

A158228

In The California Court of Appeal
First Appellate District
Division Two

Alva Pilliod and Alberta Pilliod
Plaintiffs and Respondent/Cross-Appellants,

v.

Monsanto Company
Appellant

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA
COUNTY OF ALAMEDA
HONORABLE WINIFRED Y. SMITH

**ALVA AND ALBERTA PILLIODS' MOTION FOR
JUDICIAL NOTICE**

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**In The California Court of Appeal
First Appellate District, Division Two**

Alva and Alberta Pilliod,
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v.

Monsanto Company
Defendant and Appellant/Cross-Respondent

MOTION FOR JUDICIAL NOTICE

Pursuant to Rules 8.252, 8.54 of the California Rules of Court, and Evidence Code Sections 452 (h) and 459, Alva and Alberta Pilliod move for judicial notice of a June 24, 2020 press release issued by Bayer, Monsanto's parent corporation, regarding the Roundup litigation settlement. (Travers Decl., Exhibit A.) This document was created after trial in this matter, so no motion for judicial notice was filed in the trial court.

California Evidence Code Sections 452 states, in pertinent part:

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

(Evid. Code, § 452.)

Monsanto cannot reasonably dispute the accuracy of the statements asserted by its parent corporation, Bayer, in this press release, and published on Bayer's website. This document is relevant because it directly refutes an assertion made by Monsanto in its July 1, 2020 Appellant's Reply Brief that affirming the Pilliods' punitive damage verdict would create "a precedent

that potentially thousands of litigants are each entitled to nearly \$70 million in punitive damages based on the same conduct would result in a series of awards so grossly excessive that they would threaten the solvency of the company.” (ARB-XRB 122.)

Monsanto argues that “a court reviewing the constitutionality of a due process award must consider the implications of affirming awards of this size in all of them [future cases.]” (*Id.*) The Pilliods disagree that the court should consider such evidence strategically not raised with the jury. (*Stevens v. Owens-Corning Fiberglas Corp.*, ((1996) 49 Cal.App.4th 1645, 1668 [Such consideration “encourages defendants to withhold such evidence from the jury, then use it on appeal to attack the punitive damage award...we do not condone this strategy and will not reward it by ordering a remittitur.”])) However, if the court considers Monsanto’s speculation of impending economic ruin in its reply brief, then it must also consider Bayer’s statement to its investors made seven days earlier that such an outcome is unlikely. If the court considers evidence of potential verdicts (which it should not) then it must “determine whether [Monsanto] has provided this court with adequate proof that the punitive damages it faces are, in fact, likely to destroy the company.” (*Tetuan v. A.H. Robins Co.* (1987) 241 Kan. 441, 488-489.)

In the attached press release Bayer announces the settlement of the “vast majority” of Roundup claims against Monsanto including 95% of cases set for trial. (Travers Decl. at Ex. A, pp. 1-2.) Bayer further highlights that the remaining cases are close to settlement and that there will be “closure to the current Roundup™ litigation in due course.” (*Id.* at p. 1.) The settlement is meant to only exclude the three cases that have gone to verdict: *Johnson v. Monsanto*, *Hardeman v. Monsanto*, and *Pilliod, et al. v. Monsanto*.¹ (*Id.*

¹ As the three verdicts currently stand, they would amount to only 1.2% of the overall settlement amount

at p. 3.) According to Bayer, there is no impending threat of insolvency, instead the settlement will “bring a long period of uncertainty to an end;” Bayer expects to keep its “investment grade credit ratings” and it is “well-positioned for the future.” (*Id.* at pp. 2, 6.) As such, this document demonstrates that upholding the Pilliods’ verdict will not cause Monsanto to become insolvent.

For the aforementioned reasons, the Pilliods requests that the Court take judicial notice of the attached document.

Dated: July 31, 2020

THE MILLER FIRM, LLC
MICHAEL J. MILLER
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CURTIS G. HOKE
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DECLARATION OF JEFFREY TRAVERS

I, Jeffrey A Travers, declare as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Virginia and am an associate in the law firm of The Miller Firm, LLC, counsel for Respondent and Cross-Appellant in the appeal now pending before this Court. I have personal knowledge of the facts set forth in this declaration and, if called up to do so, could and would competently testify as to each of them.

