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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

Case No. CGC-16-550128

MONSANTO COMPANY, et al.,

Defendants.

-----/

Proceedings held on Tuesday, August 7, 2018,
Volume 25, before the Honorable Suzanne R. Bolanos,
at 9:07 a.m.

REPORTED BY:

LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

Job No. 2983883A

Pages 5001 - 5129

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1 Tuesday, August 7, 2018

2 9:07 a.m.

3 Volume 25

4 San Francisco, California

5 Department 604

6 Judge Suzanne Ramos Bolanos

7

8

PROCEEDINGS

9

09:07:36

10 THE COURT: Good morning, Counsel. I understand
11 there's an issue with the jury instructions. What is the
12 issue?

13 MR. HILMERT: It's actually not with the jury
14 instructions. It's the verdict form, and it was the
09:07:45 15 issue that we were discussing yesterday that we were
16 going to meet and confer about and try to reach
17 resolution on, and ultimately, we ended up in the same
18 place we were when we were talking to your Honor
19 yesterday.

09:07:56

20 The difference is we are proposing the punitive
21 damages section of the verdict form be basically the
22 VF3902 Form and no more. We actually had a typo in our
23 version. We're going to correct that. But otherwise,
24 our version is right out of VF3902. Plaintiff's version
09:08:20 25 is, I believe, VF3902 plus some other stuff.

1 And since we used the straight CACI VF forms for
2 everything else, our position is it should apply also to
3 the punitive damages section. Their position, I
4 understand, is different, and so that's the difference
09:08:39 5 between our verdict forms. Everything else is the same,
6 other than I believe the heading to the punitive damages
7 section. They have "Punitive Damages" as the heading.
8 We have "Claim of Malice Or Fraud." I don't care about
9 that, about the heading. The only thing substantive is
09:08:54 10 what I just described --

11 THE COURT: Okay. So, then, if there's no
12 preference with respect to the heading, then we can go
13 ahead and use the "Punitive Damages" heading, so that's
14 fine.

09:09:06 15 And then what is your position, Mr. Dickens,
16 with regard to the text?

17 MR. DICKENS: Our position, your Honor, is our
18 text is exactly defendant's initial proposed text. I
19 mean, we -- it's exactly the same. Ours is VF3902, 3903
09:09:26 20 and 3904, which comports with the actual jury instruction
21 on punitive damages in which they'll be receiving.
22 There's three ways in which the jury will be able to find
23 punitive damages are appropriate here. If we only use
24 one, we're cutting out two particular elements in which
09:09:44 25 they could find malice or oppression.

1 So in order to make it complete with the jury
2 instructions, which allows not only if an officer,
3 director or managing agent act on behalf of Monsanto, but
4 also if they authorize it or if they knew of the conduct
09:10:00 5 and adopted and authorized, so there's three specific
6 ways under the particular jury instruction. Defendants
7 are the ones who actually proposed this initial jury
8 instruction first. It's only appropriate to make it
9 complete.

09:10:13 10 THE COURT: Okay. So the instruction -- the
11 text of the instruction itself explains to the jury that
12 they can find that the conduct was approved or ratified
13 or adopted by the officers of Monsanto; isn't that right?
14 So all of this is in the text of the jury instructions.
09:10:34 15 You can argue it. I think it actually is confusing if
16 you keep repeating it, so we'll just use the defense --
17 the simpler version, VF3902.

18 MR. DICKENS: The only issue there, your Honor,
19 is, you know, that is only one particular element. You
09:10:55 20 know, the 3902 is just one of the three. And so I think
21 what's contemplated is that all three would be used or
22 the simpler version, which is just the 3900, which is
23 the, "Did they commit malice or oppression?" And so if
24 we're going to use just one, then, essentially -- you
09:11:14 25 know, even if we argue when they get to the actual

1 verdict form, you know, those other two don't technically
2 fall under that one capsule of the 39 -- that would be in
3 the verdict form for 3902.

09:11:30 4 So, you know, I think what's contemplated if
5 we're going to list all three is to list all three so
6 that it comports specifically with the actual instruction
7 that they'll be given, because even if we argue it and
8 they get to the jury form, you know, it's kind of cutting
9 two legs off of the three-legged stool here.

09:11:46 10 THE COURT: I disagree. The standard
11 instruction for punitive damages for a corporate entity
12 defendant is VF3902 --

13 MR. WISNER: No --

14 THE COURT: -- and so that's the one we'll use.

09:11:58 15 MR. WISNER: -- it's actually three
16 instructions, your Honor.

17 That's our point. The standard instruction is
18 not '02. It's '02, '03 and '04. All three of them are
19 the standard CACI instructions, and it would be actually
09:12:10 20 in error to simply give one of them. If you give one,
21 you have to give all three, is actually what the
22 instructions say, because those three specific elements
23 are part of the punitive instruction.

24 The way it's currently written by just doing
09:12:25 25 '02, you are not asking about two of the elements,

1 notwithstanding the fact that it's in the instructions,
2 and so it actually creates an internal error, your Honor,
3 so we either do the general one, which is what we
4 originally wanted, or we do what the defendants
09:12:39 5 originally proposed. Either one works.

6 So the one that they're doing right now is
7 actually in error. That's the problem, and that's why
8 we're trying to fix it with the CACI instructions.

9 THE COURT: It's not in error. The committed,
09:12:53 10 authorized, ratified is essentially three different
11 versions of the same thing, so we'll stick with 3902.
12 You have made your record. Thank you.

13 Anything else on the verdict form?

14 MR. HILMERT: -- no, your Honor.

09:13:07 15 THE COURT: Okay. Great.

16 Then we also have the issue of the proposed
17 motions to strike the testimony of two prior witnesses.
18 One is motion to strike portions of testimony given by
19 Mr. Benbrook. I would note that there were objections
09:13:35 20 that were sustained that correspond to all of the
21 proposed testimony to be stricken.

22 So, Mr. Wisner, do you have any objection to
23 this on Benbrook? All of the objections were sustained.

24 MR. WISNER: On Benbrook, the problem is they're
09:13:55 25 seeking to strike questions, which doesn't make any sense

1 to me, but I don't have any problem with Benbrook, your
2 Honor. You're right. They were sustained, so it's a
3 non-issue.

09:14:07 4 THE COURT: Okay. Then the motion to strike the
5 submitted highlighted portion of the Benbrook testimony
6 is granted.

7 MS. EDWARDS: Does that leave the question in
8 the record, your Honor, or are you striking both the
9 questions and the answers? We only highlighted for your
09:14:20 10 Honor's ease and focusing in on the actual violations of
11 the motions *in limine*, but our request was that the
12 entire question and answer be stricken.

13 THE COURT: Well, I'm granting the request to
14 strike everything that was highlighted, because the
09:14:39 15 objections to all those questions were sustained. Is
16 there any reason, Mr. Wisner, that you want the question
17 to remain without the answer?

18 MR. WISNER: I don't believe there's any. But,
19 your Honor, just for the record, we do oppose the motion
09:14:51 20 to strike, but we understand the Court's ruling. Just
21 for the record, we didn't waive it, and our argument,
22 your Honor, is also to the extent that there's anything
23 discussed in there where a timely objection was not made,
24 our position is that Monsanto has waived any objection
09:15:05 25 now, but --

1 THE COURT: Well, with regard to the Benbrook
2 testimony, everything that they're requesting to strike
3 was objected to, and all of the objections were
4 sustained.

09:15:13

5 MR. WISNER: That's correct. So that would not
6 apply to this. It would apply more to Dr. Sawyer's
7 testimony.

09:15:27

8 THE COURT: Okay. So then turning to the Sawyer
9 testimony, which portions of this, if any, are you
10 opposing, Mr. Wisner?

09:15:47

11 MR. DICKENS: I can handle that. Your Honor,
12 we're posing all of it, and the issue here is Dr. Sawyer
13 didn't actually violate any particular rule of the Court.
14 Prior to him taking the stand, they raised some internal
15 email documents and some internal studies as well, but
16 the Court specifically said, this is page 3569 of the
17 transcript, "He can be questioned about them, but until
18 the document is in evidence, you can't read from the
19 document itself."

09:16:02

20 He said -- the Court said, "You can certainly
21 question him about his opinion and the basis for his
22 opinion, but you can't read from documents that are not
23 in evidence."

09:16:15

24 That's not what they're objected to here.
25 They've highlighted any time he mentioned a Monsanto

1 study. So, for example, you know, the first two here,
2 all he's saying is, you know, there's some Monsanto
3 studies, but he's not talking about any details about
4 them. He's not reading from the documents. He
09:16:28 5 specifically asked, "What did you review in reaching your
6 opinions," on the second highlighted section. He said,
7 "A variety of documents also from Monsanto, memorandums,
8 emails, official documents." He's just stating the basis
9 of his opinion here.

09:16:43 10 The bigger issue here is they waived -- and the
11 argument here, they didn't object. They didn't move to
12 strike at the time. There's really no objection here by
13 which we could go back and cure or ask an additional
14 question to try to cure any objection that they may have.

09:16:59 15 So really he hasn't violated any rule of the
16 court in all of these. You know, for example, on the
17 third page, trial transcript 3641, he was asked the
18 question, they objected, and the Court said he may answer
19 that question. And he answered, "Yes, yes. Monsanto's
09:17:16 20 performed one, two -- at least eight studies," but he
21 didn't go into the details. He didn't describe what was
22 in them. He didn't discuss any of the particulars with
23 respect to what those studies were.

09:17:31 24 So all he's doing here is forming the basis of
25 his opinions, explaining what those are. He didn't go

1 into -- you know, discuss any further details about
2 those. Now, you know, they didn't raise any type of
3 objection to what he was doing until late in the day --
4 in the afternoon. And the Court at that time in point
09:17:46 5 instructed Dr. Sawyer to just answer the questions that
6 were being asked of him, but before that, Dr. Sawyer had
7 no instruction at all from the Court.

8 THE COURT: All right. So the basis of the
9 request is that some of his testimony is in violation of
09:18:00 10 the motions *in limine*; is that correct?

11 MS. EDWARDS: It is, your Honor.

12 THE COURT: Okay. So why don't we go through
13 that.

14 Number 1, he references the Monsanto's UK POEM
09:18:10 15 studies?

16 MS. EDWARDS: Your Honor, if I may, the vast
17 majority of these are actually our objection that he
18 was -- there are 28 times that he tried to discuss
19 Monsanto documents, which were hearsay.

09:18:23 20 Mr. Lombardi did object in sidebar. There's
21 case law, *People versus Hill*. But at some point in time,
22 it becomes futile for the lawyer to be popping up and
23 objecting repeatedly. We made our objections quite
24 clear. Dr. Sawyer is a professional testifying expert,
09:18:40 25 and he knew quite well what he was doing.

1 So the vast majority of these are Dr. Sawyer
2 trying to do an, "Oops, I know about documents that the
3 jury is never going to see." And he did it quite
4 blatantly.

09:18:54

5 There is one violation of the order your Honor
6 ordered that morning, which is about the bans in other
7 countries, another point. And that's on page 3, at
8 number 8. Minutes before he took the stand, your Honor
9 issued a ruling, which he then violated. That is a
10 blatant violation of your Court's order.

