IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

KYLE CHAPLICK, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 19SL-CC04115
	)	
MONSANTO COMPANY,	)	Division 1
	)	
Defendant.	)	

DEFENDANT MONSANTO COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR MULTIPLE PLAINTIFF TRIAL SETTING

Less than three weeks after these claims were transferred to this Circuit, Plaintiffs have (for the second time) moved this Court to (1) set a preferential, expedited trial date and (2) designate thirteen disparate, individual plaintiffs for a single trial. The principal basis for Plaintiffs' request to leapfrog over the claims of thousands of other Roundup® plaintiffs now pending in this Circuit is that their claims are "trial ready." As with Plaintiffs' last request for an accelerated trial setting, this request should be denied for several reasons.

First, loss of their October 2019 trial setting in the City of St. Louis is entirely of Plaintiffs' own making. These thirteen Plaintiffs chose to file their claims in the wrong venue and they have vigorously opposed Monsanto's prompt and repeated efforts to have those claims transferred. Granting Plaintiffs the preferential treatment they now seek would reward their gamesmanship and create a dangerous precedent for the thousands of other Roundup® claims now improperly pending in the City of St. Louis.

Second, regardless of when the claims are set for trial, Plaintiffs' request for one or two trials on the claims of all thirteen Plaintiffs must be denied. All of the currently scheduled Roundup® trials in this case are limited to one or two plaintiffs, despite efforts by plaintiffs'

counsel to include additional plaintiffs in many of those trials. *See* List of Current Trial Settings in St. Louis County, Exhibit 1. This Court has imposed these limitations for good reason. A joint trial of the disparate claims of numerous plaintiffs – claims based upon vastly differing factual circumstances and arising under the law of three different states – would inevitably confuse the jury and deprive Monsanto of a fair trial.

BACKGROUND

Plaintiffs filed this case on March 12, 2018, in St. Louis City Circuit Court, and the case was assigned to Judge Mullen. Venue in that Court for Plaintiffs' claims was premised on their attempt to permissively join their claims with those of one other plaintiff, Walter Winston, who was allegedly first injured in the City of St. Louis. Approximately a month after the case was filed, Monsanto moved to sever and transfer the claims of all but Mr. Winston. Plaintiffs objected, and Judge Mullen denied Monsanto's motion. Over Monsanto's objection, Judge Mullen then scheduled a single trial of all the claims for October 15, 2019.

Monsanto sought a writ of prohibition challenging these rulings. In April of this year, the Missouri Supreme Court denied Monsanto's writ petition, but expressly stated that its denial was without prejudice to Monsanto's ability to seek relief under that Court's decision in *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168 (Mo. banc 2019) ("*J & J*"). Monsanto renewed its motion for transfer before Judge Mullen. Plaintiffs again opposed, and Judge Mullen again denied Monsanto's motion.

Monsanto promptly filed a second writ petition, and on September 3, 2019, the Missouri Supreme Court issued its preliminary writ prohibiting Respondent from taking any action with respect to the claims of the thirteen Plaintiffs other than Mr. Winston. The Court also entered an expedited briefing schedule. *The next day*, Plaintiffs withdrew their opposition to transfer of

those claims. Plaintiffs informed the Missouri Supreme Court of their consent to the transfer, causing that Court to quash its preliminary writ as moot on September 12, 2019. The next day, Judge Mullen ordered the transfer of these thirteen Plaintiffs to this Court, leaving Mr. Winston in the City with the October 15 trial. Soon thereafter, on the eve of that trial (for which Plaintiff's counsel insisted that they were committed), the parties agreed to an indefinite continuance.

