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

14
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

**MONSANTO COMPANY'S MOTION TO
EXCLUDE IMPROPER CLOSING
ARGUMENT**

Trial Date: March 18, 2019

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1 **I. INTRODUCTION**

2 Throughout this trial, including in opening statement, Monsanto has been forced to move
3 for mistrial or otherwise object to improper argument and actions by Plaintiffs' counsel. Even if
4 stricken, improper comments or conduct by Plaintiffs' counsel can unduly influence and prejudice
5 the jury. It is nearly impossible to "unring the bell," and improper comments during closing
6 argument have even more influence because they occur just before the jury deliberates. In an
7 effort to minimize the necessity of objections and set forth clear parameters for inappropriate
8 topics, Monsanto files this motion in advance of closing argument.

9 **II. ARGUMENT**

10 Based on Plaintiffs' counsel's past conduct in this case and improper statements made by
11 this same counsel during closing argument in *Johnson*, Monsanto anticipates that Plaintiffs'
12 counsel may engage in similar conduct during closing argument here. Plaintiffs' counsel has
13 already turned this trial into a circus on multiple occasions; for example, counsel has:

- 14 • twice put on gloves in an elaborate show before handling a Roundup bottle that
15 contained only water;
- 16 • purported to spray the jury with the Roundup bottle on one occasion;
- 17 • been admonished for his treatment of Monsanto's expert Dr. Bello; and
- 18 • paraded around celebrities and anti-Monsanto advocates Neil Young and Daryl
19 Hannah during Monsanto's case, including engaging in photo-ops right outside the
20 jury room in a clearly improper attempt to influence the jury.

21 In addition, Plaintiffs' counsel has repeatedly violated pre-trial rulings and court
22 admonishments. For example, during jury selection Plaintiffs' counsel specifically brought up the
23 Bayer acquisition of Monsanto in clear violation of the Court's pre-trial order. *See* Tr. 951:4-9.
24 And during Dr. Benbrook's testimony, counsel attempted to elicit testimony implying Monsanto
25 had a role in the IBT scandal, also in clear violation of the Court's in limine ruling. *See* Tr.
26 3634:4-3635:22

27 Accordingly, Monsanto respectfully asks the Court to preclude improper argument and
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1 behavior during closing argument, including but not limited to the following.

2 **1. Using Roundup Bottle As Demonstrative/Spraying Water Near Jury.**

3 Plaintiffs' counsel has now twice brought out a Roundup bottle filled with water and
4 unnecessarily sprayed it near the jury. This dramatic demonstration served no purpose other than
5 to try to scare the jury. Indeed, the Court had to instruct the jury that there was no reason to be
6 concerned because the bottle only contained water. Prior to trial, Monsanto filed a motion in
7 limine to exclude any use of "Reptile Theory" type arguments by Plaintiffs' counsel, and this is
8 precisely why. *See* Monsanto's MIL No. 27. It is improper to use physical objects in closing that
9 are not received in evidence, *Weisbart v. Flohr*, 260 Cal. App. 2d 281, 291 (1968), and to "act
10 out" demonstrations that do not fairly reflect the evidence, *id.* at 292-93 (counsel's use of props
11 during closing argument was reversible error). Plaintiffs' counsel should not have been allowed to
12 engage in this improper behavior the first two times, and they should not be allowed to do it again
13 in closing argument.

14 **2. Arguments About Monsanto's Size or Corporate Status.**

15 It is well established that "[a]ppeals to the sympathy of the jury based on the size or
16 corporate status of a defendant are improper." *Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841,
17 860 (1977) (holding the following closing argument impermissible: "'Save a buck, and that is the
18 only reason I can think of why they would handle things the way they do. These large
19 corporations, in effect, crippled [plaintiff]; they took his manhood away from him; they took his
20 privacy from him; they took his body away from him; and they left him in pain. . . .'"); *accord*
21 *Weaver v. Shell Oil Co.*, 129 Cal. App. 232, 234 (1933) (affirming grant of new trial based upon
22 statement by plaintiff's counsel during closing argument that "[s]omeone must take care of this
23 widow and those four children, and the Shell Company is a great big, rich corporation, has
24 millions, and it can afford to take care of them.").

