1 An employee is a “managing agent” if he or she exercises substantial independent authority
2 and judgment in his or her corporate decision making such that his or her decisions ultimately
3 determine corporate policy.

4 There is no fixed formula for determining the amount of punitive damages, and you are not
5 required to award any punitive damages. If you decide to award punitive damages, you should
6 consider all of the following factors in determining the amount:

7
8 (a) How reprehensible was Monsanto’s conduct? In deciding how reprehensible Monsanto’s
9 conduct was, you may consider, among other factors:

- 10 1. Whether the conduct caused physical harm;
- 11 2. Whether Monsanto’s disregarded the health or safety of others;
- 12 3. Whether Plaintiffs were financially weak or vulnerable and Monsanto knew Plaintiffs
13 were financially weak or vulnerable and took advantage of him;
- 14 4. Whether Monsanto’s conduct involved a pattern or practice; and
- 15 5. Whether Monsanto acted with trickery or deceit.

16 (b) Is there a reasonable relationship between the amount of punitive damages and Mrs. Pilliod
17 or Mr. Pilliod’s harm or between the amount of punitive damages and potential harm to
18 Plaintiffs that Monsanto knew was likely to occur because of its conduct?

19 (c) In view of Monsanto’s financial condition, what amount is necessary to punish it and
20 discourage future wrongful conduct? You may not increase the punitive award above an
21 amount that is otherwise appropriate merely because Monsanto has substantial financial
22 resources. Any award you impose may not exceed Monsanto’s ability to pay.

23 Punitive damages may not be used to punish Monsanto for the impact of its alleged
24 misconduct on persons other than Plaintiffs.

25 Source: CACI 3945

1 **MONSANTO’S PROPOSED INSTRUCTION NO. 5**

2 **PUNITIVE DAMAGES - ENTITY DEFENDANT – TRIAL NOT BIFURCATED**

3 If you decide that Monsanto’s conduct caused Mr. Pilliod or Mrs. Pilliod harm, you must
4 decide whether that conduct justifies an award of punitive damages. The purposes of punitive
5 damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage
6 similar conduct in the future.

7 You may award punitive damages against Monsanto only if Mr. Pilliod or Mrs. Pilliod prove
8 that Monsanto engaged in that conduct with malice or oppression. To do this, Mr. and Mrs. Pilliod
9 must prove one of the following by clear and convincing evidence:

- 10
- 11 1. That the conduct constituting malice or oppression was committed by one or more
12 officers, directors, or managing agents of Monsanto, who acted on behalf of
Monsanto; or
 - 13 2. That the conduct constituting malice or oppression was authorized by one or more
14 officers, directors, or managing agents of Monsanto; or
 - 15 3. That one or more officers, directors, or managing agents of Monsanto knew of the
16 conduct constituting malice or oppression and adopted or approved that conduct
after it occurred.

17 “Malice” means that Monsanto acted with intent to cause injury or that Monsanto’s conduct
18 was despicable and was done with a willful and knowing disregard of the rights or safety of another.
19 A person acts with knowing disregard when he or she is aware of the probable dangerous
20 consequences of his or her conduct and deliberately fails to avoid those consequences.

21 “Oppression” means that Monsanto’s conduct was despicable and subjected Mr. and Mrs.
22 Pilliod to cruel and unjust hardship in knowing disregard of his rights.

23 “Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked
24 down on and despised by reasonable people.

25 An employee is a “managing agent” if he or she exercises substantial independent authority
26 and judgment in his or her corporate decision making such that his or her decisions ultimately
27 determine corporate policy.

