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

CROSS-APPELLANTS' REPLY BRIEF

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I. Introduction

The three California juries, four trial judges, and three appellate justices who have reviewed Monsanto's misconduct have unanimously agreed there is "substantial evidence that Monsanto acted with a willful and conscious disregard of others' safety." (*Johnson v. Monsanto Company* (July 20, 2020, No. A155940) __ Cal.Rptr.3d ___ [2020 WL 4047332, at *32].)[1] Monsanto's claim that it is the victim of "injustice" in this case rings increasingly hollow in light of these unanimous and repeated findings. (ARB-XRB 19.) Monsanto is, and remains, a multi-billion dollar corporation that has demonstrated no remorse and taken no corrective action for behavior that far exceeds the "limits of what decent citizens ought to have to tolerate..." (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 816.)

The true victims of injustice in this case are the Pilliods, who have both suffered from a devastating and debilitating disease because of Monsanto's malfeasance. The trial court pointed to no impropriety in the jury's award of compensatory damages to the Pilliods, and the awards are not so large as to "shock[] the conscience." (*Johnson*, 2020 WL 4047332 at *26.) The trial court's decision to reduce the jury's compensatory damages verdict because the Pilliods sought a preference trial date was plain error.

The jury, in determining that decent citizens need not tolerate Monsanto's reprehensible behavior, rightly concluded that only a substantial punitive damage could punish and deter Monsanto. The jury understood that Monsanto cannot be trusted to protect the safety of the millions of U.S.

[1] The standard of review used in *Johnson* (*Id.* at 30) for assessing the jury's finding that Monsanto was liable for punitive damages is in accord with *Conservatorship of O.B.* (July 27, 2020, No. S254938) --- P.3d ---- [2020 WL 4280960].)

consumers exposed to its product. Instead, Monsanto's priority was to "protect sales" in light of valid safety concerns. (7-AA-8746.) The evidence showed that only money can motivate Monsanto's actions and that Monsanto becomes highly motivated to commit reprehensible acts to prevent a looming billion dollar question. (7-AA-8662.) The jury, therefore, rightly decided to send a message to Monsanto and other multi-billion dollar corporations that consciously disregarding the safety of the public will create, not prevent, a billion dollar question.

Monsanto's arguments on appeal indicate it has learned no lessons from the three verdicts to date. Monsanto, ignoring settled case law, continues to reargue the evidence and asks this court to make credibility assessments rejected by the jury. (*People v. Thompson* (2010) 49 Cal.4th 79, 125 ["We reject defendant's attempt to reargue the evidence on appeal and reiterate that it is not a proper appellate function to reassess the credibility of the witnesses."]) The jury heard the arguments of Monsanto's attorneys and Monsanto's spin on the evidence repeated in this appeal; and the jury and the trial judge in post-trial motions rightly rejected those arguments. The hours of videotape testimony of Monsanto's employees, played for the jury, showed a company that constantly put profits above safety.

Monsanto's heavy reliance on *Johnson & Johnson Talcum Powder Cases* ((2019) 37 Cal.App.5th 292 ("*Echeverria*")) is unavailing. In *Johnson v. Monsanto*, the trial court and appellate court rejected the same arguments Monsanto makes here holding that "Echeverria's conclusion that punitive damages could not be sustained in that case is inapplicable here." (2020 WL 4047332, at *32.) The jury likewise rejected Monsanto's claim that it could in good faith rely on approval of Roundup by regulators (ARB-XRB 107) as those regulators were heavily influenced by Monsanto and relied on the public inquiry that Monsanto manipulated. As the Pilliods' experts

persuasively testified, the consensus of the independent and impartial scientific community is that Roundup is carcinogenic, and the appellate court in *Johnson* had "no hesitation upholding the jury's causation findings." (*Id.* at *33.)

Because the jury's compensatory damage award was not based on improper factors and does not "shock the conscience," this Court should reinstate the compensatory damage award of $34,251,166.7623 for Ms. Pilliod, and $18,047,296.01 for Mr. Pilliod. The extreme reprehensibility of Monsanto's conduct strongly supports the jury's award of punitive damages. Due process considerations should reduce the punitive damages to no less than ten times the compensatory damages resulting in punitive damage awards of $342,511,667.60 for Ms. Pilliod, and $180,472,960.10 for Mr. Pilliod. While the amount may seem large at first blush, upholding core constitutional principles requires an award of these amounts.

II. Legal Argument

A. The trial court applied an incorrect standard in reducing compensatory damages and the jury's full award of compensatory damages should be reinstated by this court.

A trial court "is not permitted to substitute [her] judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." (*Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 406.) Rather the Court "should respect the jury's verdict" and only grant new trials where the jury was "obviously and clearly wrong" (Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.56; Code Civ. Proc. § 657 [remittitur warranted only where "jury clearly should have reached a different verdict or decision."]) Therefore, a jury's verdict should be reinstated if the trial court fails to "direct[] the appellate court's attention to some aspect of the record which would have misled or prejudiced the jury

and which convinces the trial judge the jury clearly should have reached a different decision" (*Bigboy*, 154 Cal.App.3d at 406.)

Here, the trial court identifies nothing in the record that indicates the jurors were misled or prejudiced and thus fails to show that the jury clearly should have reached a different decision. (6-AA-8265-8266.) Monsanto's failure to point out such a finding by the trial court underscores the need to reinstate the jury's compensatory damages. Instead, the trial court improperly created a presumption that from the "preference statute, there is a legislatively acknowledged increased risk of death or incapacity due to being over the age of 70" and thus a reduction in damages was necessary. (6-AA-8265.) The trial court's finding that a lower compensatory damage amount for a preference trial plaintiff would be reasonable does not amount to a finding that the jury premised its verdict on "improper factors" nor to a finding that the jury was obviously and clearly wrong. (*See e.g. Ingham v. Johnson & Johnson* (June 23, 2020, No. ED 107476) --- S.W.3d ---- [2020 WL 3422114, at *6] ["Defendants identify no direct source of the jury's alleged confusion and instead effectively "worked backwards, speculating as to the reason for the compensatory awards based on the end result."])

Here, the evidence demonstrated the Pilliods have suffered permanent and lasting damage from a horrific disease and that their lives have been permanently altered for the worse due to cancer. The fact that one of them was in remission at the time of trial does not alter the fact that they are still suffering the long-term mental and physical effects of cancer and its treatment.[2] Cancer also does not discriminate by age; it is devastating whether it occurs at age 40 or age 70. The Pilliods gave detailed testimony

[2] Ms. Pilliod is not in remission, and the risk of recurrence is certainly a factor the jury could have considered in awarding future non-economic damages. Ms. Pilliod was still being treated for cancer with daily medication at the time of trial. (24-RT-3980:1-20.)

about how the Roundup-induced cancer continued to harm them and the jury felt that this long-term harm was as significant as the initial diagnosis and treatment. (RB-XAOB 136-141.) Indeed "[c]ancer is a disease that strikes fear into the heart of its victims, can leave the body ravaged and a shadow of its former self" (*In re Actos (Pioglitazone) Products Liability Litigation* (W.D. La., Oct. 27, 2014) 2014 WL 5461859, at *28.) It was for the jury to determine what amount fairly compensates the Pilliods for their severe and permanent injuries. The preference trial statute (CCP § 36) does not allow the trial judge to substitute her opinion on the correct amount of compensatory damages over the collective opinion of the jury.

There is also no basis to reduce the damages on appeal. "A damages award is excessive only if the record, viewed most favorably to the judgment, indicates the award was rendered as the result of passion and prejudice on the part of the jurors." (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [quoting *Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 65, n. 12]). The primary focus on determining whether a verdict is excessive is whether or not the verdict is so "out of line with reason that it shocks the conscience." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508.)

In *Johnson*, a $37 million non-economic damage award for a Roundup user who developed NHL, the court did not find the verdict so large as to "shock[] the conscious" and rejected "Monsanto's argument that the award on its face indicates jurors' passion, prejudice or corruption." (2020 WL 4047332 at *26-27) The court held that "[t]here was no such improper appeal to passion here when Johnson's counsel requested $37 million in noneconomic losses." *(Id.)*. The court reduced damages only on the legal basis, not applicable here, that the jury instruction did not specify damages could be awarded for a shortened life expectancy.

Under California law "other verdicts may have some slight relevance, but each verdict stands or falls on its own merits." (*Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482. [affirming $40 million wrongful death award to four heirs]) While, of slight relevance, other verdicts for cancer victims demonstrate that the Pilliods' verdict does not shock the conscience. In *Ingham*, a Missouri appellate court upheld a jury award of $25 million dollars to each of twenty plaintiffs, with varying degrees of injury, who developed ovarian cancer. (*Ingham*, 2020 WL 3422114, at *6]; *see also In re Asbestos Litigation* (Del. Super. Ct. Mar. 3, 2020) 2020 WL 1228478 ["jury's damage award of $40.625 million, while considerable, was not the result of the jury manifestly disregarding the evidence or the law."])

Bigler-Engler v. Breg, Inc., ((2017) 7 Cal.App.5th 276, 302) which involves a plaintiff with an "excellent recovery" does not support Monsanto's argument. In *Bigler-Engler*, by the time of trial, the plaintiff's "condition improved steadily and dramatically... her pain was at a low level, intermittent...her daily activities had returned to normal with the exception of minor physical limitations...and her anxiety and stress were substantially reduced. (*Id.*) The plaintiff testified that she was "in good mental and physical health." (*Id.*) Furthermore, the Court found that a "detailed review of the record confirm[ed]" that the jury rested its verdict on "improper factors." (*Id.* at 304.)

Here, in contrast, the Pilliods are not making an "excellent recovery." Instead, Ms. Pilliod's "sadness was greatly increased" and she continues to get "weaker by the day." (23-RT-3792:9-10; 3794:7-9.) Mr. Pilliod's physically active life came to an end, he still suffers neurological effects from chemotherapy which are worsening and was "never completely the same" after cancer. (23-RT-3808:6-3809:9; 23-RT-3739:15-17.)