On September 17, 2019, this case was assigned to the Hon. Dean Waldemer in Division 8. Days later, these "*Chaplick* Plaintiffs" sought a trial setting in this Circuit for October 15, 2019 – the same day as the scheduled trial in the City on Mr. Winston's claims. Following Monsanto's objection, Judge Waldemer and Judge May (the coordinating judge) denied Plaintiffs' motion and directed the parties to contact the clerk for a hearing date on an "***appropriate*** Motion for Multiple Plaintiff Trial Settings." *See* 10/2/19 Order (emphasis added). The next day, on October 3, 2019, Plaintiffs filed the motion at bar, requesting an expedited trial date for 2019 (or soon thereafter) and a thirteen-plaintiff trial. Four days later Plaintiffs set this for hearing on November 8, 2019 with Judge May, the coordinating judge. On October 17, 2019, Plaintiffs moved for an automatic change of judge, and Judge May was assigned to this case on October 24, 2019.

ARGUMENT

I. This Court Should Not Reward Plaintiffs' Gamesmanship.

Had Plaintiffs properly filed their claims in this Court in the first instance, or consented to transfer long ago, they might now have forthcoming trial settings in this Court. Instead, from the time this case was filed, Plaintiffs ignored clear precedent on this venue issue and vigorously opposed Monsanto's motions for transfer, apparently to keep their cases in front of City juries

and in a venue where the Court would require that Monsanto defend multiple claims, under multiple state laws, in single trials. Plaintiffs have only themselves to blame for the position in which they now find themselves.

To avoid that obvious conclusion, Plaintiffs now try to argue that venue in the City of St. Louis City was "in accord with Missouri law" before the *J & J* decision. *See* Plfs.' Mo. at 1-2. That is a blatant misstatement of Missouri law. Missouri Supreme Court Rule 51.01, enacted in 1973, clearly provides that the Rules of Civil Procedure, including the Rule governing permissive joinder, "shall not be construed to extend or limit . . . the venue of civil actions." *J & J* simply confirmed that Rule 51.01 means what it says. *J & J*, 567 S.W.3d at 171-75. It did not create new law:

> The central issue in this case is whether permissive joinder of separate claims may extend venue to a county when, absent joinder, venue in that county would not otherwise be proper for each claim. It cannot and does not. This is evidenced not only by **our Court's rules** but also **nearly 40 years of this Court's precedent**.

Id. at 171 (emphasis added).

Moreover, Plaintiffs continued to contest venue after issuance of the *J & J* decision in February of this year. They opposed Monsanto's renewed motion to transfer, attempting to distinguish *J & J* on grounds demonstrably inconsistent with the Missouri Supreme Court's ruling and forcing Monsanto to file a second petition for writ of prohibition. It was not until the Missouri Supreme Court issued its preliminary writ to address the venue issue that Plaintiffs finally agreed to transfer their claims. And, just a few weeks after that transfer, Plaintiffs again ask this Court to grant them an expedited trial setting for 2019, apparently seeking to secure the first Roundup® trial in this Court (and this State). Granting this request would allow Plaintiffs to (i) leapfrog over the trial settings of the claims ***properly*** filed in this Court long ago, and (ii)

import the City judge's pre-trial ruling setting a thirteen-plaintiff trial into a Circuit that has not approved any such multi-plaintiff trials.[1]

Plaintiffs' gamesmanship should not be rewarded in this manner. Nor should this Court set a road map to encourage other plaintiffs to file and remain in the wrong venue until the eve of trial, then belatedly transfer and seek adoption of the pre-trial rulings and trial settings obtained in that wrong venue. The Courts of this state have long refused to permit or encourage such gamesmanship in legal proceedings. *See e.g., White v. State*, 939 S.W.32d 887, 897 (Mo. banc 1997) (defendants' allegations of ineffective assistance of counsel, which stated that counsel failed to adduce certain testimony without stating what the witness would have testified to, did not state claim for relief because "[t]o hold such allegations sufficient would turn the pleadings process into clever gamesmanship."); *May v. State*, 718 S.W.2d 495, 497 (Mo. banc 1986) (statutory written waiver of defendant's right to counsel not required when defendant refused to sign waiver form because "[t]o hold otherwise would permit a form of gamesmanship which might seriously interfere with trial proceedings.").[2]