28 There is no fixed formula for determining the amount of punitive damages, and you are not

1 required to award any punitive damages. If you decide to award punitive damages, you should
2 consider all of the following factors in determining the amount:

- 3
- 4 (a) How reprehensible was Monsanto's conduct? In deciding how reprehensible
5 Monsanto's conduct was, you may consider, among other factors:
- 6 1. Whether the conduct caused physical harm;
 - 7 2. Whether Monsanto disregarded the health or safety of others;
 - 8 3. Whether Mr. Pilliod and Mrs. Pilliod were financially weak or vulnerable
9 and Monsanto knew Mr. Pilliod and/or Mrs. Pilliod were financially weak
10 or vulnerable and took advantage of him;
 - 11 4. Whether Monsanto's conduct involved a pattern or practice; and
- 12 (b) Is there a reasonable relationship between the amount of punitive damages and Mr.
13 Pilliod and Mrs. Pilliod's harm or between the amount of punitive damages and
14 potential harm to Mr. Pilliod and/or Mrs. Pilliod that Monsanto knew was likely to
15 occur because of its conduct?
- 16 (c) In view of Monsanto's financial condition, what amount is necessary to punish it
17 and discourage future wrongful conduct? You may not increase the punitive award
18 above an amount that is otherwise appropriate merely because Monsanto has
19 substantial financial resources. Any award you impose may not exceed
20 Monsanto's ability to pay.

21 Punitive damages may not be used to punish Monsanto for the impact of its alleged
22 misconduct on persons other than Mr. Pilliod and Mrs. Pilliod.

23 Source: CACI 3945 (modified); U.S. Const. Amend. XIV. The proposed instruction deletes any
24 reference to "fraud," and "trickery or deceit," which is outside the scope of the pleadings in this case
25 and for which there is no evidence that Monsanto committed any fraud, trickery, or deceit that caused
26 Plaintiffs' alleged harms.

1 **MONSANTO’S PROPOSED INSTRUCTION NO. 6¹**

2 **STRICT LIABILITY – DESIGN DEFECT – RISK-BENEFIT TEST**

3 Mr. Pilliod and Mrs. Pilliod claim that Roundup’s design caused harm to each of them. To
4 establish this claim, Mr. and Mrs. Pilliod must each prove all of the following:

- 5 1. That Monsanto manufactured, distributed or sold Roundup;
- 6 2. That Mr. Pilliod and Mrs. Pilliod were each harmed;
- 7 3. That Roundup’s design was a substantial factor in causing harm to Mr. Pilliod and
8 Mrs. Pilliod.

9 If Mr. Pilliod and/or Mrs. Pilliod have proved these three facts, then your decision on this
10 claim must be for Mr. Pilliod and/or Mrs. Pilliod, unless Monsanto proves that the benefits of
11 Roundup’s design outweigh the risks of the design. In deciding whether the benefits outweigh the
12 risks, you should consider the following:

- 13 (a) The gravity of the potential harm resulting from the use of Roundup;
- 14 (b) The likelihood that this harm would occur;
- 15 (c) The feasibility of an alternative safer design at the time of manufacture;
- 16 (d) The cost of an alternative design; and
- 17 (e) The disadvantages of an alternative design.
- 18 (f) The benefits of the design of Roundup.

19 Source: CACI 1204. CACI 1204 (modified), adding additional factor (f) as invited by CACI 1204’s
20 bracketed language “[Other relevant factors]”.

21 _____

22

23 ¹ Plaintiffs’ case and proof is not about Roundup’s “design”; rather, this is a warnings case.
24 Glyphosate cannot be defectively designed. *See Webb v. Special Elec. Co., Inc.*, 63 Cal. 4th 167,
25 184 (2016) (“[A] basic raw material . . . cannot be defectively designed.”); *Maxton v. W. States*
26 *Metals*, 203 Cal. App. 4th 81, 88 (2012) (same). Categorical design defect liability for alleged
27 carcinogens is improper. *See Poosh v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1025–26
28 (N.D. Cal. 2012) (“[t]aken to its logical conclusion, the argument . . . would mean that the only
remedy for this alleged design defect would be a ban on the manufacture and sale of any cigarettes
containing nicotine.”). Monsanto proposes this instruction solely because if a design claim is
submitted, it should be the risk-benefit test rather than the consumer expectations instruction, which
does not apply. *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

1 **PLAINTIFFS’ PROPOSED SPECIAL INSTRUCTION NO. 1**

2 **DEFINITION OF ROUNDUP**

3 You have heard testimony that Plaintiffs Alberta and Alva Pilliod were exposed to various
4 glyphosate-containing herbicides that were manufactured by Monsanto. For purposes of these
5 instructions and the verdict form, these glyphosate-containing herbicides will be collectively
6 referred to as “Roundup.”
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 1**