The Court should reinstate the compensatory damage verdicts of $18,047,296.01 for Mr. Pilliod, and $34,251,166.76 for Ms. Pilliod. While

large, they do not shock the conscience, there was no evidence of any improper considerations by the jury, and the preference statute does not justify a reduction of compensatory damages.

B. Federal and California law support a punitive damage award of ten times the compensatory damages.

1. Monsanto's reprehensible behavior and immense wealth support a 10:1 ratio.

In this case substantial punitive damages are needed to "send a message to [Monsanto] and others in similar positions that this sort of behavior will not be tolerated." (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26.) Reducing punitive damages to a 1:1 ratio as requested by Monsanto, or affirming the trial court's 4:1 ratio, would not serve the purposes of punitive damages in California, particularly in light of Monsanto's misconduct and wealth. Instead it "would flatten out the variability of punitive damage awards by deemphasizing two important factors used to determine such damages: the extent of the defendant's misconduct and its wealth. As such, the worse the defendant's misconduct, and the greater its wealth, the more it stands to benefit from [such a] damages limitation." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 418, 93 [conc. opn. of Mosk, J.]; *Johnson*, 2020 WL 4047332 *34 ["there is no fixed formula that requires a court to set punitive damages equal to compensatory damages."]). "Wealth is an important consideration in determining the excessiveness of a punitive damage award. Because the purposes of punitive damages are to punish the wrongdoer and to make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages." (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77–78.)

A recent Missouri appellate case applying the *State Farm* factors approved a punitive damage award of $1,615,909,091 for 20 plaintiffs tried jointly in a products liability case. (*Ingham*, 2020 WL 3422114, at *40.) The

Court emphasized that "[b]cause Defendants are large, multi-billion dollar corporations, we believe a large amount of punitive damages is necessary to have a deterrent effect in this case." (*Id.*) The Court rejected defendants' argument that a 1:1 ratio is the upmost limits of due process for substantial compensatory damages emphasizing *State Farms*' holding "there are no rigid benchmarks that a punitive damages award may not surpass." (*Id.*)

In *Ingham*, for the five Plaintiffs who were able to establish jurisdiction against the subsidiary and parent corporation, the Court upheld the jury's award of $25 million in compensatory damages for each plaintiff, and a $188 million dollar punitive damage award for each plaintiff for a total ratio of 7.5:1. Under the reprehensibility prong, the court concluded that the defendants' conduct were reprehensible because, the defendants:

> discussed the presence of asbestos in their talc in internal memoranda for several decades; avoided adopting more accurate measures for detecting asbestos and influenced the industry to do the same; attempted to discredit those scientists publishing studies unfavorable to their Products; and did not eliminate talc from the Products and use cornstarch instead because it would be more costly to do so, the jury found Defendants knew of the asbestos danger in their Products when they were sold to the public.

(*Id.* at 39.)

Here, the Pilliods presented similar evidence of Monsanto discussing the carcinogenicity and genotoxicity of Roundup for decades; deliberately failing to conduct adequate testing; attempting to discredit scientists who raised safety concerns; refusing to eliminate the genotoxic surfactants from their products; and of Monsanto's knowledge of the carcinogenicity of Roundup when it sold it to the public. (RB-X/AOB 53-69.) Like the defendants in *Ingham*, Monsanto is and remains a large multi-billion dollar corporation.

As in *Ingham,* a substantial punitive damage award should be found necessary to punish and deter the reprehensible behavior of Monsanto. However, because the Court here will have to reduce the jury's verdict, as opposed to simply affirming the verdict as in *Ingham,* a 10:1 ratio should be found to be consistent with due process. Should the court reinstate the compensatory verdicts for the Pilliods then the resulting punitive damage award on appeal would be higher, but comparable, to the *Ingham* verdict resulting in an award of $342,511,667.60 for Ms. Pilliod, and $180,472,960.10 for Mr. Pilliod and total of only 6.7% of Monsanto's net worth. If the Court affirms the trial court reduction of compensatory damages then a 10:1 ratio would be lower than the *Ingham* verdict resulting in an award of $112,011,660.00 for Ms. Pilliod and $61,472,959.60 and total only 2.2% of Monsanto's net worth, a "slap on the wrist." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967.)

2. The court must conduct an exacting review of the degree of reprehensibility of Monsanto's conduct.

The parties agree that the court's review of the constitutional maximum amount of punitive damages is de novo. In fact, the California Supreme Court holds that the appellate court must conduct an "exacting appellate review" of the jury's verdict "making an independent assessment of the reprehensibility of the defendant's conduct..." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172.) However, "findings of historical fact" made by a jury in relation to punitive damages "are still entitled to the ordinary measure of appellate deference." *(Id.)* This Court does not sit as "replacement for the jury" in assessing the constitutional maximum for punitive damages. (*Id.*) Rather "its constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the "right" level in the court's own view." (*Id.* at 1188.)

The court must also give due consideration to the size of the jury's verdict. In *Johnson v. Ford* the California Supreme Court reversed an appellate court's "drastic reduction" of a jury's punitive damage award "to three times the compensatory award" because it did not adequately explain its analysis of the punitive damage guideposts. (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1213.) On remand, the appellate court recognized that it had failed to properly take into consideration the jury's verdict and corrected that error by considering:

> the jury's original verdict not as an exact expression of the level of damages necessary to punish and deter but, still, as an expression of the jury's conclusion that a very large award was necessary to punish and deter in light of the injury to plaintiffs, the scope and formal nature of defendant's scheme, and defendant's size and wealth.

(*Johnson v. Ford Motor Co.* (2005) 135 Cal.App.4th 137, 149.) In following the California Supreme Court's guidance, the appellate court increased its original assessment of punitive damages from a 3:1 ratio to a ratio of just less than 10 times the compensatory award. *(Id.)*

In this respect, the appellate court in *Johnson v. Monsanto*, was in error when it affirmed the trial court's 1:1 ratio of punitive damages to compensatory damages in *Johnson v. Monsanto*. In contrast to its detailed analysis for other issues on appeal, the appellate court did not explain its own analysis of each of *State Farm* guideposts giving due consideration to the jury's original verdict of a 6.4:1 ratio of punitive to compensatory damages. (*Johnson*, 2020 WL 4047332, *34-35.) Instead, the appellate court simply found reasonable the trial court's analysis of "three factors for determining the constitutional upper limit of punitive damages set forth in State Farm." (*Id.*) However, the trial court in *Johnson* did not actually conduct a reprehensibility analysis expressly stating that "an evaluation of degree of

reprehensibility is not necessary" due to high compensatory damages. (*Johnson v. Monsanto Co*., 2018 WL 5246323, at *5 (Cal.Super.))

Contrary to the trial court's statement in *Johnson,* the California Supreme Court mandates that an evaluation and explanation of the degree of reprehensibility by an appellate court is necessary to support a reduction in the jury's punitive damage award. (*Johnson v. Ford Motor Co.* 35 Cal.4th at 1213.) In fact, "[t]he degree of reprehensibility of the defendant's conduct is the most important indicator of the reasonableness of a punitive damage award" (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 985.) Therefore, because an analysis and explanation of the degree of reprehensibility is absent at both the trial court and appellate level in *Johnson v. Monsanto*, the 1:1 ratio should not be adopted in this case.

Moreover, the logic of the *Johnson* appellate court's 1:1 punitive damages ratio is further undermined by the appellate court's substantial reduction of compensatory damages, deflating the high compensatory damages the trial court considered to be a justification for a low punitive damage ratio. Having reduced the high compensatory damages, the justification for a low punitive ratio was no longer present.

Here, the trial court did conduct a reprehensibility analysis (6-AA-8273-8275), but did not adequately consider the jury's assessment "that a very large award was necessary to punish and deter" Monsanto's conduct. (*Johnson v. Ford*, 135 Cal.App.4th at 149.) In *Pilliod*, the jury determined that a much larger award was necessary to punish and deter Monsanto than the juries in *Johnson* ($250 million) and *Hardeman* ($75 million). The ratio of punitive to compensatory damages should thus also be larger in *Pilliod* than in *Johnson* and *Hardeman.*

3. More evidence of Monsanto's reprehensible conduct was admitted in the *Pilliod* trial than in the *Johnson* and *Hardeman* Trials.

The additional evidence in the *Pilliod* trial also supports a higher ratio of punitive to compensatory damages than that awarded in *Hardeman* and *Johnson*. As the last of the three Roundup trials to date, the *Pilliods'* counsel had the benefit of more discovery into Monsanto's conduct. This discovery included more damaging documents, and more deposition testimony of Monsanto employees which laid the foundation for the admission of these documents.

In *Johnson*, the appellate court highlighted that there was already substantial evidence to support the jury's finding of punitive damages such as the fact that Monsanto "employees discounted legitimate questions surrounding glyphosate's genotoxic effect, failed to conduct adequate studies, surreptitiously contributed to and promoted articles reporting on glyphosate's safety, and lobbied regulators to conclude that glyphosate is safe." (2020 WL 4047332, at *32.) The appellate court emphasized, however, that its opinion on the amount of punitive damages was limited to the *Johnson* case stating it was "no error for the trial court to determine *in this case* that a 1:1 limit was appropriate."(*Id.* at *34 [emphasis in original]). The court agreed that "there is no fixed formula that requires a court to set punitive damages equal to compensatory damages."

Here, a higher ratio is warranted because much more evidence was admitted in *Pilliod* than in *Johnson.* To the extent the punitive damage question was close in *Johnson*, it is not here. The additional evidence in *Pilliod* included the following:

1. Monsanto was aware that for the first 8 years of Roundup being on the market (*when the Pilliods were spraying the product*), the

company had no valid carcinogenicity test on the active ingredient, glyphosate, because the original studies conducted by IBT laboratories, which formed the basis for Roundup's approval in 1974, were found to be the product of criminally fraudulent conduct. (RB-XAOB 56)

2. Monsanto took the position at a new deposition played at trial that there is "no evidence across the board" for Roundup carcinogenicity, despite its awareness in 2002 of multiple epidemiology studies that "arguably associate glyphosate and other pesticides with lymphopoietic cancers", and new evidence of its own consultants stating in 2015 internally that Monsanto cannot take the position of "no evidence." (6-AA-7152, 7167, 7205-7207, 8325-8326.)

