A155940 & A156706

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

DEWAYNE JOHNSON,
Plaintiff and Appellant,

v.

MONSANTO COMPANY,
Defendant and Appellant.

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT
SUZANNE R. BOLANOS, JUDGE • CASE NO. CGC-16-550128

COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

HORVITZ & LEVY LLP
DAVID M. AXELRAD (BAR NO. 75731)
JASON R. LITT (BAR NO. 163743)
DEAN A. BOCHNER (BAR NO. 172133)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
daxelrad@horvitzlevy.com
jlitt@horvitzlevy.com
dbochner@horvitzlevy.com

BRYAN CAVE LEIGHTON PAISNER LLP
K. LEE MARSHALL (BAR NO. 277092)
THREE EMBARCADERO CENTER, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-4070
(415) 675-3400 • FAX: (415) 675-3434
klmarshall@bclplaw.com

ATTORNEYS FOR DEFENDANT AND APPELLANT
MONSANTO COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

DEWAYNE JOHNSON,
Plaintiff and Appellant,

v.

MONSANTO COMPANY,
Defendant and Appellant.

COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

APPELLANT'S REPLY BRIEF

INTRODUCTION

Plaintiff's attempt to defend the verdict in this case fails against the decisive facts and law presented in the opening brief.

The fundamental reason this case went wrong is the trial court's failure to follow the necessary implications of a pivotal undisputed fact: that, as the trial court itself recognized, "all of the worldwide regulators continue to find that glyphosate-based herbicides . . . are safe and not carcinogenic." (6 AA 6141.) This reality, much of which the trial court refused to even admit into

evidence, should have been dispositive many times over. Monsanto had no duty to warn of a risk that, far from being a prevailing scientific view, worldwide regulators agree does not exist. Monsanto cannot be liable for failing to do that which it could not have done in the absence of EPA approval—change its EPA-approved label to provide a warning that EPA believes is at odds with the science. And under California law, as the Court of Appeal recently held, punitive damages are unavailable as a matter of law where the alleged link between a product and cancer is subject to reasonable scientific and regulatory debate. (See *Johnson & Johnson Talcum Powder Cases* (July 9, 2019, B286283) ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27] (*Echeverria*).)

Here, there was no regulatory debate at all—the unanimous consensus was that glyphosate-based products were safe. The IARC Monograph so crucial to Plaintiff's case post-dates Plaintiff's diagnosis and did not alter the regulatory consensus on glyphosate. A scientific debate—and a fairly one-sided debate at that—is thus the very most Plaintiff could show. That is no basis for liability, much less an award of punitive damages.

Despite all of this, the jury returned a staggering verdict, including an enormous award of punitive damages, punishing Monsanto for daring to rely upon a worldwide regulatory consensus and defend the safety of its product. Nothing in Plaintiff's brief justifies this result.

The failure to warn and design defect verdicts rest on fundamentally erroneous interpretations of the applicable law.

Plaintiff's failure to warn theory required proof that Roundup's alleged cancer risks were "known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time." (29A RT 5047:3-11.) Yet no one seriously maintains that there was a prevailing scientific view that Roundup presented a potential risk of NHL "at the time" of Plaintiff's use and diagnosis. (*Ibid.*) To the contrary, at the time Plaintiff was diagnosed with cancer, the IARC Monograph on which Plaintiff places such great weight had not been issued, and the unanimous regulatory view of the science was that glyphosate posed no cancer risk to Roundup users. Even today, there is an overwhelming consensus adhering to that conclusion. Knowing that the legal requirements for his failure-to-warn claim cannot be met, Plaintiff tries to change the subject, relying on the litigation opinions of his own paid experts at the time of trial instead of what matters: the prevailing scientific view *before* his cancer diagnosis. Despite spending much of his brief attempting to dilute the applicable standard for when a warning must be given, Plaintiff cannot justify a legal duty to warn of a risk that the prevailing science said did not exist.

Plaintiff's consumer expectations theory is nothing more than an attempted end-run around this defect. Plaintiff's theory boils down to an assertion that Monsanto is liable irrespective of the prevailing science because Roundup is easy to use and Plaintiff did not expect to get sick. But under California law, the consumer expectations test does not apply where the alleged product defect involves technical details and requires expert testimony. Here,

while the jury was improperly blinded to regulatory reports agreeing with Monsanto's view, it was positively inundated with technical details and expert testimony. No consumer expects to get sick. The notion that liability attaches whenever a consumer is unexpectedly injured is a theory of liability without limit that cannot possibly be correct.

Plaintiff has also failed to establish even a remotely sound basis for concluding that Roundup actually caused his cancer. His own expert conceded that the potential causes of his cancer are overwhelmingly unknown, and did nothing to explain why those likely unknown causes can simply be tossed aside in determining the cause of Plaintiff's illness. His opinion is guesswork, not evidence. And even if there was some strained basis for a lay jury to conclude that glyphosate caused Plaintiff's cancer, Plaintiff does not dispute that EPA has rejected the cancer risk he alleges—including in a decision by the agency after trial in this highly visible case—or that federal law prohibits Monsanto from adding his proposed cancer warning to Roundup without EPA's permission. This is a textbook case of impossibility preemption.

Nor can the massive damages award stand. Even if Plaintiff introduced *some* evidence to support a failure-to-warn claim, the worldwide regulatory consensus that glyphosate is not carcinogenic establishes the utter lack of clear and convincing evidence that Monsanto acted with malice—i.e., that it *intended* to harm Plaintiff or *consciously* disregarded a *known* risk. As the Court of Appeal recently held in *Echeverria*—a case where the scientific evidence of a link to cancer was, if anything, stronger—

it is not malicious for a company to defend its product by taking one side of a reasonable scientific dispute. As a matter of law, Monsanto cannot be punished for "refus[ing] to draw a causal connection between [Roundup use] and . . . cancer before experts in the relevant fields [had] done so." (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].)

The jury's unusually large compensatory award is just as flawed. It is based on a straightforward legal error—that a plaintiff can recover pain-and-suffering damages for decades beyond his life expectancy—that was induced by counsel's flagrant attempts to inflame the jury.

In short, virtually everything in this trial went wrong. Plaintiff is entitled to sympathy, but not to a verdict that ignores sound science, distorts the facts, and subverts controlling law.

LEGAL ARGUMENT

I. The court should reverse the judgment with directions because there is no substantial evidence to support the jury's failure-to-warn and design-defect findings.

A. The warning claim fails as a matter of law because there was no prevailing scientific consensus that Roundup causes cancer.

Plaintiff acknowledges that to prevail on a failure-to-warn claim, it was not enough to establish that Monsanto could have deduced that a risk might exist. (See RB/X-AOB 65.) Instead, he had to prove that Roundup "had potential risks that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time" the product was manufactured, distributed, or sold. (29A RT 5047:3-11; see AOB 41; CACI No. 1205; *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002-1003 (*Anderson*).)[1]

---

[1] Plaintiff cites *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3, to argue that "knowable" means only " 'knowledge obtainable "by the application of reasonable, developed human skill and foresight . . . ." ' " (RB/X-AOB 65.) But *Carlin* relies upon *Anderson* and does not purport to differ from *Anderson* in requiring that "known or knowable" must be determined "in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483-1484; see CACI No. 1205.)

Although Plaintiff acknowledges the applicable standard, he disregards the CACI Committee's explanation of what it means for a potential risk to be "generally accepted in the scientific community." CACI Committee commentary provides useful guidance to courts. (E.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594-595; *DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 250-251; *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 685.) Here, the committee was careful to explain what is *not* sufficient: "A risk may be 'generally recognized' as a view (knowledge) advanced by one body of scientific thought and experiment, but it may not be the 'prevailing' or 'best' scientific view; that is, it may be a minority view." (Directions for Use to CACI No. 1205 (2019) p. 717.) In this case, the record is undisputed that at the time Plaintiff was diagnosed with cancer—well before the International Agency for Research on Cancer (IARC) issued its Monograph—there was not even a minority view, much less a prevailing one, that Roundup use had the potential to cause cancer in humans.[2] As explained in the opening brief, every

[2] Plaintiff suggests that the relevant time frame for determining Monsanto's alleged duty to warn extends beyond the date of Plaintiff's diagnosis because Plaintiff continued to spray Roundup after he was diagnosed with cancer, and the additional spraying caused his cancer to "progress[ ] from a manageable cancer to a deadly cancer." (RB/X-AOB 21.) Plaintiff cites no record support for his claim that the additional spraying exacerbated his cancer. (See *ibid.*) In fact, Plaintiff's own medical expert, Dr. Chadi Nabhan, testified that he did not know if Plaintiff's continued spraying affected the progression of his cancer. (17A RT 2864:22-2865:14; see also 27A RT 4756:7-4757:8, 4783:8-17 [Dr. Timothy Kuzel].)

single worldwide regulatory agency, as well as Plaintiff's own treating physicians, confirmed there was no scientific view—minority or otherwise—suggesting that Roundup posed a cancer threat when Plaintiff was diagnosed with non-Hodgkin's lymphoma (NHL). (See AOB 45, citing 13B RT 2098:13-23, 2106:12-15, 2120:17-2122:9; 17B RT 2995:11-14.)

Plaintiff does not dispute these facts. Instead, he asserts that the risk of cancer was "known or knowable" because his *trial experts* based their post-hoc *trial causation* opinions on scientific studies available at the time he used Roundup. (RB/X-AOB 65-66.) In support of this position, Plaintiff cites the view of one federal district judge that the expert opinions in that case were based on pre-exposure studies and Monsanto "could have reached this conclusion on its own had it investigated the issue responsibly and objectively." (*In re Roundup Products Liability Litigation* (N.D.Cal. 2019) 364 F.Supp.3d 1085, 1088-1089.) But both Plaintiff and the district judge rely *only* on the post-hoc opinions of trial experts, and ignore the actual view of the scientific community at the relevant time, to establish what was generally accepted for purposes of proving a failure-to-warn claim under California law. The worldwide regulatory consensus to this day disagrees with Plaintiff's trial experts' interpretation of those pre-exposure studies. Plaintiff produced no evidence demonstrating that before he was diagnosed with cancer, there was a generally recognized, let alone prevailing scientific view that Roundup was capable of causing cancer in humans at real-world doses. And the

clear, prevailing view—even today based on an analysis of all the science—is that it does not.

The only evidence Plaintiff cites in his respondent's brief purporting to agree with his trial experts' assessment of the science are the IARC report itself and the views expressed by a number of scientists *after* the issuance of the IARC report. (RB/X-AOB 66.) Plaintiff cites evidence that IARC is a reputable organization and that 125 scientists published a peer-reviewed article "endorsing IARC's methodology" and 95 scientists "co-signed a letter endorsing IARC's findings over" the European regulators. (*Ibid.*)

But such post-hoc analysis is irrelevant to determining the "best" or "prevailing" scientific view at the time that is relevant for a determination of Monsanto's duty to warn in this case. Publications issued and opinions expressed *after* Plaintiff's diagnosis are not evidence of what was "'"generally recognized and prevailing best scientific and medical knowledge"'" at the relevant time. (AOB 43.) Moreover, the IARC report only analyzed whether glyphosate was "capable of causing cancer under some circumstances" and did not conclude that there was a real-world potential risk that glyphosate causes cancer in those exposed to Roundup under real-world conditions. (AOB 22.) The IARC report does nothing to contradict the undisputed worldwide regulatory view that there was not sufficient evidence to establish that

Roundup posed even a potential risk of cancer to humans.[3] And even if this evidence had existed before Plaintiff was diagnosed with cancer, the evidence would not establish a *prevailing* scientific view. (See 6 AA 6146 [trial court: "Before and after IARC's classification of glyphosate as a 'probable' human carcinogen, regulatory and public health agencies worldwide have reviewed and rejected claims about the carcinogenicity of [glyphosate-based herbicides]"]; see also AOB 41-46.)

Plaintiff argues that he presented evidence that the Environmental Protection Agency (EPA) and European regulators did not follow their own guidelines and thus the jury could have concluded that their views did not reflect the " 'best scientific' " knowledge. (RB/X-AOB 66.) Most of this so-called evidence consists of the same opinions described above—i.e., Plaintiff's experts criticizing the regulatory reports that disagree with IARC.

---

[3] Plaintiff asserts that "IARC's assessment was based on real-world exposure to applicators such as Johnson and represents a real risk to human health." (RB/X-AOB 18, citing 12 RT 1741:21-24, 16A RT 2600:8-2601:21.) This assertion is highly misleading. The citations to the record establish only that IARC reviewed the epidemiology studies, which by definition examine real-world exposures. But, as IARC itself acknowledges, the epidemiology studies do not establish a statistically significant association between exposure to glyphosate-containing herbicides and cancer, and thus *do not* establish that glyphosate poses a real-world cancer risk. (16B RT 2678:20-25; 6 AA 6902.) IARC determined that glyphosate was a potential carcinogen based on its additional review of animal and mechanistic studies, which are not based on exposure to herbicides in real exposure scenarios; IARC could thus conclude only that glyphosate has the potential to cause cancer, not that actual use of glyphosate-containing herbicides poses a real-world health risk. (6 AA 6902-6903.)

The evidence says nothing about the conclusions reached years earlier by multiple regulatory agencies throughout the world, including those in Canada, Japan, and Australia, in addition to the United States and Europe. (Compare RB/X-AOB 39-40 with AOB 20-21.) The only criticism of the pre-IARC regulatory findings is made by Plaintiff's paid expert, who testified that U.S. and European regulators (whose guidelines were the same as IARC's) did not follow those guidelines. (RB/X-AOB 39-40.) But even if Plaintiff were permitted to second-guess a federal agency's interpretation of its own procedures (but see pp. 60-61, fn. 17, *post*), Monsanto could reasonably rely on the prevailing scientific view of multiple worldwide regulatory agencies without undertaking an independent investigation into each regulatory agency's internal operating procedures.

Moreover, it is Plaintiff (not Monsanto) who had the burden of proving a prevailing scientific view that supported a warning requirement. Plaintiff cannot point to a single scientist who reviewed all of the scientific literature *before* he was exposed to Roundup—as multiple regulators did—and disagreed with the regulators' conclusions. The post-hoc, litigation-driven view presented by Plaintiff's experts at the time of trial does not diminish the undisputed scientific consensus that existed before Plaintiff was diagnosed with cancer.

At bottom, Plaintiff asks this court to ignore the requirements of California law, as spelled out in the CACI instruction, that a plaintiff must prove that a risk was supported by the "generally recognized and prevailing best scientific and

medical knowledge," and instead to substitute that requirement with some lower threshold that can be met whenever a litigation expert can cobble enough together to make an argument for causation. Such a watered-down approach would run counter to California law and effectively make manufacturers no-fault insurers of users of their products. Because a risk that Roundup causes cancer was not generally recognized as prevailing in the scientific community, and certainly did not represent the best scholarship available at the time Plaintiff used Roundup, the risk was not "known" or "knowable," and Monsanto had no duty to warn.

B. The design defect claim fails as a matter of law because the consumer expectations theory advanced by Plaintiff does not apply where expert testimony is required to establish the basis of the defect.

The consumer expectations test does not apply in this case because the alleged defect in Roundup has nothing to do with how the product performed as would be expected by an ordinary consumer, but is instead based entirely on the opinions of multiple experts explaining how the proper and expected use of the product affected Plaintiff's (and other consumers') health. (See AOB 48-56.) Plaintiff's primary response is that the consumer expectations test applies because he did not expect to develop cancer from using Roundup. (RB/X-AOB 69-71.) That was also his pitch to the jury: "Simply put, in using Roundup as it's sold on the market today,

would you think that it causes cancer?" (29A RT 5119:20-21.) But it is well settled that the consumer expectations test does not apply merely because the plaintiff did not expect to be injured by the product. (AOB 49, 54.) Indeed, "If this were the end of the inquiry, the consumer expectation[s] test always would apply and every product would be found to have a design defect." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 159 (*Trejo*).) After all, "any injury from the intended or foreseeable use of a product is not expected by the ordinary consumer." (*Id.* at pp. 158-159.)

Plaintiff additionally argues that the consumer expectations test applies here because Roundup is commonly used and because he used standard methods for spraying it. (See RB/X-AOB 69 [arguing the consumer expectations test applies because Plaintiff applied a generally available form of Roundup using a "common and well-accepted method"], 70 [arguing the consumer expectations test applies because some jurors used Roundup].) But application of the consumer expectations test does not turn on whether the product is simple to use or commonly used. Rather, application of the test depends on whether the "circumstances of the product's failure" are so complex that the jury cannot decide liability without considering expert testimony. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 568-569 (*Soule*); see *id.* at p. 567 [consumer expectations test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*"]; see also *Morson v. Superior Court* (2001) 90

Cal.App.4th 775, 792 (*Morson*) ["Under *Soule* the consumer expectations test can be applied even to very complex products, but only where the circumstances of the product's failure are relatively straightforward"].)

