A158228

# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

**FIRST APPELLATE DISTRICT, DIVISION TWO**

**ALVA AND ALBERTA PILLIOD,**
*Plaintiffs and Cross-Appellants,*

*v.*

**MONSANTO COMPANY,**
*Defendant and Appellant.*

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
WINIFRED SMITH, JUDGE • CASE NO. RG17862702

# REPLY TO OPPOSITION TO MOTION FOR JUDICIAL NOTICE


**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)
ALEXANDRA C. WHITWORTH (BAR NO. 303046)
THREE EMBARCADERO CENTER, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-4070
(415) 675-3400 • FAX: (415) 675-3434
klmarshall@bclplaw.com
alex.whitworth@bclplaw.com

ATTORNEYS FOR DEFENDANT AND APPELLANT
**MONSANTO COMPANY**

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Miscellaneous**

## MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

In its motion for judicial notice, Monsanto Company requested that this court take judicial notice of three categories of documents: (1) an amicus curiae brief filed by the United States government in *Monsanto Company v. Edwin Hardeman*, United States Court of Appeals for the Ninth Circuit, No. 19-16636 (*Hardeman*); (2) excerpts of the reporter's transcript in *Johnson v. Monsanto Company* (A155940 & A156706, app. pending) (*Johnson*), currently pending in Division One of this court; and (3) judgments and related documents filed in the *Johnson* and *Hardeman* cases. (See, e.g., Monsanto's MJN 6-8.)

Plaintiffs do not oppose judicial notice of the judgments and related documents filed in the *Johnson* and *Hardeman* cases. (See Opp. to Monsanto's MJN 5.) Plaintiffs also do not oppose judicial notice of the legal arguments asserted in the amicus brief filed by the United States government in *Hardeman*. (*Ibid.*) Plaintiffs do, however, oppose the request to take judicial notice of the legal arguments in that amicus brief as legislative facts. (See Opp. to Monsanto's MJN 6.) As we discuss below, Plaintiffs' objection lacks merit: courts may look to an agency's interpretation of its own regulations and give deference to that interpretation.

Plaintiffs also oppose judicial notice of excerpts from the reporter's transcript in the *Johnson* appeal, arguing that the transcript excerpts are irrelevant. (See Opp. to Monsanto's MJN 13-16.) To the contrary, these transcript excerpts are directly

relevant to the attorney misconduct argument presented in this appeal. As we discuss below, the transcript excerpts demonstrate that Plaintiffs' counsel made improper comments during his opening statement in this case, and he knew those comments were improper because he was admonished for making almost identical statements in the *Johnson* trial several months earlier.

## LEGAL ARGUMENT

### I. The court should take judicial notice of EPA's position on preemption, as set forth in the amicus brief it filed in *Hardeman*, in its entirety.

In this appeal, Monsanto contends that Plaintiffs' claims are preempted by federal law. (See AOB 40-51; ARB/X-RB 20-41.) EPA's amicus curiae brief in *Hardeman* sets forth EPA's position that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts Plaintiffs' state law claims. Plaintiffs do not oppose Monsanto's request to take judicial notice of the legal arguments in that amicus brief, but they contend that those legal arguments cannot be judicially noticed as legislative facts. (Opp. to Monsanto's MJN 5-6.)

"The precise line of demarcation between adjudicative facts and legislative facts is not always easily identified." (*United States v. Gould* (8th Cir. 1976) 536 F.2d 216, 219.) Facts that concern the parties to the current litigation are adjudicative facts. "They relate to the parties, their activities, their properties, their businesses." (*Ibid.*, citing 2 Davis, Administrative Law Treatise (1958) § 15.03,

p. 353.) "Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case." (*Id.* at p. 220.)

Courts may look to an agency, like EPA, to decide legislative facts. (See *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 139 [agency may decide issues of legislative fact].) Thus, EPA's position on the preemption issue, as articulated in the amicus brief it filed in *Hardeman*, may be considered a "legislative fact" subject to judicial notice.