3. An admission by Monsanto's Dr. Koch that the type of ghostwriting engaged in by Monsanto's Dr. Heydens is unethical. (6-AA-6909, 6917-6918.)

4. More detailed and documentary evidence of Monsanto's actions regarding the 1983 mouse study and the EPA's review of that study wherein they found "Glyphosate was oncogenic in male mice..."[3] (6-AA-7185-7201; 7-AA-8759-8766) including:

> a. An EPA memo wherein the EPA described Monsanto's position on the study as "unacceptable" and not aligned with "those concerned with the public health." 7-AA-8994-8997.
>
> b. A Monsanto memo demonstrating that an expert hired by Monsanto to re-review the mouse pathology slides agreed to find that glyphosate was not carcinogenic before even receiving the slides. (6-AA-7194-7196, 8460-8462.)
>
> c. New Dr. Benbrook testimony that Monsanto's success in manipulating the results of the 1983 study "had a very direct effect on the market potential for future Roundup sales." (22-RT-3541:3-14.)

5. The jury was presented more evidence of Monsanto's malicious intent including:

[3] Some details of the mouse study were conveyed through expert testimony in *Johnson,* but the underlying documents were not admissible.

a. An email where Monsanto scientists joked about playing "whack-a-mole" with safety concerns. (6-AA-8305.)

b. A memo where Monsanto instructed employees to be "all about winning the argument;" to "let nothing go;" and to "discomfort our opposition;" in order to prevent Roundup "being linked with....safety concerns." (7-AA-8525, 7-AA-8529-8531)

c. A memo emphasizing the need to prevent restrictions on sales by defending "glyphosate and Roundup against all toxicological allegations" regardless of what those allegations were. (6-AA-6751-6752.)

6. More evidence where Monsanto employees emphasized profit over safety. A 1997 memo where Monsanto was worried about "the economic consequences of adverse, unopposed epidemiologic findings" instead of the safety risks highlighted by epidemiologic findings. (7-AA-8595.). A 2015 memo where Monsanto explained that it wanted to "invalidate" the relevance of IARC in order to protect sales and gain an advantage in this litigation. (7-AA-8746.) A 2015 email where Monsanto worries that any adverse decision by IARC would cost Monsanto money, with Dr. Heydens characterizing the situation as "the $1B Question." (7-AA-8662.)

7. New internal emails wherein Monsanto scientists explain that "[d]ermal exposure is the greatest risk of exposure for operators" and that "5 to 20 percent of the dose of glyphosate could be stored in the skin." (6-AA-8339, 8381; 19-RT-3214:8-9-3217:1-14.)

8. New evidence that Monsanto manipulated the reported dermal absorption rates of Roundup. In 2002, an internal study found that a skin absorption rate of Roundup at 3% could cause a user's daily dose of Roundup to exceed regulatory established safety levels. (6-AA-8344-8347.) Subsequently, Monsanto hired a lab (TNO) to study the dermal absorption rate of Roundup, and when absorption rates of 10% were found, Monsanto ordered the lab to shut down the studies. (19-RT-3224:15-3225:17.) Monsanto subsequently found a lab that used an improper protocol by freezing and heating skin, which altered the composition to reduce permeability resulting in lower absorption rate results. (19-RT-3190:5-3192:15.)

9. Evidence that, in 2008, Monsanto decided not to conduct an in vivo dermal absorption study because they feared finding out whether Roundup was capable of converting into another metabolite in the

body. (19-RT-3222:3-3223:6.) Metabolites can be carcinogenic or toxic. *(Id.)*

10. Evidence that Monsanto was aware as far back as 1991 that glyphosate absorbed into the body preferentially migrates to the bone where lymphocytes are created and lymphoma originates. (19-RT-3180:2-3184:19.)

11. Evidence and testimony that Monsanto provides its own employees, but not the public, with a Roundup safety data sheet warning that glyphosate is an IARC 2A carcinogen, and advises its employees to wear protective gear and chemical-resistant gloves. (6-AA-6714-6715; 6-AA-6739-6749; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1301[behavior reprehensible where defendant "informed its employees that the asbestos used in making 2150 sheet gaskets caused cancer" but "provided that information to customers only when they asked for the 2150 safety data sheet."]). Monsanto's Jim Guard, testified that he has been aware for a long time that the safety data sheet provides far less health & safety information than the label. (6-AA-6749.)

12. Evidence that residential users of Roundup received a higher hourly dose than professional users of Roundup due to lack of protective gear and inferior spray equipment which increases contact with skin. (19-RT-3152:5-11, 3228:10-24.)

13. Evidence of decades of Monsanto's T.V. commercials wherein actors are spraying Roundup in t-shirts and shorts with no gloves despite Monsanto's knowledge that dermal exposure is the greatest risk for Roundup users. (23-RT-3726:7-373:19.)

14. Memos wherein Monsanto describes it as "good news" that the "safety of residential Roundup is not a top-of-mind concern for today's consumer." (8-AA-9216.)

15. A 1997 email by a Monsanto scientist describing the AHS study as "junk science" which contradicts Monsanto's current position that the study is "largest, best regarded, and most comprehensive epidemiology" study. (6-AA-8454; ARB-XRB at 51.)

16. More evidence that Monsanto cannot rely in good faith on regulatory reviews including:

a. Evidence that Roundup is banned in Europe for residential users, such as the Pilliods. (8-AA-9354.)

b. Internal memos where Monsanto admits that regulatory reviews are "politically motivated" and not "science based." (7-AA-8619; 6-AA-7245-7246.).

c. The full 2017 EPA Scientific Advisory Panel report of independent scientists finding the EPA's conclusion to be based on a "distortion" of the scientific process (7-AA-8963); and the peer-reviewed publication of three of those panelists concluding there was a "compelling link" between glyphosate and NHL. (16-RT-2556:2-2558:21.)

d. Evidence of internal disagreements among EPA scientists about the carcinogenicity of glyphosate, with one division in the EPA stating that it agreed with IARC. (6-AA-7210-7212.)

e. Evidence that the EPA assured Monsanto in a text message that it had "aligned EFSA." (6-AA-7238.)

f. Additional ex parte emails and text messages between EPA and Monsanto employees showing an inappropriate relationship. (6-AA-7238-7239, 8316; 7-AA-8569-8570.)

17. The fact that California[4] lists glyphosate as a known carcinogen and that Monsanto ghostwrote public comments in an attempt to stop that listing. (21-RT-3415:4-19; 23-RT-3737:8-25.)

18. Monsanto's stipulated net worth is 18% higher than the stipulated net worth of Monsanto in the *Johnson* trial.

Most of this evidence supporting punitive damages and any post-2012 conduct was also excluded in *Hardeman.* 6-AA-8250.

The new evidence in *Pilliod* above, coupled with the already substantial evidence admitted in *Johnson*, presented a compelling case of the

[4] In *Johnson v. Monsanto*, the appellate court concluded that "One reason [the punitive damage question] is close is because, notwithstanding the IARC's determination, no evidence was presented of a regulatory body concluding that glyphosate or Roundup products cause cancer." In contrast, here, there is evidence that California's regulatory body concluded glyphosate caused cancer.

need to punish and deter the actions of Monsanto. Particularly reprehensible are Monsanto's decision to sell Roundup based on fraudulent safety studies; and Monsanto's advertisements portraying Roundup users without protective gear when it was well aware of the risks of Roundup being bound to and absorbed into the skin then migrating to the bone marrow. Such a simple act of advising the public to wear protective gear, as recommended by Monsanto's own scientists, could have dramatically reduced the Pilliods' dermal exposure to Roundup. (6-AA-8342; 19-RT-3229:13-3230:10, 3240:6-19.)

This additional evidence is why the *Pilliod* jury awarded a much higher ratio of punitive to compensatory damages (55:1 for Mr. Pilliod and 27:1 for Ms. Pilliod) than the *Johnson* (6.4:1) and *Hardeman* juries (15:1). The constitutional maximum of punitive damages set by this Court should also reflect the jury's judgment that a higher ratio is needed in the *Pilliod* case and set the ratio at 10:1 or higher.

4. Post-use and post-injury conduct is relevant to an assessment of the reprehensibility of Monsanto's behavior.

Monsanto claims, without specification or citation[5], that some evidence supporting punitive damages should not be considered because the conduct occurred after the Pilliods were injured. This is not the law in California. Regardless of when the Pilliods stopped using Roundup (and any dispute must be resolved in favor of the Pilliods) they "may present any evidence which would tend to prove the essential factors of the conscious disregard concept of malice. **This includes evidence of subsequent**

[5] Monsanto also does not cite to any part of the record where they objected to a piece of evidence being admitted for punitive damages on the basis it was post-injury.

activities ..." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 400–401.; *Echeverria (*37 Cal.App.5th at 334.*)* ["[a] defendant's entire course of conduct may be considered for purposes of assessing punitive damage awards, including post-injury conduct."]) Evidence of post-use conduct is directly relevant to the size of the punitive damages.[6] "By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature." (*Johnson v. Ford,* 35 Cal.4th at 1206.)