09:19:09

11 The rest of them, frankly, are just 28 attempts
12 of him conveying to the jury that he had documents he
13 couldn't talk about. And there were repeated objections
14 to it. At some point in time it becomes a futile
15 exercise.

09:19:25

16 THE COURT: Okay. So let's try to go through
17 this quickly.

18 Number -- in Block Number 1, Monsanto UK POEM
19 studies. Are those studies that were excluded from --
20 based on the motions *in limine*?

09:19:40

21 MR. DICKENS: They were not, your Honor.

22 MS. EDWARDS: But it is hearsay. He was
23 instructed not to talking about documents -- contents of
24 documents.

09:19:51

25 MR. DICKENS: He was not instructed to do that,

1 your Honor. He was instructed not to talk about the
2 specifics.

3 THE COURT: Now, turning to the third block
4 here, he says, in referencing studies, "I also have a
09:20:09 5 large volume of inhouse studies from Monsanto, many of
6 which were never provided to the EPA or any regulatory
7 agency."

8 Is that something that we had talked about and
9 that was not to be referenced?

10 MR. DICKENS: No, your Honor. It was not. And
11 there was no objection with respect to his question or
12 answer or any motion to strike at that point in time.

13 MS. EDWARDS: Again, your Honor, it's a
14 professional testifying expert. They know better than to
09:20:46 15 do that. And it is -- there were discussions in sidebar
16 about having Dr. Sawyer not do exactly what he was doing
17 here, which is suggesting there were -- there were
18 documents that were not provided to someone, that the
19 jury couldn't see, that he couldn't talk about.

20 THE COURT: Okay. All right. So I'm going to
21 strike, in Block Number 3, the highlighted testimony. So
22 that's at -- that's on 7/26/18 trial testimony, at 3598,
23 the portion of his answer that begins with the words,
24 "But I also," and continues to the end of that sentence.
09:21:22 25 So that may be stricken as not relevant and more

1 prejudicial than probative with respect to the suggestion
2 that there were studies that were never provided to the
3 EPA.

09:21:45 4 Now, there's a reference in Block Number 4 to
5 the operator exposure studies. Were those -- were any of
6 those studies excluded?

7 MR. DICKENS: They were not, your Honor.

8 MS. EDWARDS: Nor were they in evidence, your
9 Honor.

09:21:53 10 MR. DICKENS: Your Honor, he's merely stating
11 what he reviewed in reaching his opinions in this case.
12 That was a major basis of -- of what he relied upon in
13 reaching his analysis as to Mr. Johnson's total exposure.

09:22:13 14 And the fact that -- you know, he can rely on
15 hearsay. He's just saying, "I relied on these." Once
16 again, he's not talking about any particulars, so it's
17 not a basis for a motion to strike simply by stating that
18 this study exists.

09:22:29 19 THE COURT: In Block 6, the phrase "PCB" is
20 highlighted. Why is that highlighted?

21 MS. EDWARDS: There's a motion *in limine*
22 excluding any reference to PCBs, your Honor.

23 MR. DICKENS: Yeah. And we have no objection to
24 just striking the mention of PCBs. It was our
09:22:42 25 understanding that Monsanto was moving to strike the

1 entire question and answer. We can -- we have no
2 objection to just striking the PCB from that sentence.

3 THE COURT: All right. Then we'll strike PCB.

4 Then moving on to Block Number 7. And this is,
09:22:53 5 again, in -- we're still in direct?

6 MR. DICKENS: That's correct, your Honor.

7 MS. EDWARDS: Yes, your Honor. This has the
8 same problem --

9 THE COURT: Is this a reference to Dr. Parry's
09:23:08 10 report?

11 MR. DICKENS: It is not, your Honor.

12 THE COURT: Who is he referencing when he says,
13 "Monsanto toxicologists put this together"?

14 MR. DICKENS: I believe this is with respect
09:23:18 15 to -- we had a discussion previous to court that day with
16 respect to the PowerPoint, which was already in evidence,
17 in which he did not review with respect to surfactants.

18 And I believe that that testimony is specific to
19 that. That's why the toxicologists put that PowerPoint
09:23:37 20 together over the last 15 years. And so he's
21 specifically talking about a document that the Court
22 allowed him to talk about.

23 MS. EDWARDS: And he's opining about Monsanto's
24 reason for putting together this document. Your Honor,
09:23:50 25 it's improper. He can't opine about Monsanto's --

1 MR. DICKENS: Your Honor, that's an objection
2 that needed to be made at the time.

3 THE COURT: All right. Then moving on to Block
4 Number 8.

09:24:04

5 MR. DICKENS: Once again, we can agree, if it's
6 just the highlighted section after, "Oh, absolutely,
7 yeah."

8 THE COURT: Okay. "In other parts of the world
9 they have to," that would be stricken then.

09:24:17

10 MS. EDWARDS: Your Honor, I would ask that that
11 question and answer be stricken. There's no way to carve
12 out just that -- that particular portion of the answer.

13 MR. DICKENS: I think we just did, your Honor.
14 I think there is a way to do that.

09:24:35

15 MS. EDWARDS: I think it leaves the answer
16 incomplete and misleading.

17 THE COURT: All right. We'll strike the entire
18 answer in that portion.

19 MS. EDWARDS: Thank you, your Honor.

09:24:58

20 THE COURT: All right. Then moving along --

21 MR. WISNER: Your Honor, just for the record,
22 they sell -- Monsanto sells non-POE Roundup in the United
23 States. So that is not misleading, if you just strike
24 the references to other countries. And, in fact, that's
25 an essential part of our design defect claim. That's a

09:25:15

1 piece of evidence that's an essential part. You're
2 throwing the baby out with the bath water on that one. I
3 think that's going too far.

09:25:30

4 THE COURT: Well, is this -- is this product
5 sold in the United States?

6 MR. WISNER: Yes.

7 MR. DICKENS: There are glyphosate formulations
8 without POEAs that are sold in the United States. And
9 they objected --

09:25:39

10 THE COURT: Then we'll only strike the reference
11 to "other parts of the world."

12 Okay. Then --

09:26:00

13 MS. EDWARDS: And, your Honor, just -- just for
14 the record, I realize you're done with that argument, but
15 I do object. I think that leaves -- if that's what his
16 answer was going to be, he should have offered that
17 answer. That's not what he said. He went straight to
18 "other parts of the world." It should be stricken in its
19 entirety.

09:26:08

20 THE COURT: I understand. I think I've just
21 finished with that.

22 All right. Moving on to Block Number 9.

09:26:24

23 MS. EDWARDS: Again, it's Monsanto's own
24 documents, and he admits that. This is not -- the
25 expert's not supposed to be talking about what Monsanto's

1 documents admit or, frankly, what they state. It's
2 hearsay.

3 THE COURT: All right. So on Block Number 9,
4 the highlighted phrase may be stricken.

09:26:43 5 All right. Then there's -- in Block Number 10,
6 he says here he's examined the studies, but he doesn't
7 comment on the content.

8 MS. EDWARDS: That's fine, your Honor. We can
9 move on to Number 11.

09:27:02 10 THE COURT: All right. Then moving on to Block
11 Number 11. But this is a question now. And this is a
12 question by Counsel?

13 MS. EDWARDS: It was, your Honor.

14 MR. DICKENS: Your Honor, and, specifically, I
09:27:17 15 think this is addressing trying to get Dr. Sawyer to
16 understand that, "I don't want to hear about the
17 specifics of the study, but you did review these in
18 reaching your opinions." I think it's completely
19 appropriate as a guidance to him to answer further.

09:27:31 20 MS. EDWARDS: The problem is he then went a step
21 further and, again, said, "Based upon the studies
22 conducted by Monsanto," and then he gives a statement
23 that he attributes to those studies, which is improper
24 and hearsay.

09:27:45 25 MR. DICKENS: He's not attributing those. That

1 is his opinion in this case. He relied on the Monsanto
2 studies in reaching that opinion.

3 THE COURT: All right. That may stand.

4 MS. EDWARDS: Your Honor, could we at least
09:28:08 5 strike the "based upon the studies conducted by Monsanto
6 for the contractors"? He can offer his opinion about the
7 rate of absorption, but talking about the studies
8 themselves, it was not published to the jury. We had an
9 agreement on that. It's hearsay.

09:28:22 10 If that's his opinion, it's 10 percent. That's
11 his opinion. But I'd ask that the rest of it be
12 stricken.

13 THE COURT: That may stand, that's fine.

14 All right. Then moving on to
09:28:58 15 Block 13.

16 MS. EDWARDS: Your Honor, did we discuss
17 Block 12? It goes on to page 6, which is, frankly, the
18 bigger issue.

19 THE COURT: Page 6. Okay. "The amount of
09:29:10 20 protective gear, for example, in the Monsanto operator
21 exposure studies where the individuals wore patches for
22 testing."

23 MS. EDWARDS: Right.

24 THE COURT: Was that excluded? Was that study
09:29:20 25 excluded?

1 MS. EDWARDS: It was not excluded, but, again,
2 he's talking about the content of studies rather than
3 just offering his opinions.

4 MR. DICKENS: If it's simply the highlighted
09:29:32 5 part, your Honor, that's fine. It's really not that
6 essential.

7 THE COURT: Okay. Then the highlighted portion
8 may be stricken.

9 Then going on to Block 13, that's a continuation
09:29:45 10 of that same discussion.

11 MS. EDWARDS: It is, your Honor.

12 MR. DICKENS: And just for the record, I believe
13 at this point this is actually now cross-examination at
14 this time, your Honor.

09:29:56 15 THE COURT: Is Block 13 cross?

16 MS. EDWARDS: I don't believe it is. No, that's
17 not.

18 Oh, it actually may be. I apologize, your
19 Honor. I'm not sure.

09:30:08 20 THE COURT: Well, that actually makes a
21 difference.

22 MS. EDWARDS: I understand.

23 MR. DICKENS: I actually have the transcript
24 here, your Honor.

09:30:14 25 MR. WISNER: Based on the questioning, I'd be

1 shocked if that was cross for Number 12.

2 THE COURT: No, Number 13.

3 MR. WISNER: Oh, Number 13.

4 Yeah, I believe that is cross, your Honor.

09:30:26

5 THE COURT: Number 13 is cross?

6 MR. DICKENS: Yes, that is cross, your Honor.

7 Cross begins at 3679 of the transcript. So at this
8 point, it turns over to cross.

9 THE COURT: Okay. Then that may stand.

09:30:39

10 What about 14? Is that still cross, or is
11 that --

12 MR. DICKENS: That's correct, your Honor. It's
13 still cross.

09:30:50

14 THE COURT: Okay. Then 15, are we still on
15 cross, or are we back on redirect?

16 MR. DICKENS: Still on cross.

17 MS. EDWARDS: That's cross.

18 THE COURT: All right. Then 16, is that cross
19 or redirect?

09:31:03

20 MR. DICKENS: That's still cross as well, your
21 Honor.

22 THE COURT: When do we get back to redirect?

23 MR. DICKENS: I'm looking for that as we speak.
24 There's very limited cross, I believe.

09:31:35

25 3777.

1 MR. WISNER: So that would be Block, your Honor,
2 23.

09:31:54

3 MS. EDWARDS: 23, 24 and 25. And this gets into
4 the, "Whoops, I have all this stuff I can't tell the jury
5 about."

6 THE COURT: Okay. Then starting at 23 -- and I
7 do now remember that this statement stood out when I was
8 reviewing it -- he says on redirect, "There's other
9 things, but I can't talk about them."