Plaintiff suggests that the consumer expectations test is applicable here because he followed the product label's instructions, and therefore had an expectation that he would not be injured from using the product. (RB/X-AOB 69 ["Johnson reviewed the product label every time he sprayed Roundup," but "the label never included cancer warnings"].) But that is just another way of arguing that Monsanto failed to sufficiently warn him of the product's dangers, which is a different cause of action with separate elements that must be met. To establish a failure-to-warn claim, the plaintiff must prove that the potential risk was known or knowable based on the best available science. (See *ante*, pp. 21-22; AOB 40-48.) Under Plaintiff's formulation of the consumer expectations test, that important limitation on liability is tossed aside. If, as Plaintiff claims, the consumer expectations test applies every time a consumer is injured by a product without being warned of the risk, then the failure-to-warn theory would be superfluous, and liability would become absolute, rather than strict, in violation of California law. (See *Anderson*, *supra*, 53 Cal.3d at p. 994 [" 'strict liability has never been, and is not now, *absolute* liability' "].)[4]

---

[4] Plaintiff argues that he did not waive his design defect theory because the consumer expectations theory is a valid theory of design defect, and it was presented to the jury. (RB/X-AOB 67-68.) (continued...)

California courts adopted the consumer expectations test not to transform strict liability into absolute liability, but to ease the burden of proof on injured consumers in "res ipsa-like cases" where expert testimony is unnecessary because the product obviously did not perform as an ordinary consumer would expect. (*Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1484 (*Pruitt*).) Thus, if a car spontaneously explodes while idling, an injured plaintiff does not need expert testimony to explain that the product was defective, even if the plaintiff might need an expert to establish that his injury was caused by the explosion. (See *ibid.*; *Soule*, *supra*, 8 Cal.4th at pp. 566-567, fn. 3.) By contrast, in cases like *Trejo* and *Morson* (and this one), where the circumstances of the product's alleged failure require expert testimony about the technical and mechanical details of the manufacturing process and the product's effect on the plaintiff's health, the consumer expectations test does *not* apply. (See *Trejo*, *supra*, 13 Cal.App.5th at p. 160; *Morson*, *supra*, 90 Cal.App.4th at p. 792; AOB 48-56.)

(...continued)
Nobody disputes that the consumer expectations test can be a valid theory of design defect in the right circumstances. (See, e.g., *Soule*, *supra*, 8 Cal.4th at pp. 566-567, fn. 3.) But here, the test does not apply as a matter of law, which is demonstrated by the fact that Plaintiff's own experts testified there was nothing wrong with the product's design if proper warnings had been given. (AOB 49.) And because Plaintiff made the decision to advance an invalid theory of design defect, and did not ask the court to instruct the jury on the alternative risk/benefit theory, Plaintiff did, in fact, waive his design defect claim. (See *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1551 ["We cannot uphold the damage award on an alternative theory which was not submitted to the jury"].)

Here, the consumer expectations test does not apply because Plaintiff needed opinions from multiple experts not just to establish that Roundup caused his injuries, but also to establish the very nature of the product's alleged defects. (See AOB 51-54.) Indeed, Plaintiff's design defect claim is based not on a showing that Roundup failed to perform as would be expected by an ordinary consumer, but rather on extensive and complex expert testimony purporting to explain how Plaintiff's use of Roundup affected his health. Under *Soule*, *Trejo*, and *Morson*, a consumer expectations theory is unavailable in such a case.

Plaintiff argues that *Trejo* and *Morson* provide no guidance here because the injuries in those cases were "esoteric" and "idiosyncratic." (RB/X-AOB 71.)[5] Not so.

In *Morson*, the plaintiffs developed allergic reactions to latex gloves that allegedly affected 5 to 12 percent of the population. (*Morson*, *supra*, 90 Cal.App.4th at p. 780.) Such a broad portion of the population hardly suggests anything "idiosyncratic," and certainly not when compared to the incidence of mycosis fungoides (MF), or more broadly NHL, applicable here. Nothing in the record suggests that the incidence of NHL (of which MF is a subtype) among individuals exposed to Roundup is anything close to the 5 to 12 percent of the population affected in *Morson*. To the contrary, Plaintiff's expert testified that NHL has an incidence rate of about

---

[5] Plaintiff also claims that *Trejo* and *Morson* are "consistent" with *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, disapproved of in *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, but *Maxton* has nothing to do with the consumer expectations test. (RB/X-AOB 71.)

2 cases in 10,000 people per year. (16A RT 2561:24-2562:2.) And although the allergic reactions alleged in *Trejo* were rarer than those alleged in *Morson*, there is no evidence that such reactions are any more "esoteric" or "idiosyncratic" than the cancer diagnosis alleged in this case. Certainly, none of Plaintiff's experts suggested that NHL is a *common* reaction to Roundup exposure.

The reason the consumer expectations test did not apply in *Morson* is *not* because the allergic reactions were idiosyncratic, but because plaintiffs' ability to prove their case depended on the specifics of the product's chemical composition, the specialized knowledge surrounding it, and the medical aspects of their allergic reactions. (*Morson, supra*, 90 Cal.App.4th at p. 793.) Likewise, in *Trejo*, the court concluded that the mechanism of injury was beyond the expectations of an ordinary consumer because "[t]he circumstances of [the product's] failure involve technical details and expert testimony regarding 'the effect of the product upon an individual plaintiff's health,' " and required balancing the product's risks and benefits. (*Trejo*, *supra*, 13 Cal.App.5th at p. 160.) In both *Morson* and *Trejo*, as in this case, the mechanism of injury from the product at issue was not "a simple one that can give rise to simple consumer expectations of safety that have nothing to do with the chemical composition of the material from which the product is manufactured, or any other design characteristics for which specialized knowledge is required for understanding or taking appropriate precautions." (*Morson*, at p. 793.)

In short, the consumer expectations test does not apply here because no ordinary user would have any idea about whether Roundup could cause cancer, much less have an expectation based on its everyday use.

Plaintiff contends that *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698 (*Arnold*) compels a contrary conclusion because *Arnold* discussed the consumer expectations test in a case involving pesticides. (RB/X-AOB 70.) But in *Arnold*, the primary issue was federal preemption. (*Arnold*, at p. 702.) The respondents raised the applicability of the consumer expectations test for the first time on appeal. (*Id.* at p. 727.) In a single paragraph without any analysis, the court held the consumer expectations test was not necessarily foreclosed with respect to a claim alleging injury from pesticides sprayed in and around the plaintiff's home. (*Id.* at pp. 703, 727.) The two cases cited by the *Arnold* court do not support the conclusion that the consumer expectations test should apply here. (*Id.* at p. 727, citing *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 474-475, *Bresnahan v Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1568.) *Sparks* is an asbestos case, which is inapposite for the reasons discussed in the opening brief. (See AOB 54-55.) And *Bresnahan* discusses the consumer expectations test only in dicta, which has been expressly rejected by other appellate courts. (See *Pruitt*, *supra*, 72 Cal.App.4th at p. 1485 [explaining that "[t]he discussion of the consumer expectations test in both *Bresnahan* opinions is clearly dicta" and declining to follow those opinions].)

In any event, to the extent *Arnold* suggests the consumer expectations test can be applied to the complex technical and medical issues in this case, it is inconsistent with the Supreme Court's binding decision in *Soule* and should not be followed. Plaintiff's case is not within the realm of ordinary consumer expectations. Expert testimony is the *only* way a jury can determine whether Roundup is "defective." That is precisely why Plaintiff came to trial with multiple experts. The consumer expectations theory therefore does not apply as a matter of law.

II. The court should reverse the judgment with directions because there is no substantial evidence of causation.

Plaintiff's brief confirms that his case rests on a legally flawed theory of specific causation that is inconsistent with California law. According to Plaintiff, his experts could conclude that exposure to Roundup caused his MF by simply ignoring all unknown causes of the disease. If accepted by this court, Dr. Nabhan's version of a differential etiology would effectively gut the specific causation requirement in cases where, as here, the cause of a disease is largely unknown. Rather than account for the unknown cause of a majority of NHL cases, an expert following Dr. Nabhan's methodology could offer a specific causation opinion anytime there is exposure to an alleged carcinogen.

Plaintiff relies principally on *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555 (*Cooper*) to justify Dr. Nabhan's failure to reliably rule out

idiopathic causes for his NHL. Purporting to follow *Cooper,* Plaintiff claims that, because Dr. Nabhan testified he relied on epidemiological evidence to conclude that Roundup causes NHL, he was fully justified in discarding the possibility of an unknown cause despite undisputed evidence that the cause is unknown in at least 80 percent of NHL cases. (See RB/X-AOB 73-78.)[6] But this argument misreads *Cooper* and overlooks California's requirements for a proper differential etiology.

In *Cooper*, the Court of Appeal concluded "it is not necessary for a plaintiff to establish the negligence of the defendant as the proximate cause of injury with absolute certainty *so as to exclude every other possible cause of a plaintiff's illness*, even if the expert's opinion was reached by performance of a differential diagnosis." (*Cooper*, *supra*, 239 Cal.App.4th at p. 578.) But the court also explained that alternative causes could not be disregarded and that it would be appropriate to reject an expert's differential etiology "if the existence of an alternative explanation, *supported by substantial evidence and not mere speculation*, as a matter of law *defeated* the explanation proffered by [the expert]." (*Ibid.*, first emphasis added; see *id.* at p. 586 ["the relevant question is whether there is 'substantial evidence' of an alternative explanation for the disease"].) Thus, *Cooper*, as well as the federal

---

[6] Plaintiff also criticizes the testimony of defense expert Dr. Kuzel and treating physician Dr. Youn Kim. (RB/X-AOB 75, 76.) However, Monsanto has not argued that this testimony "defeat[s]" Plaintiff's evidence on specific causation. (RB/X-AOB 76.) As explained here, and in the opening brief, Plaintiff's evidence on specific causation defeats itself without regard to the quality of testimony proffered by Monsanto.

authorities Plaintiff dismisses, establish that once a possible cause of harm has been "ruled in" for purposes of a differential etiology, an expert must still provide an explanation for ruling out nonspeculative, unknown causes.

Far from helping Plaintiff, *Cooper* highlights the holes in Dr. Nabhan's specific causation testimony. Unlike *Cooper*, this is not a case where unknown causes were speculative. (See *Cooper*, *supra*, 239 Cal.App.4th at pp. 578, 585-586.) To the contrary, it was undisputed, and Dr. Nabhan agreed, that the vast majority of cases (at least 80 percent) of NHL cases are of unknown origin. (17A RT 2812:8-10; 17B RT 2990:6-14, 2996:19-2998:21; 27A RT 4789:20-4790:4.) Nothing in *Cooper* relieved Dr. Nabhan from having to reliably rule out such nonspeculative causes of Plaintiff's disease. That it may be difficult to do so explains precisely why "for diseases for which the causes are largely unknown . . . a differential etiology is of little benefit." (Federal Jud. Center, Reference Manual on Scientific Evidence (3d ed. 2011) pp. 617-618.)

Plaintiff commits nearly the same error in his attempt to make up for Dr. Nabhan's reliance on epidemiological studies that did not show a relative risk greater than 2.0 to rule in Roundup as the cause. According to Plaintiff, *Cooper* only requires epidemiological studies that show a relative risk greater than 2.0 when that is the only evidence of causation. (RB/X-AOB 73-74.) Because Dr. Nabhan at some point reviewed animal and mechanistic studies in addition to the epidemiological studies (albeit those that found a relative risk less than 2.0) on which he

relied to form his opinion,[7] Plaintiff argues that *Cooper*'s "greater than 2.0" requirement does not apply and that Dr. Nabhan could properly discard idiopathic causes in reaching an opinion on specific causation. (See RB/X-AOB 73.) Not so.

Again, Plaintiff misreads *Cooper* in an effort to avoid the need to rule out the nonspeculative idiopathic causes in this case. *Cooper* recognizes that epidemiological studies, even if they show a relative risk greater than 2.0, are probative of causation in the context of a differential etiology only if there is *also* a reasoned basis for ruling out equally likely alternative causes. (See *Cooper*, *supra*, 239 Cal.App.4th at p. 594 ["Thus, *having considered and ruled out other background causes* . . . Dr. Smith could conclude based on the [epidemiological] studies that it was more likely than not that [plaintiff's] exposure to Actos® caused his bladder cancer" (emphasis added)].) Under *Cooper*, therefore, it is only *after* an expert provides a reasoned basis for excluding alternative causes supported by substantial evidence that it becomes appropriate for an expert to rely on epidemiological studies to show specific causation. Thus, *Cooper* did not permit Dr. Nabhan to rely on epidemiological studies to establish specific causation without also explaining why, given the undisputed evidence of idiopathic causes, it is not just as likely, indeed more likely, that the cause of plaintiff's illness is unknown. (*Id.* at pp. 584-586.)

---

[7] Data produced by animal and mechanistic studies are no substitute for epidemiological studies, which determine the relative risk of harm to humans in real-world situations. (21B RT 3683:5-3684:19; 24A RT 4206:23-4207:10.)

Plaintiff claims the federal authorities on differential etiology cited in the opening brief deal only with experts who "did not reliably 'rule in' the Defendant's product as a cause of the injury." (RB/X-AOB 77.) To the contrary, these authorities not only draw into question the validity of any differential etiology in cases where, as here, the cause of an illness is largely unknown (see AOB 58-59, 61), but also reaffirm the basic principle that, for a differential etiology to have evidentiary value, there must be not only a reliable basis for ruling in a product as a possible cause, but also a reliable basis for ruling out plausible alternative causes. (See, e.g., *Bland v. Verizon Wireless, (VAW) L.L.C.* (8th Cir. 2008) 538 F.3d 893, 897 (*Bland*) ["Where the cause of the condition is unknown in the majority of cases, [an expert] cannot properly conclude, based upon a differential diagnosis, [that exposure to defendant's product] was 'the most probable cause' of [plaintiff's illness]. As a practical matter, [the expert's] causation opinion could not possibly be based upon a reasonable degree of medical certainty. [¶] . . . Even if [the expert] were able to link [the illness] to [exposure to defendant's product], [the expert] must *also* rule out other possible causes." (emphasis added)].)

Nor is there merit to Plaintiff's argument that Dr. Nabhan properly considered and ruled out unknown causes. (RB/X-AOB 42, 77.) Dr. Nabhan observed that Plaintiff was younger than most people who contract NHL. (17B RT 2843:2-2844:19.) As Plaintiff notes, Dr. Nabhan ruled out some risk factors, and concluded that only Plaintiff's race and Roundup exposure remained. (RB/X-AOB

42; 17A RT 2841:4-2853:23.)[8] Dr. Nabhan then expressed his opinion that because Plaintiff was exposed to Roundup (17A RT 2831:7-13, 2834:2-2836:10), which Dr. Nabhan believed to be a cause of NHL (see 17A RT 2848:1-6; 17B RT 2997:8-10), Roundup must have caused Plaintiff's illness (17A RT 2849:9-21; 17B RT 2887:14-18, 2997:5-10).[9] In effect, Dr. Nabhan concluded that ruling in exposure to Roundup as a possible cause meant he could automatically rule out unknown causes. He thus collapsed the "ruling in" and "ruling out" steps of a differential etiology into a single finding, and evaded the need to *independently* explain why unknown causes can be excluded, no matter how likely the unknown causes are to be the actual cause of Plaintiff's illness.[10]

---

[8] As explained in the opening brief, it was not enough for Dr. Nabhan to exclude a few possible contributing factors and then ignore the vast majority of unknown causes that were as likely as not to have been the cause of Plaintiff's MF. (See AOB 61-62.)

[9] Dr. Nabhan ruled in exposure to Monsanto's herbicides as a potential cause based on a bare minimum latency period (time between exposure and illness) (17A RT 2854:6-2859:23; 17B RT 3012:10-3014:12), while ignoring undisputed evidence of much longer median latency periods for NHL and other similar cancers (see 21B RT 3678:4-3679:6, 3775:16-3781:9 [median latency periods range from 6 to 10 years depending on type of chemical and exposure]). Dr. Nabhan gave no specific reason for ruling out race. (See 17A RT 2853:19-2854:2.)

[10] Although Plaintiff argues that Dr. William Sawyer's testimony is admissible, he does not appear to suggest that it is substantial evidence of specific causation beyond whatever Dr. Nabhan established with his testimony. (See RB/X-AOB 78.) Like Dr. Nabhan, Dr. Sawyer made no attempt to account for the fact that at least 80 percent of NHL cases are of unknown cause. Indeed, he did not purport to perform a differential etiology at all and made

(continued...)

Were Dr. Nabhan's reliance on Plaintiff's exposure to Roundup sufficient to excuse the need to address idiopathic causes, a differential etiology could rest solely on an expert's juxtaposition of plaintiff's exposure to a product and the occurrence of an illness, without regard to alternative causes that are as likely, and here even more likely, to be the actual cause of that illness. (See *Kilpatrick v. Breg, Inc.* (11th Cir. 2010) 613 F.3d 1329, 1343 (*Kilpatrick*) [" '[S]imply because a person [is exposed to a product] and then suffers an injury does not show causation' "].) Such a speculative leap is neither sound science nor substantial evidence. Dr. Nabhan's specific causation opinion is nothing more than a guess, entitled to no evidentiary weight.[11]

(...continued)
no effort whatsoever to consider other possible causes. (See AOB 61-63.)