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[1] Moreover, Plaintiffs' newly transferred Roundup® claims should follow this Circuit's Standing Order, which is clear that the assigned judge sets the trial date ***and then*** the coordinating judge rules on the plaintiff-selection procedure. 6/4/19 Order at 2 (emphasis added), Exhibit 12. Plaintiffs disregard this Circuit's approach by seeking a trial date ***and*** a multi-plaintiff trial at the same time. If this shortcut is permitted here, many plaintiffs' firms will ignore the Standing Order and demand that a single judge (assigned or coordinating) set both a trial date and a plaintiff-selection procedure at the same time. As this Court has not yet set a trial date, proceedings with respect to the selection of plaintiffs for trial are premature and violate this Circuit's Standing Order.

[2] *Accord Austin v. Trotter's Corp.*, 815 S.W.2d 951, 955 (Mo. App. 1991) (affiant's vague statement in affidavit was not sufficient to create issue of fact that preclude summary judgment because it "is an example of gamesmanship."); *Hilmer v. Hezel*, 492 S.W.2d 395, 396 (Mo. App. 1973) (trial court properly excluded testimony based upon defendant's improper interrogatory response because "'[d]efendant's strained interpretation of the interrogatory is an attempt at gamesmanship.").

Plaintiffs' allegations that they have complied with their discovery obligations and that the case is "trial ready" do not justify the extraordinary relief they seek. Compliance with discovery obligations should be true of every plaintiff in every Roundup® lawsuit. Many plaintiffs in other cases pending in this Circuit have complied with discovery and have not received a preferential trial setting. There is no reason why this case should take precedence over the claims of plaintiffs who ***properly*** filed in this venue at the outset.[3]

II. Plaintiffs' Proposal Would Deprive Monsanto Of A Fair Trial and Provide No Benefit to this Circuit.

Plaintiffs do not just ask for a preferential trial setting, they request that this Court deviate from its prior practices and set the claims of all thirteen plaintiffs for a single trial. The only alternative they suggest is dividing the case into two trials. It is clear that Plaintiffs' counsel is not content with only a near term trial date – they had that with Mr. Winston in the City of St. Louis and agreed to continued it. They want this because a multi-plaintiff trial will act to the detriment of Monsanto.

To the extent this Court addresses the issue of a multi-plaintiff trial now, before scheduling a trial date, it should reject Plaintiffs' alternatives in favor of single-plaintiff trials. A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136, (1955); *accord Stonecipher v. Poplar Bluff R1 School District*, 205 S.W.3d 326, 329 (2006). Toward that end, Missouri Rule 52.05(b) allows courts to issue orders to, *inter alia*, prevent prejudice. Under Rule 52.06, "[a]ny claim against a party may be severed and proceeded with separately." Similarly, Rule 66.02 authorizes the trial court to order separate trials to prevent

[3] Plaintiffs expend considerable effort estimating Monsanto's legal resources in an attempt to argue that Monsanto will not be prejudiced by overlapping trials. *See* Plfs.' Mo. at 8. But the extent of Monsanto's legal resources is not the issue and should not determine when and how this Court sets its cases for trial.

prejudice. That is exactly what this Court should do here. As set forth below, a plaintiffs' verdict based on a multi-plaintiff trial will never survive appellate review.

A. Plaintiffs' Claims Do Not Arise Out of The Same Transaction or Occurrence.

Joinder of these Plaintiffs' claims was never proper under the Missouri Rules and, more fundamentally, a joint trial on these claims would deprive Monsanto of its right to a fair trial. Rule 52.05 allows such joinder of parties' claims ***only if*** plaintiffs' claims arise out of the same transaction or occurrence or series of same, and the Missouri courts lack discretion to overlook this requirement. In *State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172, 175 (Mo. App. 1964), for example, the Missouri Court of Appeals issued a writ of prohibition ordering a trial court to sever claims asserted by two plaintiffs who purchased the defendant's allegedly defective fuel at different times in "separate transactions" that were "in no way related," resulting in two separate fires at different places on different dates. 379 S.W.2d at 174-75. The court held that "neither the occurrences nor the transactions were the same" and thus joinder was improper under Rule 52.05. *Id*. at 175.