09:32:10

10 MR. DICKENS: From that point forward, your
11 Honor, and the question and the next answer, I mean,
12 we're fine with striking that.

13 THE COURT: Okay. So the highlighted portions
14 of 23 and 24 and 25 may be stricken.

09:32:25

15 MS. EDWARDS: Thank you, your Honor.

16 THE COURT: Okay. So then we will bring the
17 jury in.

18 MR. GRIFFIS: We have to raise one more issue,
19 your Honor, regarding slides.

09:32:34

20 MR. WISNER: There's objections to my slides.

21 May I approach, your Honor?

22 THE COURT: Yes.

23 MR. WISNER: My slides are unnumbered, your
24 Honor, but I put two little pink tabs next to the two I
25 think that Monsanto is concerned with.

09:32:59

1 MR. GRIFFIS: I need to do two housekeeping
2 things first, your Honor.

3 THE COURT: Okay.

09:33:07

4 MR. GRIFFIS: One is I need to place on the
5 record that the OPP 2016 report was referred to through
6 the trial by two different exhibit numbers, 2481,
7 predominantly, and 2482. And they're exactly the same.
8 And the one we've put into evidence is 2481. So if there
9 are references in the transcript to 2482, that's really a
10 reference to 2481.

09:33:27

11 The other is that I understood your Honor to
12 deny our directed verdict question yesterday, but I don't
13 believe you actually said so on the record. So I would
14 ask you to do so, that we --

09:33:41

15 THE COURT: All right. Yes. This matter will
16 proceed to the jury, so the motion for a directed verdict
17 is denied.

09:33:53

18 MR. GRIFFIS: Okay. So with regard to the
19 slides, your Honor, the issue as to both of the marked
20 slides is the same, which is that this is an issue that
21 we addressed in a motion *in limine* about comparisons
22 between Monsanto and big tobacco. And the -- we won't
23 reargue that. We did argue it before your Honor, and
24 there wasn't a final ruling on it, because Mr. Wisner
25 said he wouldn't say any such thing in opening. So it

09:34:12

1 was moot for the moment.

2 The main point that we're making there is that
3 this isn't a trial about big tobacco. The jury isn't
4 going to be making evaluations about it and seeing the
09:34:26 5 evidence about it. And it's a prejudicial comparison.

6 And Mr. Wisner stayed away from that in opening.
7 And now in closing, there are two slides that are going
8 to be making comparisons, quoting testimony that was
9 elicited from Dr. Mucci and Dr. Benbrook about tobacco
09:34:44 10 companies. And the obvious point of the slides is to say
11 that, "Here is Monsanto talking about confounding, which
12 is just the same as those evil tobacco companies did;
13 therefore, Monsanto is doing the same thing as them."

14 This isn't a trial about tobacco, and the jury's
09:35:00 15 heard plenty of testimony about confounding, that they
16 can evaluate on its scientific merits, not on the tobacco
17 comparison, your Honor.

18 So we object to those two slides on that basis.

19 THE COURT: All right. So just so I can make
09:35:14 20 sure I'm looking at the correct slides, the first slide
21 is titled "Three Pillars of Cancer Science, Epidemiology,
22 Monsanto's Arguments"?

23 MR. GRIFFIS: There's a quote. Yeah, a picture
24 of Dr. Mucci --

25 THE COURT: Okay.

1 MR. GRIFFIS: -- and a quote about tobacco and
2 confounding. And then the other one is a similar one
3 with Dr. Benbrook.

4 THE COURT: Oh, with Dr. Benbrook.

09:35:37

5 MR. GRIFFIS: Two slides on -- also the same
6 subject, "Confounding and Big Tobacco."

7 THE COURT: All right. Mr. Wisner?

09:36:02

8 MR. WISNER: Yes, your Honor. So a couple
9 things. The testimony that's copied and pasted in these
10 two slides is directly from the transcripts. There was
11 no objection to either question by any party at any time
12 about this.

09:36:18

13 Dr. Mucci, on direct, specifically credited
14 epidemiology for finding the association between tobacco
15 and lung cancer. And she was saying that's what's so
16 great about epidemiology. That was her argument.

17 And her big defense to the epidemiology in this
18 case, specifically that there are confounders. That was
19 her big point.

09:36:32

20 And then I said, "Well, isn't it true the very
21 thing that you credit epidemiology for, that's exactly
22 how they try to discredit the epidemiology when they were
23 talking about tobacco?" And she said, "Yeah, that's
24 true."

09:36:44

25 And so the point of this testimony -- putting

1 aside how it paints Monsanto, the point of this testimony
2 and my discussion of it is that historically this issue
3 of confounding has been misinterpreted, particularly at
4 the beginning part of the science, when we're starting to
5 see risks. Just like tobacco, they started fighting it.

09:37:04

6 Incidentally, we have even more evidence of it
7 than that. So following that, there's a document in
8 evidence, Exhibit 321. It's in evidence. It came in
9 through Dr. Goldstein's testimony.

09:37:17

10 And in that document, he specifically talks
11 about, quote, "While I would love to have more friends
12 and more choices, we don't have a lot of supporters and
13 can't afford to lose the few we have." And he's talking
14 about the ACHS; right, which is an organization. It
15 stands for the American Counsel Chemistry -- Council of
16 Science -- it's one of those acronyms.

09:37:32

17 And the point is they're an industry-sponsored
18 group, and there was testimony about that. And
19 Dr. Benbrook said, "Yes, they're the ones that held out
20 to the very end saying confounders in tobacco," all the
21 way up into the '80s. And so the fact that that is the
22 company that Monsanto seeks to keep and they're making
23 the exact same scientific arguments here is something the
24 jury can consider. And, in fact, it's in evidence.

09:37:51

09:38:05

25 So I'm not offering anything that wasn't opened

1 either through testimony by them or us. So I -- I don't
2 believe -- I didn't talk about it in opening, because
3 there was no evidence about it, and I wasn't going to
4 talk about it.

09:38:18

5 But now it's in evidence, it's on the table, and
6 the jury can consider that in weighing this important
7 scientific issue.

09:38:33

8 MR. GRIFFIS: So Mr. Wisner is making my point
9 for me by saying this is the company Monsanto chose to
10 keep, as if Monsanto is advocating for, you know, issues
11 that tobacco companies did.

09:38:52

12 And this is testimony that's elicited from their
13 witness, by them, Dr. Benbrook, for the self-serving
14 purpose of making that parallel so that it can be used to
15 argue that Monsanto is behaving like the tobacco
16 companies.

09:39:07

17 The issue about confounding should be evaluated
18 on the merits. They -- every single one of their experts
19 talked about epidemiology. Mr. Wisner has a slide saying
20 that they all did and apparently is claiming expertise on
21 the subject. Confounding was amply discussed in terms of
22 the studies. And with expert testimony, the slur about
23 tobacco and the comparison to big tobacco is unnecessary
24 and unduly prejudicial.

09:39:25

25 And it's something that the jury has not been

1 given any evidence to judge. It's based on the prejudice
2 and bias in the mind of the jury, "Oh, that's improper.
3 We know it was bad. We know it was wrong. We know there
4 was no science." But they haven't heard that. They
09:39:39 5 haven't heard that scientific debate, and they don't have
6 any evidence to judge that scientific debate.

7 So allusion has been made a couple of times in
8 this trial, but that shouldn't be made in closing.

9 THE COURT: Mr. Griffis, I understand your
09:39:51 10 argument, and you make a good point. But let me ask you
11 a question: This testimony that is repeated on this
12 slide, was there an objection at the time this testimony
13 was given?

14 MR. GRIFFIS: There was not.

09:40:08 15 THE COURT: All right. Well, if the testimony
16 was actually given during the course of the trial and
17 it's in evidence and there was no objection, then at this
18 point any objection to this testimony is waived.

19 MR. GRIFFIS: Okay. We would ask your Honor
09:40:36 20 that Mr. Wisner not be permitted to make argument about
21 it, comparing Monsanto to tobacco companies, but to say
22 what was said and move on.

23 THE COURT: All right. I think that that's
24 fair.

09:40:49 25 Which is to say, Mr. Wisner, this testimony, you

1 correctly pointed out, is in evidence. The witness has
2 responded and gave these answers. And any objection,
3 including any objection that it's prejudicial, was not
4 made at that time and, therefore, now it's waived.

09:41:10

5 Having said that, though, the quotes are taken
6 out of context -- out of the context of the witness'
7 entire testimony. And it can be -- and there's certainly
8 an argument to be made that they're given undue influence
9 by isolating these statements and putting them on the
10 slide in bold, red print.

09:41:29

11 So just be careful that you don't cross the line
12 and begin making prejudicial arguments, because then
13 you'll reopen that door, and I'll have to decide whether
14 or not it's more prejudicial than probative.

09:41:45

15 MR. WISNER: Here's the problem with that -- and
16 I appreciate the Court's advice. I do.

17 The problem with that is literally my job is to
18 point out evidence that supports my position, that
19 persuades the jury into agreeing with me. And that's not
20 prejudicial in the sense that it's undue prejudice. I

09:41:59

21 can make arguments based on the evidence in the record.

22 And I have every intention of telling this jury
23 that every major carcinogenic thing that's occurred
24 throughout time had the same story of Monsanto, whether
25 it be tobacco, whether it be asbestos, whether it be

09:42:17

1 benzene. That there was a fight that the science was
2 emerging and they'd been in the market for years. And
3 that has come into the record through various people's
4 testimony. And that's an entirely appropriate argument
09:42:32 5 to be making.

6 Now, am I saying that Monsanto is as bad as the
7 tobacco company? I'm probably going to say worse,
8 actually. I am. I mean, this is an argument, and I
9 intend to persuade this jury to award punitive damages
09:42:45 10 against this company. And I have a right to do that,
11 provided I don't misstate the evidence.

12 So I understand you're saying I'm getting close
13 to the line here, but argument at closing argument is
14 where argument happens; right? And I'm allowed to spin,
09:43:02 15 cajole. And if they don't like what I'm doing, that's
16 their job, to respond in argument, saying, "This is out
17 of context. Let me show you the rest of the sentence."
18 And that's -- that's argument. That's what trial
19 lawyering is about.

09:43:14 20 And so, you know, that's my intention, your
21 Honor, and I don't think that that's improper by any
22 measure whatsoever.

23 MR. GRIFFIS: My alarm only grows, your Honor.
24 There's been no testimony whatsoever, no witness that
09:43:29 25 saying every substance that's ever been claimed to be

1 carcinogenic and ultimately proved to be carcinogenic was
2 defended by these same methods, by arguments about
3 confounding, that this happened with asbestos, this
4 happened with tobacco, et cetera. That's something
09:43:42 5 Mr. Wisner came up with, and it's far beyond the record
6 and would require many, many, many trials to adequately
7 place that before the jury.

8 THE COURT: Yes, I agree.

9 So Mr. Wisner, when you argue, make sure that
09:43:55 10 you base your argument on the evidence that is before the
11 jury.