25 In *Johnson*, Plaintiffs' counsel, Mr. Wisner, was reprimanded by Judge Bolanos for
26 making outrageous comments during closing argument that were not based on the evidence and
27 were clearly designed to inflame the jury. Specifically, Mr. Wisner made up a fantastical story
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1 about how Monsanto’s corporate representative was sitting in the courtroom with a conference
2 room in St. Louis, Missouri “on speed dial.” Declaration of Sandra Edwards (“Edwards Decl.”)
3 Exh. A. He continued, “in that board room, there’s a bunch of executives waiting for the phone to
4 ring. Behind them is champagne on ice.” *Id.* Even after the Court sustained Monsanto’s
5 objection to that line of argument, Mr. Wisner continued, undeterred:
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7 The number you have to come out with is the number that tells those people -- they
8 hear it, and they have to put the phone down, look at each other, and say, “We have
9 to change what we’re doing.” Because if the number comes out and it’s not
10 significant enough, champagne corks will pop. “Attaboys,” are everywhere.

11 *Id.* Although the Court sustained Monsanto’s objections, the damage had been done.
12 Accordingly, Plaintiffs’ counsel must be unambiguously precluded from using these flagrantly
13 improper types of arguments in this case.

14 **3. Arguments About The Alleged Historic Context of Case Or Changing the World.**

15 “An attorney’s appeal in closing argument to the jurors’ self-interest is improper and thus
16 is misconduct because such arguments tend to undermine the jury’s impartiality.” *Cassim v.*
17 *Allstate Ins. Co.*, 33 Cal. 4th 780, 796 (2004). Moreover, arguments that ask “each juror to
18 become a personal partisan advocate” are improper because they “tend[] to denigrate the jurors’
19 oath to well and truly try the issue and render a true verdict according to the evidence.” *Loth v.*
20 *Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 765 (1998).

21 In *Johnson*, Mr. Wisner began his closing argument by improperly suggesting to the jury
22 that a verdict in his client’s favor would “actually change[] the world”:

23 And if you return a verdict today that does that, that actually
24 changes the world. I mean, it’s crazy to say that; right? I told you
25 all at the beginning of this trial that you were part of history, and
26 you really are, and so let me just say thank you.

27 Edwards Decl. Exh. A.

28 Mr. Wisner previewed this theme in opening statement in this case as well, both starting
and ending his opening statement by telling the jury that this is a “historic” case:

- “Hi. My name is Brent Wisner. I’m the attorney that represents Alberta and Alva Pilliod

1 in this lawsuit in their historic fight against Monsanto.” Tr. 1309:14-16.

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- 3 • “The fact that you’re here today, part of this historic case, means everything to them.” Tr. 1429:12-13.

4 Such argument was clearly improper and Monsanto already had to move for mistrial once
5 on this basis. See Tr. 1430:3-6. Plaintiffs’ characterization of the case as “historic” should not be
6 allowed again. Similarly, counsel should not be allowed to suggest that the verdict will change the
7 world or have any effect outside of this case, such as influencing the EPA to change its
8 determinations regarding glyphosate safety and/or registration. See Tr. 1404:10-16 (“But the most
9 recent iteration of [EPA’s] opinion is that it doesn’t cause cancer. That’s where the EPA, we
10 think, stands right now. Although they could change after – well, after this trial. Who knows?”).