[11] Plaintiff cites two cases that supposedly have accepted differential etiologies even " 'when the cause of a disease is unknown in the majority of cases.' " (RB/X-AOB 77, citing *In re E.I. du Pont de Nemours and Company* (S.D. Ohio 2016) 342 F.Supp.3d 773, 783; see RB/X-AOB 74-75, citing *Wendell v. GlaxoSmithKline LLC* (9th Cir. 2017) 858 F.3d 1227, 1236-1237.) In *du Pont*, the expert did not consider that a disease " 'was more likely than not the result of unknown causes.' " (*du Pont*, at p. 783.) Therefore, it was not necessary for the expert in *du Pont* to show why it was not more likely that the cause of the plaintiff's illness was simply unknown. (*Ibid.*) And, in *Wendell*, as explained in our opening brief, the court of appeals excused an expert's failure to rule out all potential alternative causes because the evidence showed the defendant's drug was a widely recognized carcinogen and, absent exposure to the drug, plaintiff had only a one-in-six million chance of contracting the disease. (AOB 59-60, fn. 15.) In other words, in *Wendell*, alternative causes were not plausible and the expert therefore had no need to rule them out.

The Court of Appeal's recent decision in *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626], further illustrates the inadequacy of Dr. Nabhan's differential etiology.

In *Echeverria*, the court found substantial evidence to support the jury's finding on specific causation—i.e., that exposure to talc caused plaintiff's ovarian cancer. (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *25].) But that conclusion was based on a number of factors that are not present in this case.

1. Although there was evidence in *Echeverria* that the majority of cancer cases have an unknown cause (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *8, *11]), the plaintiff's specific causation expert did not ignore idiopathic causes but instead explained why, in her opinion, idiopathic causes could be ruled out in her differential etiology (*id.* at pp. *11, *23-*24). By contrast, here, once Dr. Nabhan ruled out a few identifiable causes, he ignored the undisputed evidence that in at least 80 percent of NHL cases, the cause is unknown and made a speculative leap to the conclusion that exposure to Roundup caused Plaintiff's MF without accounting for idiopathic causes.

2. *Echeverria* noted that the defendant could not point to any substantial evidence that the plaintiff's specific causation expert overlooked possible causes. (See, e.g., *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *22-*23].) In contrast, in this case, there was undisputed evidence that in at least 80 percent of NHL cases, the cause is unknown. (17B RT 2997:17-23; see also 17A RT 2812:8-10; 17B RT 2990:6-14,

2996:19-2998:21; 27A RT 4789:20-4790:4.) Under *Cooper*, therefore, Dr. Nabhan was obliged to explain why these unknown causes could be "ruled out," i.e., why it was as likely as not, indeed more likely, that the cause of Plaintiff's MF is unknown.

3. *Echeverria* upheld the plaintiff's expert's reliance on epidemiological studies to support her specific causation opinion where a number of the studies showed a relative risk greater than 2.0. (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *21].) In contrast, none of the epidemiological studies in this case show a statistically significant relative risk of 2.0 or greater when properly adjusted for other pesticide use. (See AOB 27, 57.) Moreover, as explained in *Cooper*, reliance on epidemiological studies to support specific causation is appropriate only if there is also a reasoned basis for excluding alternative causes supported by substantial evidence. (*Cooper*, *supra*, 239 Cal.App.4th at p. 594.) The plaintiff's specific causation expert in *Echeverria* provided this explanation for unknown causes. Dr. Nabhan did not even attempt to do so.

Echeverria also distinguishes federal authorities holding that to prove specific causation, a differential etiology must reliably rule out plausible alternative causes. (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *24], citing *Tamraz v. Lincoln Elec. Co.* (6th Cir. 2010) 620 F.3d 665 (*Tamraz*), *Henricksen v. ConocoPhillips Co.* (E.D.Wash. 2009) 605 F.Supp.2d 1142 (*Henricksen*), and *Doe v. Ortho-Clinical Diagnostics, Inc.* (M.D.N.C. 2006) 440 F.Supp.2d 465 (*Doe*).) *Echeverria* reasoned that these federal cases need not be considered because they held

there was insufficient evidence to prove general causation—i.e., that the product at issue was capable of causing a particular illness. (*Echeverria*, at p. *24.) However, the federal case law criticism of a differential etiology that fails to account for unknown causes is independent of and does not depend on the evidence of general causation.

For example, in *Tamraz*, the court of appeals rejected a differential etiology *not only* because the expert failed to reliably rule in possible causes of a disease *but also* because the expert did not reliably rule out plausible alternative causes. (*Tamraz*, *supra*, 620 F.3d at pp. 674-675.)

Henricksen rejected a differential diagnosis, *not only* because the expert failed to quantify plaintiff's exposure to the chemical at issue, but also because the expert (and, as the court noted, *all* of plaintiffs' experts) failed to " 'reliably rule out reasonable alternative causes of [the alleged harm] or idiopathic causes.' " (*Henricksen, supra,* 605 F.Supp.2d at pp. 1161-1162; see *id.* at p. 1163 ["Thus *in addition to the reasons cited above*, because Gardner's methodology employed fails to adequately account for the possibility that Henricksen's AML was idiopathic, the court finds that his conclusion that prolonged exposure to benzene in gasoline was the cause of his AML is unreliable and therefore inadmissible" (emphasis added)].)

Henricksen expressly criticizes the very type of faulty differential etiology Dr. Nabhan utilized in this case. (*Hendricksen*, *supra*, 605 F.Supp.2d at p. 1162 ["Gardner (and all of Plaintiffs experts, for that matter) fail to exclude-much less

address in their reports-the likelihood that Henricksen's AML had no known cause. The [evidence is] unrebutted as to the fact that 80–90% of all cases of AML are idiopathic, having no known cause. . . . [¶] *It seems the only reason cited for distinguishing Henricksen's disease from one of 'no known cause' was the existence of a known risk factor, namely exposure to benzene. Standing alone, the presence of a known risk factor is not a sufficient basis for ruling out idiopathic origin in a particular case, particularly where most cases of the disease have no known cause.*" (emphasis added)].)[12]

And in *Doe*, after rejecting an expert's testimony on the cause of plaintiff's autism for lack of proof of general causation, the court went on to *independently* evaluate the expert's differential etiology "for [the] sake of completeness." (*Doe, supra*, 440 F.Supp.2d at p. 476.) The court then, separate and apart from finding a lack of general causation evidence, found the differential etiology deficient because the expert failed to account for the fact that the cause of most cases of autism is unknown. (*Id*. at pp. 477-478 ["Although Dr. Geier apparently has considered a number of specific genetic disorders in performing his differential diagnosis, the Court finds that his failure to take into account the existence of such a strong likelihood of a currently unknown genetic cause of autism serves to negate Dr. Geier's use of the differential diagnosis technique as being proper in this instance"]; see *Hall v. Conoco Inc.*

---

[12] *Henricksen* goes on to reject plaintiffs' expert testimony on general causation (*Henricksen, supra,* 605 F.Supp.2d at pp. 1169-1176), but reiterates the failure of plaintiffs' experts to rule out the idiopathic causes that account for the vast majority of the disease at issue (*id*. at p. 1169).

(10th Cir. 2018) 886 F.3d 1308, 1314 ["because the evidence had pointed to idiopathic causes in most cases of acute myeloid leukemia . . . the district court could reasonably view the failure to rule out idiopathic causes as a fatal error tainting the differential diagnosis"]; *Bland*, *supra*, 538 F.3d at p. 897 ["[w]here the cause of the condition is unknown in the majority of cases, [an expert] cannot properly conclude, based upon a differential diagnosis," the plaintiff's "exposure to freon was 'the most probable cause' of [his] exercise-induced asthma"]; *Milward v. Rust-Oleum Corp.* (1st Cir. 2016) 820 F.3d 469, 475-476; *Kilpatrick*, *supra*, 613 F.3d at pp. 1342-1343; *Black v. Food Lion, Inc.* (5th Cir. 1999) 171 F.3d 308, 312-314.)

Finally, the need for a reliable basis to exclude idiopathic causes is even greater in this case, given the lack of foundation for Dr. Nabhan's decision to rule in Roundup exposure as a potential cause of Plaintiff's NHL. As Monsanto previously explained, Plaintiff's epidemiological expert, Dr. Alfred Neugut, conceded that none of the epidemiological studies he considered showed a statistically significant relative risk ratio of 2.0 or greater. (16B RT 2682:13-15, 2702:25-2703:3; 2736:25-2737:3.) Instead, Dr. Nabhan relied upon selective data points in the McDuffie (2001), De Roos (2003), and Eriksson (2008) studies, which were largely unadjusted for other pesticides (see AOB 27) and ignored the determination of both IARC and Dr. Neugut that the epidemiology as a whole showed a slight risk ratio of only approximately 1.3 (16A RT 2612:20-2614:21; 17A RT 2825:12-2830:5; 17B RT 2911:8-21, 2913:11-2938:11).

On top of that, Dr. Nabhan relied primarily upon the IARC Monograph (17A RT 2793:5-23, 2819:5-15; 17B RT 2896:20-2897:9, 2901:15-19, 2997:5-16), which did not determine whether there is an actual carcinogenic risk at real-world exposures (see AOB 22-23). And Dr. Nabhan also testified without regard to what level of Roundup exposure is significant in causing NHL and whether Plaintiff was subjected to that amount of exposure, even though he admitted that "minimal exposure may not be that significant" in causing NHL. (17A RT 2835:8; see 17A RT 2834:2-2836:10, 2847:22-2848:6, 2867:2-2868:13; 17B RT 3035:13-25, 3036:2-21, 3041:6-3042:3.)

These foundational defects reinforce the conclusion that, as the court recognized in *Echeverria*, "a differential diagnosis alone may be insufficient as the sole basis for an opinion on the etiology of a largely idiopathic disease." (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *25].)

In sum, Plaintiff failed to prove causation, and Monsanto is entitled to judgment as a matter of law. (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 [when plaintiff has had a "full and fair opportunity to present [his] case" but has failed to produce sufficient evidence to support his claim, "judgment for defendant is required"].)

III. The court should reverse the judgment with directions because Plaintiff's liability claims are preempted.

A. Impossibility preemption precludes Plaintiff's claims.

The jury's finding that California tort law requires Monsanto to add a cancer warning for Roundup " 'irreconcilably conflic[ts]' " with federal law and therefore is preempted as a matter of impossibility. (*Merck Sharp & Dohme Corp. v. Albrecht* (2019) 587 U.S. ___ [139 S.Ct. 1668, 1679, 203 L.Ed.2d 822] (*Albrecht*) ["the judge must simply ask himself or herself whether the relevant federal and state laws 'irreconcilably conflic[t]' "].) Federal law prohibits Monsanto from adding a cancer warning without the approval of EPA. Yet that agency has consistently *disagreed* with such a warning. Just this past April, EPA announced in formal agency action that it has "not identif[ied] any human health risks from exposure to any use of glyphosate." (EPA, Glyphosate Proposed Interim Registration Review Decision Case Number 0178 (April 2019) p. 35 <https://bit.ly/2xQ7Cwe> (as of July 26, 2019) (hereafter EPA, Glyphosate Proposed Interim Registration Review Decision).)

Plaintiff does not dispute either of these two dispositive propositions: that federal law prevents Monsanto from adding a cancer warning to Roundup without first obtaining EPA's approval, and that EPA has consistently found glyphosate to be noncarcinogenic. (AOB 20-21, 24-25, 64-65.) Plaintiff instead

seeks to obscure this irreconcilable conflict by overstating the relevance of FIFRA's savings clause and *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431 [125 S.Ct. 1788, 161 L.Ed.2d 687] (*Bates*). But because Monsanto cannot add the cancer warning to Roundup that the jury found California law requires without violating federal law, Plaintiff's claims are preempted.[13]

To avoid impossibility preemption, Plaintiff improperly conflates it with principles of express, field, and obstacle preemption. There are several independent types of "implied" preemption that embody different principles of federalism. Field preemption is a type of implied preemption where "[t]he intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " (*Arizona v. United States* (2012) 567 U.S. 387, 399 [132 S.Ct. 2492, 183 L.Ed.2d 351] (*Arizona*).) Obstacle preemption is another type of implied preemption that occurs when state law " 'stands as an

---

[13] Preemption applies to Plaintiff's warning and design claims. (AOB 64-67.) Plaintiff's argument that "the absence of warnings regarding the safety of Roundup is relevant to whether the product performed as safely as an ordinary consumer would have expected it to perform" only further confirms that Plaintiff's primary theory of liability against Monsanto is that California law requires Monsanto to provide a cancer warning on the Roundup label. (RB/X-AOB 68.) Plaintiff pursues that liability theory despite the fact that Monsanto cannot add a cancer warning without EPA's approval under federal law and that EPA undisputedly is of the view that glyphosate does not cause cancer.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Ibid.*) Monsanto argues only that a third type of implied preemption applies: impossibility or conflict preemption.

Unlike express, field, and obstacle preemption that turn on congressional intent or objective (*Arizona*, *supra*, 567 U.S. at p. 399), impossibility preemption "requires no inquiry into congressional design" (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143 [83 S.Ct. 1210, 10 L.Ed.2d 248] ["A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce"]). Rather, impossibility preemption exists where it is " 'impossible for a private party to comply with both state and federal' " law, irrespective of congressional design. (*Mutual Pharmaceutical Co., Inc. v. Bartlett* (2013) 570 U.S. 472, 480 [133 S.Ct. 2466, 186 L.Ed.2d 607] (*Bartlett*).)

Plaintiff's reliance on FIFRA's savings clause (7 U.S.C. § 136v(a) [reserving to states the right to regulate federally-approved pesticides]) to avoid impossibility preemption is misplaced. The U.S. Supreme Court has unequivocally held "that neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.' " (*Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 352 [121 S.Ct. 1012, 148 L.Ed.2d 854] (*Buckman*), quoting *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 869 [120 S.Ct.

1913, 146 L.Ed.2d 914].) The Federal Food, Drug, and Cosmetic Act (FDCA) at issue in the impossibility preemption cases *PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604 [131 S.Ct. 2567, 180 L.Ed.2d 580] (*Mensing*), *Bartlett*, and *Albrecht* contains a similar savings clause to FIFRA that reserves to states the right to regulate FDA-approved products, yet the U.S. Supreme Court nonetheless held in those cases that state law claims were preempted if they conflicted with the FDCA. (See Drug Amendments of 1962, Pub.L. No. 87-781 (Oct. 10, 1962) 76 Stat. 780, 793 ["Nothing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law"].)

Plaintiff's argument that impossibility preemption must not apply because California retains the power to ban the sale of Roundup altogether cannot be reconciled with Congress's statutory scheme. Although section 136v(a) of title 7 of the United States Code provides that a state may "regulate the sale or use of any federally registered pesticide or device," including potentially banning its use, that provision must be read in context with the very next subdivision, section 136v(b) entitled "Uniformity" (original formatting omitted). Section 136v(b) makes clear that a state cannot require a pesticide manufacturer to sell a pesticide with labeling warnings "in addition to or different from those required under this subchapter" as provided by EPA. Plaintiff's rhetorical argument that if California can ban Roundup then

surely it can also impose labeling requirements on Roundup that conflict with federal law is directly at odds with Congress's statutory scheme.

The argument is also squarely contradicted by the U.S. Supreme Court. The Court in *Bartlett* expressly rejected the argument that stopping the conduct remedies impossibility preemption because "if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.' " (*Bartlett*, *supra*, 570 U.S. at p. 488.) Plaintiff's " 'stop-selling' rationale" is therefore "incompatible with [the Court's] pre-emption jurisprudence." (*Ibid.*) Although a state ban on the sale of Roundup does not conflict with federal law because no federal law compels the sale of that product, a state requirement compelling a cancer warning on Roundup does conflict with federal law. *Bartlett* expressly repudiates the notion that a manufacturer must leave the market to resolve such a conflict between state and federal law.

Plaintiff's suggestion that *Bates* prevents the application of impossibility preemption is also wrong. (See RB/X-AOB 94-96.) The Court in *Bates* considered whether state warning claims " 'parallel' " to FIFRA's misbranding provisions were *expressly* preempted under FIFRA's express preemption clause, 7 U.S.C. § 136v(b). (See *Bates*, *supra*, 544 U.S. at p. 447.) While the Court rejected the defendant's field and obstacle preemption arguments, the Court never discussed impossibility preemption in *Bates*. (See *id.* at pp. 441-442, 450; accord, *Bartlett*, *supra*, 570 U.S. at p. 491 [explaining that *Bates* held "the design-defect claim in question . . .

fell outside the class of claims covered by the express pre-emption provision at issue in that case"].) Nor would any argument for impossibility preemption in *Bates* have been as strong as the one here: in *Bates*, the Court expressly noted that "EPA never passed on the accuracy" of the efficacy claims being challenged (*Bates*, at p. 440), whereas here EPA has most definitely passed on, and agreed with, Monsanto's view of the science. The two federal district court orders cited by Plaintiff suggesting that *Bates* silently rejected impossibility preemption wrongly conflate field and obstacle preemption arguments, which were addressed in *Bates*, with impossibility preemption, which was not. (See RB/X-AOB 95.) But they are different doctrines. Nothing in *Bates* or the impossibility preemption cases of *Mensing*, *Bartlett*, and *Albrecht*, which were decided after *Bates*, compromises application of straightforward impossibility preemption principles in the FIFRA context.