12 MR. WISNER: Absolutely.

13 THE COURT: So these statements are in evidence,
14 and you're being permitted to put them on a slide and
09:44:07 15 bold them in bright red. But remember also that your
16 argument has to be based only on the evidence that's been
17 presented and not on matters that are outside of their
18 purview. Do you understand?

19 MR. WISNER: Absolutely, your Honor.

09:44:25 20 THE COURT: Okay. All right.

21 Anything else, then, before --

22 MR. GRIFFIS: Yes. I want to lodge an objection
23 to this slide, which is the third. It's a scale with a
24 feather on it, and my objection is that it says, "The
09:44:38 25 preponderance of the evidence: 50.01 percent." The

1 number of decimals is not very important.

2 But my objection is that the rules on the burden
3 of proof and the California standard on the burden of
4 proof has no numerical translation. It's not part of the
09:44:59 5 law, that it is 50 percent or greater than 50 percent or
6 50.01 percent or any other number. And we object to its
7 quantification in this slide.

8 MR. WISNER: I believe that slide is used in
9 every closing argument by every plaintiff's lawyer in the
09:45:16 10 State of California. So I don't think it's ever been
11 excluded in the history of trial lawyering, and it would
12 be absurd to do that here.

13 We often talk about 50, 51 percent as a way to
14 explain probability. And I don't think there's anything
09:45:29 15 improper about this whatsoever.

16 THE COURT: All right. I'll allow the slide.
17 Keep in mind that with regard to the punitive damages,
18 there is a higher burden of proof. So please make sure
19 that you don't confuse them with regard to the burden of
09:45:46 20 proof on that issue.

21 MR. WISNER: I specifically quote that, your
22 Honor, in -- in the slide.

23 THE COURT: Okay.

24 MR. GRIFFIS: Thank you, your Honor.

09:45:52 25 THE COURT: All right. Anything further?

1 MR. GRIFFIS: No.

2 MR. WISNER: One quick thing, your Honor. Would
3 it be possible, since we went 15 minutes past, to go
4 until 12:15, because that was my 145 budget, and then
09:46:05 5 take a slightly shorter lunch?

6 THE COURT: Okay. We can go until 12:15.

7 MR. WISNER: Thank you, your Honor.

8 THE COURT: Will you let the jury in?

9 (Jury enters courtroom.)

09:48:38 10 THE COURT: Good morning, Ladies and Gentlemen.
11 Welcome back.

12 Today we will hear the closing arguments of the
13 lawyers in this matter.

14 Before we begin, I'm going to instruct you on
09:48:48 15 the law that applies to this case. And in order to make
16 it easier for you to follow along, I'm going to ask
17 Madam Clerk to please distribute to each of you a copy of
18 the jury instructions. Okay?

19 All right. So in your jury instruction
09:50:37 20 packages, we're going to start with Instruction Number 1,
21 page 1.

22 Members of the jury, you have now heard all the
23 evidence. The attorneys will have one last chance to
24 talk to you in closing argument. But before they do, it
09:50:53 25 is my duty to instruct you on the law that applies to

1 this case. You must follow these instructions as well as
2 those that I previously gave you. You will have a copy
3 of my instructions with you when you go to the jury room
4 to deliberate. I have provided each of you with your own
09:51:09 5 copy of the instructions.

6 You must decide what the facts are. You must
7 consider all the evidence and then decide what you think
8 happened. You must decide the facts based on the
9 evidence admitted in this trial.

09:51:24 10 Please do not allow anything that happens
11 outside this courtroom to affect your decision. Do not
12 talk about this case or the people involved in it with
13 anyone, including family and persons living in your
14 household, friends and coworkers, spiritual leaders,
09:51:40 15 advisors or therapists. Do not do any research on your
16 own or as a group. Do not use dictionaries or other
17 reference materials.

18 These prohibitions on communications and
19 research extend to all forms of electronic
09:51:53 20 communications. Please do not use any electronic devices
21 or media, such as a cell phone or smart phone, PDA,
22 computer, tablet device, the internet, any internet
23 service, any text or instant-messaging service, any
24 internet chat room, blog or website, including social
09:52:12 25 networking websites or online diaries, to send or receive

1 any information to or from anyone about this case or your
2 experience as a juror until after you have been
3 discharged from your jury duty.

09:52:28 4 Do not investigate the case or conduct any
5 experiments. Please do not contact anyone to assist you,
6 such as a family accountant, doctor or lawyer. Do not
7 visit or view the scene of any event involved in this
8 case. If you happen to pass by the scene, do not stop or
9 investigate. All jurors must see or hear the same
09:52:45 10 evidence at the same time. Do not read, listen to or
11 watch any news accounts of this trial. You must not let
12 bias, sympathy, prejudice or public opinion influence
13 your decision.

14 If you violate any of these prohibitions on
09:53:01 15 communications and research, including prohibitions on
16 electronic communications and research, you may be held
17 in contempt of court or face other sanctions.

18 I will now tell you the law that you must follow
19 to reach your verdict. You must follow the law exactly
09:53:16 20 as I give it to you, even if you disagree with it. If
21 the attorneys have said anything different about what the
22 law means, you must follow what I say.

23 In reaching or you verdict, do not guess what I
24 think your verdict should be from something I may have
09:53:30 25 said or done.

1 Pay careful attention to all the instructions
2 that I give you. All the instructions are important
3 because together they state the law that you will use in
4 this case. You must consider all of the instructions
09:53:45 5 together.

6 After you have decided what the facts are, you
7 may find that some instructions do not apply. In that
8 case, follow the instructions that do apply and use them
9 together with the facts to reach your verdict.

09:53:58 10 If I repeat any ideas or rules of law during my
11 instructions, that does not mean that these ideas or
12 rules are more important than the others. In addition,
13 the order in which the instructions are given does not
14 make any difference.

09:54:14 15 You must decide what the facts are in this case
16 only from the evidence you have seen or heard during the
17 trial, including any exhibits that I admit into evidence.
18 Sworn testimony, documents or anything else may be
19 admitted into evidence. You may not consider as evidence
09:54:30 20 anything that you saw or heard when court was not in
21 session, even something done or said by one of the
22 parties, attorneys or witnesses.

23 What the attorneys say during the trial is not
24 evidence. In their opening statements and closing
09:54:45 25 arguments, the attorneys talk to you about the law and

1 the evidence. What the lawyers say may help you
2 understand the law and the evidence, but their statements
3 and arguments are not evidence.

09:54:58 4 The attorneys' questions are not evidence. Only
5 the witnesses' answers are evidence. You should not
6 think that something is true just because an attorney's
7 question suggested that it was true. However, the
8 attorneys for both sides have agreed that certain facts
9 are true. This agreement is called a stipulation. No
09:55:14 10 other proof is needed and you must accept those fact as
11 true in this trial.

12 Each side had the right to object to evidence
13 offered by the other side. If I sustained an objection
14 to an question, ignore the question and do not guess as
09:55:29 15 to why I sustained the objection. If the witness did not
16 answer, you must not guess what he or she might have
17 said. If the witness already answered, you must ignore
18 the answer.

19 During the trial I granted a motion to strike
09:55:44 20 testimony that you heard. You must totally disregard
21 that testimony. You must treat it as though it did not
22 exist.

23 A witness is a person who has knowledge related
24 to this case. You will have to decide whether you
09:55:59 25 believe each witness and how important each witness'

1 testimony is to the case. You may believe all, part or
2 none of a witness' testimony.

3 In deciding whether to believe a witness'
4 testimony, you may consider, among other factors, the
09:56:13 5 following: How well did the witness see, hear or
6 otherwise sense what he or she described in court?

7 How well did the witness remember and describe
8 what happened?

9 How did the witness look, act and speak while
09:56:25 10 testifying?

11 Did the witness have any reason to say something
12 that was not true? For example, did the witness show any
13 bias or prejudice or have a personal relationship with
14 any of the parties involved in the case or have a
09:56:38 15 personal stake in how this case is decided?

16 What was the witness' attitude toward this case
17 or about giving testimony?

18 Sometimes a witness may say something that is
19 not consistent with something else he or she said.

09:56:52 20 Sometimes different witnesses will give different
21 versions of what happened. People often forget things or
22 make mistakes in what they remember. Also, two people
23 may see the same event but remember it differently. You
24 may consider these differences, but do not decide that

09:57:08 25 testimony is untrue just because it differs from other

1 testimony.

2 However, if you decide that a witness did not
3 tell the truth about something important, you may choose
4 not to believe anything that witness said. On the other
09:57:22 5 hand, if you think the witness did not tell the truth
6 about some things but told the truth about others, you
7 may accept the part you think is true and ignore the
8 rest.

9 Do not make any decisions simply because there
09:57:34 10 were more witnesses on one side than on the other. If
11 you believe it is true, the testimony of a single witness
12 is enough to prove a fact.

13 You must not be biased in favor of or against
14 any witness because of his or her disability, gender,
09:57:49 15 race, religion, ethnicity, sexual orientation, age,
16 national origin or socioeconomic status.

17 For purposes of these instructions and the
18 verdict form, the term "Monsanto" shall refer to
19 defendant Monsanto Company.

09:58:09 20 A corporation, Monsanto, is a party in this
21 lawsuit. Monsanto's entitled to the same fair and
22 impartial treatment that you would give to an individual.
23 You must decide this case with the same fairness that you
24 would use if you were deciding a case between
09:58:24 25 individuals.

1 When I use words like "person" or "he" or "she"
2 in these instructions to refer to a party, those
3 instructions also apply to Monsanto.

09:58:37 4 A party must persuade you by the evidence
5 presented in court that what he or she is required to
6 prove is more likely to be true than not true. This is
7 referred to as the burden of proof.

09:58:54 8 After weighing all of the evidence, if you
9 cannot decide that something is more likely to be true
10 than not true, you must conclude that the party did not
11 prove it. You should consider all the evidence, no
12 matter which party produced the evidence.

09:59:13 13 In criminal trials, the prosecution must prove
14 that the defendant is guilty beyond a reasonable doubt,
15 but in civil trials, such as this one, the party who is
16 required to prove something need prove only that it is
17 more likely to be true than not true.

09:59:30 18 Certain facts must be proved by clear and
19 convincing evidence, which is a higher burden of proof.
20 This means the party must persuade you that it is highly
21 probable that the fact is true. I will tell you
22 specifically which facts must be proved by clear and
23 convincing evidence.

09:59:45 24 Evidence can come in many forms. It can be
25 testimony about what someone heard or saw or smelled. It

1 can be an exhibit admitted into evidence. It can be
2 someone's opinion.

3 Direct evidence can prove a fact by itself. For
4 example, if a witness testifies she saw a jet plane
09:59:59 5 flying across the sky, that testimony is direct evidence
6 that a plane flew across the sky. Some evidence proves a
7 fact indirectly. For example, a witness testifies that
8 he saw only the white trail that jet planes often leave.
9 This indirect evidence is sometimes referred to as
10:00:22 10 circumstantial evidence. In either instance, the
11 witness' testimony is evidence that a jet plane flew
12 across the sky.

13 As far as the law is concerned, it makes no
14 difference whether evidence is direct or indirect. You
10:00:37 15 may choose to believe or disbelieve either kind. Whether
16 it is direct or indirect, you should give every piece of
17 evidence whatever weight you think it deserves.