Even if post-use reprehensible conduct by Monsanto could be said not to injure the Pilliods, it certainly injured others who later developed NHL due to Monsanto's continuous reprehensible conduct. "[O]ne relevant factor in this analysis is the extent to which the defendant's alleged wrongful conduct involved repeated actions, including conduct occurring after the incident in question." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 592; *Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [conduct reprehensible wherein post-incident "Defendants showed no remorse, inasmuch as they took no steps to remedy the substandard conditions, as reported by the subsequent tenants."]). The U.S. Supreme Court instructs that "due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs." (*Johnson v. Ford,* 35 Cal.4th

[6] Monsanto inappropriately tries to equate the Pilliods' valid objection to this court's consideration of documents created after trial and therefore not part of the trial record as somehow contradictory with the Pilliods' position that post-use conduct admitted at trial can be considered for punitive damages. (ARB-XRB 33.)

at 1204.) Therefore "a civil defendant's recidivism remains pertinent to an assessment of culpability" in a reprehensibility analysis. *(Id.)*

The Pilliods do not claim, as in *Echeverria*, that "scientific evidence" in and of itself "developed post-injury" is evidence of reprehensibility. *(*37 Cal.App.5th at 334.*)* Instead, it is Monsanto's "orchestrate[d]" attacks against such evidence that makes Monsanto's conduct malicious. (7-AA-8746, 8669, 8693.) Monsanto's attacks on IARC[7], ghostwriting and lobbying of governments to ignore IARC are simply a continuation of Monsanto's multi-decade game of "whack-a-mole" played at the cost of the Pilliods' health and the lives of thousands of other victims who used Roundup believing it was safe. (RB-XAOB 53-69.)

Furthermore, Monsanto argues that the post-incident political decisions by regulatory agencies absolve it of responsibility for punitive damages. (ARB-XRB 102.) Therefore, Monsanto makes relevant it's post-incident ghostwriting, attacks on IARC, and any scientific evidence that undermine the reliability of these regulatory decisions. As Judge Chhabra explained in *Hardeman v. Monsanto*, where such evidence was excluded*:*

> Monsanto could have chosen to flick the domino that would have brought in much more post-2012 evidence. The Court informed Monsanto that it could bring in the testimony from Dr. Portier about the details underlying the regulators' post-IARC conclusions that it now contends was improperly excluded, but that the details of the IARC classification, the evidence surrounding Monsanto's attacks on IARC, and the attempts to influence U.S. regulators would then also be admissible. ... Monsanto declined. This appears to have been good trial strategy on Monsanto's part, considering the recent damages awards against Monsanto in San Francisco and Alameda County state

[7] In any event, the IARC monograph and Monsanto's plans to attack IARC were both developed before Ms. Pilliod's diagnosis and before Mr. Pilliod stopped using Roundup.

> courts, following trials where virtually all this evidence seems to have come in.

(*In re Roundup,* (N.D. Cal., July 12, 2019) 2019 WL 3219360, at *4.) As opposed to *Hardeman,* Monsanto's trial counsel made a strategic decision to "flick the domino" in this case and Monsanto cannot now complain about that decision on appeal.

5. Monsanto fails to meet its burden to demonstrate that its actions are not reprehensible.

It is well-settled that "if, as defendants here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error assigned is deemed to be waived." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) This principle applies also to a jury's finding of the degree of reprehensibility. (*Fernandes,* 16 Cal.App.5th at 941 [defendant "does not state any facts about reprehensibility, far less state them in favor of the judgment, and therefore forfeits the claim."].)

Here, likewise, Monsanto's claim that there was no evidence that it engaged in reprehensible conduct ignores large swaths of the Pilliods' evidence of reprehensible conduct**.** (ARB-X-RB at 116.) Monsanto ignores most evidence presented by Plaintiff which supports the jury's finding on punitive damages and misrepresents the evidence it does address. Monsanto engaged in a similar tactic in *Johnson*, where the court noted that "Although we do not go so far as to conclude that Monsanto has waived the issue, we conclude that it has not met its appellate burden to show error and that substantial evidence supports the award of punitive damages." (2020 WL 4047332 at *30; *see also In re Roundup*, (2019) 364 F.Supp.3d 1085, 1089 ["Monsanto cannot prevail on a motion for summary judgment by simply ignoring large swaths of evidence."]). As in *Johnson*, Monsanto briefly

addresses only four of the many incidents evidencing Monsanto's misconduct, and presents only its interpretation of the evidence which was rejected by the jury.

Johnson rejected Monsanto's arguments regarding the Parry report noting that "one disputed issue at trial, and which the parties continue to debate, is whether all of these tests were conducted and done adequately...The conflicting testimony highlights that the adequacy of the testing was a question for the jury."(2020 WL 4047332 at *31.) As the Pilliods also showed at trial, and the jury accepted, Monsanto did not conduct all of the tests Parry suggested, and Parry never agreed that Roundup wasn't genotoxic. (RB-XAOB 59-60.) The best evidence Monsanto can muster, to contradict what is clear in Dr. Parry's written reports, is an email account of a four-hour meeting with Dr. Parry written by Monsanto without confirmation by Dr. Parry. (9-AA-9884.) Even in that email, Monsanto reports that Parry believed Roundup is genotoxic by a mechanism of oxidative damage. (*Id.*) Parry even asked for Monsanto to sponsor a studentship to help him further research on the "biological relevance of oxidative damage, and its possible relationship with mutagenic events." *(Id.)* Dr. Parry also expressed his irritation with Monsanto's ghostwritten Williams paper stating that it was "dismissive of other researcher's" work. *(Id.)*

With respect to Monsanto's repeated failure to test, Monsanto simply claims, contrary to the evidence, that it did "sufficient testing." (ARB-XRB 106-107.) However, *Johnson* confirmed that Monsanto's failure to test the Roundup formulation, as opposed to glyphosate alone, could support a jury's finding on punitive damages. (2020 WL 4047332 at *31.) Monsanto's own employees repeatedly make statements about the lack of necessary formulation testing, which to this day have not been conducted. (6-AA-6906

["you cannot say Roundup is not a carcinogen. We have not done the necessary testing on the formulation to make that statement;"] 6-AA-8387 ["We simply aren't going to do the studies Parry suggests;"] 6-AA-8572["will need to incorporate information from ... studies of manufacturing workers, before any conclusions can be established as valid;"] 6-AA-8380 ["To fully address this issue would likely require a repeat of the monkey dermal and intravenous studies."]). Regulatory agencies have also confirmed the lack of Roundup formulation testing. The lack of an epidemiology study on manufacturing workers was identified as "a critical data-gap" by the EPA Scientific Advisory Panel evaluating glyphosate. (7-AA-8896.) The EPA acknowledges that more testing on Roundup is needed because "glyphosate formulations are hypothesized to be more toxic than glyphosate alone." (9-AA-10207-10208.)

Monsanto claims that "working with scientists to author literature" is not deceitful and therefore cannot be reprehensible. (ARB-X-RB at 116.) The jury disagreed. Monsanto did not disclose the fact that its employees wrote the Williams (2000) paper; Monsanto did not disclose the fact that it wrote portions, and had final editorial say, of the Intertek papers; Monsanto did not disclose that it ghostwrote the newspaper op-eds attacking IARC; and Monsanto did not disclose that it ghostwrote public comments submitted to the State of California challenging the Prop 65 listing. (RB-XAOB at 61-63.) These are all deceitful acts because:

> the integrity of the published record of scientific research depends not only on the validity of the science but also on honesty and authorship. [T]he scientific record is distorted if the primary purpose of an article is to persuade readers in favor of a special interest rather than to inform and educate and this purpose is concealed.

(6-AA-6806.) *Johnson* held that a jury could conclude "...it was improper to conceal the contributors' connection to Monsanto. Even if the evidence did

not require an inference that Monsanto was more concerned about defending and promoting its product than public health, it supported such an inference." (2020 WL 4047332 at *32; see also *Ingham*, 2020 WL 3422114, at *36 [punitive damages available where "Defendants published articles downplaying the safety hazards associated with talc through deception without revealing their funding."])

Finally, *Johnson* rejected Monsanto's arguments that lobbying cannot be considered reprehensible and held that the "jury could have inferred that Monsanto's actions in attempting to influence regulatory agencies evinced an indifference to public safety" and that such "meetings were intended primarily to protect Monsanto's bottom line." (2020 WL 4047332 *at *32*.) Here, the trial court determined that although "defendant's efforts to influence or persuade agencies regarding policy decisions cannot support punitive damages," such evidence was relevant as to whether Monsanto could have relied in good faith on those decisions; and could be relevant to downstream effects on consumers. (6-AA-8268, 8271.) To the extent there is a practical difference between these holdings, *Johnson* would overrule the trial court's opinion that lobbying efforts cannot directly support punitive damages.

Here, the evidence properly presented in favor of the verdict and the evidence ignored by Monsanto in its briefing support the jury's finding that Monsanto acted reprehensibly. As the 13th juror, the trial court held that "there was clear and convincing evidence that Monsanto undertook continuous efforts to impede, discourage, or distort the scientific inquiry about glyphosate and those actions were reprehensible and showed a conscious disregard for health." (6-AA-8273; *Johnson*, 2020 WL 4047332 at *32 ["The trial court's approval of the punitive damage award by denying

[Monsanto] a new trial is not binding on appeal, but we must give it significant weight."])

6. It was the jury's province to determine whether Monsanto acted in good faith

Monsanto claims that "[t]he evidence shows that Monsanto advocated a view of the scientific evidence on glyphosate that it believed in good faith." However, the jury and trial court concluded the opposite. (ARB-X-RB at 116.) The trial court held that "Monsanto made efforts to interfere with the underlying public scientific inquiry and as a result cannot have in good faith relied on the available public science." (6-AA-8272.)

Instead of accepting the jury's role as a fact-finder, Monsanto seeks on appeal to re-argue its interpretation of the facts rejected by the jury and the trial court. (*People v. Reynoso* (2003) 31 Cal.4th 903, 918 [Appellate courts cannot experience what the fact-finder experiences "the nuances, the inflections, the body language which traditionally form part of the basis on which credibility is evaluated by triers of fact."]) The jury simply did not believe Monsanto's witnesses nor the argument of counsel that Monsanto acted in good faith. As explained by the *Johnson* appellate court:

> Although the jury could have accepted Monsanto's characterization of its conduct as simply demonstrating advocacy for a "well-supported belief that its products were safe," we reject the argument that the jury was required to do so. To begin with, substantial evidence was presented from which the jury could infer that Monsanto acted with a conscious disregard for public safety...