2. Attached as Exhibit A is a true and correct copy of a June 24, 2020, press release from Bayer titled “Bayer announces agreements to resolve major legacy Monsanto litigation.”

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31st day of July, 2020 in Orange, VA.

/s/ Jeffrey A. Travers

Jeffrey A. Travers

EXHIBIT A



Home > Media > News

Wednesday - June 24, 2020

Bayer announces agreements to resolve major legacy Monsanto litigation

Company will make a total payment of \$10.1 billion to \$10.9 billion (EUR 9.1 billion to EUR 9.8 billion) to resolve current and address potential future Roundup™ litigation / Company also resolves dicamba drift litigation for payment of up to \$400 million and most PCB water litigation exposure for payment of approximately \$820 million / Funding sourced from free cash flow and Animal Health divestment / Bayer is well positioned to deliver science-based solutions to meet global health, nutrition needs

Leverkusen, June 24, 2020 – Bayer announced today a series of agreements that will substantially resolve major outstanding Monsanto litigation, including U.S. Roundup™ product liability litigation, dicamba drift litigation and PCB water litigation. The main feature is the U.S. Roundup™ resolution that will bring closure to approximately 75% of the current Roundup™ litigation involving approximately 125,000 filed and unfiled claims overall. The resolved claims include all plaintiff law firms leading the Roundup™ federal multi-district litigation (MDL) or the California bellwether cases, and those representing approximately 95% of the cases currently set for trial, and establish key values and parameters to guide the resolution of the remainder of the claims as negotiations advance. The resolution also puts in place a mechanism to resolve potential future claims efficiently. The company will make a payment of \$8.8

billion to \$9.6 billion to resolve the current Roundup™ litigation, including an allowance expected to cover unresolved claims, and \$1.25 billion to support a separate class agreement to address potential future litigation. The Roundup™ class agreement will be subject to approval by Judge Vince Chhabria of the U.S. District Court for the Northern District of California. The resolutions were approved unanimously by Bayer's Board of Management and Supervisory Board with input from its Special Litigation Committee. The agreements contain no admission of liability or wrongdoing.

“First and foremost, the Roundup™ settlement is the right action at the right time for Bayer to bring a long period of uncertainty to an end,” said Werner Baumann, Chief Executive Officer of Bayer. “It resolves most current claims and puts in place a clear mechanism to manage risks of potential future litigation. It is financially reasonable when viewed against the significant financial risks of continued, multi-year litigation and the related impacts to our reputation and to our business. The decision to resolve the Roundup™ litigation enables us to focus fully on the critical supply of healthcare and food. It will also return the conversation about the safety and utility of glyphosate-based herbicides to the scientific and regulatory arena and to the full body of science.”

“The Roundup™ agreements are designed as a constructive and reasonable resolution to a unique litigation,” said Kenneth R. Feinberg, court-appointed mediator for the settlement talks. “The separate, independent settlements of the current claims are unique and a tribute to Bayer. The significant progress made to date – which exceeds the initial participation rates of other claims resolution proceedings – provides a robust framework that will enable the parties to bring closure to the current Roundup™ litigation in due course.”

Resolution of Roundup™ litigation

The multi-step Roundup™ resolution includes several elements. The agreements will resolve the vast majority of the current litigation in U.S. federal and state courts, including both plaintiffs with filed cases and parties who have retained counsel but not yet filed their claims in court. Those participating in the settlement will be required to dismiss their cases or agree not to file. The range

of \$8.8 billion to \$9.6 billion covers both the agreements already signed and those that are still under negotiation. It also reflects the fact that the number of claimants who are eligible to receive compensation under these agreements won't be known until the claims process is well underway. The claims still subject to negotiation largely consist of cases generated by TV advertising and for which plaintiffs' law firms have provided little or no information on the medical condition of their clients, and/or cases held by law firms with small inventories.

The three cases that have gone to trial – Johnson, Hardeman and Pilliod – will continue through the appeals process and are not covered by the settlement. It is important for the company to continue these cases as the appeals will provide legal guidance going forward. In an appellate court filing, the U.S. government expressed its specific support for the company's preemption arguments, asserting that state law warning claims in the Roundup™ litigation conflict with U.S. federal law, requiring no cancer warning, and must be dismissed. Just this week, a federal judge in California found that the weight of scientific evidence does not support the state's Proposition 65 cancer warning requirement for glyphosate-based herbicides -- a ruling that reinforces the very arguments the company has made at trial.