Finally, the U.S. Supreme Court's recent *Albrecht* decision supports the conclusion that impossibility preemption applies to bar Plaintiff's claims. As a threshold matter, the Court does not have to resort to *Albrecht*'s alternative "clear evidence" impossibility preemption framework because Plaintiff does not dispute that federal law prohibits Monsanto from adding a cancer warning or changing Roundup's ingredients without first obtaining EPA's approval. (See *In re Celexa & Lexapro Marketing & Sales Practices* (1st Cir. 2015) 779 F.3d 34, 41 ["The line *Wyeth* [*v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 173 L.Ed.2d 51]] and [*Mensing*] thus draw between changes that can be

independently made using the CBE regulation and changes that require prior FDA approval also makes some pragmatic sense"].) *Albrecht* concerned the "clear evidence" standard for impossibility preemption that applies where federal law permits a private party to make a product change before obtaining regulatory approval. (See *Albrecht*, *supra*, 139 S.Ct. at p. 1673 ["FDA regulation called the 'changes being effected' or 'CBE' regulation permits drug manufacturers to change a label without prior FDA approval"].) Under that type of regulation, the private party must present "clear evidence" that the regulator would have exercised its authority to rescind or otherwise reject the product change, had it been made. (See *id.* at p. 1672.) Here, unlike in *Albrecht*, there is no dispute that Monsanto could not have added a cancer warning without EPA's express approval.

Even under *Albrecht*'s "clear evidence" analysis, preemption would be required because EPA's scientific reviews of glyphosate demonstrate it is fully informed about Roundup's potential carcinogenic risks and has communicated to Monsanto and the public consistently that it has "not identif[ied] any human health risks from exposure to any use of glyphosate." (EPA, Glyphosate Proposed Interim Registration Review Decision, *supra*, at p. 35; see AOB 20-21, 24-25, 66.)[14] As further evidence that EPA has

[14] Plaintiff argues that the "clear evidence" standard is not satisfied because EPA was not "fully informed" about the glyphosate science. In support, Plaintiff cites evidence that Monsanto did not share with EPA Dr. James Parry's review of several genotoxicity studies published in the 1990s. (RB/X-AOB 96.) In the event the Court reaches the *Albrecht* analysis, it should (continued...)

rejected the need for a cancer warning, EPA proposed in April 2019 to mandate all 592 glyphosate registrations be "update[d] . . . to modern standards" including new drift-management instructions and environmental hazard standards for aquatic use because "[l]abels directions . . . vary significantly from label to label." (EPA, Glyphosate Proposed Interim Registration Review Decision, *supra*, at p. 38.) EPA did not mandate a cancer warning as part of its proposed "modern standards" for glyphosate labeling. (*Ibid*.)

Plaintiff does not dispute that under federal law, Monsanto cannot change the ingredients in Roundup or add a cancer warning to Roundup without EPA's prior approval. This admission alone is dispositive on the issue of impossibility preemption. Nor is it conceivable that EPA would have approved a cancer warning for Roundup, since Plaintiff does not contest that EPA found glyphosate not likely to be carcinogenic to humans in 1993, 1997, 2002, 2004, 2008, 2013, 2016, 2017, and most recently in April 2019. (AOB 20-21, 24-25, 66.) That indisputable fact also compels preemption. Put simply, it would have been impossible for Monsanto to comply with California law without a federal agency abandoning a scientific conclusion it holds to this day. Binding

---

(...continued)
reject Plaintiff's factual argument as a matter of law because the evidence here shows that EPA has reviewed " 'nearly 90 genotoxicity studies' " in addition to more relevant epidemiology and animal studies and data submitted by glyphosate registrants. (AOB 24-25; see *Albrecht*, *supra*, 139 S.Ct. at p. 1680 [court should " 'resolve subsidiary factual disputes' that are part and parcel of the broader legal question"].)

Supreme Court precedent prohibits Monsanto from being put in this untenable position.

B. Express preemption also precludes Plaintiff's claims.

As explained in the opening brief, Plaintiff's warning claims are also expressly preempted because FIFRA expressly prohibits states from imposing "any requirements for labeling or packaging" that are "in addition to or different from" the requirements imposed by FIFRA, and Plaintiff's warning claims imposed a more expansive obligation to warn of risks associated with " 'misus[e]' " or " 'reasonably foreseeable' " use of Roundup.[15] (AOB 66-67.)

Plaintiff's primary response to Monsanto's express preemption argument is that the "widespread and commonly recognized practice" language is not a "requirement[ ] for labeling or packing" under section 136v(b) because that language is found in FIFRA's registration provision and not in FIFRA's misbranding provisions. (RB/X-AOB 93.) This response, however, ignores that the jury was instructed in a manner that it could find Monsanto failed to warn under California state law, yet Monsanto would not be liable for misbranding under FIFRA. (See *Bates*, *supra*, 544 U.S. at p. 454 ["a manufacturer should not be held liable under a

[15] If a product can be defectively designed under the consumer expectations test due to a lack of warnings, as Plaintiff argues (see RB/X-AOB 68-69), then Plaintiff's design claims are likewise expressly preempted as they impose labeling or packaging requirements that are "in addition to or different from those required" under FIFRA's misbranding provisions (7 U.S.C. § 136v(b)).

state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA"].)

The jury was instructed that under California law, Monsanto needed to warn about "potential risks . . . to persons using or misusing [Roundup] in an intended or reasonably foreseeable way." (5 AA 5500-5501.) FIFRA's misbranding provisions, however, only require Monsanto to provide "directions for use" or "a warning or caution statement" that are "necessary for effecting the purpose for which the product is *intended*." (7 U.S.C. § 136(q)(1)(F)-(G), emphasis added.) Congress omitted from FIFRA's misbranding provisions the concepts of "misuse" and "reasonably foreseeable uses" that are found in California law. FIFRA's misbranding provisions instead work together with section 136a(d)(1)(B)-(C), which contain the "widespread and commonly recognized practice" language to define misbranding in a more limited way than California law. (7 U.S.C. § 136(q)(1)(F)-(G).)

Plaintiff does not dispute that California law imposes a broader "misuse" and "reasonably foreseeable" standard for warnings than FIFRA's misbranding provisions, or that there was evidence from which the jury could find liability under California law but not FIFRA. Nor does Plaintiff dispute that his mishaps spraying Roundup in April 2014 and January 2015 causing dermal contact were the type of exposure that a jury could find "reasonably foreseeable" but not liable for misbranding under FIFRA.

Because California's failure to warn standard imposes labeling requirements that are "in addition to or different than" FIFRA's requirements, Plaintiff's warning claims are expressly preempted.[16]

IV. The trial court's exclusion of EPA and foreign regulatory documents was prejudicial error.

Plaintiff asks this court to endorse a trial conducted on a slanted evidentiary playing field. In Plaintiff's view, it was proper to show the jury the IARC Monograph as evidence that glyphosate causes cancer at some hypothetical dose, while keeping the jury blind to the many regulatory documents supporting that Roundup does not cause cancer to humans working in the field—including recent reports directly rejecting IARC's conclusion. Plaintiff's brief fails to justify this one-sided result. Irrelevant rhetoric about "hearsay within hearsay" notwithstanding (RB/X-AOB 86), Plaintiff cannot overcome the principle that " 'EPA reports are generally admissible under [the public records hearsay exception]' " (*Palmisano v. Olin Corp.* (N.D.Cal., June 24, 2005, No. C-03-01607 RMW) 2005 WL 6777560, at p. *3 (*Palmisano*)

[16] Plaintiff is incorrect that Monsanto waived its express preemption argument. (See RB/X-AOB 91-92.) Monsanto argued express preemption based on FIFRA's express preemption clause (7 U.S.C. § 136v(b)) in both its motion for summary judgment and its opposition to Plaintiff's summary judgment motion. (1 AA 234-235; 2 AA 1749-1753.) The trial court then erroneously granted Plaintiff summary adjudication on Monsanto's express preemption defense, foreclosing Monsanto from raising these defenses again during trial. (4 AA 3207-3209.)

[nonpub. opn.] [concluding EPA report is admissible under Fed. Rules. Evid., rule 803(8)(C)].)

As an initial matter, Plaintiff would read the public records exception out of the law by demanding EPA employees be called "to testify regarding the EPA's procedures for conducting the evaluations." (RB/X-AOB 87.) But "the official records exception[ ] permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation.' " (*People v. George* (1994) 30 Cal.App.4th 262, 274.) Requiring a document " 'custodian' " as a prerequisite to admissibility would defeat the purpose of the public records exception. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319 (*Jazayeri*).)

Applying that exception, the regulatory reports offered by Monsanto were admissible. Plaintiff does not dispute that the first requirement of the public records hearsay exception—that the "writing[s] [be] made by and within the scope of duty of a public employee"—is satisfied. (Evid. Code, § 1280, subd. (a).)

The second requirement—that "[t]he writing [be] made at or near the time of the act, condition, or event"—is also easily satisfied. (Evid. Code, § 1280, subd. (b).) There is no dispute that the regulatory reports were created concurrently with, or just after, the agencies' review of the relevant studies and determinations regarding the carcinogenicity of glyphosate. In fact, the reports describe the agencies' determination—which is precisely the "act" at issue. Plaintiff misses the point in arguing that the regulatory reports are "based on" studies conducted by

others, rather than "acts or events" that were "directly observed" by the officials. (RB/X-AOB 86.) If that were required, then EPA reports would rarely be admissible; they would not be " 'generally admissible,' " as many courts have recognized. (*Palmisano*, *supra*, 2005 WL 6777560, at p. *3.)

Plaintiff's principal argument is that the third requirement—trustworthiness—is not met. (RB/X-AOB 86-87.) Yet Plaintiff ignores that with the first two requirements satisfied, the EPA and foreign regulatory reports are entitled to a *presumption* of trustworthiness. (See *Jazayeri*, *supra*, 174 Cal.App.4th at p. 317.) Plaintiff instead cites a case for the uncontroversial proposition that " 'EPA reports must survive a trustworthiness inquiry.' " (RB/X-AOB 86, citing *Junk v. Terminix Intern. Co.* (8th Cir. 2010) 628 F.3d 439, 449.) Yet Plaintiff does not mention why the report in that case was not trustworthy: it included a "prominent disclaimer" that it was " 'not sufficiently detailed' " or " 'intended to be used directly for . . . decision making.' " (*Junk*, at p. 449.) The thorough regulatory reports here have no such disclaimer, so Plaintiff resorts to second-guessing the decisions and procedures of expert regulators.

For example, Plaintiff suggests the reports are not trustworthy because the authoring agencies considered information provided by Monsanto or other glyphosate manufacturers. (RB/X-AOB 87.) But consideration of such information is a routine part of the regulatory process and one of the most efficient ways for agencies to identify relevant literature and studies, including information not in the public domain. And

the regulators did not rely solely on such data. EPA's Office of Pesticide Programs (OPP), for example, considered reviews conducted by other agencies and organizations from around the world (including IARC), "studies published in the open literature," and multiple rounds of public comments. (7 AA 6951-7031, 7060-7146, 7147-7373, 7374-7595.) OPP even submitted its proposed findings to the FIFRA Scientific Advisory Panel, considered its comments, provided meaningful responses, and revised its determination where appropriate. (3 AA 2097.) These layers of input, review, and revision make OPP's and EPA's decisions more, not less, trustworthy. OPP's report on glyphosate is "an authoritative, exhaustive study by a public agency pursuant to law," and thus admissible under the public records exception. (*Marsee v. United States Tobacco Co.* (W.D.Okla. 1986) 639 F.Supp. 466, 470 [admitting Surgeon General's Advisory Committee report on carcinogenicity of smokeless tobacco and excluding IARC report on the same issue], affd. (10th Cir. 1989) 866 F.2d 319.)[17]

[17] In a further attempt to justify keeping the jury blind to the EPA's views, Plaintiff alleges that "[t]he SAP unanimously concluded that the EPA did not follow its guidelines." (RB/X-AOB 87.) This is misleading. The FIFRA Scientific Advisory Panel (SAP) noted its disagreement on narrow technical issues specific to the interpretation of animal studies. (RA 138.) Nowhere did the SAP suggest that the EPA report as a whole was untrustworthy. To the contrary, some panel members "supported the Agency's conclusion," while others would have modestly revised it to say that "the Agency *cannot exclude the possibility* of observed positive associations . . . suggesting human carcinogenic potential of glyphosate *even though* study limitations and concerns about (continued...)

It is just as misleading for Plaintiff to assert that "the European assessments" were "largely written by Monsanto." (RB/X-AOB 87.) Monsanto submitted a request for registration renewal of Roundup to the European Food Safety Authority (EFSA) that outlined Monsanto's view of the glyphosate science, which is standard practice for EFSA. (13A RT 2012:3-25.) EFSA then subjected Monsanto's renewal request to multiple rounds of independent review and revision by "experts from all of the countries in the EU," which ultimately had to be approved by EFSA, the European Commission, and Parliament. (*Ibid.*) Again, these levels of review and revision, all conducted under government mandate, enhances the trustworthiness of these reports.

Notably, in asserting that he "presented evidence that the government documents were not trustworthy" (RB/X-AOB 87), Plaintiff does not say, and cannot say, that *the trial court* found these documents untrustworthy. Nowhere did the trial court make such a finding. (See 14A RT 2202:13-2205:11, 2260:7-2261:16; 14B RT 2288:14-21; 20 RT 3529:1-3547:17.) Instead, the court criticized the reports as either "outdated" or "not final." (20 RT 3530:1-5.) But the applicable question is not finality but *trustworthiness*. Many years of review and revision only enhance a regulatory report's trustworthiness. The fact that EPA's long-

---

(continued...)
potential biases remain." (RA 166-168, emphases added.) At most, the SAP report just underscores the reasonableness of Monsanto's reliance on the regulatory consensus on these technical scientific issues.

term review process remained ongoing does not undermine the trustworthiness of an expert regulator's considered analysis of the most recent science. Ultimately, Plaintiff asks this court to defy common sense: by introducing a novel and artificial test of "finality," Plaintiff demands that a lay jury be blinded to the most recent authoritative views of expert, independent regulators on the precise question it has been asked to decide.

Even if this finality argument were accepted, it would not apply to the foreign regulatory reports Monsanto attempted to introduce, most of which were finalized in 2016 or 2017. (See 7 AA 7891-7960; 8 AA 7963-8000 [Health Canada Pest Management Regulatory Agency Re-evaluation Decision (RVD2017-01) (Apr. 28, 2017)], 8003-8064 [Australian Pesticides and Veterinary Medicines Authority's Regulatory position: consideration of the evidence for a formal reconsideration of glyphosate (Sept. 2016)].) Neither the trial court nor Plaintiff has explained why the jury, permitted to consider the IARC Monograph for its truth, should not also have received *final* reports of Australian, Canadian, and European regulators *disagreeing with the IARC determination*.

For all of these reasons, the trial court erred in refusing to admit the regulatory reports Monsanto offered at trial. And because these reports spoke to the most fundamental issues in the case, this error was undeniably prejudicial. Plaintiff again misses the point by noting that Monsanto did not object to the admission of the IARC Monograph. (RB/X-AOB 85-86.) In a fair trial, a jury allowed to consider that Monograph would also be allowed to

consider the plethora of regulatory decisions reaching an opposite conclusion.

Plaintiff suggests that there was no prejudice because of passing references at trial to the existence of these regulatory reports. (RB/X-AOB 88.) Yet Plaintiff's counsel specifically told the jury it had been instructed to ignore those reports and that only the IARC Monograph could be considered for its truth. (29A RT 5064:23-5065:5.) Indeed, Plaintiff's counsel went so far as to suggest the opposite of the truth—that Monsanto had not put more regulatory reports in the record because they did not support its position. (See AOB 72-73.) Plaintiff's brief even gives up the game, arguing that "the jury was entitled to assign more credibility to Johnson's experts and IARC than to the EPA." (RB/X-AOB 19.) But how could the jury determine how much credibility to assign to EPA's views *without having access to EPA's views, and while being told it could not consider them*? In short, in a trial about whether glyphosate causes cancer, and whether Monsanto acted with malice by not so informing consumers, it was unquestionably prejudicial for the jury to have been presented with such a distorted picture. The only solution is a new trial.

V. The punitive damages award should be stricken because there was no evidence that Monsanto acted with malice or oppression.

A. There is no clear and convincing evidence Monsanto acted with malice or had actual knowledge of a probability that Roundup would cause cancer.