(2020 WL 4047332 *at *31*)

Johnson is in accord with *Pfeifer* where the defendant also argued that it "reasonably believed that" its product was safe and that "regulations supported its belief that the products were safe...." (220 Cal.App.4th at 1301.) *Pfeifer* rejected this argument, holding that JCI "misapprehends our role as

an appellate court. Review for substantial evidence is not trial de novo....The jury rejected the inferences that JCI proposes on appeal, and the trial evidence supports its decision to do so." *(Id.)*

The jury here viewed the body language of Monsanto's employees as they evaded questions or provided answers that strained credibility. Monsanto employee Dr. Goldstein even admitted, "we have some limitations on our credibility when we are speaking as Monsanto publicly." (6-AA-7847.) For example, when Monsanto's Product Safety Assessment Strategy Lead Dr. Heydens was asked at a 2017 deposition about a pre-lawsuit 2015 email wherein he admitted to ghostwriting Williams (2000), he nonetheless denied ghostwriting because he must have had "bad recall" when he wrote the email. (6-AA-6833.) The jury could reasonably reject Dr. Heyden's self-serving post-lawsuit claims to the contrary because "[c]onsiderations of trustworthiness, whether based on his ability to recall or on other factors, are the exclusive province of the jury." (*People v. Capers* (2019) 7 Cal.5th 989.) Dr. Heydens further ruined his credibility when, after presented with overwhelming evidence that he reviewed, contributed to and edited the Intertek papers, he could not simply concede that the resulting published articles falsely claimed that Monsanto employees did not review the manuscript prior to publication. (6-AA-6825-6831)

Monsanto's own emails show a lack of good faith belief in the safety of Roundup. When Monsanto learned on October 15, 2014, that IARC would evaluate glyphosate, Dr. Heydens acknowledged that Roundup had "vulnerabilities" in all the areas considered by IARC including "epidemiology…exposure, genotox and mode of action." (7-AA-8562.) In January 2015, Monsanto was fretting about the impact IARC's expected conclusions would have on regulatory reviews calling it the billion dollar question. (7-AA-8662.) On February of 2015, one month before the IARC

evaluation, Monsanto drafted an IARC response plan predicting that IARC would classify glyphosate as a possible or probable human carcinogen. (7-AA-8665.) Monsanto had no belief at all that IARC, "the worldwide authority on establishing whether an agent is a carcinogen" (16-RT-2455:14-15) could look at the science and conclude Roundup was not classifiable as a carcinogen.

Monsanto employees, in furtherance of its company policy to "let nothing go" eviscerated any shred of credibility at trial by taking indefensible positions. Monsanto corporate representative, William Reeves, took the incredible position at trial that there was "no evidence across the board" that Roundup was carcinogenic notwithstanding all the epidemiology, toxicology and mechanistic studies supporting IARC's carcinogenicity conclusions, and even when Monsanto's own consultants stated that "you can't say there is no evidence." (6-AA-7152, 7205-7206.) Monsanto took the position at trial that protective gear is not needed for Roundup even though Monsanto warns its own employees to wear safety gear. (7-AA-8770; 22-RT-3607:2-9-3609:22.). Monsanto took the affirmative position at trial that Roundup is not carcinogenic where its own toxicologist internally concedes that "we have not done the necessary testing on the formulation to make that statement." (6-AA-6906.) Monsanto, at trial, refused to acknowledge any flaws with the AHS study even when its own scientists pre-litigation stated that the study was "junk science," "will be inaccurate," and "produce spurious results" (6-AA-7182; 7-AA-8574.) Monsanto employees took the position at trial that the POEA surfactant in Roundup is as safe as "soap." (6-AA-6723.) However, internally, Monsanto scientists concede that the POEA is "toxic," "hazardous," and that it "played a role" in promoting tumors in the George (2010) study. (7-AA-8495; 7-AA-8659; 7-AA-8713.) Monsanto, at trial, attempted to deride IARC as an outlier agency and unreliable even

where its expert Dr. Mucci's textbook on Cancer Epidemiology cites IARC 475 times; and where Dr. Mucci agrees that IARC is an "important cancer agenc[y]" and that it is an important source of information about what causes cancer. (29-RT-4914:17-4915:5; 4933:5-21.)

Monsanto, at trial (and on appeal), claimed that that National Institute of Health NAPP study concluded that there was no association between Roundup and NHL. (ARB/X-RB at 51.) However, two authors of that study, Dr. Weisenburger and Dr. Blair, testified at trial that it did show a significant association between Roundup and NHL. (16-RT-2514:10-2515:2; 6-AA-6671). Dr. Weisenburger testified that NAPP demonstrated a statistically significant, fully adjusted **"**two-and-a-half-fold" increase risk of DLBCL for people like the Pilliods who used glyphosate more than twice per year. (16-RT-2514:10-14.) The NAPP study authors specifically write that "[o]ur results are also aligned with findings from epidemiological studies of other populations that found an elevated risk of NHL for glyphosate exposure and... were supportive of the IARC evaluation of glyphosate as a probable Group 2A carcinogen for NHL." (29-RT-4959:4-21; 4963:14-16.)

Monsanto claims that there is no evidence that it hid any scientific study from regulators or the public, but a request for admission read at trial made clear Monsanto never submitted the Parry reports to the EPA.[8] (18-RT-3063:6.) Monsanto failed to share reports that the surfactant in Roundup significantly increased absorption of glyphosate into the skin at a threefold excess above regulatory limits. (19-RT-3224:13-3225:17.) Monsanto, likewise, did not make its animal carcinogenicity studies publicly available prior to this litigation. As Dr. Jameson explained, "basically all of the data that was available for glyphosate was provided by industry to EPA...it's

[8] Monsanto does not dispute Dr. Benbrook's testimony that it violated EPA regulations in failing to submit the Parry reports. (22-RT-3592:22-3594:8.).

considered confidential. And so we wouldn't be able to get that data from the EPA." (14-RT-2107:19-25.) Dr. Martens, a former Monsanto toxicologist and current consultant, confirmed that only if you were "under contract with a company" could you "gain access to those studies." (6-AA-7040.) Finally, only Monsanto can fill the "critical data gap" of whether Monsanto employees who handle Roundup have developed NHL at an excess rate. (7-AA-8896.)

Nearly every claim that Monsanto lawyers or attorneys made at trial was contradicted by ample documentary evidence. Completely absent from the documentary evidence at trial was any indication that Monsanto cared about whether or not Roundup caused cancer. As Judge Chhabria aptly noted:

> while the jury was shown emails of Monsanto employees crassly attempting to combat, undermine or explain away challenges to Roundup's safety, not once was it shown an email suggesting that Monsanto officials were actively committed to conducting an objective assessment of its product.

(*In re Roundup Products Liability Litigation* (2019) 385 F.Supp.3d 1042, 1047.)

Not only was there substantial evidence to support that Monsanto did not have a good faith belief in the safety of its product, but Monsanto's utter intransigence in failing to at least acknowledge some of this evidence at trial supports the jury's award of punitive damages; and supports at least a 10:1 ratio of punitive damages on appeal.

7. The jury rejected Monsanto's argument that political regulatory conclusions absolve it of its reprehensible behavior.

The jury also rightly rejected Monsanto's argument that it acted in good faith based on conclusions by political regulatory agencies. (ARB-XRB

116.) As the trial court correctly noted, "Monsanto's efforts to impede, discourage, or distort the scientific inquiry about glyphosate, support a jury finding that it could not reasonably rely on the EPA's regulatory action or inaction that was based on that science." (6-AA-8271.) The *Johnson* appellate court agreed holding that the "...the jury could have inferred that Monsanto's actions in attempting to influence regulatory agencies evinced an indifference to public safety." (2020 WL 4047332 at *32.)

Furthermore, the jury rejected Monsanto's clearly false argument that "manufacturers, scientists, and regulators all agree" that Roundup is safe. (ARB-X/RB at 122.) This argument was rejected in *Johnson:*

> Monsanto repeats its claim that "the overwhelming consensus of independent, expert regulators is that exposure to glyphosate does not pose a carcinogenic risk to humans." Again, the jury rejected the notion that there is "consensus" on this point, and it is not our role to reweigh the evidence in support of punitive damages.

(*(Id.)*; *Ingham*, 2020 WL 3422114, at *36 [rejecting similar claim because "[t]hese arguments ask us to entertain evidence and inferences from the evidence contrary to the jury's verdict, defying our standard of review."])

Regulatory "action or inaction, though not dispositive, may be considered to show whether a product is safe or not safe." (*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1393; *Johnson*, 2020 WL 4047332 at *33 [acknowledging that regulatory findings are relevant to, but not dispositive in a punitive damage analysis].) However, where a Defendant attempts to "rely on regulatory agencies' findings as a defense" against punitive damages, the jury is entitled to consider evidence of the Defendants' "purported manipulation of those same agencies." (*Perrine v. E.I. du Pont de Nemours and Co.* (2010) 225 W.Va. 482, 552.) Also, where, as here, "plaintiff *did* present to the jury evidence tending to

contradict" a regulatory agencies finding, "it is not for [an appellate] court to declare, as a matter of law, that a jury could not disagree with the [regulator's] conclusions." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 144.)

Ignoring California law, Monsanto argues that the jury has no choice but to accept the EPA and other regulator's conclusions despite substantial evidence those conclusions were flawed. (ARB-XRB 47.) However, other than those political findings, the evidence from the peer-reviewed literature supporting Monsanto is sparse. Monsanto exclusively relies on one independent published peer-reviewed study in support, the AHS study. (ARB-XRB 51.) However, the lead investigator, Dr. Blair, and another author of that study, Dr. De Roos, have concluded that Roundup is a probable carcinogen. (6-AA-6667-6668; 13-RT-1866:23-1877:13.) Supporting the Pilliods' position, on the other hand, are " 'a boat load' of studies" showing genotoxicity, and studies concluding that Roundup "increased cancer risks" which prompted the appellate court in *Johnson* to "have had no hesitation upholding the jury's causation findings." (*Johnson*, WL 4047332, at *33).