Potential future cases will be governed by a class agreement which is subject to court approval. The agreement includes the establishment of a class of potential future plaintiffs and the creation of an independent Class Science Panel. The Class Science Panel will determine whether Roundup™ can cause non-Hodgkin's lymphoma (NHL), and if so, at what minimum exposure levels. The materials considered by the Class Science Panel that Bayer has permission to disclose or are in the public domain will be posted on a public website. Both the class and company will be bound by the Class Science Panel's determination on this question of general causation, taking this decision out of the jury trial setting and putting it back in the hands of expert scientists. If the Class Science Panel determines that a causal connection between Roundup™ and NHL is not established, class members will be barred from claiming otherwise in any future litigation against the company. The Class Science Panel's determination is expected to take several years. Class members will not be permitted to proceed with Roundup™ claims prior to the Class Science Panel's determination, and

cannot seek punitive damages. The agreed funding is capped at \$1.25 billion and will support research into treatment of NHL, NHL diagnostic programs in underserved areas, and assistance payments to class members who develop NHL before the Class Science Panel's determination and are eligible on a need basis for assistance during that period.

The company said that before deciding to settle, it considered the alternative course of continuing to litigate Roundup™ cases. In the company's risk assessment, potential negative outcomes of further litigation, including more advertising and growing numbers of plaintiffs, upwards of twenty trials per year and uncertain jury outcomes, and associated reputational and business impacts, likely would substantially exceed the settlement and related costs.

"Taking account of various options, I am convinced this plan provides a comprehensive, reasonable solution to the complex, contested issues presented by this litigation," said attorney John Beisner, a consultant to Bayer's Supervisory Board and a mass tort expert who leads Skadden, Arps, Slate, Meagher & Flom LLP's Mass Torts, Insurance and Consumer Litigation Practice Group.

"Supported by our external advisor John Beisner and the Litigation Committee, the Supervisory Board has closely followed the Roundup™ litigation, as well as the dicamba and PCB litigation, and has provided counsel to the Board of Management on these matters. The Supervisory Board unanimously agrees with our Board of Management that all three settlements are in the best interest of the company and our stakeholders," said Norbert Winkeljohann, Chairman of Bayer's Supervisory Board.

Baumann added: "Our company is grounded in the well-being of our customers. As a science-based company committed to improving people's health, we have great sympathy for anyone who suffers from disease, and we understand their search for answers. At the same time, the extensive body of science indicates that Roundup™ does not cause cancer, and therefore, is not responsible for the illnesses alleged in this litigation. We stand strongly behind our glyphosate-based herbicides, which are among the most rigorously studied products of their kind, and four decades of science support their safety and that they are not

carcinogenic.” Indeed, in its Interim Registration Review Decision, issued in January, the U.S. Environmental Protection Agency (EPA) accurately concluded that it “did not identify any human health risks from exposure to glyphosate.”

Customers, including farmers and other professional users who depend on glyphosate-based herbicides for their livelihoods, will see no change in the availability of Roundup™ products under the Roundup™ agreements announced today. Meanwhile, Bayer remains committed to offering customers more choices and announced last year an investment of approximately EUR 5 billion over a ten-year period to develop additional methods to manage weeds as part of an integrated approach to sustainable agriculture.

Resolution of dicamba litigation

Bayer also announced a mass tort agreement to settle the previously disclosed dicamba drift litigation involving alleged damage to crops. The company will pay up to a total of \$400 million to resolve the multi-district litigation pending in the U.S. District Court for the Eastern District of Missouri and claims for the 2015-2020 crop years. Claimants will be required to provide proof of damage to crop yields and evidence that it was due to dicamba in order to collect. The company expects a contribution from its co-defendant, BASF, towards this settlement.

The only dicamba drift case to go to trial – Bader Farms – is not included in this resolution. The company believes the verdict in Bader Farms is inconsistent with the evidence and the law and will continue to pursue post-trial motions and an appeal, if necessary.

Bayer stands strongly behind the safety and utility of its XtendiMax™ herbicide with VaporGrip™ technology and continues to enhance training and education efforts to help ensure growers use these products successfully. The company is settling the pending dicamba drift cases to be able to focus on the needs of its customers.