1. Monsanto did not act despicably in following the scientific determinations of EPA and worldwide regulators.

As explained above (see *ante*, pp. 22-26), there is no dispute that at the time Plaintiff was exposed to Roundup and diagnosed with cancer, the consensus among regulatory agencies worldwide was that there was no evidence of any real-world risk of cancer to those exposed to Roundup. The fact that Monsanto agreed with and followed this worldwide consensus by not warning of purported cancer risks negates Plaintiff's failure-to-warn claim, and provides no evidence, much less clear and convincing evidence, of a *malicious* failure to warn. Plaintiff simply has no evidence, and certainly no clear and convincing evidence, that Monsanto was "'aware'" of any "'*probable dangerous consequences* of [its] conduct, and that [it] willfully and deliberately failed to avoid those consequences.'" (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 (*Hoch*), emphasis added; accord, *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27] [even where defendant was found liable for failing to warn of a cancer

risk, defendant could not be held liable for punitive damages where it "refused to draw a causal connection between [the use of its product] and . . . cancer before experts in the relevant fields ha[d] done so"].)[18]

Plaintiff begins his punitive damages discussion by acknowledging his heavy burden of establishing the basis for a punitive damages award (RB/X-AOB 98-99), but then quickly abandons that standard when addressing Monsanto's conduct in light of the worldwide regulatory consensus. Plaintiff argues that because punitive damages are purportedly "the most effective remedy for consumer protection against defectively designed mass-produced" products, punitive damages are available even where regulatory bodies declare a product to be safe and where there is "a 'reasonable disagreement' among experts" about the safety of the product. (RB/X-AOB 102.) Plaintiff thus argues that a

---

[18] In its opening brief, Monsanto pointed out that the trial court's tentative decision was to grant JNOV on the entirety of Plaintiff's punitive damages claim. Plaintiff criticizes Monsanto for citing the tentative opinion because such an opinion is never final, and the trial court is always free to change a tentative ruling. (RB/X-AOB 64.) Nobody disputes the legal status of the trial court's tentative decision. Monsanto cited the tentative ruling simply to demonstrate that the trial court's factual findings did not change from the tentative opinion granting JNOV and the final opinion denying it, and the legal analysis in the tentative opinion was correct. Because the trial court failed to apply the proper legal standard in considering whether there was clear and convincing evidence of punitive damages, and this court reviews the denial of JNOV de novo, this court should independently reach the conclusion that the trial court's factual findings (as well as the evidence in the record as a whole) require that the punitive damages award be stricken.

punitive damages award should be upheld where there is evidence of "constructive" knowledge that the defendant's product " 'might' " be dangerous, "[e]ven where the risk of harm is relatively slight." (RB/X-AOB 100, 102-103.)

Plaintiff is wrong. He effectively concedes the lack of clear and convincing evidence of despicable conduct by advocating a standard that would permit punitive damages in *every* failure-to-warn case, wholly divorced from the prevailing views of the scientific community and the actual knowledge of the defendant as to the likelihood of the product's dangers. Punitive damages can be awarded for a conscious disregard of *probable* harm, not *possible* harm. (See *Hoch*, *supra*, 24 Cal.App.4th at p. 61.) To claim otherwise, Plaintiff ignores the cases that explain what it means for a defendant to be aware of the *probable* dangerous consequences of its conduct: "Put another way, the defendant must 'have *actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm.' " (*Pacific Gas & Electric Company v. Superior Court* (2018) 24 Cal.App.5th 1150, 1159 (*PG&E*).) Plaintiff fails to cite or acknowledge *PG&E* in his respondent's brief.

The recently decided *Echeverria* decision further confirms that Plaintiff was required to prove Monsanto willfully and maliciously disregarded a *known* risk of probable harm, even where it is alleged that the defendant's product caused cancer. In *Echeverria*, the Court of Appeal held that JNOV in favor of the manufacturer-defendant was required following a $347 million

punitive damage award in a case alleging that the defendant's talcum powder product caused ovarian cancer. (See *Echeverria, supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *12, *25-*27].) The court held that no reasonable juror could find clear and convincing evidence supporting punitive damages where "various entities ha[d] conducted evaluations of the entire body of relevant evidence" and failed to reach any conclusion "that perineal use of talc [was] carcinogenic." (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *26].) In other words, where "[t]he evidence demonstrated it [was] not universally accepted in the scientific or medical community that talc" was "a significant risk factor for ovarian cancer," punitive damages were not permitted as a matter of law "despite the published cell, epidemiological, and animal studies, as well as the IARC 2B designation" that showed "an association between talc and ovarian cancer." (*Ibid.* [punitive damages not permitted as a matter of law where there was no "direct, conclusive evidence establishing genital talc use causes ovarian cancer"].)

Here, even more than in *Echeverria*, the evidence is undisputed that Monsanto had none of the requisite knowledge that could lead a jury to find clear and convincing evidence of malice or oppression. EPA has approved the sale of glyphosate without a cancer warning since 1974 and repeatedly determined that glyphosate does not cause cancer, and that view is shared by regulators worldwide, including regulators for the European Union, Canada, Australia, New Zealand, and Japan. (AOB 20-21, 24-26, 66.) This is not a case where there was simply a

disagreement among experts as to the purported dangers of a product. This is a case where there was a prevailing view in the scientific and regulatory community that Roundup posed no real-world health risks, and the only evidence to the contrary was the post-hoc opinions of paid experts, relying on other opinions formed well after Plaintiff was diagnosed with cancer. As a matter of California law, it was not *malicious* for Monsanto to "refuse[ ] to draw a causal connection between [the use of its product] and . . . cancer before experts in the relevant fields ha[d] done so." (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].)[19]

---

[19] *Echeverria* underscores what has been the law for decades in California—i.e., that punitive damages may not be awarded in the absence of a defendant's conscious disregard of a known risk, which requires actual knowledge. (*PG&E*, *supra*, 24 Cal.App.5th at p. 1159.) Here, the trial court made factual findings concerning Monsanto's lack of knowledge of a known risk, which should have precluded liability for punitive damages. (See 6 AA 6141 [tentative ruling: "Plaintiff presented no evidence that any Monsanto employee believed at any time that exposure to Monsanto's GBH products cause NHL"], 6146 [final ruling: "Before and after IARC's classification . . . , regulatory and public health agencies worldwide have reviewed and rejected claims about the carcinogenicity of GBHs"].) And the federal district court in the *Hardeman* case made similar findings that likewise should have precluded a punitive damages award. (See *In re Roundup Products Liability Litigation* (N.D.Cal., July 15, 2019, Nos. 16-md-02741-VC, 16-cv-00525-VC) ___ F.Supp.3d ___ [2019 WL 3219363, at p. *3] [plaintiff did not "present any evidence that Monsanto was in fact aware that glyphosate caused cancer but concealed it"]; *ibid.* ["[T]he metaphorical jury is still out on whether glyphosate causes NHL. The trial showed that there is credible evidence on both sides of the scientific debate."].)

Plaintiff argues that the punitive damages question cannot come down to Monsanto's actual knowledge because, according to one unpublished trial court opinion from Louisiana, " '[i]f the sole opinion(s) of one biased actor within the complex system can govern and control the nature, timing, and dissemination of information, and warning, the system breaks down.' " (RB/X-AOB 103.) But it is Plaintiff, not Monsanto, who asks this court to accept the post-hoc opinions of his own paid experts over the consensus of regulatory agencies throughout the world. Whatever the law is in Louisiana, a California Court of Appeal has held that punitive damages are unavailable where a putative link to cancer "remains under scientific investigation" by regulators. (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].) Punitive damages plainly cannot be allowed here, where Monsanto's knowledge was informed by the studied opinions of the regulatory agencies tasked with determining the potential hazards of glyphosate.

Thus, even if Plaintiff were correct that punitive damages could be awarded based on something less than actual knowledge of probable harm, there would still be no basis for an award of punitive damages because there is no evidence that Monsanto acted with malice or oppression. Worldwide regulatory approval of Monsanto's sale of Roundup without a cancer warning is simply incompatible with a finding that Monsanto acted despicably. Monsanto's reliance on the scientific determinations and approvals made by worldwide regulators weighs against any finding that there is clear and convincing evidence of malice or oppression. (See

Echeverria, supra, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27] [while a defendant's "compliance with, or actions consistent with, governmental regulations or determinations about a product do not necessarily eviscerate a claim for punitive damages," no reasonable jury could conclude that the defendant engaged in " 'despicable conduct' " by failing "to draw a causal connection between" the use of the defendant's product and cancer "before experts in the relevant fields ha[d] done so"]; see also *Kim v. Toyota Motor Corp*. (2018) 6 Cal.5th 21, 36-37 [disapproving "older" Court of Appeal cases such as *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, cited by Plaintiff (RB/X-AOB 99), and holding that a defendant's compliance with industry standards is probative of the appropriateness of its conduct]; *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 548; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 579 [116 S.Ct. 1589, 134 L.Ed.2d 809] (*Gore*) ["BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to vehicles] and damage requiring disclosure to purchasers"]; *Nader v. Allegheny Airlines, Inc.* (D.C.Cir. 1980) 626 F.2d 1031, 1035 [reversing punitive damage award related to an airline's overbooking practice because the governing federal agency "had publicly and formally expressed its approval of the practice"]; *Stone Man, Inc. v. Green* (Ga. 1993) 435 S.E.2d 205, 206 [defendant's "compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages"]; Prosser & Keeton, Torts (5th ed. 1984) § 36,

p. 233, fn. 41 ["In most contexts . . . compliance with a statutory standard should bar liability for punitive damages"].)

Monsanto's reliance on the views of worldwide regulators is particularly incompatible with a finding of malice or oppression here because Monsanto did not merely "comply" with regulations; rather, worldwide regulators have expressly and repeatedly reviewed the body of scientific literature and concluded there was no evidence of the exact risk Plaintiff alleges Monsanto should have warned of. Thus, the evidence does not just show that Monsanto complied with regulations, but that these expert regulators were expressing the prevailing scientific view of the potential dangers of Roundup. And here, Monsanto simply could not change the label to warn of this alleged risk without the prior approval of EPA, which had repeatedly determined that the risk did not exist. (See *ante*, pp. 47-55.)

As previously discussed, Plaintiff asserts that the conclusions of the regulators are of no value because they were somehow influenced by Monsanto to ignore their own standards in concluding that Roundup poses no cancer risk to Monsanto's customers. (RB/X-AOB 19, 40.) Plaintiff does not come close to supporting this contention with evidence, basing it instead solely on the fact that Monsanto presented its position that Roundup posed no cancer risk and wrote the initial draft of some regulatory reports. (RB/X-AOB 40, 61-62.) That argument, however, does not supply evidence that regulators failed to perform their own independent review, or that Monsanto influenced their final conclusions. (See *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL

3001626, at p. *26] [even where the defendant "mount[ed] a defense" of its product by developing a "strategy" to persuade regulatory agencies that preexisting studies were flawed and inconclusive, punitive damages were barred as a matter of law]; *ibid.* [where the defendant defended its product to a committee evaluating cancer risks, punitive damages were unavailable as a matter of law where there was no evidence the defendant's efforts changed the committee's "ultimate conclusion"].)

In any event, Plaintiff's unsupported claim that Monsanto misled or defrauded regulatory agencies to maintain clearance to sell Roundup without a cancer warning cannot support punitive damages as a matter of federal law. (See *Buckman*, *supra*, 531 U.S. at pp. 347-348 [because "[p]olicing fraud against federal agencies" is not a matter within traditional state regulation and rather "the relationship between a federal agency and the entity it regulates is inherently federal," "fraud-on-the-FDA claims" are preempted by federal law].) The Ninth Circuit, citing *Buckman*, reinforced this conclusion in *Nathan Kimmel, Inc. v. DowElanco* (9th Cir. 2002) 275 F.3d 1199 (*Kimmel*). There, the court held it would be "troubled" if a California state court "judged illegal under state law" "an applicant's disclosures [to the EPA] under FIFRA" that were "not challenged by the EPA" because "[s]uch an approach would force FIFRA applicants to ensure that their disclosures to the EPA would satisfy not only the standards imposed by that agency under federal law, but also the potentially heterogeneous standards propounded by each of the 50 States." (*Id.* at p. 1207; see *Giglio v. Monsanto Company* (S.D.Cal., Apr. 29, 2016, No.

15cv2279 BTM (NLS)) 2016 WL 1722859, at p. *3 [nonpub opn.] [finding that "[u]nder Kimmel" claims that Monsanto "failed to adequately warn the EPA of the dangers of Roundup and concealed information from and/or misrepresented information to the EPA . . . . are preempted by FIFRA" (citation omitted)].) Moreover, "[t]he concerns expressed by the Supreme Court in *Buckman* hold true not only where there is a separate fraud-on-the-FDA [or EPA] claim but also where a plaintiff seeks to prove fraud on the FDA [or EPA] in order to bring a traditional state-law torts suit." (*In re Trasylol Products Liability Litigation* (S.D.Fla. 2010) 763 F.Supp.2d 1312, 1325; see *id.* at pp. 1326-1327 [collecting cases that agree].) It is for EPA pursuant to federal law, and not a California court or jury as a basis for awarding punitive damages, to determine "the propriety of disclosures" Monsanto made to EPA about Roundup.

2. Plaintiff's alleged specific acts of purported misconduct do not show either malice or the actual knowledge necessary to support punitive damages.

None of the 10 instances of conduct cited by Plaintiff support his claim for punitive damages. (See RB/X-AOB 100-101.) They do not, individually or collectively, rise to the level of despicable conduct necessary to establish a basis for punitive damages. And allegations of despicable conduct untethered to evidence of Monsanto's knowledge of probable dangerous consequences of Roundup, cannot as a matter of law support an award of punitive

damages, given the backdrop of the worldwide regulatory consensus finding no such probable dangers.

Many of these alleged instances of conduct involve Monsanto's alleged reactions to IARC, or to other conduct that occurred *after* Plaintiff's cancer diagnosis. But as explained in *Echeverria*, "[s]cientific evidence developed post-injury [does] not create a reasonable inference that [the defendant] was acting with malice, pre-injury, in failing to warn of probable dangerous consequences of the product." (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].) Such "post-injury" conduct "fall[s] short of establishing clear and convincing evidence of malice." (*Ibid.*)

Most of the other instances involve Monsanto's purported attempts to influence regulatory agencies. Similar evidence of a "strategy" to "influence or persuade" regulatory agencies was offered in *Echeverria.* (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *26].) Nevertheless, the Court of Appeal held that JNOV on punitive damages was necessary because there was no evidence that the defendant acted despicably in not providing a warning given the failure of regulatory bodies to reach the conclusion that there was a probable causal link between the defendant's product and cancer. (*Id*. at pp. *25-*27.) Defending a product the defendant believes is safe, with substantial scientific and regulatory authority rendering that belief reasonable, is not evidence of despicable conduct.

(i) Response to IARC: As explained above, Monsanto's response to IARC's Monograph has no legal relevance to Plaintiff's

punitive damage claim because Plaintiff was diagnosed with cancer several months before IARC issued the Monograph and, as discussed earlier, there is no evidence that any additional spraying by Plaintiff had any impact on his cancer. (See *ante*, p. 22 & fn. 2; see also *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].) In any event, Plaintiff stopped spraying Roundup in March 2015 at approximately the same time IARC released its glyphosate findings.[20] Any response to IARC followed Plaintiff's last exposure and therefore cannot support a finding of malice or oppression. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422-423 [123 S.Ct. 1513, 155 L.Ed.2d 585] (*State Farm*) [due process requires punitive damages to be derived "from the acts upon which liability was premised"]; *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68 ["Punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*."].)

Moreover, Monsanto's response to IARC reflects nothing more than a *legitimate* scientific disagreement that cannot be a basis for finding malice or oppression. Indeed, the very evidence Plaintiff cites is testimony by Monsanto employee Dan Goldstein that "there was debate" as to whether Monsanto "should

---

[20] Plaintiff claims the evidence shows that he last used glyphosate in January 2016. (RB/X-AOB 100, citing 19A RT 3376:24-3377:4.) That is not accurate. The record citation is to attorney argument outside the presence of the jury. The evidence shows that Plaintiff stopped applying Roundup in March 2015, when Dr. Ope Ofodile wrote a letter to his employer. (See 18A RT 3151:3-25, 3154:2-16; 18B RT 3236:4-13.)

acknowledge that Roundup may cause cancer but that a dose response assessment . . . was not done by IARC and [glyphosate] doses were low," or whether Monsanto "should remain with what [Goldstein] believe[s] is the correct assessment, which is glyphosate is unlikely to cause cancer." (5 AA 5644-5646.) Goldstein also testified that the head of occupational medicine at Environmental Safety Health was " 'in alignment . . . not [to] concede a cancer hazard.' " (5 AA 5645.) This is not evidence of "malice" or actual knowledge that Roundup was causing cancer; rather, it shows reasoned discussion about a scientific disagreement with IARC. (See, e.g., *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27, citing *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-1317] ["no evidence to support punitive damages where there was a genuine dispute in scientific community about the benefit of the proposed safety measure"]; *Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 959 [reversing punitive damage award because it "remains purely speculative as to whether the [defendant] acted with such malice rather than out of a bona fide disagreement"].) The dispositive evidence that this position was reasonable is the fact that since IARC issued its Monograph, EPA and other worldwide regulators have reached the same conclusion regarding the science as did Dr. Goldstein.