11 **4. Referencing Facts Not In Evidence.**

12 It is elementary that argument made in closing that is unsupported by evidence is improper.
13 *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1227 (2006) (“We agree that any references
14 to Ford having destroyed or torn up documents was not supported by the evidence and constituted
15 improper argument.”). “While a counsel in summing up may indulge in all fair arguments in favor
16 of his client’s case, he may not assume facts not in evidence or invite the jury to speculate as to
17 unsupported inferences.” *Malkasian v. Irwin*, 61 Cal. 2d 738, 746 (1964) (affirming grant of new
18 trial where counsel hypothesized about a motor vehicle accident in a manner that was “contrary to
19 physical facts” and where “[t]here was no testimony that even remotely suggested” his
20 hypothetical occurred). Additionally, it is wholly improper to argue the importance of a court-
21 excluded document and ask the jury to draw negative inferences because it wasn’t admitted into
22 evidence. *Hansen v. Warco Steel Corp.*, 237 Cal. App. 2d 870, 877 (1965) (“Counsel was guilty
23 of *serious misconduct* in arguing the importance of the excluded document and in asking the jury
24 to draw an inference because plaintiff’s attorney had made an objection which the court had
25 sustained.” (emphasis added)).

26 Plaintiffs’ counsel must be precluded from commenting on matters not in evidence and
27 from encouraging the jury to speculate as to why any document is not in evidence. For example,
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1 in *Johnson*, counsel specifically told the jury that Monsanto did not call anybody to testify on
2 certain topics because they could not find anyone to do so. Edwards Decl. Exh. A. He also stated
3 his “theory”—which was wrong as a matter of law—that the reason certain EPA documents were
4 not admitted into evidence was because the EPA did not want to admit that they had made a
5 mistake about glyphosate. *Id.*

6 This type of misconduct has continued in this case. During opening statements, for
7 example, Mr. Wisner improperly stated that Dr. Zhang was a member of the EPA Scientific
8 Advisory Panel and that she and other SAP scientists were “so outraged by what the EPA was
9 doing, they went and did their own study and published it last month.” Tr. 1405:24-1406:8. There
10 is no evidence whatsoever to support this statement; it was pure uncorroborated attorney
11 testimony, and counsel should not be allowed to repeat it during closing argument. He has also
12 suggested on multiple occasions that recent findings of the EPA Office of Pesticide Programs are
13 preliminary and that EPA may change its determination, but we now know that the most recent
14 EPA report has been released and its findings are consistent with the earlier reports. *See* Tr.
15 1404:10-16; 1408:12-16. Plaintiffs’ counsel cannot make any statements that affirmatively
16 suggest that the most recent report does not exist.

17 **5. Counsel’s Personal Opinion/Personal Attacks on Monsanto Witnesses**

18 “Personal attacks on the character or motives of the adverse party, his counsel, or his
19 witnesses are misconduct.” *Stone v. Foster*, 106 Cal. App. 3d 334, 355 (1980) (comment that “I
20 wouldn’t believe one word he said . . .” was improper). “The rule [forbidding an attorney to
21 pander to the prejudice, passion or sympathy of the jury] also manifests itself by prohibiting
22 irrelevant ad hominem attacks.” *Martinez v. Dep’t of Transp.*, 238 Cal. App. 4th 559, 566 (2015);
23 *accord Las Palmas Assoc. v. Las Palmas Center Assoc.*, 235 Cal. App. 3d 1220, 1246 (1991)
24 (“Personal attacks on opposing parties and their attorneys, whether outright or by insinuation,
25 constitute misconduct. Such behavior only serves to inflame the passion and prejudice of the jury,
26 distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence
27 admitted at trial.”); *People v. Johnson*, 121 Cal. App. 3d 94, 103 (1981) (counsel’s comment that
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1 he believed the witness to be telling an “outright lie” was improper).

2 Again, Plaintiffs’ counsel blatantly violated these rules in *Johnson*. There, he described
3 one of Monsanto’s witnesses testimony as “offensive,” “completely bonkers,” “disgusting,” and
4 “reprehensible,” and argued that the witness “has no dignity.” Edwards Decl. Exh. A. After
5 Plaintiffs’ counsel blurted out these inappropriate attacks, the bell could not be unring in that case.
6 Accordingly, the Court here should make explicit that these types of arguments will not be
7 tolerated here.

8 **6. Coordinated Efforts With Celebrities to Improperly Influence the Jury.**

9 Parties have the right to an impartial jury. “An impartial jury is one in which no member
10 has been improperly influenced . . . and every member is capable and willing to decide the case
11 solely on the evidence before it.” *In re Hamilton*, 20 Cal. 4th 273, 294 (1999) (internal quotation
12 marks and citations omitted).