Resolution of PCB litigation

Bayer also announced a series of agreements that resolve cases representing most of the company's exposure to PCB water litigation. Monsanto legally manufactured PCBs until ceasing their production in 1977. One agreement establishes a class that includes all local governments with EPA permits involving water discharges impaired by PCBs. Bayer will pay a total of approximately \$650 million to the class, which will be subject to court approval.

At the same time, the company has entered into separate agreements with the Attorneys-General of New Mexico, Washington, and the District of Columbia to resolve similar PCB claims. For these agreements, which are separate from the class, Bayer will make payments that together total approximately \$170 million.

Funding sourced from free cash flow and Animal Health divestment

Cash payments related to the settlements are expected to start in 2020. Bayer currently assumes that the potential cash outflow will not exceed \$5 billion in 2020 and \$5 billion in 2021; the remaining balance would be paid in 2022 or thereafter. In order to finance these payments which are subject to tax treatment, Bayer can make use of existing surplus liquidity, future free cash flows, the proceeds from the Animal Health divestment, and additional bond issuances, which will provide flexibility in managing the settlement payments as well as upcoming debt maturities.

Based on publications by the rating agencies and the company's communication with them, Bayer expects to keep investment grade credit ratings. With its strong underlying business, the company intends to keep its dividend policy. At the same time, deleveraging the balance sheet remains a high priority.

Bayer: Well positioned for the future

"As we work to put this major litigation behind us, Bayer can set a course for the future and tackle the global challenges we face in both health and nutrition – not only today as we confront the COVID-19 pandemic, but also long-term, as we work to improve quality of life for a growing and aging population of an estimated 10 billion people by 2050," said Baumann. "More than 100,000 people put their

energies into making our vision of 'Health for all, Hunger for none' come true with medicines and agricultural products. We believe that science and innovation will be critical to the future, just as they have been for Bayer in serving customers and patients over nearly 160 years. We are committed to addressing these challenges in a responsible manner, both to help meet the UN's sustainable development goals, and maintain the transparency and constructive engagement with stakeholders that is essential to sustain public trust in our products and in our company."

About Bayer

Bayer is a global enterprise with core competencies in the life science fields of health care and nutrition. Its products and services are designed to benefit people by supporting efforts to overcome the major challenges presented by a growing and aging global population. At the same time, the Group aims to increase its earning power and create value through innovation and growth. Bayer is committed to the principles of sustainable development, and the Bayer brand stands for trust, reliability and quality throughout the world. In fiscal 2019, the Group employed around 104,000 people and had sales of 43.5 billion euros. Capital expenditures amounted to 2.9 billion euros, R&D expenses to 5.3 billion euros. For more information, go to www.bayer.com.

Notes to editors:

*The following resources are available online **www.bayer.com/settlements***

// Speeches for the Investor Conference Call

// Links to the conference calls (recordings will also be available there shortly after the calls)

// Further information on glyphosate

*TV editors can download the latest Bayer footage free of charge at **www.tv-footage.bayer.com/***

Find more information at: www.bayer.com

Forward-Looking Statements

This release may contain forward-looking statements based on current assumptions and forecasts made by Bayer management. Various known and unknown risks, uncertainties and other factors could lead to material differences between the actual future results, financial situation, development or performance of the company and the estimates given here. These factors include those discussed in Bayer's public reports which are available on the Bayer website at www.bayer.com. The company assumes no liability whatsoever to update these forward-looking statements or to conform them to future events or developments.

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**First Appellate District
Division Two**

Alva Pilliod and Alberta Pilliod
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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
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COUNTY OF ALAMEDA
HONORABLE WINIFRED Y. SMITH

[PROPOSED] ORDER

FOR GOOD CAUSE SHOWN, the Court grants the Pilliods' motion to take judicial notice of the document attached as exhibits A to the declaration of Jeffrey Travers.

Dated: _____

Presiding Justice

PROOF OF SERVICE

I am employed in the County of Orange, Commonwealth of Virginia. I am over the age of 18 years and not a party to the within action. My business address is 108 Railroad Avenue, Orange, VA 22960. On July 31, 2020, I served the foregoing documents described as Motion for Judicial Notice on all interested parties in this action as follows:

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Via the Court's TrueFiling Electronic Filing System.

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

Executed on July 31, 2020 at Orange, VA.

/s/ Jeffrey A. Travers
Jeffrey A. Travers