2 **FAILURE TO WARN – LACK OF WARNINGS MUST BE CAUSE OF INJURY**

3 Mr. Pilliod and Mrs. Pilliod each allege that the lack of sufficient warnings by Monsanto
4 about the potential risks of Roundup products® was a substantial factor in causing each of their
5 harms. In order to prevail on these claims, Mr. and Mrs. Pilliod must each prove that if Monsanto
6 gave a different warning or disclosed different information, they would not have developed their
7 respective NHL subtypes.

8
9 Source: See, e.g., *Motus v. Pfizer, Inc.*, 358 F.3d 659, 660-61 (9th Cir. 2004) (“We agree with the
10 Second Circuit that a product defect claim based on insufficient warnings cannot survive summary
11 judgment if stronger warnings would not have altered the conduct of the prescribing physician.”);
12 *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 991 (C.D. Cal. 2001) (“A plaintiff asserting causes of
13 action based on a failure to warn must prove not only that no warning was provided or the warning
14 was inadequate, but also that the inadequacy or absence of the warning caused the plaintiff’s
15 injury.”); see *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1018 (10th Cir. 2001) (“In the duty to
16 warn context, assuming that plaintiffs have established both duty and a failure to warn, plaintiffs
17 must further establish proximate causation by showing that had defendant issued a proper warning to
18 the learned intermediary, he would have altered his behavior and the injury would have been
19 avoided.”) (citation omitted); *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 555-56, 863 P.2d 167, 177
20 (Cal 1993) (“Plaintiff’s mother, who administered the SJAC to plaintiff, neither read nor obtained
21 translation of the product labeling. Thus, there is no conceivable causal connection between the
22 representations or omissions that accompanied the product and plaintiff’s injury.”).

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 2²**

2 **PUNITIVE DAMAGES – FINDING OF MALICE OR OPPRESSION CAN ONLY**
3 **BE BASED ON CONDUCT THAT GAVE RISE TO LIABILITY**

4 In deciding whether Monsanto is liable for punitive damages, you may consider only conduct
5 by Monsanto that you believe caused Mr. Pilliod and/or Mrs. Pilliod’s injuries. Any evidence you
6 may have heard regarding conduct by Monsanto that occurred after Monsanto manufactured,
7 distributed, and sold the product that each Plaintiff used and claims to have caused their particular
8 harm cannot be a basis for finding that punitive damages may be imposed.

9
10 Source: U.S. Const. Amend. XIV; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-
11 23 (2003) (“A defendant’s dissimilar acts, independent from the acts upon which liability was
12 premised, may not serve as the basis for punitive damages. A defendant should be punished for the
13 conduct that harmed the plaintiff, not for being an unsavory individual or business.”); *Holdgrafer v.*
14 *Union Oil. Co.*, 160 Cal. App. 4th 907, 929-30 (2008) (citing *State Farm*); *Medo v. Super. Ct.* 205
15 Cal. App. 3d 64, 68 (1988) (“Punitive damages are not simply recoverable in the abstract. They must
16 be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.*”)
17 (emphasis in original).

18
19
20
21
22
23
24
25
26
27
28

² In Monsanto filed a bench brief in support of this instruction. In the prior set submitted to the Court, this instruction was numbered Special Instruction No. 3. In the revised set, it is now Special Instruction No. 2.