Plaintiffs request consolidation, which is not the proper vehicle here. And even if was, it is still prohibited where, as here, individual issues predominate over any common issues of fact or law. The Missouri courts recognize that consolidation of civil personal injury claims for trial is generally reserved for derivative/spousal claims, or involve cases concerning economic loss / property damage, where individual plaintiffs are more likely to have a strong overlap of factual allegations. Even in those cases, consolidation has been limited to those circumstances where the common issues of fact and law were "overwhelming." *See Owens v. ContiGroup Companies, Inc.*, 344 S.W.3d 717, 725 (Mo. App. 2011) (affirming consolidation of nuisance

claims involving the same cause of action, same defendant, same location of defendant farm, same property-based injury, and same time period).

Plaintiffs' reliance on *Blanks v. Fluor Corp*., 450 S.W.3d 308 (Mo. App. E.D. 2014) is misleading. While that case involved a joint trial of plaintiffs claiming lead poisoning from a smelter operation in their town, the defendant did not challenge the joinder of those claims for trial and the court of appeals did not address that issue. The other cases that Plaintiffs rely upon are similarly inapposite. In *Belden v. Chicago Title Ins. Co.*, 958 S.W.2d, 54, 56-57 (Mo. App. 1997), the court affirmed consolidation for those seeking to recover due to unmarketable property titles – purely economic loss – and having same claims and identical jury instructions. Similarly, in *Hammonds v. Eisert*, 745 S.W.2d 253, 254-55 (Mo. App. S.D. 1988), beneficiaries of trusts sued a common defendant alleging undue influence on the same settlor. In affirming consolidation, the court reasoned that "each action involved the events of July 20, 1977, and May 12 and 13, 1980 . . ." The facts of these cases are vastly different from personal injury/products liability claims such as this one.

In considering consolidation of similar product liability actions, courts generally look for the following factors: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; and (7) whether all plaintiffs are represented by the same counsel. *See In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir. 1993) (reversing consolidation of claims alleging "repetitive stress" injuries from use of equipment associated with various defendants). The court reasoned that "[t]he burden is on the party seeking aggregation . . . to show common factual or legal issues warranting it. . . It may be that such increased costs would make settlement easier to achieve, but that would occur only at the cost of ***elemental fairness***." *Id*. At 374

(emphasis added). The same is true here. The individual differences between the proposed trial plaintiffs' claims predominate over any common issues of fact or law.

The differences among plaintiffs in glyphosate litigation are far more numerous. Plaintiffs allege use of different Roundup® products at different exposure levels occurring at different places and different times. The products they used have different percentages of glyphosate, different labeling and advertising, and different methods of application. Moreover, the plaintiffs all have different medical histories (including different subtypes of NHL and different risk factors for developing their diseases), different doctors, and different prognoses. *See also infra* Part III.B. Plaintiffs' claims are not properly joined under Rule 52.05 (and so should be severed), nor can they be consolidated for trial.

B. Even If Properly Joined, Fairness And Due Process Demand Severance Of The Claims For Trial.

Regardless of whether the claims were properly joined at the outset, severance for trial is necessary. A multi-plaintiff trial of disparate claims arising under the laws of different states is fundamentally unfair to Monsanto.

First, the claims would be governed by the tort law of three different states: Missouri (one plaintiff), Georgia (four plaintiffs), and Florida (eight plaintiffs) – rendering it virtually impossible for jurors to track and apply the differences in state law to the myriad of claims before them. For this very reason, courts have consistently refused to conduct joint trials under different state laws. *E.g.*, *Boschert v. Pfizer, Inc.*, No. 4:08–CV–1714 CAS, 2009 WL 1383183, at *4 (E.D. Mo. May 14, 2009) (granting motion to sever claims of four plaintiffs allegedly injured from the same medication and stating that "four separate trials would be necessary, not only because the plaintiffs' claims would be individualized, but because four sets of jury instructions would be required to encompass the laws from four different states").