18 During the trial, you received deposition
19 testimony that was read from the deposition transcript or
10:00:56 20 shown by video. A deposition is the testimony of a
21 person taken before trial. At a deposition, the person
22 is sworn to tell the truth and is questioned by the
23 attorneys. You must consider the deposition testimony
24 that was presented to you in the same way as you consider
10:01:15 25 testimony given in court.

1 Before trial, each party has the right to ask
2 another party to admit in writing that certain matters
3 are true. If the other party admits those matters, you
4 must accept them as true. No further evidence is
5 required to prove them.

10:01:32

6 A party may offer into evidence any oral or
7 written statement made by an opposing party outside the
8 courtroom.

9 When you evaluate evidence of such a statement,
10 you must consider these questions:

10:01:46

11 One, do you believe that the party actually made
12 the statement? If you do not believe that the party made
13 the statement, you may not consider the statement at all.

14 Two, if you believe that the statement was made,
15 do you believe that it was reported accurately?

10:02:03

16 You should view the testimony about an oral
17 statement made by a party outside the courtroom with
18 caution.

19 During the trial, you heard testimony from
20 expert witnesses. The law allows an expert to state
21 opinions about matters in his or her field of expertise,
22 even if he or she has not witnessed any of the events
23 involved in the trial.

10:02:16

24 You do not have to accept an expert's opinion.
25 As with any other witness, it is up to you to decide

10:02:30

1 whether you believe the expert's testimony and choose to
2 use it as a basis for your decision. You may believe
3 all, part or none of an expert's testimony. In deciding
4 whether to believe an expert's testimony, you should
5 consider:

6 The expert's training and experience;

7 The facts the expert relied on;

8 And the reasons for the expert's opinion.

9 The law allows expert witnesses to be asked
10 questions that are based on assumed facts. These are
11 sometimes called "hypothetical questions." In
12 determining the weight to give to the expert's opinion
13 that's based on the assumed facts, you should consider
14 whether the assumed facts are true.

15 If the expert witnesses disagreed with one
16 another, you should weigh each opinion against the
17 others. You should examine the reasons given for each
18 opinion and the facts or other matters that each witness
19 relied on. You may also compare the experts'
20 qualifications.

21 A substantial factor in causing harm is a factor
22 that a reasonable person would consider to have
23 contributed to the harm. It must be more than a remote
24 or trivial factor. It does not have to be the only cause
25 of the harm.

1 Conduct is not a substantial factor in causing
2 harm if the same harm would have occurred without that
3 conduct.

4 Mr. Johnson claims that the design of Roundup
10:04:08 5 Pro or Ranger Pro was defective because Roundup Pro or
6 Ranger Pro did not perform as safely as an ordinary
7 consumer would have expected it to perform. To establish
8 that claim, Mr. Johnson must prove all of the following:

9 One, that the product is one about which an
10:04:26 10 ordinary consumer can form reasonable minimum safety
11 expectations.

12 Two, that Monsanto manufactured, distributed or
13 sold Roundup Pro or Ranger Pro.

14 Three, that the Ranger Pro or Roundup Pro used
10:04:41 15 by Mr. Johnson did not perform as safely as an ordinary
16 consumer would have expected it to perform when used or
17 misused in an intended or reasonably foreseeable way.

18 That Mr. Johnson was harmed, and that Roundup
19 Pro or Ranger Pro or -- Ranger Pro's failure to perform
10:05:03 20 safely was a substantial factor in causing
21 Mr. Johnson's harm.

22 Mr. Johnson claims that Roundup Pro or Ranger
23 Pro lacked sufficient warnings of potential risk. To
24 establish this claim, Mr. Johnson must prove all of the
10:05:23 25 following:

1 That Monsanto manufactured, distributed or sold
2 Roundup Pro or Ranger Pro.

3 That Ranger Pro or Roundup Pro had potential
4 risks that were known or knowable in light of the
10:05:35 5 scientific and medical knowledge that was generally
6 accepted in the scientific community at the time of the
7 manufacture, distribution and sale of Roundup Pro or
8 Ranger Pro.

9 That the potential risks presented a substantial
10:05:51 10 danger when Roundup Pro or Ranger Pro is used or misused
11 in an intended or reasonably foreseeable way.

12 That ordinary consumers would not have
13 recognized the potential risks.

14 That Monsanto failed to adequately warn of the
10:06:07 15 potential risks.

16 That Mr. Johnson was harmed; and.

17 That the lack of sufficient warnings was a
18 substantial factor in causing Mr. Johnson's harm.

19 Mr. Johnson claims that Monsanto was negligent
10:06:21 20 by not using reasonable care to warn or instruct about a
21 dangerous condition of Roundup Pro or Ranger Pro or about
22 facts that made the Roundup Pro or Ranger Pro products
23 likely to be dangerous. To establish this claim,
24 Mr. Johnson must prove all of the following:

10:06:41 25 That Monsanto manufactured, distributed or sold

1 Roundup Pro or Ranger Pro;

2 That Monsanto knew or reasonably should have
3 known that the Roundup Pro or Ranger Pro was dangerous or
4 was likely to be dangerous when used or misused in a
10:06:56 5 reasonably foreseeable manner;

6 That Monsanto knew or reasonably should have
7 known that users would not realize the danger;

8 That Monsanto failed to adequately warn of the
9 danger of Roundup Pro or Ranger Pro products;

10:07:11 10 That a reasonable manufacturer, distributor or
11 seller under the same or similar circumstances would have
12 warned of the danger or instructed on the safe use of the
13 Roundup Pro or Ranger Pro products;

14 That Mr. Johnson was harmed;

10:07:25 15 And that Monsanto's failure to warn or instruct
16 was a substantial factor in causing Mr. Johnson's harm.

17 If you decide that Mr. Johnson has proved his
18 claim against Monsanto, you also must decide how much
19 money will reasonably compensate Mr. Johnson for the
10:07:46 20 harm. This compensation is called "damages."

21 The amount of damages must include an award for
22 each item of harm that was caused by Monsanto's wrongful
23 conduct, even if the particular harm could not have been
24 anticipated.

10:08:03 25 Mr. Johnson does not have to prove the exact

1 amount of damages that will provide reasonable
2 compensation for the harm. However, you must not
3 speculate or guess in awarding damages.

10:08:24 4 The damages claimed by Mr. Johnson for the harm
5 caused by Monsanto fall into two categories called
6 economic damages and noneconomic damages. The parties
7 have stipulated to the amount of economic damages. The
8 stipulated amount has already been included on the
9 verdict form. You will, however, be asked on the verdict
10:08:46 10 form to state the amount of noneconomic damages, if any.

11 The following are the specific items of
12 noneconomic damages claimed by Mr. Johnson:

13 Past and future physical pain, mental suffering,
14 loss of enjoyment of life, disfigurement, physical
10:09:04 15 impairment, inconvenience, grief, anxiety, humiliation,
16 emotional distress and any other similar damages.

17 No fixed standard exists for deciding the amount
18 of these noneconomic damages. You must use your judgment
19 to decide a reasonable amount based on the evidence and
10:09:24 20 your common sense.

21 To recover for future pain, mental suffering,
22 loss of enjoyment of life, disfigurement, physical
23 impairment, inconvenience, grief, anxiety, humiliation
24 and emotional distress, Mr. Johnson must prove that he is
10:09:43 25 reasonably certain to suffer that harm.

1 For future noneconomic damages, determine the
2 amount in current dollars paid at the time of judgment
3 that will compensate Mr. Johnson for future noneconomic
4 damages.

10:09:59

5 The arguments of the attorneys are not evidence
6 of damages. Your award must be based on your reasoned
7 judgment applied to the testimony of the witnesses and
8 the other evidence that has been admitted during trial.

10:10:17

9 If you decide Mr. Johnson has suffered damages
10 that will continue for the rest of his life, you must
11 determine how long he will probably live. According to
12 National Vital Statistics Report published by the
13 National Center For Health Statistics, a 46-year-old male
14 is expected to live another 33 years. This is the
15 average life expectancy. Some people live longer, and
16 others die sooner.

10:10:37

17 This published information is evidence of how
18 long a person is likely to live, but is not conclusive.
19 In deciding a person's live expectancy, you should also
20 consider, among other factors, that person's health,
21 habits, activities, lifestyle and occupation.

10:10:53

22 Mr. Johnson seeks damages from Monsanto under
23 more than one legal theory. However, each item of
24 damages may be awarded only once, regardless of the
25 number of legal theories alleged.

10:11:12

1 If you decide that Monsanto's conduct caused
2 Mr. Johnson harm, you must decide whether that conduct
3 justifies an award of punitive damages. The purposes of
4 punitive damages are to punish a wrongdoer for the
10:11:32 5 conduct that harmed the plaintiff and to discourage
6 similar conduct in the future. You must not include in
7 an award of punitive damages any amount intended as
8 compensation for loss, harm or damage that Mr. Johnson
9 has incurred or may incur.

10:11:51 10 You may award punitive damages against Monsanto
11 only if Mr. Johnson proves that Monsanto engaged in that
12 conduct with malice or oppression. To do this,
13 Mr. Johnson must prove one of the following by clear and
14 convincing evidence:

10:12:11 15 One, that the conduct constituting malice or
16 oppression was committed by one or more officers,
17 directors or managing agents of Monsanto, who acted on
18 behalf of Monsanto;

19 Or that the conduct constituting malice or
10:12:24 20 oppression was authorized by one or more officers,
21 directors or managing agents of Monsanto; or

22 That one or more officers, directors or managing
23 agents of Monsanto knew of the conduct constituting
24 malice or oppression and adopted or approved that conduct
10:12:39 25 after it occurred.

1 "Malice" means that Monsanto acted with intent
2 to cause injury or that Monsanto's conduct was despicable
3 and was done with a willful and knowing disregard of the
4 rights or safety of another. A person acts with knowing
10:12:56 5 disregard when he or she is aware of the probable
6 dangerous consequences of his or her conduct and
7 deliberately fails to avoid those consequences.

8 "Oppression" means that Monsanto's conduct was
9 despicable and subjected Mr. Johnson to cruel and unjust
10:13:16 10 hardship in knowing disregard of his rights.

11 "Despicable conduct" is conduct that is so vile,
12 base or contemptible that it would be looked down on and
13 despised by reasonable people.

14 An employee is a "managing agent" if he or she
10:13:36 15 exercises substantial independent authority and judgment
16 in his or her corporate decision making, such that his or
17 her decisions ultimately determine corporate policy.

18 There is no fixed formula for determining the
19 amount of punitive damages, and you are not required to
10:13:55 20 award any punitive damages. If you decide to award
21 punitive damages, you should consider all of the
22 following factors in determining the amount:

23 How reprehensible was Monsanto's conduct? In
24 deciding how reprehensible Monsanto's conduct was, you
10:14:15 25 may consider, among other factors:

1 Whether the conduct caused physical harm.

2 Whether Monsanto disregarded the health or
3 safety of others.

4 Whether Mr. Johnson was financially weak or
10:14:29 5 vulnerable and Monsanto knew Mr. Johnson was financially
6 weak or vulnerable and took advantage of him.