Instead of acknowledging the Pilliods' evidence, Monsanto inappropriately seeks to introduce new evidence on appeal that was not presented at trial. For example, Monsanto cites a new January 2020 EPA document in support of its claim that its conduct was not reprehensible. Monsanto ignores the "fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision." (*California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803 ["opinions expressed by the Legislative Analyst Office after the judgment was entered are not relevant to our legal determinations."]) "Factual matters that are not part of the record will not be considered on appeal and should not be referred to in

a party's brief." (*Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630, 650.[9])

Even if the court does consider the 2020 EPA document, that document simply reiterates the EPA's previous conclusions repeatedly presented at trial and rightly rejected by the jury. Congress, in enacting FIFRA mandated that "[i]n no event shall registration of [a pesticide] be construed as a defense for the commission of any offense under this subchapter." (7 U.S.C. § 136a(f)(2)) Where registration of a pesticide does not provide a defense for compensatory damages, it likewise would not provide a defense against punitive damages. (*Silkwood v. Kerr-McGee Corp*. (1984) 464 U.S. 238, 255.) This is for good reason. The EPA is not infallible and in many cases woefully fails in its duty to protect human safety by prioritizing the protection of corporations.

Monsanto is keenly aware that it cannot rely in good faith on the EPA being a neutral arbiter of its pesticides. For example, in a 2018 Monsanto internal report on the EPA, administration officials stated "[w]e have Monsanto's back on pesticides regulation... Monsanto need not fear any additional regulation from this administration." (6-AA-6557-6558.) The report concluded that "In essence, the political leadership favors deregulation and dismisses the expert risk analysis" with respect to glyphosate. *Id.* This

[9] Monsanto also cites this document in support of preemption for the first time in its reply brief. As such, the Court should disregard Monsanto's argument based on this document because "it is elementary that points raised for the first time in a reply brief are not considered by the court." (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) This document was available prior to the filing of Monsanto's opening brief and Monsanto was certainly aware of its existence.

report describes EPA's agenda as "deregulatory and pro-business," not pro-human safety. *Id.*

Litigation involving the EPA's recent approval of another pesticide manufactured by Monsanto, dicamba, also highlights why Monsanto cannot in good faith rely on the EPA's assessments. The Ninth Circuit Court of Appeals recently reversed the EPA registration of dicamba. [10] The Ninth Circuit held that the EPA relied almost exclusively on "Monsanto, and only Monsanto" for disregarding the environmental risks of dicamba. (*National Family Farm Coalition v. U.S. Environmental Protection Agency* (9th Cir. 2020) 960 F.3d 1120, 1137.) In doing so the:

> EPA made multiple errors in granting the conditional registrations. As described above, the EPA substantially understated the risks it acknowledged, and it entirely failed to acknowledge other risks. We conclude that the "fundamental flaws" in the EPA's analysis are so substantial that it is exceedingly "unlikely that the same rule would be adopted on remand."

(Id. at 1145.)

Like here, there is also a separate mass tort proceeding where private litigants, whose property was destroyed by dicamba drift, sued Monsanto for failing to warn about the environmental damage of dicamba. The first dicamba trial also resulted in a substantial punitive damage verdict against Monsanto, even before the Ninth Circuit vacated the Dicamba registration. [11] (*Bader Farms, Inc. v. Monsanto Company* (E.D. Mo., Feb. 28, 2020, No. 1:16-CV-00299-SNLJ) 2020 WL 1503395, at *1.)

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[10] The Pilliods cites this document as but one example of the evidence that the Pilliods could use to rebut Monsanto's reliance on new EPA documents outside of the record.

[11] There is currently a challenge pending against the EPA's January 2020 decision regarding the interim re-registration of glyphosate. (*NRDC, et al v. USEPA* (9th Cir. 2020), No. 20-70787.)

As in the dicamba case, the EPA analysis of glyphosate is also based on "fundamental flaws" which the SAP panel described as a "distortion" of the scientific process. (7-AA-8963.) As in dicamba, the EPA simply ignores or understates risks of glyphosate. The EPA ignored the findings of methodological flaws and need for more testing highlighted by the independent SAP panel; the EPA ignored the internal peer review by the Office of Research and Development which agreed with IARC's assessment of glyphosate and criticized the EPA's "dichotomized" view of studies (6-AA-7210-7212); the EPA dismissed the findings of IARC even before reading IARC's analysis (6-AA-7240-7241); and the EPA has ignored the reams of independent peer-reviewed literature supporting the fact that Roundup is genotoxic. (22-RT-3576:8-18, 3580:12-3582:18)

Quite simply, the EPA "has Monsanto's back on pesticide regulation" regardless of the actual data. It is in these circumstances, where "[g]overnmental safety standards...have failed to provide adequate consumer protection against the manufacture and distribution of defective products" that "[p]unitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 562.)

The conclusions of six government regulators cited by Monsanto are also underwhelming and were rejected by the jury. Monsanto's worldwide regulatory "consensus" of six governmental agencies excludes all of Africa, South America, Asia (except Japan) and most importantly the State of California. A closer look at those regulatory findings demonstrates that the reports of those six entities simply piggy back on each other and utilize the same flawed methodology highlighted by both the SAP panel and the 95 independent scientists who reviewed the decision in Europe. (13-RT-1866:22-1877:13.) The document from Australia is based on the European review

because “rather than undertaking a full review in isolation, the APVMA make use of this international assessment.” (8-AA-9367.) The New Zealand review, written by one scientist, is only a 16 page critique of IARC which simply adopts the views of the EPA and EFSA; there is no independent review of the studies. (10-AA-10707-10722.) The one scientist in New Zealand even quotes and relies on Williams (2000), ghostwritten by Monsanto, for its assessment that “Roundup herbicide does not pose a health risk to humans". (10-AA-10716-10717.) Canada’s review of glyphosate is based on the U.S. EPA’s review. (9-AA-10231 [“Canada and the USEPA have been collaborating on the re-evaluation of glyphosate.”]). The U.S. EPA likewise “aligned EFSA,” the European regulators, to agree with their opinion on glyphosate. (6-AA-7819.) The review by Japan was never read into or entered into evidence, so the methodology used by Japan is simply unknown.

The political findings of these governments also exclude consideration of the formulated Roundup product containing the genotoxic surfactant POEA (also called tallowamine). EFSA explained that one if its major differences with IARC was that “IARC did not only assess glyphosate, but assessed glyphosate-based formulations; while the EU peer review is focused on the pure active substance." (25-RT-4174:12-22.) This is a critical problem where the peer-reviewed literature demonstrates that Roundup (with POEA) is up to 200 times more genotoxic than glyphosate alone; and that POEA in Roundup significantly enhances the absorption of glyphosate through the skin. (17-RT-2764:7-10; 19-RT-3171:12-22; 19-RT-3224:16-24.) Nonetheless, Monsanto continues to use POEA even after the European ban, and where Monsanto scientists internally acknowledged “there are nonhazardous formulations, so why sell a hazardous one?" (25-RT-4172:3-10; 6-AA-6843.)

These regulators have never reviewed a carcinogenicity study of POEA. The EPA statement that “[t]here is no evidence that the AAPs are

carcinogenic" simply means that the EPA has not reviewed and Monsanto has not provided the EPA such studies. (9-AA-9829; 9-AA-9942.) Monsanto and the EPA point to an "SAR analysis" as evidence that surfactants are not carcinogenic. However, an "SAR analysis" is simply a computer simulation. (*See Forest Laboratories, Inc. v. Teva Pharmaceuticals USA, Inc.* (D. Del., Jan. 5, 2016) 2016 WL 54910, at *8 ["[N]o pharmacokineticist would rely solely on performance predictions from an *in silico* [simulated] model to determine the *in vivo* PK characteristics of a drug."]). Monsanto also admits it has never conducted a long-term animal carcinogenicity tests of the Roundup formulation. (6-AA-6906; 22-RT-3638:16-19.) There can be no consensus that Roundup is not carcinogenic where even Monsanto's toxicologist admits, "you cannot say Roundup is not a carcinogen. We have not done the necessary testing on the formulation to make that statement." *(Id.)*

These flawed regulatory opinions don't even exonerate the active ingredient glyphosate, and certainly not the Roundup formulation of glyphosate and its POEA adjuvant which was not evaluated. The EPA evaluation of glyphosate, alone, states "a conclusion regarding the association between glyphosate exposure and risk of NHL cannot be supported based on the available data due to conflicting results." (9-AA-10203.) The ECHA opinion notes that the epidemiology "indicates a potential concern for human health" with NHL. (8-AA-9832.)

The jury properly rejected Monsanto's reliance on these flawed regulatory findings.

8. *Echeverria* does not support a reduction of punitive damages against Monsanto.

Here, the trial court, in denying Monsanto's motion for a new trial carefully considered and distinguished *Echeverria*, holding that:

> In J&J, the defendant looked [at] the public science and drew a conclusion from that science....In this case, however, Monsanto made efforts to interfere with the underlying public scientific inquiry and as a result cannot have in good faith relied on the available public science in making its decisions about the danger of glyphosate.

(6-AA-8246.) Nevertheless, Monsanto argues that the Court should disregard the trial court's well-reasoned analysis because prior trial court holdings "lack persuasive force because neither [*Johnson* nor *Hardeman*] considered *Echeverria*'s holding." (ARB-XRB 103).