Major differences exist between the laws of these three states. For instance, a Florida statute creates a rebuttable presumption that a manufacturer is ***not*** liable if the product complied with relevant regulatory standards designed to prevent the harm that occurred, and where compliance is a condition for selling the product. Fla. Stat. § 768.1256(1). Because the EPA has approved the sale of glyphosate, Monsanto is entitled to that presumption under Florida law. However, Missouri has no comparable provision.

Similarly, both Florida and Georgia require privity between the plaintiff and the manufacturer to prosecute a breach of warranty claim. *See Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 620 (11th Cir. 1983); *T.W.M. v. American Med. Systems, Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995). Missouri imposes no such requirement. *See Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 55 (Mo. banc 1963).

These are just two of the many significant variations in the law of the three states in question. Even if divided into two groups of plaintiffs, application of two different state laws to the disparate claims of six or seven plaintiffs would cause impermissible confusion.

Second, whether comprised of thirteen, seven, or six plaintiffs, such a trial would undermine Monsanto's right to rebut each individual plaintiff's causation claim based on evidence and arguments specific to that plaintiff. Citing "interests of fairness and efficiency," a federal district judge in California granted Monsanto's severance motion to prevent a single trial on Roundup® claims of just ***two*** plaintiffs. *See Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016). The court noted the "significant factual differences in the circumstances under which Roundup® was applied by Plaintiffs; frequency, duration, and amount of exposure; concurrent exposures to other products; timing of exposure, location, and medical histories" and

determined that any similarities "are outweighed by the differences in Plaintiffs' claims, which render trying the two claims together not only inefficient, but potentially prejudicial." *Id*. at 758.

Joinder of thirteen (or six or seven) plaintiffs multiplies these disparities. For instance:

- **Different Alleged Injuries:** Plaintiffs all claim injury based on NHL, a group of cancers related to the immune system. But over 60 subtypes of NHL exist, which have varied risk factors, treatment regimens, and prognoses. They will have different treatments, prognoses, and, in some cases, their own unique alternative causes or risk factors. Here, these Plaintiffs describe the distinct differences in their own conditions:

> Among the *Chaplick* Plaintiffs is a man who lost his eye sight in his early 50s because his non Hodgkin lymphoma (NHL) wrapped around his ocular nerve; another man who in his early 50s can barely walk because his NHL has caused debilitating scrotal edema; a man whose NHL was so aggressive that his tumor nearly doubled in size while on his second regimen of chemotherapy and is alive today only because he was accepted into a new NHL treatment therapy referred to as CAR-T; a young man, now 25 years old, who was diagnosed with NHL at age 17; and a man whose NHL has come back six times over the last 20 years, and each time it returns has to undergo another round of chemotherapy.

Motion at 4-5.

- **Different Exposure Allegations:** Each plaintiff will have his or her own factual allegations regarding exposure, including timeframe, and frequency. For example:

  - Steven Gatewood alleges that he sprayed a Roundup® product daily. *See* Gatewood Fact Sheet at 11, Ex. 2; *See also* Hammond Fact Sheet at 9, Ex. 3 (alleging daily use of products). Others allege use of such products on only a monthly basis. *See*, *e.g.*, Sessions Fact Sheet, at 10, Ex. 10.

  - Kyle Chaplick alleges that he applied Roundup®-branded products one to four times per month from 2007 through 2017 while Richard Haley Sr. alleges that he applied such products daily from 1987 through 2007, and James Cole alleges that he applied Roundup®

weekly from 1984 through 2015. *See* Chaplick Fact Sheet at 9, Ex. 4; Haley Amended Fact Sheet at 10, Ex. 5; Cole Amended Fact Sheet at 9-10, Ex. 6.