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 4**

2 **PUNITIVE DAMAGES – NOT COMPENSATION**

3 Punitive damages are not intended to compensate Mr. Pilliod or Mrs. Pilliod. If you awarded
4 compensatory damages to Mr. Pilliod and/or Mrs. Pilliod, your award will have fully compensated
5 Plaintiff(s) for any loss, harm, or damage that he or she has incurred or may in the future incur as a
6 result of Monsanto’s conduct. Accordingly, you must not include in an award of punitive damages
7 any amount intended as compensation for loss, harm, or damage that Mr. Pilliod or Mrs. Pilliod has
8 incurred or may incur.
9

10
11 Source: U.S. Const. Amend. XIV; *see, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.
12 408, 416 (2003) (“Compensatory damages ‘are intended to redress the concrete loss that the plaintiff
13 has suffered by reason of the defendant’s wrongful conduct.’ By contrast, punitive damages serve a
14 broader function; they are aimed at deterrence and retribution.”) (internal citations omitted); *id.* at
15 419 (“It should be presumed a plaintiff has been made whole for his injuries by compensatory
16 damages, so punitive damages should only be awarded if the defendant’s culpability, after having
17 paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to
18 achieve punishment or deterrence.”); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 n.27
19 (2008) (explaining that “[p]unitive damages by definition are not intended to compensate the injured
20 party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme
21 conduct.”) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981)).
22
23
24
25
26
27
28

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 5**

2 **PUNITIVE DAMAGES – MITIGATING EVIDENCE**

3 In determining the amount of punitive damages, if any, you should take into consideration
4 any mitigating evidence. Mitigating evidence is evidence that may demonstrate that there is no need
5 for punitive damages or that a reduced amount of punitive damages should be imposed against
6 Monsanto.

7
8
9 Source: U.S. Const. Amend. XIV; *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 904 (9th Cir. 1994)
10 (“[I]n calculating punitive damages, the court must consider the reprehensibility of the defendant’s
11 actions as well as any mitigating conduct”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.
12 408, 419 (2003) (“[T]he most important indicium of the reasonableness of a punitive damages award
13 is the degree of reprehensibility of the defendant’s conduct.”); *Rosener v. Sears, Roebuck & Co.*, 110
14 Cal. App. 3d 740, 753-54 (Ct. App. 1980) (considering mitigating factors in finding exemplary
15 damages award excessive).

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 6**

2 **SPECULATIVE OR CONJECTURAL RISKS**

3 A manufacturer has no duty to warn of risks that are merely speculative or conjectural.
4

5 Source: *T.H. v. Novartis Pharm. Corp.*, 4 Cal. 5th 145, 164, 407 P.3d 18, 28 (Cal. 2017) (“The
6 manufacturer has no duty to warn of risks that are “merely speculative or conjectural, or so remote
7 and insignificant as to be negligible.”) (quoting *Carlin v. Super. Ct.*, 56 Cal. Rptr. 2d 162, 920 P.2d
8 134 (Cal 1996)). *See also* comments to Instruction No. 5 (modified CACI 1205).
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 8**

2 **CLEAR EVIDENCE EPA WOULD HAVE REJECTED CANCER WARNING**

3 Monsanto is not liable to Mr. Pilliod or Mrs. Pilliod based on a failure to warn if there is
4 clear evidence EPA would have rejected any attempt by Monsanto to amend the label of Roundup
5 products to add a cancer warning about the risk of NHL. EPA’s repeated conclusion that a particular
6 product does not pose a particular risk may constitute clear evidence that EPA would have rejected a
7 proposed warning related to that risk.

8
9 Source: *Wyeth v. Levine*, 555 U.S. 555, 571 (2009) (“[A]bsent clear evidence that the FDA would
10 not have approved a change to Phenergan's label, we will not conclude that it was impossible for
11 Wyeth to comply with both federal and state requirements.”); *Seufert v. Merck Sharp & Dohme*
12 *Corp.*, 187 F. Supp. 3d 1163, 1174 (S.D. Cal. 2016) (“The FDA’s repeated conclusion that scientific
13 data did not support warning of pancreatic cancer risk coupled with the FDA’s statement that
14 product labeling was adequate amounts to clear evidence that the FDA would have rejected a
15 pancreatic cancer labeling change.”); *Dobbs v. Wyeth Pharm.*, 797 F. Supp. 2d 1264, 1276–77 (W.D.
16 Okla. 2011) (the FDA’s “repeated conclusions . . . that there was no scientific evidence to support a
17 causal connection between [selective serotonin reuptake inhibitors] and suicidality in adult patients”
18 constituted “clear evidence that the FDA would have rejected” an expanded warning for suicide).