"When considering whether a federal statute preempts state law, we may look to the pronouncements of the federal agency that administers the statute for guidance." (*CallerID4u v. MCI Communications Services* (9th Cir. 2018) 880 F.3d 1048, 1061.) The fact that the agency's interpretation of a statute it administers "comes to [the court] in the form of an *amicus* brief does not make it 'unworthy of deference.' " (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 563, fn. 7, quoting *Auer v. Robbins* (1997) 519 U.S. 452, 462 [117 S.Ct. 905, 137 L.Ed.2d 79] (*Auer*), holding limited by *Kisor v. Wilkie* (2019) 588 U.S. ___ [139 S.Ct. 2400, 2414-2418, 204 L.Ed.2d 841]; see *Barrientos v. 1801-1825 Morton LLC* (9th Cir. 2009) 583 F.3d 1197, 1214 ["[A]gency's litigation position in an amicus brief is entitled to deference if there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter,' " quoting *Auer,* at p. 462]; see also *Marsh v. J. Alexander's LLC* (9th Cir. 2018) 905 F.3d 610, 627 [it is "well-settled law" that

courts may defer to an agency's interpretation that is advanced in an amicus brief].)

EPA's current position on preemption is entitled to deference as an agency's own interpretation of its regulations.[1] "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." (*Auer*, *supra*, 519 U.S. at p. 462 [judicially noticing and deferring to the Secretary of Labor's interpretation of regulations contained in an amicus brief].) The court "defers to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.' " (*Chase Bank USA, N. A. v. McCoy* (2011) 562 U.S. 195, 196 [131 S.Ct. 871, 178 L.Ed.2d 716], quoting *Auer*, at p. 461; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 [an "agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts" with the court deciding how much weight to assign the agency's views on a case-by-case basis].)

Further, an agency may change its position when it presents a reasoned analysis for its current stance. (See *Riegel v.*

---

[1] Plaintiffs contend that EPA's amicus brief in *Hardeman* is not entitled to deference because EPA has changed its position on preemption over time. (See Opp. to Monsanto's MJN 6.) Plaintiffs ask this court to rely on the position advanced by EPA in an amicus brief it filed more than 20 years ago in *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316. (RB 78; Pilliods' MJN 4.) But as long ago as 2005, EPA departed from its prior position in *Etcheverry*. (See *Bates v Dow Agrosciences* LLC (2005) 544 U.S. 431, 448-449 & fn. 24 [125 S.Ct. 1788, 161 L.Ed.2d 687].)

*Medtronic, Inc.* (2d Cir. 2006) 451 F.3d 104, 124-125 [relying on FDA's determination of preemption in an amicus brief filed in another case addressing the same issue, even though FDA previously took a different view, because an agency may change its position as long as it presents a " ' "reasoned analysis" ' "]; *Horn v. Thoratec Corp.* (3d Cir. 2004) 376 F.3d 163, 179 [rejecting argument that the court should give no weight to FDA's interpretation because FDA previously argued that premarket approval did not support preemption]; see also *Horn*, at p. 179 ["We cannot agree that the FDA's position is entitled to no deference, or 'near indifference' simply because it represents a departure from its prior position. . . . [A]n agency may change its course so long as it can justify its change with a 'reasoned analysis.' "].)

In *Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187, 173 L.Ed.2d 51], the Supreme Court explained the reasons it has historically deferred to a federal agency's judgment: Agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Id.* at pp. 576-577.) "The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." (*Id.* at p. 577.) Even if the court need not defer to "an agency's conclusion that state law is pre-empted," it can pay attention to "an agency's explanation of how state law affects the regulatory scheme." (*Id.* at p. 576.) Therefore, EPA's legal arguments in the *Hardeman*

amicus brief that set forth the agency's position should be accorded deference as legislative facts.

Finally, Plaintiffs argue that this court should not take judicial notice of new facts in the *Hardeman* amicus brief. (Opp. to Monsanto's MJN 8-13.) But the primary "fact" to which Plaintiffs object—i.e., that EPA made a mistake in approving some Proposition 65 warnings for glyphosate products—is part of EPA's legal position and therefore should be considered by the court in resolving the preemption issue. As explained in the opening brief, preemption is an issue of law for the court to resolve, which includes any associated subsidiary factual questions. (See AOB 41, 47-49; *Merck Sharp & Dohme Corp. v. Albrecht* (2019) 587 U.S. ___ [139 S.Ct. 1668, 1672, 203 L.Ed.2d 822].) Therefore, the court can and should consider the entirety of the EPA's amicus brief in *Hardeman* for purposes of its de novo review.[2]

[2] Plaintiffs spend much of their opposition objecting to Monsanto's alleged reliance on new facts in the *Hardeman* amicus brief. (Opp. to Monsanto's MJN 8-11.) Yet in their opposition, Plaintiffs cite to and rely on new factual materials that are not part of the record. (Opp. to Monsanto's MJN 11-12 [citing to recently published articles and studies].) The court should disregard these materials because they are outside the record and Plaintiffs have failed to request that they be judicially noticed.