- Finally, some Plaintiffs allege that they wore some type of protective clothing; others do not. *See e.g.*, Haley Amended Fact Sheet, 11, Ex. 5 (stating he wore protective clothing); Chaplick Fact Sheet at 10, Ex. 4 (stating he did not wear protective clothing when handling the product); Jenkins Fact Sheet at 10, Ex. 9 ("I occasionally wore gloves.").

- **Roundup® Products Used for Different Purposes:** Some plaintiffs allege use of Roundup® products for personal use in their yard or garden, such as Kyle Chaplick, *see* Chaplick Fact Sheet at 10, Ex. 4. Other plaintiffs claim they used it for occupational or agricultural purposes, such as Bryan Cook, *see* Cook Fact Sheet at 10, Ex. 7. Still others allege both personal and occupational use, such as James Cole, *see* Cole Fact Sheet at 10, Ex. 6. *See also* Karr Fact Sheet at 10, Ex. 8 (use of Roundup® products was personal and work-related).

- **Different Roundup® Products and Use of Non-Monsanto Products:** Even product identification is expected to vary, as Roundup® is a brand name covering several distinct products, with varying warnings, percentage of active product, and other differences. For example:

  - Kyle Chaplick alleges he used two variations of Roundup® products while other Plaintiffs only allege the use of "Roundup®" generally. *See* Chaplick Fact Sheet at 9, Ex. 4 (using Roundup® Max Control 365 and Roundup® "Pump-N-Go" Weed and Grass Killer); Karr Fact Sheet at 9, Ex. 8 (alleging use of Roundup® and Roundup® concentrate); Jenkins Fact Sheet at 9, Ex. 9 (alleging use of "Roundup®).

  - Further, Bryan Cook alleges that he used other glyphosate-containing products besides Roundup®, while other Plaintiffs allege they only used Roundup® products, and

others were not certain. *See* Cook Fact Sheet at 9, Ex. 7 (other glyphosate products used); Karr Fact Sheet at 9, Ex. 8 (other glyphosate products used) Jenkins Fact Sheet at 9, Ex. 9 (only Roundup® products used); Hammond Fact Sheet at 9-10, Ex. 3 (doesn't know whether used other glyphosate-containing products, but also lists use of other herbicides including 2,4-D, Grazon, and Erasure).

This case thus presents thirteen distinct questions as to whether a particular product applied in a particular manner under particular circumstances over a particular timeframe caused a particular plaintiff to develop a particular form of NHL. It would be impossible for a jury to sift through the evidence relating to all of the claims in a multi-plaintiff trial and properly assess each individual plaintiff's claim of causation.

Third, a multi-plaintiff trial presents the risk that the jury will not properly assess the damages to individual plaintiffs. In a recent trial involving twenty-two different claims in St. Louis City, deliberating for less than twenty minutes per plaintiff, the jury awarded each plaintiff or plaintiff-family the *exact same amount in compensatory damages* (approximately 25 million dollars), despite their significant differences. *See Ingham v. Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct. St. Louis City July 12, 2018) (appeal pending). Some plaintiffs were in full recovery; at least one plaintiff was terminally ill; and others had already died. The evidence also disclosed different treatments, prognoses, and exposures to the product. There is no question that the jury either ignored or could not follow the differences among the plaintiffs.

Fourth, a multi-plaintiff trial inflates the strengths and obscures the weaknesses of individual cases. Presented with the repetitive evidence that all plaintiffs were allegedly exposed to Roundup® and that all have developed cancer, a jury is likely to assume that there is some connection between them all, regardless of what the scientific evidence says. This puts

Monsanto in the position of trying to refute such an assumption, rather than correctly placing the burden on each individual plaintiff to prove that his or her unique exposure to Monsanto's product caused his or her unique injury. In the context of just two plaintiffs, the *Rubio* court recognized the potential for such evidence spillover:

> Consolidating the two claims may give rise to the easy, potentially prejudicial inference that if Roundup caused [one Plaintiff's] cancer it caused [the other Plaintiff's cancer] as well, or vice versa. In other words, by trying the two claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case.