7 Whether Monsanto's conduct involved a pattern or
8 practice.

9 And whether Monsanto acted with trickery or
10:14:46 10 deceit.

11 Is there a reasonable relationship between the
12 amount of punitive damages and Mr. Johnson's harm or
13 between the amount of punitive damages and potential harm
14 to Mr. Johnson that Monsanto knew was likely to occur
10:15:03 15 because of its conduct?

16 In view of Monsanto's financial condition, what
17 amount is necessary to punish it and discourage future
18 wrongful conduct? You may not increase the punitive
19 award above an amount that is otherwise appropriate
10:15:23 20 merely because Monsanto has substantial financial
21 resources. Any award you impose may not exceed
22 Monsanto's ability to pay.

23 Punitive damages may not be used to punish
24 Monsanto for the impact of its alleged misconduct on
10:15:39 25 persons other than Mr. Johnson.

1 You must not consider, or include as part of any
2 award, attorneys' fees or expenses that the parties
3 incurred in bringing or defending this lawsuit.

4 You have heard references to Agent Orange. The
10:15:56 5 defendant in this case did not make Agent Orange, and you
6 should not consider that product or any references to it
7 for any purpose.

8 You have been told about lawsuits that were
9 filed against Monsanto in which a plaintiff claimed to
10:16:15 10 have developed NHL after being exposed to Roundup or to
11 Roundup as well as other chemicals. You may consider
12 these lawsuits only on the issue of whether Monsanto had
13 been placed on notice of claims of NHL in people exposed
14 to Roundup. You are instructed that a complaint contains
10:16:35 15 nothing more than allegations made against another party,
16 and so the existence of such complaints is not evidence
17 that Roundup, in fact, causes NHL.

18 During Dr. Portier's cross-examination,
19 reference was made to the California EPA. You must
10:16:57 20 disregard this reference and not consider it for any
21 purpose.

22 The following exhibits are being admitted for
23 the limited purpose of showing Monsanto's state of mind
24 regarding the state of the science and for no other
10:17:12 25 purpose:

1 One, EPA, Office of Prevention, Pesticides and
2 Toxic Substances, Reregistration Eligibility Decision,
3 Glyphosate (September 1993) [Exhibit DX2489];

4 And Number 2, EPA, Office of Pesticide Programs,
10:17:41 5 Glyphosate Issue Paper: Evaluation of Carcinogenic
6 Potential, September 12th, 2016, [Exhibit DX2481].

7 You must not consider whether any of the parties
8 in this case has insurance. The presence or absence of
9 insurance is totally irrelevant. You must decide this
10:18:05 10 case based only on the law and the evidence.

11 All right. We're going to stop here. At the
12 conclusion of the closing arguments, I will read to you
13 the final instructions before you go to the jury room.

14 And so now we'll begin with the closing
10:18:21 15 statement of the plaintiffs.

16 Mr. Wisner, when you're ready.

17 MR. WISNER: Thank you, your Honor.

18 May it please the Court. Counsel.

19 Hi, everyone. It's been a long trial, and it's
10:18:50 20 been a while since I've spoken to you, about a month. At
21 the beginning of this trial, I told you this case was
22 about choice and the fact that Monsanto, by not warning,
23 deprived consumers in California and Mr. Johnson the
24 right to make an informed choice about what chemicals he
10:19:12 25 exposed himself, and in this case, what chemicals he

1 actually exposed to children in the Benicia School
2 District.

3 But as this case has unfolded, it's occurred to
4 me that this isn't just about the choice that was robbed
10:19:26 5 from the client. It's also about the choices that
6 Monsanto made. You see, Monsanto made a choice when it
7 got Dr. Parry's report in 2000 to not share it with the
8 EPA or anyone. They made a choice to not do the studies
9 that Dr. Parry recommended, because they knew what it
10:19:49 10 would show. They made a choice to not study the
11 formulated product in long-term carcinogenicity studies.
12 And the best explanation I could hear so far was that's
13 because it would have killed all the rats and mice.

14 They made a choice when they didn't call
10:20:10 15 Mr. Johnson back, when he called the company desperate
16 for answers, asking for some information about the stuff
17 that he was spraying at that time. And when
18 Dr. Goldstein didn't call him back, that continued to
19 deprive him of that choice.

10:20:25 20 Monsanto made a choice to engage in
21 ghostwriting. You've seen document after document where
22 Monsanto's response to scientific concerns, legitimate
23 scientific concerns, is to make up science. Put someone
24 else's name on it, and no one's the wiser. We saw that
10:20:49 25 email from Dr. Heydens, where he said, "That's what we

1 did with Williams in 2000." That's the same article
2 referenced in all of the literature, and it's the same
3 article that Monsanto's internal PowerPoint said served
4 them well for over a decade. It's the same article in
10:21:06 5 the EPA report that's cited repeatedly.

6 Monsanto made a choice to not put a cancer
7 warning on the label. Right now, you've heard testimony
8 that the Material Safety Data Sheet discloses the IARC
9 classification. Right now, that's the case. But the
10:21:29 10 very label that goes to actual people using it in the
11 field, using it in their job, doesn't say anything.
12 That's a choice. That is a choice that reflects reckless
13 disregard for human health. It is a choice that Monsanto
14 made and today is their day of reckoning.

10:21:48 15 Every single cancer risk that has been found has
16 this moment, every single one, where the science finally
17 caught up, where they couldn't bury it anymore, where the
18 truth got shown to 12 people sitting in a jury box making
19 a true and honest decision, and that is this day. This
10:22:08 20 is the day Monsanto is finally held accountable, and this
21 is the beginning of that day. Because after this trial
22 is over, after you return a verdict that says, "Monsanto,
23 no more. Warn. Call people back. Do the studies that
24 you needed to do for 30 years, studies that the EPA asked
10:22:32 25 them to do in the '80s. Do your job."

1 And if you return a verdict today that does
2 that, that actually changes the world. I mean, it's
3 crazy to say that; right? I told you all at the
4 beginning of this trial that you were part of history,
10:22:50 5 and you really are, and so let me just say thank you.

6 I know you guys didn't actually have a choice to
7 be on this jury, so it's kind of a weird thing to thank
8 you for your service, but you could be on a jury and not
9 pay attention, and not one of you has done that. You've
10:23:06 10 asked incredibly good questions. Some of them we were
11 able to answer. Some of them we were not. But the
12 questions told us exactly how closely you were tracking
13 this case. Some of you have five notebooks of notes.
14 That's unbelievable. The level with which you've paid
10:23:25 15 attention to this case, thank you, and I really mean
16 that.

17 Not just for me, though, for Mr. Johnson and his
18 family. And Mrs. Johnson would be here, but her job
19 wouldn't let her off today, so she actually is working
10:23:41 20 right now. A consequence of the bills, you know, and
21 hopefully she'll be here tomorrow, but they wouldn't give
22 her paid leave, and they need the money to pay the bills,
23 so I'm sorry she couldn't be here today.

24 All right. So this case really involves three
10:24:00 25 fundamental questions. And the jury verdict form we're

1 going to go over in a little bit, and I'm going to go
2 through all the questions. There's actually a lot more
3 than three questions, but they really boil down to three
4 core issues. The first is: Can Monsanto be a
5 substantial contributing factor in causing cancer? That
6 sounds like a lot of legalese, because it is, and I'm
7 going to discuss that in detail, why we use this
8 terminology instead of just asking does Roundup cause
9 cancer.

10:24:18

10 The second is: Was Roundup a substantial
11 contributing factor in causing Mr. Johnson's cancer?

10:24:30

12 And finally: Did Monsanto act with conscious
13 disregard of human health?

14 Let's start with the first question. Before I
15 get to this question, "Can Roundup be a substantial
16 contributing factor in causing cancer," you have to
17 understand the burden of proof here.

10:24:44

18 Now, a lot of you have actual pretty robust
19 scientific backgrounds, and that's great, because it
20 helps you understand the science in this case, but the
21 level required in the scientific field is not what's
22 required in this courtroom. It's not absolute. It is
23 something called preponderance of the evidence, more
24 likely than not.

10:24:57

25 And Mr. Dickens, during jury selection, talked

10:25:12

1 about a scale, right, and this is a commonly used
2 graphic. You have two scales of evidence, and on one
3 side -- they're exactly the same, except one side has a
4 feather on it. That is enough to meet our burden of
10:25:31 5 proof. I like the quote at the bottom. It says, "I'm
6 not sure, but I think so." And that's really the
7 standard here.

8 What we have to prove to you is not yes,
9 absolutely, it causes cancer, but you ask yourself, when
10:25:45 10 you're sitting in that deliberation room, maybe some of
11 you are going to say, "I'm not so sure, but I think so."
12 We're done. We've met our burden, and that's what's
13 required here.

14 Now, what do we actually have to show, that goes
10:25:59 15 to the jury instruction about causation. It says, "A
16 substantial factor in causing harm is a factor that a
17 reasonable person would consider to have contributed to
18 the harm. It must be more than a remote or trivial
19 factor. It does not have to be the only cause of the
10:26:16 20 harm. Conduct is not a substantial factor in causing
21 harm if the same harm would have occurred without that
22 conduct."

23 So let me break this down a little bit. The
24 first issue is a substantial factor. It doesn't mean it
10:26:28 25 has to be the only cause of something; right? We all

1 know cancer is a complicated disease. It's
2 multi-factorial. It's multi-causal, and we don't have to
3 show that Roundup was the only cause of Mr. Johnson's
4 cancer. We simply have to show that it contributed, that
10:26:47 5 it played a substantial role in contributing to it, and
6 we only have to do that more likely than not. That's
7 actually what we have to prove here.

8 And in a minute -- or after I'm done, after
9 lunch, Mr. Lombardi is going to come up here and he's
10:27:01 10 going to say they have to prove this, they have to prove
11 this, they have to prove this. Don't forget the law,
12 because this is not a criminal trial, as much as it feels
13 like it at times. It's a civil one.

14 Now, it goes on to say, "Conduct is not a
10:27:15 15 substantial factor in causing harm if the same harm would
16 have occurred without that conduct." The harm here,
17 Ladies and Gentlemen, is that right now Mr. Johnson has
18 cancer and all of the horror that that entails. And the
19 question you have to decide is, would he be sitting here
10:27:36 20 today with the cancer that he has without that
21 contribution? It is not the question of, would he
22 develop cancer at some point down the line, 20, 30 years
23 from now? It is, did he -- would he be where he is today
24 absent the Roundup?

10:27:51 25 Don't let the defendants, Monsanto, trick you on

1 this point. It's really important. So, for example, if
2 you decide that the Roundup promoted the tumors, that it
3 contributed to the creation of his tumors on his skin,
4 then we've met our burden. Even if he ultimately would
10:28:11 5 have gotten that cancer 10, 15 years down the line, the
6 point is he wouldn't be here today absent the
7 contributing factor.

8 In addressing the issue of causation and the
9 general question, "Can Roundup be a substantial
10:28:26 10 contributing factor in causation of cancer," we've talked
11 about the three pillars of cancer science, and you guys
12 have heard a lot about this. You've heard about
13 epidemiology. You've heard about toxicology. You've
14 heard about mechanism.

10:28:38 15 The weird thing is, though, you've heard that
16 from our experts. Because here's the simple truth,
17 Monsanto presented four live witnesses to you, four. The
18 first one was Dr. Mucci, and she only looked at the
19 epidemiology. She refused to look at toxicology or any
10:29:00 20 mechanistic data.