The *Johnson* appellate court has now also reviewed *Echeverria* and has rejected Monsanto's arguments. In accord with the trial court and the Pilliods' arguments, *Johnson* held that "[t]he evidence here is also far different from the facts in recently decided *Echeverria* [] cited by Monsanto in its reply brief and again at oral argument." (2020 WL 4047332 at *32.) *Johnson* noted that in *Echeverria,* "malice could not be shown because it was '*undisputed* that there has not been direct, conclusive evidence establishing genital talc use causes ovarian cancer.'" (*Id.*) With Roundup, however, "there *was* evidence of studies that had concluded that the product increased cancer risks." (*Id. at* 33.) And unlike in *Echeverria*, the *Johnson* court "had no hesitation upholding the jury's causation findings." *(Id.)*

Furthermore, the evidence of Defendants' conduct in *Echeverria* does not remotely approach Monsanto's conduct. *Echeverria* reaffirms that "[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." (249 Cal.Rptr.3d at 678.) *Echeverria* held that

Defendant's actions regarding talc presented a "close case" regarding punitive damages. *(Id.)* The reasons cited by *Echeverria* to affirm the trial court's JNOV ruling on punitive damages are not applicable to the present case:

> - Unlike Monsanto's affirmative attack on scientists, its deceptive manipulation of the scientific literature and its political pressure on the EPA, JJCI's attempts to influencing the literature and regulatory agencies was limited "to describ[ing] the flaws of studies showing a link, point out inconclusive results, and highlight the absence of any established causal link." *(Id. at* 677.)
>
> -Unlike the actions by Monsanto in hiding the Parry report, its toxicology studies and other data such as reports of NHL among its employees, "[t]here was no evidence JJCI had any information about the dangers or risks of perineal talc use that was unavailable to the scientific or medical community." *(Id.)*
>
> - Unlike Monsanto's orchestrated outcry against IARC, JJCI's critiques of available evidence were largely consistent with IARC. *(Id.)*
>
> - Unlike Monsanto's direct influence on the findings of the EPA and other regulatory authorities, there was no evidence that JJCI's efforts had any impact on the findings by third-parties. *(Id.)*
>
> - Unlike the growing acceptance that Roundup causes cancer by qualified scientists, the scientific consensus at the time of plaintiff's diagnosis, including the opinion of plaintiff's expert, was that talc was not a probable carcinogen. *(Id. at* 677, 678.)

Finally, *Echeverria* would likely be decided differently were the trial held today. *Ingham* was a subsequent trial involving the same injury, same product, and same defendant as *Echeverria*. (2020 WL 3422114, at *37.) However, after the *Echeverria* trial and before the *Ingham* trial, evidence was discovered and developed that defendant's talc product contained asbestos and that defendant was actively hiding this fact. *Id. Ingham*, therefore explained it arrived at a different result because at the *Echeverria* trial "no evidence was adduced that samples of Defendants' Products contained asbestos or Defendants sought to conceal this fact by persuading the industry

to adopt the J-41 method rather than a pre-concentration testing method." *(Id.)*

9. Monsanto's efforts to manufacture doubt on the growing consensus that Roundup is genotoxic and carcinogenic is reprehensible and requires a punitive to compensatory ratio of 10:1.

IARC represents the consensus of the independent scientific community as to which chemicals are carcinogenic and is the "the worldwide authority on establishing whether an agent is a carcinogen."(16-RT-2455:14-15.) IARC's preeminent role in identifying carcinogens was supported by a publication authored by over 100 scientists. (6-AA-6636; 14-RT-2128:17-2134:15.) Notably absent from Monsanto's attempt to retry the facts on this appellate review is reference to the public peer-reviewed literature which reflects a growing consensus Monsanto sought to combat. Even authors from the one independent study Monsanto relies on, the AHS study, have concluded that Roundup is a probable carcinogen. (6-AA-6667-6668; 13-RT-1866:23-1877:13.)

As Dr. Benbrook testified to, and published in a peer-review journal, there have been 122 genotoxicity studies on Roundup published by independent scientists in the public peer-reviewed literature. (22-RT-3581:4-3582:4.) 73% of those studies show evidence of genotoxicity. (*Id.)* A published meta-analysis of these studies showed a statistically significant genotoxic effect of Roundup. (12-RT-1727:20-1735:17) In 2007, investigators in South America reported that "[a]erial spraying of [Roundup] by the Colombian government on the border of Colombia and Ecuador has caused a high degree of DNA damage in local Ecuadorian people." (7-AA-8611-8612.) Monsanto coordinated efforts with its contacts in "the US State Department" to help get "in front of the story." (*Id*.)

In 1999, Hardell, et al., published an epidemiological study that found a non-statistically significant increased risk of NHL with glyphosate and noted “glyphosate...might be of concern” and that “Gene mutations and chromosomal aberrations have been reported in mouse lymphoma cells exposed for glyphosate.” (24-RT-3918:13-3919:20) An internal memo by Monsanto reviewing the study noted that it will raise the "index of concern" for glyphosate. (7-AA-8581.) In response to Hardell, Monsanto was worried about the “the economic consequences of adverse, unopposed epidemiologic findings.” (7-AA-8595.)

Therefore, when the McDuffie (2001) observed a doubling of the risk between of NHL for frequent Roundup users, Monsanto hand-delivered a copy of the ghostwritten Williams (2000) article to Dr. McDuffie in an effort to convince the authors to keep the positive findings out of the abstract so the “usual suspects” couldn’t find the data in internet searches. (6-AA-7163-7165, 8332-8336; 7-AA-8604.) Monsanto was worried that “[f]olks like Hardell might seize on the results to say they confirm his findings.” (6-AA-8334.) An updated study by Hardell, et al., in 2002 concluded that “glyphosate was a risk factor for NHL." (16-RT-2492:1-4.)

In 2002, a Monsanto memo concluded that several epidemiology studies “arguably associate glyphosate and other pesticides with lymphopoietic cancers.” (6-AA-7167, 8296.) When the De Roos (2003) study was released, Monsanto noted that “[i]t looks like NHL and other lymphopoietic cancers continue to be the main cancer epidemiology issues [] for glyphosate...” (6-AA-6697-6698.) Monsanto was worried that De Roos (2003) might “add more fuel to the fire for Hardell.” *(Id.)* Importantly, De Roos (2003) noted that its findings “provide some impetus for further investigation into the potential health effects of glyphosate, even though one review concluded that the active ingredient is non-carcinogenic and non-genotoxic.” (29-RT-4939:13-4940:20.) The review referenced by De Roos

(2003) was the ghostwritten Williams (2000) paper. (*Id.*) Eriksson (2008) concluded that "Glyphosate was associated with a statistically significant odds ratio for lymphoma in our study, and the result was strengthened by a tendency to dose response effect…" (16-RT-2520:7-22.) Monsanto's initial reaction was how to "combat" the findings. (6-AA-7174-7175, 8329.)

In June 2014, Monsanto somehow obtained a private email from Dr. Benbrook reporting on the results of the Shinasi meta-analysis which showed a significant increase with glyphosate and NHL, stating that the study would be "taken seriously worldwide." (7-AA-8660.) By the time IARC reviewed Roundup, there were hundreds of studies in the peer-reviewed literature supporting the genotoxic and carcinogenic nature of Roundup. (7-AA-8854-8867.) In 2015, the post-IARC NAPP study authors concluded that "our results are also aligned with findings from epidemiological studies of other populations that found an elevated risk of NHL [and]... were supportive of the IARC evaluation of glyphosate..." (29-RT-4959:4-21; 4963:14-16.)

95 independent scientists concluded in 2016 that the totality of the data supports a finding that Roundup is a probable carcinogen. (13-RT-1866:22-1877:13.) 17 independent scientists unanimously concluded that Roundup was a probable carcinogen in the IARC evaluation. (7-AA-8853; 14-RT-2160:16-20.) Three of the SAP panelists in 2019 concluded, in a peer-reviewed journal that there is a "compelling link" between Roundup and NHL. (14-RT-2311:4-2312:8.)

Outside of the ghostwritten Monsanto studies and proprietary data, there is little support for Monsanto's position in the independent scientific community. As Monsanto's Dr. Goldstein noted when he had to resort to funding the ACSH "we don't have a lot of supporters and can't afford to lose the few we have." (6-AA-6707; 7-AA-8671.) The ACSH is the last refuge for any industry manufacturing doubt. Notably, in a 2008 Washington Supreme Court decision approving an indoor smoking ban, the lone dissent

cited the ACSH for the debunked proposition that "the role of ETS [environmental tobacco smoke] in the development of chronic diseases like cancer and heart disease is uncertain and controversial." (*American Legion Post #149 v. Washington State Dept. of Health* (2008) 164 Wash.2d 570, 633.) As Dr. Goldstein readily admitted, the ACSH has some "warts" and "...if you look back at them historically, some of their positions on tobacco, some of their positions on lead, are not positions that I would agree with." (6-AA-6707.) Nonetheless, Monsanto hired them.

10. Monsanto's conduct parallels the conduct of the tobacco industry and thus supports the jury's punitive damages award.

Monsanto's recruitment of the ACSH to attack IARC and sow doubt about the carcinogenicity of glyphosate is one of many similarities between Monsanto's actions and the actions of the tobacco companies. In 1956, forty years after cigarettes were introduced, the scientific community still remained divided about whether smoking caused lung. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, at 1651.)

In 1954, while the evidence was still in dispute, "the tobacco industry embarked upon a decades-long strategy to create public doubt ...." *(Id. at* 1652. The industry issued a press release stating " '[d]istinguished authorities point[ed] out' that there was no proof that cigarette smoking caused cancer." (*Bullock,* 198 Cal.App.4th. at 551.) The industry pledged to the public that "[w]e accept an interest in people's health as a basic responsibility" and announced the formation of an "[a]dvisory Board of scientists disinterested in the cigarette industry." *(Id.)* "In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer." (*Boeken,* 127 Cal.App.4th at 1653.) Yet, the tobacco industry still "continued their campaign of doubt." *(Id.)* Privately acknowledging a link between smoking and cancer, the industry sought to "avoid promoting any research that would

reveal that link." (*Bullock,* 198 Cal.App.4th at 552.) In a 1970 internal memo it was stated: "Let's face it. We are interested in evidence which we believe denies the allegation that cigarette smoking causes disease." (*(Id. at* 553.) No warnings were added to cigarette packs until the mid to late 1960s. (*Boeken,* 127 Cal.App.4th at 1663.)