## II. The court should take judicial notice of transcript excerpts from the *Johnson* case because those excerpts are relevant to the attorney misconduct issue presented in this appeal.

In its moving papers, Monsanto explained that the court should take judicial notice of certain transcript excerpts from the *Johnson* trial because those excerpts are relevant to one of the attorney misconduct arguments raised in this appeal. (See Monsanto's MJN 7, 10, 15-17.) The transcripts are relevant because they show that Plaintiffs' counsel knew it was improper to tell the jury about the "historic" nature of this case but he did so anyway, even after the trial judge in *Johnson* had admonished him for making almost identical comments in *Johnson*. (*Ibid.*) In response, Plaintiffs take the position that the transcript excerpts are irrelevant and raise several arguments in support of that position. (See Opp. to Monsanto's MJN 13-16.) As we explain below, none of those arguments withstand scrutiny.

First, Plaintiffs argue that "Monsanto presents a very misleading account of the *Johnson* trial by asking for judicial notice of only three pages of a 5,000-page trial transcript." (Opp. to Monsanto's MJN 13.) Monsanto seeks judicial notice of five pages from the reporter's transcript in *Johnson* because those pages contain the relevant misconduct committed by Plaintiffs' counsel, the trial court's analysis of that misconduct, and the court's curative admonition to the jury. (See Monsanto's MJN, Declaration of Dean A. Bochner, exh. C, pp. 37-41.) If Plaintiffs believe Monsanto omitted other relevant pages from the

transcript, Plaintiffs are welcome to seek judicial notice of those pages as well.

Second, Plaintiffs argue that "[c]ontrary to Monsanto's assertions, there was no finding and no evidence that the jury in *Johnson* acted with inflamed passion in rendering its verdict" or "that counsel or the jury in *Johnson* 'inflated' Johnson's damages." (Opp. to Monsanto's MJN 13-14.) This is a straw man argument: Nowhere in its moving papers or in its briefing in this matter does Monsanto assert that the jury in *Johnson* "acted with inflamed passion in rendering its verdict" or that counsel or the jury " 'inflated' Johnson's damages." (*Ibid.*; see Monsanto's MJN 9-20.)[3] Plaintiffs' argument is also irrelevant: Regardless whether the jury in *Johnson* acted with passion, it is beyond dispute that the trial court admonished Plaintiffs' counsel for making improper comments that are virtually identical to the comments he made during his opening statement in this case, several months after the *Johnson* trial concluded.

Third, Plaintiffs argue that Monsanto's recitation of what occurred in *Johnson* is "misleading[ ]" because their counsel was not admonished after he told the jurors that they were " 'part of history' " in his opening statement in *Johnson*. (Opp. to Monsanto's MJN 14; see Monsanto's MJN, Bochner Decl., exh. C,

---

[3] Monsanto argued in the *Johnson* appeal that the jury in that case acted with passion when it returned a verdict exceeding $289 million, and that Plaintiff's counsel made other improper arguments that were designed to inflate the award of future noneconomic damages, but obviously we do not assert these arguments here.

p. 37:17-22.) Counsel was not admonished for making these comments during his opening statement in *Johnson* only because Monsanto did not object at that time. Monsanto *did* object when counsel repeated the statements in closing argument in *Johnson*, and the trial judge agreed those comments were "really inappropriate" and gave the jury a curative instruction. (Monsanto's MJN, Bochner Decl., exh. C, pp. 39:22-41:22.) Thus, months *after* he was admonished for making inappropriate comments designed to inflame the jury, Plaintiffs' counsel decided to repeat those comments during his opening statement in this trial.

Fourth, Plaintiffs claim that the transcript pages are irrelevant because their attorney's comments in this case were not similar to those he made in *Johnson*. (Opp. to Monsanto's MJN 15 ["counsel did not make similar arguments in this case"], 16 ["The portions of the closing arguments that the *Johnson* trial court initially found to be improper were not repeated in *Pilliod*"].) Nonsense. This is what counsel said in his opening statement here: "The fact that you're here today, *part of this historic case*, means everything to [the Pilliods]. So thank you for your time." (11 RT 1429:12-14, emphasis added; see 11 RT 1309:16.) And this is what counsel said in closing argument in *Johnson*: "I told you all at the beginning of this trial that you were *part of history*, and you really are, and so let me just say thank you." (Monsanto's MJN, Bochner Decl., exh. C, p. 38:3-5, emphasis added; see Monsanto's MJN, Bochner Decl., exh. C, p. 37:21-22 [opening

statement in *Johnson*: "each one of you, whether or not you want to be . . . , are actually *part of history*" (emphasis added)].)