21 You heard from Dr. Foster. He only looked at
22 the animal data. He refused to look -- or he looked at
23 the epidemiology, but he refused to opine about it or
24 give you any opinions about or the mechanism data. And
10:29:16 25 then you heard from Dr. Kuzel, who had looked at

1 literally one epidemiology study, and then Dr. Al-Khatib
2 when actually had no opinions about caution whatsoever,
3 so he's really off the table.

4 What did they do? They atomized the science.

10:29:33 5 They broke it into little parts and put everyone on their
6 little island and said, on this island, you don't have
7 enough. But that's not science.

8 We actually called five experts, and every
9 single one -- Dr. Portier, Dr. Neugut, Dr. Sawyer,

10:29:48 10 Dr. Benbrook and Dr. Nabhan -- looked at everything,
11 every animal study. They looked at every epidemiological
12 study. They looked at the hundreds of mechanism studies.
13 And when you look at the totality of the evidence, it
14 causes cancer.

10:30:03 15 That's what IARC did. Because if you look at
16 just the epi -- we all agree, the epi by itself, you
17 don't get causation. The rodents alone, you don't get
18 causation. But when you put all three together, then you
19 have causation.

10:30:23 20 Why didn't Monsanto call somebody who could
21 testify to all three topics? They didn't present anybody
22 about mechanism, by the way, at all. Why didn't they
23 call somebody? Because they couldn't find anybody.

24 You've seen hundreds and hundreds of scientists sign
10:30:40 25 their names on Dr. Portier's letter, sign their names on

1 Dr. Blair's letter. The scientific advisory panel for
2 the EPA, they all agree that when you look at everything,
3 there's a risk.

4 But why did didn't they call a witness to say
10:30:55 5 the opposite? Because they couldn't find one. Because
6 Dr. Mucci has too much integrity. If you showed her the
7 animal data, she'd go, you've got a problem. Dr. Foster,
8 if you showed him the epi and you showed him the
9 mechanism, he'd probably say they've got a problem. The
10:31:12 10 fact that Monsanto hasn't brought a single witness to
11 testify about all of this is glaring. It is astonishing.
12 It shows just actually how Monsanto likes to deal with
13 the science.

14 Now, the only group, person or entity that
10:31:28 15 Monsanto points to that did look at all the evidence,
16 supposedly, is the EPA. But there's a special -- this is
17 the report. It's the OPP report from 2016,
18 September 12th, and it says it's an issue paper; right?
19 So what this was is a document that was actually sent to
10:31:46 20 the scientific advisory panel for their comments, that
21 group of 16 scientists who reviewed the merits of this
22 document.

23 Here's the instruction: "The following exhibits
24 may be admitted for the limited purpose of evaluating
10:32:04 25 Monsanto's state of mind regarding the state of science

1 and for no other purpose." This instruction does not
2 apply to the IARC Monograph. You can look at that
3 document, and you can believe the truth of the statements
4 made in it, but you cannot believe the truth of this
10:32:21 5 document. It has not been admitted for that purpose.

6 And the reason why is a really important one,
7 because Monsanto didn't put anyone in this stand right
8 here to talk to you about it intelligently. We didn't
9 get to cross-examine the guy who authored this, ask him,
10:32:38 10 hey, why did you do this why did you violate your EPA
11 guidelines? They didn't put anyone up there because they
12 know if they did, I would have torn that person apart.

13 It wouldn't have been my criticisms. It would
14 be the scientific advisory panel's criticisms. They
10:32:53 15 didn't follow their own guidelines. Dr. Foster, he goes,
16 guidelines, well people, sometimes you go outside the
17 guidelines. That's not science. Okay?

18 Science is not sticking an arrow in the wall and
19 drawing the bullseye around it. Guidelines dictate how
10:33:09 20 you do things and how you look at it and how you assess
21 it, how you weight things, and the only thing that the
22 independent scientists that reviewed this document agreed
23 on, all across the board, was that the EPA didn't follow
24 the guidelines. That's what this document says.

10:33:25 25 Now, why is that? Why is it that this document

1 is given limited significance and was highly criticized
2 by the scientific advisory panel? Well, I have a couple
3 theories. The first one is the EPA approved this product
4 in 1970s. It's been on the market for 40 years, and the
10:33:45 5 scientists that approved it would have to go and tell
6 everybody in the world, we got it wrong. They have a dog
7 in the fight, because they'd have to tell the world we
8 made a mistake, that the countless cancers that this
9 product has caused in the United States, my bad.

10:34:04 10 They'd have to own up to that. And even after
11 the scientific advisory panel said, hey, you ain't
12 following your guidelines, you ain't doing it right, they
13 just doubled down on it. They didn't explain anything.
14 And that's why the 2017 report is not in evidence, and
10:34:20 15 that's why the SAP panel -- Monsanto didn't put that in
16 evidence. They only want you to see this little part of
17 the story, and even this part of the story is limited.

18 I think everybody here can agree that no one's
19 perfect, but the EPA has made mistakes before.
10:34:40 20 Government agencies make mistakes. We've heard time and
21 time again about the various things that we found out
22 were cancer after decades, if not hundreds of years, of
23 thinking they were safe. We've heard about it over and
24 over again, and that's what's going on here.

10:34:56 25 It's also important to realize on page 19 of

1 this document, it says, unequivocally, that although
2 there are multiple lines of evidence -- okay. "Although
3 there are studies available on glyphosate-based pesticide
4 formulations, the agencies soliciting advice from the
10:35:16 5 FIFRA SAP on this evaluation of human carcinogenic
6 potential for the active ingredient glyphosate only at
7 this time."

8 So while they list a bunch of the formulated
9 studies, most of which are positive, for what it's worth,
10:35:30 10 they actually don't offer an opinion about the formulated
11 products. Just think about how is that possible? I
12 mean, they're approving a product. They know it's being
13 used in a formulated way in the real world, and they're
14 not even looking at it.

10:35:49 15 Finally, I'm going to put together a story that
16 has come out in the videos but maybe was clearly
17 explained and that is Jess Rowland. Jess Rowland
18 authored the first version of this. You saw that. It
19 was presented to you. What do we know about Jess
20 Rowland?

21 This is an e-mail in evidence. It's from Daniel
22 Jenkins to William Heydens. It's just after the IARC
23 conclusion in April 2015. He says, "So Jess called me
24 out of the blue this morning." This is Jess Rowland.
10:36:24 25 Here's what Jenkins says. He actually quotes him. By

1 the way, this is April 2015.

2 So what's happened at that point is IARC's
3 announced a two-way classification, but they actually
4 haven't published the Monograph. They haven't shown
10:36:40 5 anybody the reasoning behind their decision. They just
6 posted it. Before the Monograph comes out, Jess Rowland
7 says, "We have enough to sustain our conclusions. Don't
8 need gene tox or epi. The only thing is the Cheminova
9 study" -- that's the consumer study, the one that has the
10:36:59 10 mystery virus that no one seems to know where it came
11 from -- "with the sarcoma in mice. We have that study
12 now and its conclusions are irrelevant because at limit
13 does? I'm the chair of the CARC, and my folks are
14 running this process for glyphosate in regulation review.
10:37:14 15 I have called a CARC meeting in June."

16 So we have the guy who's writing the document
17 calling Monsanto asking questions about how to get rid of
18 an animal study. That's what this is saying, and he's
19 saying we're going to disagree with IARC, even before
10:37:31 20 we've seen the Monograph. That's not science. I don't
21 know what that is. That's creepy. That's the person
22 when's doing the EPA evaluation.

23 But then it gets worse, because at this time the
24 ATSDR -- which Dr. Portier used to run, by the way, not
10:37:49 25 at this time, but he used to run it when he was working

1 for the federal government -- decided to run a review on
2 glyphosate. They were looking specifically at the
3 carcinogenic potential. Here's what he said, "Jess
4 called to ask for a contact name at ATSDR. I passed on
10:38:04 5 Jesslyn's e-mail." That's the person at ATSDR. "He told
6 me no coordination is going on and he wanted to establish
7 some saying 'If I can kill this, I should get a medal.'"

8 This is the person in the EPA, the person who's
9 supposed to be looking out for our health, bragging to a
10:38:23 10 Monsanto employee that he's going to kill something,
11 another person's investigation of it, and if he does it,
12 he should get a medal. You have to put the EPA's
13 assessment in context, because the EPA's assessment is
14 not transparent.

10:38:39 15 We don't get to see the e-mails and
16 conversations between Monsanto and EPA. But you know
17 what is transparent, hundred percent, everything
18 published and available to the world, it's IARC's
19 classification. They looked at all the evidence and
10:38:55 20 rated it. Epi is limited which means that it's a
21 credible causal association but you can't rule out chance
22 or bias. Toxicology is sufficient, the highest possible
23 rating, and the mechanism is strong, highest possible
24 rating.

10:39:11 25 And the fact that Monsanto has not called a

1 single witness to discuss mechanism with you, this is
2 undisputed. It is the strongest piece of evidence of
3 carcinogenicity, and Monsanto didn't call a witness to
4 talk about it.

10:39:25

5 I mean, they talk about -- they brought in these
6 little specialized epi person, animal person. They could
7 have brought in a mechanism person, but they didn't even
8 bother because if they had brought in an expert to try to
9 tell you the mechanism data wasn't strong or didn't

10:39:42

10 support causation, it would have been a disaster for him.
11 I would have put study after study after study in front
12 of them and said, sir, how can you say that?

13 Let's look at the studies very quickly. You
14 guys have heard about this already. I don't want to
15 belabor all the evidence. If I need to address some
16 things that they bring up in rebuttal, I will.

10:40:01

17 Just so you know, we're going to go until 12:15
18 with me. Mr. Lombardi's going to go two hours after
19 lunch, and then I will have the last 45 minutes or so to
20 respond. That's how it's going to work, and you should
21 probably start deliberation tomorrow morning.

10:40:18

22 This is the epi data. We have something that no
23 one disputes. Whether or not you an have adjustment for
24 pesticides or not adjusted for other pesticides, whatever
25 you do, it's all to the right of one. Every single time

10:40:31

1 it's to the right of one with the exception of Orsi which
2 -- everyone agrees it's kind of an unuseful study because
3 it's a hospital-based study.

10:40:48 4 Most of these -- with the exception of De Roos
5 2005, which is the AHS, most of these are
6 population-based, so they're not just looking at farmers
7 spraying in industrial cabs. They're looking at people
8 using it in the real world, and it's all to the right of
9 one.

10:40:59 10 I asked Dr. Foster about it. Remember, I put up
11 my notebook and I drew a line and I put X's on both sides
12 of the line and I said, if there was no risk, you would
13 expect to see some above and below the line, just by
14 random chance; right? He said yeah. But I said, here,
10:41:14 15 it's all to the right, what's the likelihood of that? He
16 said, yeah, that's pretty unexpected. He conceded. That
17 was their own witness.

18 Dr. Portier calculated the probability of this
19 occurring. It's a 3-percent chance. So if there's truly
10:41:29 20 no risk, and this is the data you're seeing, the
21 likelihood of seeing this data is 3 percent. Basic
22 probability (inaudible). We also have dose-response.
23 Sorry it's not on here, but for both the De Roos and --
24 I'm sorry -- the McDuffie, it showed that greater than
10:41:46 25 two days per year use had a more than doubling of the

1 risk, and it was statistically significant.