1 **MONSANTO’S PROPOSED SPECIAL INSTRUCTION NO. 9**

2 **JOINDER OF THE CLAIMS OF MR. PILLIOD AND MRS. PILLIOD**

3 Although their claims were presented together in a single trial, Mr. Pilliod and Mrs. Pilliod
4 are separate plaintiffs who assert separate claims against Monsanto. Although some of the evidence
5 you heard is applicable to both Mr. Pilliod and Mrs. Pilliod, other evidence you heard is applicable
6 only to one of them individually.

7 For example, you heard evidence that Mr. Pilliod and Mrs. Pilliod each used different
8 amounts of Roundup and were diagnosed with different cancers at different times. When
9 considering the Plaintiffs’ claims, you should separately consider the evidence for each Plaintiff
10 regarding what Monsanto knew or reasonably should have known in light of the science that existed
11 at the time Monsanto manufactured, distributed, and sold the product that each Plaintiff used and is
12 alleged to have caused their particular harm. In considering the Plaintiffs’ claim for punitive
13 damages, you should only consider conduct that allegedly caused Plaintiffs’ harm, and you may not
14 consider evidence of Monsanto’s conduct after Monsanto manufactured, distributed, and sold the
15 product that each Plaintiff used and is alleged to have caused their particular harm.

16 When considering Mr. Pilliod’s claims you may not consider evidence that is applicable only
17 to Mrs. Pilliod’s claims. Similarly, when considering Mrs. Pilliod’s claims you may not consider
18 evidence that is applicable only to Mr. Pilliod’s claims.

19
20 Source: California law requires Monsanto to warn only of risks that were known or reasonably
21 scientifically knowable by generally accepted science at the time Plaintiffs manufactured,
22 distributed, or sold the products that caused their harm. *See Anderson v. Owens-Corning Fiberglas*
23 *Corp.*, 53 Cal. 3d 987, 999-1000 (1991) (holding that “knowledge or knowability” of risk is a
24 required component of failure to warn claims). Monsanto’s knowledge and conduct after Plaintiffs’
25 NHL cannot have influenced Plaintiffs’ injury. *See Espresso Roma Corp. v. Bank of Am., N.A.*, 100
26 Cal. App. 4th 525, 534 (2002) (excluding as irrelevant evidence of defendant’s conduct after injury-
27 causing events “because they relate to events occurring long after” relevant time period); Cal. Evid.
28 Code §§ 210, 350. Monsanto’s conduct after it manufactured, distributed, and sold the product that

1 caused Plaintiffs’ harm is also not relevant to punitive damages, because a punitive damage award
2 cannot be premised on “conduct that bore no relation to the [Plaintiffs’] harm” without violating
3 federal due process. *State Farm Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (“A defendant’s
4 dissimilar acts, independent from the acts upon which liability was premised, may not serve as the
5 basis for punitive damages.”); *see also Willis v. Buffalo Pumps Inc.*, No. 12cv744 BTM (DHB),
6 2014 WL 1028437, at *5 (S.D. Cal. Mar. 17, 2014) (“Punitive damages are not simply recoverable
7 in the abstract. They must be tied to oppression, fraud or malice in the conduct which gave rise to
8 liability in the case.”).

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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
26
27
28

PROOF OF ELECTRONIC SERVICE

Roundup Products Cases, Case No. JCCP 4953
Pilliod, et al. v. Monsanto Company, Case No. RG17862702
Alameda County Superior Court

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is One California Street, 18th Floor, San Francisco, California 94111.

On May 1, 2019, I served a true and correct copy of the documents described as **PLAINTIFFS’ AND MONSANTO’S JOINT SUBMISSION OF PROPOSED JURY INSTRUCTIONS** on the interested parties by electronic transfer to Case Anywhere via the Internet, pursuant to the Court’s Case Management Order No. 2 Authorizing Electronic Service dated March 23, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Proof of Electronic Service was executed on May 1, 2019 at San Francisco, California.

/s/ Dana DeMonte
Dana DeMonte