In sum, the transcript pages from *Johnson* are relevant because they establish that Plaintiffs' counsel knew, long before the *Pilliod* trial began, that it was improper to characterize this case as "historic" because he was specifically admonished for making almost identical statements in the *Johnson* trial. Because the transcript excerpts are relevant to the attorney misconduct issue presented in this appeal, the court should take judicial notice of those transcript excerpts.

## CONCLUSION

For the foregoing reasons, the court should grant Monsanto's motion for judicial notice in its entirety.

July 1, 2020

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

Attorneys for Defendant and Appellant
**MONSANTO COMPANY**

**PROOF OF SERVICE**

**Pilliod et al. v. Monsanto Company**
**Case No. A158228**

**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 1, 2020, I served true copies of the following document(s) described as **REPLY TO OPPOSITION TO MOTION FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

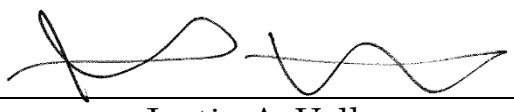
**SEE ATTACHED SERVICE LIST**

**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 1, 2020, at Burbank, California.



Justin A. Volk

**SERVICE LIST**
**Pilliod et al. v. Monsanto Company**
**Case No. A158228**

| | |
|---|---|
| Curtis G. Hoke<br>Jeffrey A. Travers<br>Michael J. Miller<br>The Miller Firm, LLC<br>108 Railroad Avenue<br>Orange, VA 22960<br>jtravers@millerfirmllc.com<br>mmiller@millerfirmllc.com<br>choke@millerfirmllc.com | Attorneys for Plaintiff and Appellant<br>**Alberta Pilliod and Alva Pilliod**<br><br>*Served via TrueFiling* |
| Robert Brent Wisner<br>Pedram Esfandiary<br>Baum, Hedlund, Aristei & Goldman, PC<br>12100 Wilshire Blvd, Suite 950<br>Los Angeles, CA 90025-7107<br>rbwisner@baumhedlundlaw.com<br>pesfandiary@baumhedlundlaw.com | Attorneys for Plaintiff and Appellant<br>**Alberta Pilliod and Alva Pilliod**<br><br>*Served via TrueFiling* |
| Mark S. Burton<br>Baum Hedlund Aristei & Goldman<br>711 Van Ness Avenue, Suite 500<br>San Francisco, CA 94102<br>mburton@audetlaw.com | Attorneys for Plaintiff and Appellant<br>**Alberta Pilliod and Alva Pilliod**<br><br>*Served via TrueFiling* |
| Steven J. Brady<br>Brady Law Group<br>1015 Irwin Street<br>San Rafael, CA 94901<br>stevebrady@bradylawgroup.com | Attorneys for Plaintiff and Appellant<br>**Alberta Pilliod and Alva Pilliod**<br><br>*Served via TrueFiling* |
| K. Lee Marshall<br>Bryan Cave Leighton Paisner LLP<br>Three Embarcadero Center, 7th Floor<br>San Francisco, CA 94111-4070<br>klmarshall@bclplaw.com | Attorneys for Defendant and Appellant<br>**Monsanto Company**<br><br>*Served via TrueFiling* |

| | |
|---|---|
| Eugene Brown, Jr.<br>Hinshaw & Culbertson<br>One California Street, 18th Floor<br>San Francisco, CA 94111 | Attorneys for Defendant and Appellant<br>**Monsanto Company**<br><br>*Served via TrueFiling* |
| Kelly A. Evans<br>Jay J. Schuttert<br>Evans Fears & Schuttert LLP<br>2300 West Sahara Avenue, Suite 900<br>Las Vegas, NV 89102 | Attorneys for Defendant and Appellant<br>**Monsanto Company**<br><br>*Served via TrueFiling* |
| Tarek Ismail<br>Joe Tomaselli<br>Goldman Ismail Tomaselli Brenna & Baum LLP<br>564 West Randolph Street, Suite 400<br>Chicago, IL 60661 | Attorneys for Defendant and Appellant<br>**Monsanto Company**<br><br>*Served via TrueFiling* |
| Honorable Winifred Smith<br>Alameda County Superior Court<br>1221 Oak Street<br>Oakland, CA 94612 | Trial Court Judge<br><br>Case Number: RG17862702<br><br>*Served via U.S. Mail* |