(ii) Dr. Parry's 1999 Report: Monsanto hired Dr. Parry in 1999 to review four recently published genotoxicity papers. (See 5 AA 5816-5818.) Dr. Parry posed eight questions to Monsanto based upon his *review* of the papers. Monsanto conducted testing

at its Environmental Health Laboratory to answer his questions and the results of those tests were later published in the Journal of Agricultural Chemicals in 2008 for EPA and the scientific community to review. (5 AA 5843-5844.) Dr. Parry's review of four published genotoxicity papers implicates a tiny fraction of the available glyphosate science and the fact that his initial views of these studies were not sent to EPA had no effect on the development of glyphosate science. (AOB 24-25 [EPA reviewed "23 epidemiological studies, 15 animal carcinogenicity studies, and nearly 90 genotoxicity studies"].) That Monsanto did not provide a copy of Dr. Parry's views of the studies was hardly despicable, especially when Monsanto ultimately gave due credence to Dr. Parry's recommendations and conducted appropriate follow-up studies. In any event, such conduct is not a proper legal basis for imposing punitive damages because it concerns the propriety of Monsanto's disclosures to EPA. (See *Buckman*, *supra*, 531 U.S. at p. 348; *Kimmel*, *supra*, 275 F.3d at p. 1207.)

(iii) EPA's 1985 Classification of Glyphosate: Monsanto did not "f[i]ght against" EPA's classification of glyphosate in 1985, as Plaintiff claims. (RB/X-AOB 100.) Again, mounting a defense of a product is legally insufficient to establish malice. (See *ante*, pp. 71-72, 74.) But in any event, Dr. Christopher Portier merely testified that "through some discussion and debate that I read . . . [EPA] allowed Monsanto to re-evaluate" one of the mouse studies and EPA agreed with Monsanto's reevaluation. (12B RT 1817:1-1820:10.) EPA has since repeatedly concluded based upon additional data that animal studies do not support a finding that

glyphosate is carcinogenic. (7 AA 7242; 26A RT 4528:3-4532:17.) Because there is no evidence that this exchange was anything other than the regulatory give-and-take undertaken in good faith concerning the merits of the science at issue in an EPA review, it cannot be the basis for a finding of malice. (See *Kimmel*, *supra*, 275 F.3d at p. 1207.)

(iv) Defense of Glyphosate Business: Plaintiff misrepresents the job responsibilities of Monsanto employees Drs. Donna Farmer and William Heydens to imply that their defense of glyphosate is evidence of malicious conduct. (RB/X-AOB 48-49, 100.) Drs. Farmer and Heydens were both regulatory toxicologists whose job responsibilities included ensuring Monsanto would "meet all the requirements by the regulators." (5 AA 5538, 5700.) Dr. Farmer further testified that the concept of "defending glyphosate" meant "being technically correct" about glyphosate with regulators in response to "questions or allegations." (5 AA 5538.) Yet again, there is nothing wrong with employing scientists to respond to regulatory questions and present their indisputably deeply-held view of the scientific record. Plaintiff can point to nothing more, and such insinuations of improper conduct are not evidence of malice or actual knowledge of a risk of harm. (See *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *26-*27].)

(v) Adequate Testing: Plaintiff, like the trial court, failed to explain how the *record* could support a "failure to adequately test" allegation. Nor has Plaintiff responded to the legal authorities demonstrating that a failure-to-test theory cannot

support punitive damages when there is no evidence that Monsanto had actual knowledge that Roundup could cause cancer but nevertheless refused to test it. (RB/X-AOB 51-52, 101; AOB 79-80.) And while Plaintiff claims Monsanto should have conducted another animal study and another epidemiology study (RB/X-AOB 51-52), Plaintiff fails to show how those additional studies would have materially added to the available scientific knowledge, in light of the dozens of epidemiology and animal studies on glyphosate, one of the most studied substances on earth. (13A RT 2051:1-3; 26A 4503:17-24; 7 AA 7286.)

(vi) Surfactant Use: Plaintiff suggests Monsanto acted despicably by using the surfactant polyoxyethylene tallow amine (POEA). Plaintiff's own expert Dr. Sawyer testified that EPA conducted "an SAR analysis" and "did not find [POEA] . . . likely to be carcinogenic." (21A RT 3614:11-3615:16.) Plaintiff also ignores testimony by Monsanto employees that "EPA requires a battery of studies on a surfactant which would include acute toxicity and irritation, sensitization, subchronic toxicity, genotoxicity and developmental toxicity and some form of reproductive toxicity" and conducted a "human health risk assessment" before approving the surfactant. (5 AA 5580-5582, 5710-5711.) Plaintiff's citation to the George 2010 study to speculate that POEA could have "played a role" in Plaintiff's cancer is unsupported by expert testimony; both IARC and EPA rejected that study as unreliable. (See RB/X-AOB 113; 12B RT 1863:3-1865:2; 14A RT 2207:14-2208:9.)

(vii) Ghostwriting: Plaintiff seeks to justify the punitive award by claiming that Monsanto "ghostwrote" the Williams (2000) genotoxicity paper. (RB/X-AOB 53-54, 101.) That theory is invalid as a matter of law: claims of "ghostwriting" do "not establish malicious behavior that would permit punitive damages." (*In re Prempro Products Liability Litigation* (E.D.Ark. 2008) 554 F.Supp.2d 871, 897, affd. in part & vacated in part (8th Cir. 2009) 586 F.3d 547, 571, 573.) But even if true ghostwriting were assumed to be nefarious, Plaintiff's claim is unsupported by the evidence. The "Acknowledgements" section of Williams (2000) expressly acknowledges the contribution of toxicologists and other scientists at Monsanto, even identifying the scientists by name. (6 AA 6555.) That Monsanto's contributions were recognized in the "Acknowledgements" section of Williams (2000), as opposed to the author line, as Plaintiff prefers, falls well short of substantial evidence (much less clear and convincing evidence) that Monsanto acted despicably. Perhaps more fundamentally, Plaintiff does not challenge the scientific accuracy or conclusions of the Williams (2000) paper, or suggest that it would have reached a different result in the absence of Monsanto's publicly acknowledged contribution. (See *In re Prempro*, *supra*, at p. 897 ["there is no evidence that . . . Wyeth supported articles that it knew were false or misrepresented the science"].) In such circumstances, a dispute about how best to credit authorship can hardly support the imposition of punitive damages.

(viii) Punitive Damage Defense Email: Monsanto employee Dr. Goldstein stated in a *single* email in 2004 that " '[s]ome people

seem to take offense at the idea of helping us manage our punitive damage liability, often without realizing that, quote, "doing the right thing," and quote, "managing liability," are oftentimes one and the same.' " (5 AA 5625.) The email does not describe any specific conduct or action and it reflects the common-sense notion that if a company tries to do the right thing, it should not be held liable for punitive damages. That is hardly evidence of malice.

(ix) "Orchestrating an Outcry" to IARC: For the reasons stated above, Monsanto's reasonable defense of its product in response to IARC is not evidence of malice or actual knowledge that Roundup causes cancer, but reflects a scientific disagreement with IARC. (See *ante*, pp. 74-76.) Further, Monsanto's disagreement with IARC cannot, consistent with due process, support the punitive award, because *Plaintiff* stopped spraying Roundup in the same month IARC announced its glyphosate classification and therefore this conduct "bore no relation to [Plaintiff's] harm." (*State Farm*, *supra*, 538 U.S. at pp. 422-423 [due process requires punitive damages to be derived "from the acts upon which liability was premised"].)

(x) Plaintiff's Phone Calls: Plaintiff, who had already been diagnosed with MF, called Monsanto in November 2014 and the Missouri Regional Poison Control (MRPC) in March 2015 to report that a rash appeared after an exposure to Roundup. (See 6 AA 6516, 6519; 18B RT 3322:15-3324:16.) Plaintiff claims he spoke to a Monsanto employee who told him that his rash symptoms were inconsistent with Roundup exposure and relayed his symptoms to Dr. Goldstein, who said he would call Plaintiff but

does not recall doing so. (17B RT 2982:16-2984:22; 5 AA 5617-5618.) The views expressed by Monsanto's employees were consistent with Monsanto's understanding of the risk of harm, as reflected by the regulatory consensus that Roundup is not carcinogenic. Dr. Goldstein's oversight in apparently not calling Plaintiff at worst amounted to "'"mere carelessness,"'" which "'"does not justify the imposition of punitive damages."'" (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210; see *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at p. *27].) A simple failure to return a phone call, while perhaps a discourteous oversight, cannot provide a sufficient basis here to impose punitive damages, especially when these episodes occurred after Plaintiff had already been diagnosed with MF and near the time he stopped using Roundup. Any return call would have had no impact on Plaintiff's use or treatment. (See *State Farm*, *supra*, 538 U.S. at pp. 422-423.)

B. The clear and convincing evidence requirement makes the applicable standard of review especially rigorous.

Plaintiff argues the court should review his punitive award using the same *substantial evidence* standard of review that governs his warning and design claims, even though he was required to prove his punitive damage claim by *clear and convincing evidence*. (RB/X-AOB 98.) The issue of which standard governs is now pending before the California Supreme Court. (*B.(O.), Conservatorship of*, review granted May 1, 2019, S254938

[issue presented: where trial court order must be based on clear and convincing evidence, is an appellate court required to find only substantial evidence to support the trial court's order or substantial evidence from which the trial court could have found clear and convincing evidence to support its order].)

The better reasoned position is that the clear and convincing evidence standard heightens the appellate standard of review, and the appropriate question on appeal should be " 'whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*.' " (*T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1239.) The reasons for requiring punitive damages to be proven by clear and convincing evidence are thwarted if, on appellate review, the "substantial evidence" test is not adjusted to take into account this heightened evidentiary requirement. Under the proper and stricter review standard, an appellate court should review the whole record to determine whether a reasonable jury could find by clear and convincing evidence that the defendant was guilty of malice, oppression, or fraud. (E.g., *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482 ["the trial court properly viewed the evidence presented by [the plaintiff] with that higher burden in mind. In our review of the trial court's order granting the nonsuit, we can do no differently." (footnote omitted)]; accord, *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891-892; see *PG&E*, *supra*, 24 Cal.App.5th at p. 1159; *T.J.,* at pp. 1238-1240; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1294; *Johnson & Johnson*

v. Superior Court (2011) 192 Cal.App.4th 757, 762; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1048-1049; *Hoch*, *supra*, 24 Cal.App.4th at pp. 59-60.)

In any event, under either standard, Monsanto did not engage in "despicable conduct" while having " 'actual knowledge of the risk of harm it [was] creating and, in the face of that knowledge, fail[ed] to take steps it knows will reduce or eliminate the risk of harm.' " (*PG&E*, *supra*, 24 Cal.App.5th at p. 1159.) The very most Plaintiff could be said to establish is a reasonable scientific disagreement, with regulatory agencies around the world sharing Monsanto's view of the science. As a result, there is no basis for any award of punitive damages as a matter of law. (See *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27].)

VI. A new trial or remittitur is required because the award of future noneconomic damages is excessive.

A. Plaintiff may not recover damages for 33 years of pain and suffering that he will not experience.

1. California law prohibits recovery of pain and suffering damages for "lost years."

Monsanto's opening brief explained that Plaintiff is entitled to recover damages for pain and suffering he is reasonably certain to experience based on his projected life span *at the time of trial*. (AOB 87-89.) "This is so because it would be inappropriate to

award damages for future pain which will not occur . . . because of the shortened life span of the victim." (*Morrison v. State* (Alaska 1973) 516 P.2d 402, 406 (*Morrison*).) Dr. Nabhan testified that Plaintiff's projected life expectancy at the time of trial was one and a half years. (See AOB 88; 17B RT 2886:20-2887:12.) Yet the jury awarded Plaintiff $33 million in future noneconomic damages based on his counsel's argument that he should be compensated over his entire 33-year *pre-injury* life expectancy, even if he does not live that long. (29A RT 5110:16-20, 5124:11-13.) Because the law does not allow recovery of pain and suffering damages for "lost years," the $33 million award cannot stand.

Plaintiff disagrees, arguing that he may recover future noneconomic damages based on his *pre-injury* life expectancy. (RB/X-AOB 80-81.) Plaintiff is wrong. California law limits recovery of future noneconomic damages to pain and suffering that the plaintiff is "reasonably certain" to experience. (*Bellman v. San Francisco H. S. Dist.* (1938) 11 Cal.2d 576, 588; see Civ. Code, § 3283; 29A RT 5049:21-25.) Accordingly, future noneconomic damages are based solely on a plaintiff's projected life expectancy at the time of trial, not his pre-injury life expectancy. (*Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 550, fn. 8 (*Buell-Wilson*) [evaluating excessiveness of noneconomic damages in light of plaintiff's "projected life span at the time of trial"], vacated on other grounds in *Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [127 S.Ct. 2250, 167 L.Ed.2d 1087]; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 305 (*Bigler-Engler*) [remitting award of noneconomic damages in light of several factors,

including plaintiff's "life expectancy of 58 years at trial"]; see Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages* (1962) 50 Cal. L.Rev. 598, 605 ["awards for pain and suffering . . . are invariably limited to the period of the victim's shortened life expectancy"]; 6 AA 5938-5939.)

California law is consistent with the law of other jurisdictions on this point. (See *Morrison*, *supra*, 516 P.2d at p. 406 ["[D]amages for future pain and suffering . . . are based on actual life expectancy at the time of trial"]; *Coward v. Owens-Corning Fiberglas Corp.* (Pa.Super.Ct. 1999) 729 A.2d 614, 627 ["a jury may not award damages for loss of life's pleasures for periods of time after the plaintiff's death[;] it may do so for any period following his injury so long as he may remain alive and subject to impairment"], 628; *Rhone v. Fisher* (Md. 1961) 167 A.2d 773, 775, 778 (*Rhone*) ["All of the American cases in point . . . have specifically disapproved of an allowance of damages for the shortening of life"]; see *Crecelius v. Gamble-Skogmo, Inc.* (Neb. 1944) 13 N.W.2d 627, 632; *Ham v. Maine-New Hampshire Interstate Bridge Authority* (N.H. 1943) 30 A.2d 1, 6; *Howell v. Lansing City Electric Ry. Co.* (Mich. 1904) 99 N.W. 406, 437-439 (*Howell*); see also 2 Stein, Stein on Personal Injury Damages (3d ed. 2019) § 8:25; Rest.2d Torts, § 924, com. e; 22 Am.Jur.2d (2019) Damages, § 247; 2 Speiser et al., American Law of Torts (2019) § 8:21.)

Faced with this overwhelming authority, Plaintiff suggests that even if he cannot recover based on his pre-injury life expectancy, he can effectively be compensated for those lost years

under the guise of damages for " 'loss of enjoyment of life.' " (RB/X-AOB 80.) Not so. Damages for " 'loss of enjoyment of life' " (also known as "hedonic" damages) compensate for " 'physical impairment which limits the plaintiff's capacity to share in the amenities of life' " *during his lifetime*, and not for years of life lost due to an injury. (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 760, fn. 1, 763; see *Huff v. Tracy* (1976) 57 Cal.App.3d 939, 943; Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2018) ¶ 3:686, p. 3-117 ["Damages are awardable for the detriment plaintiff has suffered, and will continue to suffer, from an inability to 'enjoy life' as he or she could have but for the injury"].)

Similarly, although a plaintiff may recover damages for pain and suffering caused by a "shortened life expectancy," those damages are intended to compensate a plaintiff for his distress at the prospect of a hastened death, not lost years. (Haning et al., Cal. Practice Guide: Personal Injury, *supra*, ¶ 3:701, p. 3-118 ["Shortened life expectancy" means "additional anxiety, worry and impairment of the ability to enjoy life" caused by injuries that diminish one's life expectancy (boldface omitted)]; see *Rhone*, *supra*, 167 A.2d at p. 778 [" 'If . . . a shortening of life may be apprehended this may be considered in determining the extent of the injury . . . and the bodily and mental suffering which will result. But damages cannot be recovered for the loss or shortening

of life.' "]; *Morrison*, *supra*, 516 P.2d at p. 406; *Howell*, *supra*, 99 N.W. at pp. 437-438.)[21]

2. The out-of-state cases cited by Plaintiff do not apply here.

Plaintiff cites cases from other jurisdictions in an effort to bolster his argument that he may recover pain and suffering damages for years he is not expected to live. (See RB/X-AOB 80-81.) These cases are distinguishable, and in any event, they should not be followed in light of clear authority in California and the vast majority of other states prohibiting such a recovery.