13 On May 1, celebrities and anti-Monsanto advocates Neil Young and Daryl Hannah sat with
14 Plaintiffs’ counsel to observe trial. Declaration of Sandra Edwards (“Edwards Decl.”) at ¶ 2;
15 Declaration of Eugene Brown (“Brown Decl.”) at ¶ 2. Monsanto does not take issue with their
16 presence in the courtroom as observers, as is their right. However, during court recesses and after
17 court adjourned for the day, Plaintiffs’ counsel, Michael Baum, deliberately chose to make a scene
18 by taking photographs with Mr. Young and Ms. Hannah right in front of the jury assembly room,
19 *as jurors were exiting the room*. Brown Decl. at ¶ 3. Mr. Baum’s photo-op can only be described
20 as a calculated effort to draw attention and influence jurors. It worked: a juror was heard
21 commenting that he wondered if he could get a photo with Mr. Young and Ms. Hannah. Edwards
22 Decl. at ¶ 3. When Monsanto’s counsel approached Plaintiffs’ counsel, Mr. Miller, and stated that
23 this behavior was inappropriate, Mr. Miller’s only response was to say that his co-counsel Mr.
24 Baum’s conduct was outside of his control. Brown Decl. at ¶ 4.

25 Not only did Mr. Young and Ms. Hannah sit with Plaintiffs’ counsel during trial and take
26 photographs with them in front of jurors, they had lunch with them in public (which was
27 documented on Ms. Hannah’s Twitter) and were mingling with them in front of the courthouse
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1 after trial for all—including the jury—to see. *See* Edwards Decl. at ¶¶ 2-4; Brown Decl. at ¶¶ 2-3.
2 It was thus apparent to any onlooker that they were associated with Plaintiffs’ counsel.

3 This spectacle can be categorized as nothing other than an intentional attempt by Plaintiffs’
4 counsel to use Mr. Young and Ms. Hannah’s celebrity status to improperly influence the jurors
5 and pressure them to find for Plaintiffs. Plaintiffs’ counsel also undoubtedly knew that seeing
6 these celebrities associating with Plaintiffs’ counsel would likely prompt jurors to research their
7 involvement in the trial. If any members of the jury were to perform a simple Google search for
8 Mr. Young or Ms. Hannah, they would quickly learn of their strong anti-Monsanto sentiment.
9 Indeed, in 2015, Mr. Young produced an album called “the Monsanto Years.” And after the
10 *Johnson* trial, Mr. Young and Ms. Hannah co-authored an opinion piece in the San Francisco
11 Chronicle entitled “Let \$289 million jury award stand in Monsanto case.” *See*
12 [https://www.sfchronicle.com/opinion/openforum/article/Let-289-million-jury-award-stand-in-](https://www.sfchronicle.com/opinion/openforum/article/Let-289-million-jury-award-stand-in-Monsanto-case-13303640.php)
13 [Monsanto-case-13303640.php](https://www.sfchronicle.com/opinion/openforum/article/Let-289-million-jury-award-stand-in-Monsanto-case-13303640.php). In addition, Ms. Hannah’s Twitter account contains numerous
14 tweets about the Roundup trials, including one where she specifically wrote about her experience
15 in court *during this trial*: “Well that was a trip! – of course I know these skeezy corporate cronies
16 manipulate & lie – but to see it right in front of your eyes is soooo depressing & creepy.”
17 Edwards Decl. at ¶ 4.

18 Plaintiffs’ counsel’s calculated effort to coordinate with celebrities to improperly influence
19 the jury is wholly inappropriate, and the Court should admonish them not to do it again.

20 **III. CONCLUSION**

21 These examples of Plaintiffs’ counsel’s past behavior demonstrate why Monsanto has a
22 real concern that counsel’s closing argument in this case will be replete with misconduct.
23 Monsanto thus seeks an order prohibiting the types of improper arguments mentioned herein.
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