See Rubio, 181 F. Supp. 3d at 758. Based upon similar concerns, courts in Missouri and elsewhere repeatedly have rejected arguments for multi-plaintiff trials. *See, e.g., Miller v. Bayer Healthcare Pharms., Inc*., Case No. 4:14-CV-00652-SRB, 2017 WL 2313287, at *1 (W.D. Mo. Mar. 6, 2017) (severing cases for trial "[d]ue to the fact-intensive and individualized nature of each cause of action, and with each Plaintiff presenting evidence that could unfairly influence the jury's liability and damages verdicts as to the other Plaintiff").

This Court's instructions cannot cure the inevitable confusion. *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (reversing jury verdict on the ground that consolidation of asbestos cases for trial was error even though trial court instructed the jury on several occasions). *Accord Baker v. Waterman S.S. Corp.*, 11 F.R.D. 440-41 (S.D.N.Y. 1951) ("No matter how carefully a jury were instructed as to separate consideration of the damages of each plaintiff, there is a chance that the jury . . . may be influenced, subconsciously perhaps, by the more serious injuries of one plaintiff in reaching its verdict in the case of the other").

There is no doubt a jury presented with ***thirteen disparate stories*** will improperly conflate them, focusing on the most dramatic features of each plaintiff's story.

Finally, this proposed joint trial would allow jurors to award punitive damages to each trial plaintiff for injuries to other persons, which would violate Monsanto's due process rights. The Supreme Court has held that the Due Process Clause precludes a punitive damages award that is not specifically tied to a defendant's conduct towards a particular plaintiff. *Philip Morris USA v. Williams*, 549 US. 346, 353-57 (2007); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003). A "jury may not punish for the harm caused [to] others," and the "Due Process Clause prohibits a State's inflicting punishment for harm caused [to] strangers to the litigation." *Philip Morris*, 549 U.S. at 356-57.

Empirical evidence confirms the prejudicial effect of a multi-plaintiff personal injury trial. In *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Court decertified the claims of a class of smokers against a tobacco company, in part because such joinder "magnifies and strengthens the number of unmeritorious claims" and "skew[s] trial outcomes." *Id.* at 746. In support, the court relied on *Kenneth S. Bordens and Irving A. Horowitz*, "MASS TORT CIVIL LITIGATION: THE IMPACT OF PROCEDURAL CHANGES ON JURY DECISIONS," 73 Judicature 22 (1989), (Exhibit 11). The authors conducted 66 mock trials, half with a single plaintiff and half with four plaintiffs. Of the latter, half had an outlier – a plaintiff with significantly worse injuries than the others. In cases involving an outlier, the "outlier tended to pull up the awards of the less severely injured":

> Jurors reported that the severity of the outlier's injury suggested that *all* of the plaintiffs would eventually share that fate.

Id. at 25 (emphasis in original). Moreover, the "punitive damages awarded to the plaintiffs were significantly affected [up] by the size of the plaintiff population and the presence of an outlier." *Id.* The message is simple: more plaintiffs in a single trial equates to a greater probability of a

plaintiffs' verdict and significantly higher awards of both actual and punitive damages. That violates due process and ultimately wastes judicial resources.

Plaintiffs argue that adding a few individuals to a single trial next year will somehow alleviate this Circuit's burden of many thousands of plaintiffs. To the contrary, based on the law, empirical evidence, and common sense, judicial efficiency in the long term would be better served with a series of single-plaintiff trials that are designed to represent the larger plaintiff pool.

CONCLUSION

WHEREFORE, for all these reasons, Monsanto requests that this Court DENY Plaintiffs' request for preferential, expedited trial setting and DENY their request for a trial with more than one or two Plaintiffs.

DATED: November 4, 2019

By: /s/ *Gregory J. Minana*

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, the foregoing was electronically filed with the Clerk of the Court of St. Louis County, Missouri using Missouri Case.Net which sent notification of such filing to all persons listed in the Court's electronic notification system.

By: /s/ *Gregory J. Minana*
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