Two of the cases interpret the language of other states' wrongful death and survival statutes, which do not apply to the California common-law tort claims asserted here. (See RB/X-AOB 80, citing *Castro v. Melchor* (Haw. 2018) 414 P.3d 53, *Choctaw Maid Farms, Inc. v. Hailey* (Miss. 2002) 822 So.2d 911.) *Castro* considered whether the estate of a viable fetus may recover damages for loss of life under Hawai'i's survival statute. (*Castro*,

---

[21] Plaintiff relies on *Buell-Wilson* and *Bigler-Engler* (RB/X-AOB 80), but neither case holds that a plaintiff may recover noneconomic damages for "lost years." *Buell-Wilson* identifies "shortened life expectancy" as one of the elements of recoverable noneconomic damages cited in CACI No. 3905A, even though CACI No. 3905A did not and does not list "shortened life expectancy" as an element of noneconomic damages. (See *Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 549; CACI No. 3905A (2003-2004); CACI No. 3905A (2019).) *Bigler-Engler* quotes verbatim the statement from *Buell-Wilson*. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 300.) Anyway, both cases likely use the term "shortened life expectancy" to refer to one's distress at the prospect of a shortened life, consistent with the authorities cited above.

at pp. 64-67.) *Castro* recognized that (1) "Hawai'i case law is unique because it does not require the decedent to have actually experienced the loss of enjoyment of life to recover hedonic damages"; and (2) Hawai'i law differs from California law, which does not allow wrongful death claims to be brought on behalf of unborn children. (*Id.* at pp. 61, 64.) *Choctaw Maid Farms* addressed whether a plaintiff may recover hedonic damages under Mississippi's wrongful death statute, which says " 'the fact that death was instantaneous shall in no case affect the right of recovery.' " (*Choctaw Maid Farms*, at p. 922.)

All the other cases cited by Plaintiff involve medical malpractice actions that apply the "lost chance" doctrine to claims against a medical provider for failing to timely diagnose a disease. (See RB/X-AOB 80-81, citing *James v. United States* (N.D.Cal. 1980) 483 F.Supp. 581, *Bauer ex rel. Bauer v. Memorial Hosp.* (Ill.App.Ct. 2007) 879 N.E.2d 478, *United States v. Anderson* (Del. 1995) 666 A.2d 73, and *Dickhoff ex rel. Dickhoff v. Green* (Minn. 2013) 836 N.W.2d 321.) Here, Plaintiff is not asserting a medical malpractice claim, and the "lost chance" doctrine does not apply in California. (See *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1600-1612.) Moreover, the "lost chance" doctrine compensates a plaintiff for loss of an opportunity for early treatment and survival as a result of a medical provider's negligence, not years of life the plaintiff lost as a result of the underlying injury. (See *Dickhoff*, at pp. 333-336.) Finally, California law caps total noneconomic damages in medical malpractice cases at $250,000 (Civ. Code,

§ 3333.2), which would prevent any recovery that comes close to the $37 million awarded in this case.

3. Dr. Kuzel's testimony does not support an award of $33 million.

Plaintiff next argues that the $33 million award is supported by "testimony from [Dr.] Kuzel that Johnson could live for another thirty-three years" and "[i]f the jury believed this testimony they would have properly awarded [him] damages for thirty-three years of suffering." (RB/X-AOB 82.) But Plaintiff ignores what Dr. Kuzel actually said. Dr. Kuzel testified that Plaintiff might "live his normal life expectancy" if he were "*cured of this disease*." (27B RT 4854:6-10, emphasis added.) Even if the jury credited this testimony, the jury had no basis to award *any* damages for pain and suffering after Plaintiff was "cured." (AOB 89.) Plaintiff will not experience any pain and suffering after he is cured, and certainly not pain and suffering amounting to $1 million per year. Thus, even if Plaintiff lives to his natural life expectancy, there is no evidence he will "continue[ ] to live *in pain* for those thirty-three years," as he argues on appeal. (RB/X-AOB 79, emphasis added.)

Dr. Kuzel also testified that patients with *early stage* MF may live a natural life expectancy, unlike those who present with more extensive disease, and the undisputed evidence established that Plaintiff's MF is extensive. (See AOB 89.) Monsanto is not trying to "disown" Dr. Kuzel's testimony, as Plaintiff argues. (RB/X-AOB 82.) Rather, Dr. Kuzel's testimony is not susceptible to the twisting Plaintiff attempts, and certainly does not support

an award of $33 million in future noneconomic damages.[22] Because the jury's award was based on an improper measure of damages, the judgment should be reversed or reduced.

B. Even if the jury did not improperly award pain and suffering for "lost years," an award of $33 million for one and a half years of pain and suffering is excessive.

Plaintiff insists he "deserves" $33 million even if he dies in the next couple of years. (RB/X-AOB 79; see 29A RT 5110:19-20 ["[I]t doesn't matter if he dies in two years or dies in 20. . . . [H]e deserves that money."].) But under California law, an award of $33 million for the type and duration of pain and suffering alleged here is clearly excessive.

A point of comparison is found in *Buell-Wilson*. There, the plaintiff was rendered paraplegic when her spine was fractured and severed in a vehicle rollover. (*Buell-Wilson, supra*, 141 Cal.App.4th at p. 533.) Portions of her spinal cord and nerve root were pulverized. (*Ibid.*) Metal screws and rods had to be inserted into her back to stabilize her upper body. (*Ibid.*) She lived in

---

[22] Plaintiff's contention that the jury was entitled to rely on Dr. Kuzel's testimony is a radical departure from his position at trial. In closing argument, Plaintiff's counsel maligned Dr. Kuzel's character and denigrated his testimony: "That Monsanto would call someone up here and speculate about bone marrow transplants that no one has ever offered to him, that he might live until he's 30 [*sic*], when his most recent scan showed the exact opposite, is outrageous. It is disgusting. It is reprehensible. That man has no dignity." (29A RT 5108:2-7.)

severe and constant pain that would only increase over time. (*Id.* at p. 534.) Below the waist, she felt phantom pain—a constant burning sensation below her ribs. (*Ibid.*) Above the waist, she suffered constant pain, including painful pressure on her ribs from the rods in her back. (*Ibid.*) Pain medication provided temporary relief but with debilitating side effects. (*Ibid.*) She also had no bladder or bowel control. (*Ibid.*) She had to catheterize herself multiple times daily, and her feces had to be manually extracted. (*Ibid.*) She also suffered recurring urinary tract infections that exposed her to a potentially fatal kidney disease. (*Ibid.*)

Notwithstanding these facts, the Court of Appeal observed that the jury's award of noneconomic damages—amounting to about $1,868,399 per year over plaintiff's projected 35-year life expectancy—was "extremely high" and, indeed, "excessive." (*Buell-Wilson, supra*, 141 Cal.App.4th at p. 550 & fn. 8.) In this case, the $22 million per year awarded by the jury ($33 million for the 1.5-year period of Plaintiff's injury) is almost *12 times greater* than the "extremely high amount" found excessive in *Buell-Wilson*. The fact that Ms. Buell-Wilson's injuries are far more severe and debilitating than Plaintiff's injuries demands a reversal or remittitur on excessiveness grounds.

C. The verdict reveals that the jury acted with passion and prejudice.

1. The court should draw no inferences from the length of the jury's deliberations or plaintiff's request for punitive damages.

Monsanto's opening brief discussed several factors that demonstrate the jury was inflamed when it awarded $33 million for future pain and suffering, including the fact that "there is a punitive element to the compensatory damages award" (6 AA 6153), the gross discrepancy between the future economic and noneconomic damage awards, the enormous disparity between this verdict and awards for similar injuries in other cases, and misconduct by Plaintiff's counsel during closing argument (AOB 89-93).

In response, Plaintiff argues that the jury could not have been inflamed because its deliberations lasted three days. (RB/X-AOB 82.) Nonsense. "The length of time that a jury deliberates has no bearing on nor does it directly correlate to the strength or correctness of its conclusions or the validity of its verdict." (75B Am.Jur.2d (2019) Trial, § 1352; see *Estate of Jones v. Phillips* (Miss. 2008) 992 So.2d 1131, 1149 ["There is no legal yardstick to measure how much time a jury must deliberate before returning its verdict. Short deliberations do not automatically demonstrate bias or prejudice."]; *Forrestt v. Koch* (Conn.App.Ct. 2010) 996 A.2d 1236, 1242 ["the time a jury spends in deliberation cannot form the basis of a claim that its verdict was affected by

improper influences"].) Indeed, in *Buell-Wilson*, the Court of Appeal concluded that the jury's award of noneconomic damages was the product of passion or prejudice (*Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 547), and there, the jury deliberated for *five* days (*id.* at p. 539)—two days longer than the jury deliberated here.[23]

Plaintiff also argues that the fact "[t]hat the jury awarded . . . only two-thirds of the punitive damages requested [by his counsel] is further evidence that the jury was not inflamed." (RB/X-AOB 82.) It is true that Plaintiff's lawyer asked for an astronomical $373 million in punitive damages and the jury awarded "only" $250 million. (29A RT 5118:7-5119:1; 5 AA 5503.) The obvious unreasonableness of counsel's request cannot mean that an enormous $250 million punitive damage award, which had to be substantially reduced by the trial court as excessive, is "evidence that the jury was not inflamed." (RB/X-AOB 82.)

---

[23] Plaintiff cites *In re Asbestos Litigation* (Del.Super.Ct., Jan. 31, 2019, No. N14C-08-164 ASB) 2019 WL 413660 [nonpub opn.] and *People v. Jurado* (2006) 38 Cal.4th 72, but neither case supports his position. (See RB/X-AOB 82.) *In re Asbestos Litigation* is an unpublished order from a Delaware trial court that offers a conclusory statement with no analysis. (*In re Asbestos Litigation*, at p. *11.) In *Jurado*, the Court concluded that the jury was not inflamed by victim-impact testimony in the penalty phase of a criminal trial, in part because "the jury deliberated on penalty for five days before reaching its verdict." (*Jurado*, at p. 134.) Here, the jury spent three days deliberating on *all issues*—liability, causation, compensatory and punitive damages—and it's impossible to know how much time the jurors devoted to each issue or the extent to which their decisionmaking was tainted by passion and prejudice.

Punitive damages aside, Plaintiff disregards the fact that the jury awarded the exact amount of future noneconomic damages requested by his counsel—$33 million, or $1 million for every year of his pre-injury life expectancy, even though there was no evidence he was reasonably certain to experience any pain and suffering during most of that 33-year period. The fact that the jury awarded the precise amount requested by Plaintiff's counsel, where there was no evidence to support that amount, is evidence of passion and prejudice. (See *Harris v. Mt. Sinai Med. Ctr.* (Ohio 2007) 876 N.E.2d 1201, 1204 [jury awarded amount of noneconomic damages requested by counsel ($15 million), which was " 'so out-of-line and unjustified that it must have been the result of passion or prejudice' "].)

2. The $33 million award of future noneconomic damages is significantly higher than verdicts for similar injuries.

Plaintiff next suggests that the court should not consider other cases with similar injuries in evaluating whether this verdict is excessive. (RB/X-AOB 83.) He cites *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615-616, for the proposition that reliance on other verdicts " 'would constitute a serious invasion into the realm of factfinding.' " But controlling Supreme Court authority encourages Courts of Appeal to consider "the amounts awarded in prior cases for similar injuries" when evaluating excessiveness. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508; see *Maede v. Oakland High School Dist.* (1931) 212 Cal. 419, 425; cf.

Buell-Wilson, *supra*, 141 Cal.App.4th at p. 551 ["evidence of other verdicts is . . . relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries"].)

Plaintiff claims that "[t]he highest courts of three states have approved similar non-economic damages." (RB/X-AOB 83-84.) But none of those cases involved plaintiffs with similar injuries or similar life expectancies. (See *Reckis v. Johnson & Johnson* (Mass. 2015) 28 N.E.3d 445, 448, 450-451, 468 & fn. 44, 469 [seven-year-old girl with life expectancy of 66 more years lost more than 95 percent of the top layer of her skin, suffered heart and liver failure, a stroke, a cranial hemorrhage that caused seizures, underwent brain surgery and more than 12 eye surgeries, and was legally blind]; *Munn v. Hotchkiss School* (Conn. 2017) 165 A.3d 1167, 1172, 1186-1188, 1190 [15-year-old girl with 66-year life expectancy suffered permanent brain damage, could not speak or sign, had limited use of arms, hands, and legs, and limited control over facial muscles, resulting in profuse drooling]; *Meals ex rel. Meals v. Ford Motor Co.* (Tenn. 2013) 417 S.W.3d 414, 417-418, 423-425, 428 [six-year-old boy with a roughly 56-year life expectancy suffered permanent paralysis below the waist, a closed head injury, collapsed lung, internal bleeding, and severe abdominal and intestinal injuries].)

By contrast, the cases cited in the opening brief involve plaintiffs with similar injuries. (AOB 91; see also *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 524 [jury awarded $450,000 in total noneconomic damages to plaintiff who

contracted pleural mesothelioma].) In a footnote, Plaintiff challenges two of those six cases. (RB/X-AOB 83, fn. 16.) But even if the court were to disregard the two cases Plaintiff complains about (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651; *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92), the award of *future* noneconomic damages in this case is still more than eight times higher than the next highest award of *total* noneconomic damages ($4 million), and more than 12 times higher than the average of the remaining four awards ($2,697,500). (AOB 91-92.) There is no serious dispute that this award is an outlier.

3. The $33 million award is disproportionate to the economic damages awarded.

Plaintiff argues there is " 'no authority establishing limits upon a general damages award based on a small amount of special damages.' " (RB/X-AOB 84.) Monsanto does not argue that there is an "established limit" on noneconomic damages based on the amount of economic damages awarded. Rather, the relationship between noneconomic and economic damages is just one factor that courts consider in evaluating excessiveness. (See *Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 555 [remitting excessive noneconomic damages to an amount "proportionate to the economic damages award"]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 [rejecting excessiveness challenge where "the size of the award for emotional distress is not out of line with the economic damages awarded"], disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644;

Thompson v. John Strona & Sons (1970) 5 Cal.App.3d 705, 712 [trial court properly exercised its discretion by ordering new trial on ground that noneconomic damages were excessive, in part because "the special damages were relatively nominal"].)

4. The court may consider attorney misconduct to which no contemporaneous objection was made.

Plaintiff next boasts that his counsel's comments about " 'changing the world' " and " 'champagne corks' " were proper. (RB/X-AOB 84-85.) They were not. The trial court correctly concluded the remarks were improper, sustaining objections (to the champagne comments) and giving a curative instruction (as to the "changing the world" comment). (29A RT 5117:2-24; 30 RT 5265:13-5267:22.) Yet Plaintiff's counsel exacerbated the misconduct by continuing to discuss the champagne fantasy right after the court sustained a defense objection to that argument. (29A RT 5117:8-24.)

Plaintiff also argues that Monsanto waived its excessiveness argument by not objecting to his counsel's comments. (RB/X-AOB 81, 85.) Not so. Monsanto is *not* seeking reversal based on a claim of attorney misconduct, which requires a timely objection. (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 295.) Rather, Monsanto is arguing that the verdict is excessive and not supported by the evidence. That argument is preserved because it was asserted in the motion for new trial. (6 AA 5937-5939, 6098-6100; see *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918.) We

discuss counsel's misconduct only to explain *why* the jury awarded excessive damages, which is appropriate. (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at pp. 295-298 & fn. 19, 299, 304 [although attorney misconduct was either waived or not prejudicial on its own to warrant a new trial, the misconduct inflamed the jury and resulted in an excessive verdict]; see also *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 468-469.)

5. The $33 million award has a punitive element.

Finally, Plaintiff's brief ignores the fact that "there is a punitive element to the compensatory damages award," as the trial court recognized (6 AA 6153) and as explained in the opening brief (AOB 90-92). A finding of excessiveness is warranted on this ground alone. (See *Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 484-485, 489 [trial court, in a "carefully reasoned ruling," concluded that past noneconomic damages were excessive based in large part on "the apparent punitive aspect of the verdict"]; *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 794 [reversing award of compensatory damages that may have included "some amount intended to punish the [defendant] for its conduct"].)

CONCLUSION

The court should reverse with directions to enter judgment for Monsanto because there is no substantial evidence to support any theory of liability or causation, and because all liability theories are preempted. Alternatively, the court should reverse and remand for a new trial on all issues because of the erroneous and prejudicial exclusion of evidence and the legally improper and excessive award of future noneconomic damages. If the court declines to order a new trial on excessiveness grounds, the court should reduce the future noneconomic damages to $1.5 million in light of the evidence presented at trial. Finally, the court should strike the punitive damages award because there is no evidence to support the jury's finding of malice or oppression.

CROSS-RESPONDENT'S BRIEF

INTRODUCTION

As discussed above, the Court of Appeal's decision in *Echeverria* confirms that the punitive damages verdict here should be set aside in its entirety. (*Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27].) Indeed, as the trial court correctly observed, Plaintiff's "evidence [of punitive damages] is thin" even when "cobbled together." (23A RT 4026:13-4027:8; 28 RT 4909:20-22.) In these circumstances, the court can quickly dispose of Plaintiff's challenge to the trial court's decision to reduce the punitive award. There can be little doubt that the one-to-one ratio of punitive to compensatory damages was the absolute maximum allowed by due process.