Monsanto's claim that the EPA has approved the sale of glyphosate without a cancer warning since 1974 is not compelling in light of the fifty years that cigarettes were sold without a warning. (ARB-XRB 24.) Like the tobacco industry, Monsanto has been engaged in a campaign of doubt as a scientific consensus grows. (RB-XAOB 53-54.) Like the tobacco industry, which falsely claimed it created a panel of "disinterested" experts, Monsanto falsely created panels of "independent" experts. (*Id.* at 61-63.) Like the tobacco industry, Monsanto internally acknowledge a link between Roundup and NHL, yet refused to test its product. (*Id.* at 55, 58-60.) Monsanto refused to conduct the tests Parry recommended and buried his report, because as Dr. Heydens proclaimed "what we are really trying to achieve here," is getting someone who can be "influential with regulators...when genotox issues arise." (6-AA-8387.) Like the tobacco industry, Monsanto, is continuing its campaign of doubt even after the World Health Organization (IARC) concluded that glyphosate is a probable carcinogen. (7-AA-8669.) If anything, Monsanto is more aggressive than the tobacco industry and indeed its attacks are designed to "invalidate" the relevance of a vital scientific organization created to protect human health for the purposes of protecting sales of Roundup and for gaining an advantage in this litigation. (7-AA-8746, 8693.)

In light of the similarities between Monsanto and the tobacco industry and the award of a 16:1 ratio between punitive and compensatory damages in *Bullock* (198 Cal.App.4th at 573) a 10:1 ratio in this matter is reasonable

and well within the constitutional confines outlined in *Simon* and *State Farm*, under both California and federal law..

C. There is no punitive element in the compensatory damage award.

Here, there was no punitive element in the compensatory damages and the reprehensibility was high. The trial court made clear that there was no punitive element in the reduced compensatory damages, stating they do "not contain a punitive element." (6-AA-8274.) The jury's original award of compensatory damages also do not contain a punitive element. The jury was instructed clearly about the distinction between compensatory and punitive damages in the instructions. (32-RT-5488-5491) "Absent some contrary indication in the record, we presume the jury follows its instructions." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) The Pilliods' counsel did not ask the jury to include any punitive element within the compensatory damages. Instead, counsel emphasized that punitive damages are separate and apart from compensatory damages. (32-RT-5603:5-21.) The compensatory damage awards resulted from the twelve jurors assessing the substantial injuries of the Pilliods and applying their collective wisdom to the trial court's instructions on punitive damages and these facts. (RB/X-AOB 44-48.)

A punitive element in compensatory damages occurs only where the Plaintiff directly experienced and witnessed the reprehensible conduct and thus felt outrage and humiliation by how Defendant was treating them. In *State Farm*, the U.S. Supreme Court found a punitive element because there was no physical injury and "[m]uch of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426.) Likewise, in *Roby*, the compensatory damages resulted mainly from the harassment directed at plaintiff by her superiors with an intent to humiliate her and not from a personal injury. (47 Cal.4th at 710.)

Here, no evidence was presented that the Pilliods' distress was caused by outrage towards the company or humiliation from the way they were treated. For example, the Pilliods did not express outrage that Monsanto ghostwrote articles. The Pilliods knew nothing about such conduct before the lawsuit. The Pilliods' damages testimony was exclusively related to how cancer affected their lives. (RB-XAOB 136-140.) They sought no damages for outrage towards Monsanto. This case is similar to *Bullock*, which distinguished *Roby* and *State Farm*, holding that:

> Unlike the situation where the plaintiff is awarded a generous amount for emotional distress arising from economic harm with no physical injury... neither the circumstances here nor the amount of the emotional distress damages suggests that those damages reflect either Bullock's outrage and humiliation or the jury's indignation at Philip Morris's conduct.

(*Bullock*, 198 Cal.App.4th at 566–567.)

Even if there were a punitive element in the damages, it would not be sufficient to reduce punitive damages to a 1:1 ratio. A 1:1 ratio requires a finding of both "relatively low reprehensibility" and a "substantial award of noneconomic damages" containing a punitive element. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718; Gober *v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 222-223 [a "modest" degree of reprehensibility supports a 6 to 1 ratio even where damages contained a punitive element.]) Here, the reprehensibility if Monsanto conduct is very high.

D. Monsanto wholly failed to establish that a substantial punitive damage award to the Pilliods will bankrupt it.

Monsanto speculates that awarding the Pilliods substantial punitive damages will result in thousands of future punitive damage awards in other Roundup cases that will bankrupt the company. (ARB-XRB 122.) However, no California or U.S. Supreme Court case lists speculative future awards as a factor to be considered on appeal in a due process analysis. Rather, under

California law the "contention that the potential liability for punitive damages in other cases for the same design defect renders the imposition of such damages violative of [defendant's] due process rights also lacks merit. Followed to its logical conclusion, it would mean that punitive damages could never be assessed against a manufacturer of a mass produced article." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 812.) In *Stevens v. Owens-Corning Fiberglas Corp.*, the court noted:

> The "overkill" argument has been in the air for many years; it was first prominently discussed in the much-cited dicta off *Roginsky v. Richardson–Merrell, Inc.* (2d Cir.1967) 378 F.2d 832, 839–840. Nevertheless, every appellate court in the nation to consider the argument that punitive damages should be barred in mass tort cases to prevent "overkill" has rejected the idea, though not without misgivings (and dissents) in some cases. The unanimity of this result has been recently recognized, and OCF cites no authority to disturb it

((1996) 49 Cal.App.4th 1645, 1670).

Certainly, "the defendant's exposure to other punitive damage claims is a relevant circumstance which may be introduced at trial." (Restatement (Second) of Torts § 908, Comment *e* (1977); *Tetuan v. A.H. Robins Co.* (1987) 241 Kan. 441, 485.)) However, where at trial the defendant makes "a calculated tactical decision to attempt to avoid *any* liability, rather than trying to mitigate its punitive damages," it is too late to bring up the argument on appeal. (*Tetuan* (1987) 241 Kan. 441, 485; *Stevens,* 49 Cal.App.4th at1666 ["We conclude that evidence of punitive damages imposed in other cases must be presented to the jury in the first instance;] *Grimshaw,* 119 Cal.App.3d at 812 ["If Ford should be confronted with the possibility of an award in another case for the same conduct, it may raise the issue in that case."]) *Stevens* further recognized the danger of gamesmanship in Monsanto's overkill argument because it "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." (*Id.* at 1668.)

Monsanto also provides no actual evidence that a substantial punitive damage award for the Pilliods would bankrupt Monsanto. If the Court does consider Monsanto's argument involving speculative future trials then it should first "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,* 241 Kan. At 488–489.) In *Tetuan*, the court noted that Defendant had failed to provide such proof because it had settled most of the mass tort cases and that 97% of settlement went to compensatory damages which contradicted its claims that speculative punitive damages would bankrupt the company. *(Id.)* The Oregon Supreme Court noted that "[h]indsight demonstrates that the apprehension of the Roginsky court was heavily exaggerated. Of the 1,500 cases, in only 3 did juries award punitive damages. The vast majority of cases were settled and the financial destruction feared by the Second Circuit did not come to pass." (*State ex rel. Young v. Crookham* (1980) 290 Or. 61, 66.)

Here, likewise, one week prior to filing its reply brief on July 1, 2020 Bayer (Monsanto's even wealthier parent corporation) announced via a press release that it settled the "vast majority" of Roundup claims against Monsanto including 95% of cases set for trial. (Pilliods RJN, Ex. A, pp. 1-2.) Bayer told its investors 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.) 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.)

There is no evidence that the Pilliod punitive damage verdict will bankrupt Monsanto. The evidence indicates that Monsanto has resources to pay a substantial verdict; and that there will unlikely be another Roundup trial. Monsanto's failure to raise the repetitive punitive damage argument with the jury waives consideration of the argument on appeal. Otherwise, the court will be required to weigh whether Monsanto's representation to its stock-holders that it will soon resolve all claims is more or less likely to be true than Monsanto's representation to this court made one week later that it is in danger of insolvency due to "potentially thousands of litigants" who could go to trial and be awarded punitive damages. (ARB-XRB 122.)

Furthermore, true to form, Monsanto explains in the press release that the settlement is made purely for financial reasons; it takes no responsibility and expresses no remorse for its actions; and continues to insist that "Roundup does not cause cancer." (Pilliods RJN, Ex. A, p. 4) This press release indicates that, not only does Monsanto have the ability to pay a substantial verdict to the Pilliods, but also that the punitive damages as reduced by the trial court are plainly insufficient to deter Monsanto from continuing its reprehensible behavior with respect to Roundup. The punitive damage award must be increased.

III. CONCLUSION

The trial court erred in substituting its judgment for the judgment of the jury in reducing compensatory damages by relying on the preference statute to create a presumption of "a legislatively acknowledged increased risk of death or incapacity due to being over the age of 70." (6-AA-8265.) Therefore the jury's compensatory damage verdict of $34,251,166.7623 for Ms. Pilliod, and $18,047,296.01 for Mr. Pilliod should be reinstated.

In light of the high reprehensibility of Monsanto's behavior, the severe physical harm to the Pilliods, and the high net worth of Monsanto, a punitive damages award of no less than ten times the compensatory damage award comports with due process. That amount would be $342,511,667.60 for Ms. Pilliod, and $180,472,960.10 for Mr. Pilliod. Such an award is necessary so that Monsanto changes its behavior and does not simply write off its conscious disregard for human safety as a routine cost of doing business.

July 31, 2020

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

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Dated: July 31, 2020

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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 Cross-Appellant's Reply Brief on all interested parties in this action as follows:

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Via U.S. Mail

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.

Jeffrey A. Travers