In *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 719-720 (*Roby*), the California Supreme Court held that, in cases like this one, where there is a "low degree of reprehensibility and [a] substantial award of noneconomic damages" that includes a punitive component, a one-to-one ratio was "the maximum punitive damages . . . in light of the constraints imposed by the federal Constitution." Here, the trial court correctly found that any ratio greater than one-to-one would be excessive under the federal due process clause because the "thin" evidence of punitive damages demonstrates a low degree of reprehensibility (28 RT 4909:20-22), the jury's "extremely high" $37 million compensatory award consisted mostly of noneconomic damages that contained a punitive element (6 AA 6153), and the $250 million punitive award

is nearly five times greater than the largest punitive damage award to have survived judicial scrutiny in California.

If the court does not reverse with directions to enter judgment for Monsanto on the punitive damages claim or otherwise reduce the punitive damages award, the court should affirm the trial court's decision to reduce the $250 million punitive damage award.

STANDARD OF REVIEW

The Court reviews de novo whether a punitive damage award is excessive as a matter of federal due process. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).) De novo review is "intended to ensure punitive damages are the product of the ' " 'application of [due process], rather than a decisionmaker's caprice.' " ' " (*Ibid.*, quoting *State Farm*, *supra*, 538 U.S. at p. 418.)

Plaintiff purports to acknowledge that standard, but then argues that the trial court's decision must be reversed if it was influenced by an erroneous understanding of the law or lacks an adequate specification of reasons. (RB/X-AOB 108.) Plaintiff, however, is improperly conflating the standard that applies to the grant of a new trial on state law excessiveness grounds with the standard that applies on federal due process excessiveness grounds. Under the latter standard, this court must affirm the trial court's ruling if the result is correct, regardless of the reasons given by the trial court. (*Simon*, *supra*, 25 Cal.4th at p. 1172 [explaining that de novo review for constitutional excessiveness

requires an "independent assessment of the reprehensibility of the defendant's conduct"].)

Here, the trial court ruled that the punitive damage award was constitutionally excessive, and ordered a new trial conditioned on Plaintiff's failure to accept a remittitur of the constitutionally permitted amount. (6 AA 6150-6153.) The trial court never considered Monsanto's separate argument that a new trial should be granted because the punitive damages are also excessive under state law. (Compare *ibid.* [trial court's order] with 6 AA 5942 [Monsanto's new trial motion arguing state law excessiveness], 6102-6103 [Monsanto's reply in support of new trial motion arguing state law excessiveness].) Accordingly, if this court independently determines that the reduction in the punitive damages was not required by the U.S. Constitution, the court should remand the case to the trial court to determine whether a new trial (or a new trial conditioned on the refusal to accept a remittitur) should be granted under state law. (See *Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc.* (1986) 176 Cal.App.3d 1217, 1223-1224 [where new trial order was based on an erroneous conclusion that damages were temporally limited, appellate court vacated new trial order and remanded case to the trial court for a determination of whether the damages award was excessive "absent the erroneous time limitation"].)

LEGAL ARGUMENT

Because punitive damages "serve the same purposes as criminal penalties" but are awarded by juries without "the protections applicable in a criminal proceeding" (*State Farm*, *supra*, 538 U.S. at p. 417), due process "imposes certain limits, in respect . . . to amounts forbidden as 'grossly excessive' " as a safeguard (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 [127 S.Ct. 1057, 166 L.Ed.2d 940] (*Williams II*)). The constitutional "guideposts" for courts reviewing excessiveness of punitive damage awards are (1) the degree of reprehensibility of the defendant's actions; (2) the disparity between the compensatory and punitive damage awards; and (3) a comparison between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases. (*Roby*, *supra*, 47 Cal.4th at p. 712.) The trial court correctly held that these guideposts compel reduction of the jury's punitive award to a one-to-one ratio between punitive and compensatory damages.

I. The trial court correctly determined that the second guidepost compelled a one-to-one ratio.

The trial court correctly determined that because "[t]he compensatory damages award of $39,253,209 is extremely high for a single plaintiff and consists largely of non-economic damages," the second guidepost is "dispositive" and compels a reduction of punitive damages to a one-to-one ratio with the compensatory damages. (6 AA 6153.)

Because noneconomic damages "may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent," due process requires ratios perhaps no greater than one-to-one between "punitive damages and a substantial compensatory award for [noneconomic damages]." (*Simon*, *supra*, 35 Cal.4th at p. 1189; see *State Farm*, *supra*, 538 U.S. at p. 425 ["When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee"].) In *Roby*, the Court held that due process required a one-to-one ratio because the $1.9 million compensatory award consisted of $1.3 million in noneconomic damages that "may have reflected the jury's indignation at [defendant's] conduct, thus including a punitive component." (*Roby*, *supra*, 47 Cal.4th at p. 718.)

Plaintiff makes the superficial claim that the trial court's decision was "conclusory," but Plaintiff cites no authority disputing that $39,253,209 is indeed an " 'extremely high' " compensatory award or that the jury's award of $37 million in noneconomic damages contains a punitive component. (RB/X-AOB 109-110.) As discussed above, the $37 million in noneconomic damages awarded to Plaintiff is highly disproportionate to the noneconomic damages juries have awarded patients with terminal mesothelioma. (See *ante*, pp. 96-97; AOB 91-92.) Moreover, the $37 million noneconomic award comprises 94 percent of the total compensatory award, overwhelming the economic damages. By contrast, the award of noneconomic damages in *Roby* comprised only 68 percent of the total compensatory damage award. (*Roby*,

supra, 47 Cal.4th at p. 718.) The trial court here did not err in concluding that the jury's unprecedented $37 million compensatory award that consisted mostly of noneconomic damages "may have reflected the jury's indignation at [Monsanto's] conduct" and compelled a reduction of punitive damages to a one-to-one ratio. (*Ibid.*)

The cases cited by Plaintiff to support applying a higher ratio are unpersuasive because they involve relatively small compensatory awards and highly reprehensible conduct. (See RB/X-AOB 110-111.) Tobacco companies are defendants in five of the nine cases Plaintiff cites, and in each of those cases the compensatory award paled in comparison to the $37 million awarded here. (See *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 566 (*Bullock*) [$850,000 compensatory award]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1650 (*Boeken*) [$5.5 million compensatory award]; *Williams v. Philip Morris Inc.* (Or. 2006) 127 P.3d 1165, 1171 (*Williams I*) [$521,485 compensatory award], vacated on other grounds in *Williams II*, *supra*, 549 U.S. 346; *Schwarz v. Philip Morris USA, Inc.* (Or.App. 2015) 355 P.3d 931, 940-944 (*Schwartz*) [$168,514 compensatory award]; *Burton v. R.J. Reynolds Tobacco Co.* (D.Kan. 2002) 205 F.Supp.2d 1253, 1255, 1263-1264 [$196,416 compensatory award], affd. in part, revd. in part on other grounds (10th Cir. 2005) 397 F.3d 906.)

Moreover, in those cases, the defendants knew about but disregarded a scientific consensus that tobacco causes cancer. These cases generally "involved the same defendant, same theories

of recovery and much of the same conduct" that reviewing courts consistently find highly reprehensible. (*Bullock*, *supra*, 198 Cal.App.4th at p. 567.) Plaintiffs in those cases proved that the tobacco company "knew that the consensus among scientific and medical professionals was that cigarette smoking caused lung cancer" and "[d]espite that knowledge . . . falsely asserted that there was no consensus in the scientific and medical community concerning the adverse health effects of smoking" and "assured [its] customers that if [it] learned that any cigarette ingredient caused cancer [it] would remove that ingredient." (*Id.* at p. 561; accord, *Boeken*, *supra*, 127 Cal.App.4th at p. 1692; *Williams I*, *supra*, 127 P.3d at pp. 1177-1178; *Schwarz*, *supra*, 355 P.3d at pp. 940-941.) The tobacco cases stand in stark contrast to the facts of this case, where regulators worldwide conclude to this day that Roundup is *not* a carcinogen and continue to approve Monsanto's sale of Roundup without a cancer warning. (See *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *4, *26-*27].)

The other cases Plaintiff cites are also inapposite. *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368, involved a comparatively small $35,000 compensatory award. *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 222-223, upheld a six-to-one ratio against an employer who ignored sexual harassment by its store director, resulting in only a $75,000 compensatory award. *Yung v. Grant Thornton, LLP* (Ky. 2018) 563 S.W.3d 22, 30, 71, affirmed an award of $20 million in compensatory damages and $80 million in punitive damages because the company continued selling a product to customers

even though it "knew very early on [the product] would likely implode with the I.R.S., causing serious financial and business consequences." Plaintiff cites another out-of-state case where the court held that the jury had sufficient evidence to conclude that the company had actual knowledge that its product increased a risk of harm to consumers yet persisted in selling the product. (*In re Actos (Pioglitazone) Products Liability Litigation* (W.D.La., Oct. 27, 2014, No. 6:11–MD–2299) 2014 WL 5461859, at p. *24 [nonpub. opn.] [allegation that two pharmaceutical companies conspired to sell a drug knowing that it increased the risk of bladder cancer].)

Here, if the court does not vacate the punitive award in its entirety, it should conclude, like the trial court, that due process requires reducing the punitive damages to an amount equal to the "extremely high" compensatory award.

II. The low degree of reprehensibility provides an alternative ground to affirm the trial court's decision to reduce the punitive damages award.

Although the trial court determined that a one-to-one ratio was required "regardless of the level of reprehensibility" (6 AA 6153), the low degree of reprehensibility present here is an alternative ground to affirm the trial court's decision to reduce the punitive damage award. The trial court's comments that "the evidence [of punitive damages] is thin" and its tentative order granting Monsanto JNOV on the punitive damages claim are indicative of a low degree of reprehensibility. (28 RT 4909:20-22.)

As discussed above, de novo review of the evidence confirms Monsanto did not act reprehensibly. (See *ante*, pp. 64-82; cf. *Echeverria*, *supra*, ___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27] [concluding on similar facts that there was no substantial evidence of malice].)

The reprehensibility guidepost "reflects the accepted view that some wrongs are more blameworthy than others" and that punitive damages "may not be 'grossly out of proportion to the severity of the offense.' " (*Gore*, *supra*, 517 U.S. at pp. 575-576.) Moreover, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"; in other words, the defendant may only "be punished for the conduct that harmed the plaintiff" and not for general business practices. (*State Farm*, *supra*, 538 U.S. at p. 423.)

The key "aggravating" reprehensibility factors are not present in this case. There is, at most, very weak evidence that Monsanto's conduct " 'evinced an indifference to . . . the health or safety of others' " or that Plaintiff's harm " 'was the result of intentional malice, trickery, or deceit' " by Monsanto. (*Roby*, *supra*, 47 Cal.4th at p. 713.) The evidence unequivocally shows that Monsanto reasonably believes that Roundup is not a carcinogen when all of the extensive glyphosate science is considered. EPA has repeatedly reached the same scientific determination and approved Monsanto's sale of Roundup without a cancer warning for more than four decades. (AOB 20-21, 24-25, 66.) Indeed, EPA reiterated its consistent scientific determination

that glyphosate does not cause cancer as recently as April 2019. (See EPA, Glyphosate Proposed Interim Registration Review Decision, *supra*, at p. 35.) European, Canadian, Australian, and Japanese regulators, among others, have similarly concluded that glyphosate, one of most studied substances in the world, does not cause cancer. (AOB 25-26.) This evidence is inconsistent with the key reprehensibility factors of indifference to health and intentional malice.

Plaintiff points to the same evidence the trial court found to be "thin," such as Dr. Parry's genotoxicity report, the Williams (2000) genotoxicity paper that discloses Monsanto's contributions in its acknowledgements section, Monsanto's 1985 communication with EPA concerning a mouse tumor study, and Monsanto's awareness of a small subset of epidemiology and genotoxicity studies that it and numerous regulators reviewed and determined did not establish that glyphosate causes cancer when viewed in context of all the available glyphosate science. (RB/X-AOB 112-115.) Monsanto explains above why this evidence is insufficient to support the punitive damage award and likewise is not reprehensible as a matter of due process. (See *ante*, pp. 64-82.) Plaintiff did not prove that Monsanto possessed actual knowledge that Roundup caused cancer or that Monsanto was recklessly indifferent to public health; rather, the evidence shows that Monsanto agreed with and relied on the scientific determinations of worldwide regulators who for decades have concluded that glyphosate does not cause cancer and have approved Monsanto's sale of Roundup without a cancer warning. (See *Echeverria*, *supra*,

___ Cal.App.5th ___ [2019 WL 3001626, at pp. *25-*27] [concluding on similar facts that there was no basis for an award of punitive damages].)

III. Reversal of the trial court's decision to reduce the punitive damages would result in an unprecedented punitive award in California.

Although the third guidepost is often "less useful" in cases involving common law torts (*Simon*, *supra*, 35 Cal.4th at p. 1183), a reversal of the trial court's decision to reduce the punitive damage award would result in an unprecedented punitive damage award. To our knowledge, the two largest punitive damages awards that survived judicial scrutiny in California are $55 million and $50 million, and both cases involved lower compensatory damage awards and far more reprehensible conduct than Plaintiff proved here. (See *Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 566 [reducing punitive damage award to $55 million, amounting to a two-to-one ratio to compensatory damages for deficient design resulting from deliberate decisions of management]; *Boeken*, *supra*, 127 Cal.App.4th at p. 1703 [remitting punitive damage award to $50 million, resulting in an approximately nine-to-one ratio for knowingly selling cancer-causing cigarettes and fraud].)

In *Buell-Wilson*, the plaintiff proved that "Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width" (*Buell-Wilson*, *supra*, 141 Cal.App.4th at p. 535) but that Ford management "refus[ed] to follow its engineers'

recommendations to improve the stability of the Explorer" (*id.* at p. 569) because it "would have delayed the vehicle's release date and impacted profits" (*id.* at p. 536). In *Boeken*, the plaintiff proved that the defendant "manufactured a dangerous product, knowing that it was a dangerous product—one that caused addiction and disease—and it added chemicals to the product to make it more addictive and easier to draw into the lungs" and then marketed that product to the plaintiff as a juvenile using misleading representations. (*Boeken*, *supra*, 127 Cal.App.4th at p. 1692.)

Plaintiff did not prove Monsanto engaged in conduct even remotely similar to the conduct alleged in those cases. Reinstatement of the $250 million punitive damage verdict would result in the largest judicially approved award of punitive damages in California history, in a case with exceedingly "thin" evidence of malice or oppression. (28A RT 4909:20-22.) There is no basis for an award of punitive damages in this case, much less the $250 million awarded by the jury.

CONCLUSION

For all the foregoing reasons, if the court does not strike the punitive damage award in its entirety or otherwise reduce it further, the court should affirm the trial court's decision to reduce the punitive damage award to an amount equal to the compensatory damage award.

July 29, 2019

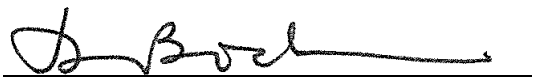
HORVITZ & LEVY LLP
DAVID M. AXELRAD
JASON R. LITT
DEAN A. BOCHNER
BRYAN CAVE LEIGHTON PAISNER LLP
K. LEE MARSHALL

Attorneys for Defendant and Appellant
MONSANTO COMPANY

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 24,174 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: July 29, 2019



Dean A. Bochner

PROOF OF SERVICE

Johnson v. Monsanto Company
Case No. A155940 & A156706

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On July 29, 2019, I served true copies of the following document(s) described as **COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 29, 2019, at Burbank, California.

Melody Liu

SERVICE LIST
Johnson v. Monsanto Company
Case No. A155940 & A156706

Curtis G. Hoke Jeffrey A. Travers Michael J. Miller The Miller Firm, LLC 108 Railroad Avenue Orange, VA 22960 jtravers@millerfirmllc.com mmiller@millerfirmllc.com choke@millerfirmllc.com	Attorneys for Plaintiff and Appellant Dewayne Johnson
Robert Brent Wisner Pedram Esfandiary Baum, Hedlund, Aristei & Goldman, PC 12100 Wilshire Blvd, Suite 950 Los Angeles, CA 90025-7107 rbwisner@baumhedlundlaw.com pesfandiary@baumhedlundlaw.com	Attorneys for Plaintiff and Appellant Dewayne Johnson
Mark S. Burton Audet & Partners 711 Van Ness Avenue, Suite 500 San Francisco, CA 94102 markburton@earthlink.net	Attorneys for Plaintiff and Appellant Dewayne Johnson
K. Lee Marshall Bryan Cave Leighton Paisner LLP Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4070 klmarshall@bclplaw.com	Attorneys for Defendant and Appellant Monsanto Company
Hon. Suzanne R. Bolanos Civic Center Courthouse 400 McAllister St, Department 504 San Francisco, CA 94102	Trial Judge [Case No. CGC16550128] ***Via U.S. Mail***

Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102 (415) 865-7000	Electronic Copy (CRC, Rule 8.212(c)(2)(A)(i)) ***Via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (Truefiling)***