2 Now, they've complained that it wasn't adjusting
3 for confounders, but if you actually looked at the
4 study -- and I showed Dr. Mucci -- they looked at this
10:41:57 5 issue and they said none of the other pesticides are
6 contributing to it. So there's a dose-response there.

7 In De Roos -- I'm sorry, Eriksson 2008, there
8 was also greater than 10 days per year analysis. Again,
9 that was doubling and statistically significant. In the
10:42:11 10 Andreotti, there was an intensity-weighted measurement --
11 I don't have it on here -- and that one was negative. It
12 was all below one, which by the way is very weird.
13 Studies should not be consistently below one. But in any
14 event, all four of those metrics were below one, which --
10:42:29 15 I'll explain why that's in a second.

16 In any event, there's a lot of evidence here
17 about the epidemiology, but let's be clear. Nobody is
18 saying it gets you there. Nobody. Dr. Portier,
19 Dr. Neugut, nobody says it gets you there, and IARC
10:42:45 20 themselves concluded it was limited. So if you were to
21 just look at the epidemiology and block everything else
22 out, that's not proper science.

23 So let's talk about some of the criticisms.
24 We'll do this quickly because I don't want to spend too
10:43:01 25 much time. They really raised three issues in the case.

1 One was confounding, the second was proxy bias. And then
2 their argument was you have to look at the NAPP and the
3 AHS; right? Those are the issues at stake, so let's go
4 through those quickly.

10:43:16

5 On confounding, it's not an issue here, okay?
6 In De Roos 2003 they examined 47 different pesticides.
7 They looked at whether or not there was any confounding,
8 and they said there was not. That's primarily the data
9 this is based on. So the idea that there's confounding,
10 it's just garbage and it's out of a playbook. Okay?
11 This is what Dr. Mucci agreed to.

10:43:31

12 I said, "Doctor, you said that one of the great
13 accomplishments of epidemiology was that it helped expose
14 that tobacco was associated with lung cancer; right?"

10:43:46

15 "Yes.

16 "And isn't it true that when that fight was
17 happening in the epidemiology world, the tobacco
18 companies kept saying it's confounders?"

19 "Maybe. I'm sure they did, yes."

10:44:00

20 It's a classic way of hiding a risk.

21 MR. LOMBARDI: Objection, your Honor. Beyond
22 the scope of the evidence. There's no evidence about
23 anything other than Monsanto in this case.

24 THE COURT: Sustained.

10:44:15

25 MR. WISNER: Let's look at another document.

1 This is Exhibit 321, also in evidence. This is an e-mail
2 from Dr. Goldstein. The subject is ACSH. It's an
3 organization. He said, "While I would love to have more
4 friends and more choices" -- by the way this is in
10:44:36 5 February 2015, just before the IARC classification.

6 "While I'd like to have more friends and more
7 choices, we don't have a lot of supporters and can't
8 afford to lose the few we have. I am well aware of the
9 challenges of ACSH, and I know Eric has valid concerns,
10:44:49 10 so I can assure you I'm not all starry-eyed about ACSH.
11 They have plenty of warts, but you will not get a better
12 value for your dollar than ACSH."

13 Out of context, this e-mail doesn't tell you
14 much. So I asked Dr. Benbrook to tell us about ACSH, and
10:45:05 15 here's what he said.

16 "The ACSH, what position did it take with
17 regards to tobacco?

18 "They were one of the scientific organizations
19 that held out to the end and argued that the science
10:45:16 20 really clear about tobacco causing cancer.

21 "QUESTION: Talked about how too many
22 confounders; right?

23 "ANSWER: That's certainly one of the arguments
24 that's brought up."

10:45:31 25 That Monsanto is now raising confounders on this

1 data, that they seek the allegiance of ACSH should tell
2 you a lot.

3 The next problem, proxy bias.

4 Now, I have the slides in here, but I don't have
10:45:53 5 enough time to get through it all. We looked at a study
6 by Dr. Blair from 1993. During Dr. Mucci's cross-
7 examination, I put it up there and showed her the portion
8 when they discussed the issue of proxy bias. Basically
9 what they said was when you talk to proxies, they tend to
10:46:11 10 understand estimate the use of pesticides; right?

11 And so if you add that to your data, it will
12 tend to underestimate exposures. What that does is it
13 creates classification exposure -- misclassification
14 exposure error, and what that does is it doesn't inflate
10:46:29 15 risks. It pushes it towards one. That's what it does.

16 Now, Dr. Mucci she took a remarkable position.
17 She said you have to exclude them from your analysis
18 completely. That's insane. You're looking at people who
19 have cancer and you're going to cut out everyone who's
10:46:49 20 already died? That is the definition of selection bias;
21 right? How can you estimate a risk when you ignore the
22 data from the people who've already died from the
23 disease?

24 Of course, if you do that, your risk is going to
10:47:01 25 disappear. But that's not how this works. People who

1 have cancer die. And in epidemiological studies, you ask
2 the next of kin for as much information as you can, but
3 you adjust for it. You don't remove it. And when you
4 adjust for proxy bias in this data, nothing happens. It
10:47:19 5 doesn't -- it actually gets a little bit less. It
6 attenuates towards the null. So absolutely there's no
7 evidence of any true proxy bias here. And Dr. Mucci's
8 reliance of excluding it all together from the data is
9 just a rampant violation of basic epidemiological
10:47:35 10 principles.

11 And so what happens is if you were properly
12 dealing with proxy bias -- if we didn't have proxy bias
13 as they say, these data would actually be closer to one.
14 It would not be greater. So the existence of proxy
10:47:51 15 respondents and the fact that we still see a risk
16 actually strengthens the evidence.

17 Let's talk about the North American Pooled
18 Project. And in what I can only describe as a fit of
19 I-don't-know-what's-going-on-here, Monsanto keeps trying
10:48:05 20 to argue that the NAPP supports their position. It
21 simply doesn't. It just doesn't. Let's look at the
22 document. This is the actual draft manuscript. This is
23 the last one, September 21, 2015. This is the draft that
24 was there.

10:48:20 25 It's the same authors that we've talked about,

1 we've seen them in a bunch of other studies. And what
2 are the results that they report? Cases whoever used
3 glyphosate had a significantly elevated risk of NHL
4 overall. Odds ratio of 1.43, statistically significant.
10:48:37 5 And that's adjusting for proxies, confounders, and all
6 the stuff that Dr. Mucci said you had to have.

7 Subjects who used glyphosate for greater than
8 3.5 years had increased SLL risk. Odds ratio -- again,
9 that's not statistically significant, but it's elevated.
10:48:54 10 And those who used glyphosate for greater than two days a
11 year -- remember, this is dose makes the poison; right?
12 So it's greater two days a year -- had significantly
13 elevated odds of NHL overall. 2.42, statistically
14 significant. These were suggested increases -- these
10:49:15 15 were suggested increases -- statistically increasing by
16 rate NHL overall, FL, and SLL with more days of
17 glyphosate use.

18 The data supports there's a problem here. And
19 again, don't take my word. This is quite literally what
10:49:31 20 it says about IARC. It says, "Our results are also
21 aligned with findings from epidemiological studies of
22 other populations that found an elevated risk of NHL for
23 glyphosate exposure and with a greater number of days per
24 year of glyphosate use as well as a meta-analysis of
10:49:50 25 glyphosate use and NHL risk. From an epidemiological

1 perspective, our results were supportive of the IARC
2 evaluation of glyphosate as a probable (Group 2A)
3 carcinogen for NHL."

4 I don't know where they're getting this idea
10:50:06 5 that that somehow makes it weaker. The simple fact is
6 this was not published. It's never been published. It's
7 still in the process of being published. We don't
8 actually know what's going on. It was never published,
9 so IARC couldn't actually look at it. They didn't
10:50:22 10 consider the data. And if they had, it would have
11 strength their conclusion. It would have strengthened
12 the epidemiological evidence, not weakened it.

13 Finally, let's talk about the AHS. The AHS is
14 what it is. It is a cohort study. It's pretty big for a
10:50:38 15 cohort study. It's looking at professional pesticide
16 applicators. And what we know is that people who entered
17 the study, right, were people when had been spraying for
18 over 16 years and none of them had cancer.

19 So the population begins off with people who are
10:50:53 20 clearly resistant to cancer. That's the starting basis
21 of the population. And then from there, we follow them
22 for 20 years, and it's still going. It will follow them,
23 hopefully, until the end of time, and we'll see what the
24 data shows. And over 80 percent of them are spraying
10:51:11 25 glyphosate and other pesticides; right?

1 And in addition to all that, Mr. Lombardi will
2 point out to you, and we'll hear repeatedly, that the
3 risks of NHL started long before glyphosate hit the
4 market for farmers, for this population. So we're
10:51:25 5 dealing with people who are resistant, people who are
6 already at increased risks of NHL.

7 And that's really important to understand;
8 right? Because when the numbers in the control group are
9 related, let's say, it's 0, 1, 3, 5; right? There's a
10:51:46 10 clear pattern there. But if we add 5 to each of those --
11 so it's 5, 6, 8, 10 -- the statistical significance
12 disappears because of the noise. When you start adding a
13 bunch of more cases, it's harder to see risks. That's
14 what we're seeing in the AHS.

10:52:04 15 Remarkably, you don't have to take my word for
16 it. In evidence is Exhibit 154. It was brought in by
17 stipulation, so you really haven't had a chance to look
18 at it, but it came in through the cross of Dr. Mucci.
19 This is a document created by John Acquavella, Monsanto's
10:52:23 20 epidemiologist at the time in July 22, 1997. They talk
21 about the AHS. This is before they have any data. This
22 is them just talking about the study before the results
23 come in.

24 And if you read through this document, they're
10:52:36 25 scared. They're not scared that they're going to get

1 data that supports that it doesn't cause cancer. They're
2 worried they're going to get data that shows that it
3 causes cancer. Dr. Acquavella goes on a tirade
4 describing how bad the study is.

10:52:52

5 For example, one of his criticisms is, "Most of
6 the diseases to be studied in the AHS have scant
7 reasoning to link them putatively to pesticide exposure.
8 Thus, much of the research can be termed 'exploratory.'"
9 That should be amusing to a lot of people here because,

10:53:06

10 in a minute, Mr. Lombardi is going to come up and tell
11 you that every study but the AHS is exploratory, and this
12 is their own person saying that it is exploratory. Sort
13 of an amusing contradiction.

10:53:22

14 "That's not unusual in epidemiology, but it is
15 unusual on this big a scale." By the way, this is
16 Exhibit 154. Read the whole thing cover to cover. It's
17 pretty amusing. It's Monsanto strongly accusing the AHS
18 before they get the results, and yet they have the
19 audacity to come in here and say it's the greatest study

10:53:41

20 since sliced bread, and they're going to do that in their
21 closing.

22 Here's the part that's really interesting.
23 Under the exposure assessment, Dr. Acquavella says, "The
24 exposure in the AHS will be inaccurate." It will be.

10:53:55

25 And we know why; right?

1 I showed you guys the questionnaire that people
2 had to fill out in 25 minutes after they just took an
3 exam. And among the 47, 80 or whatever pesticides that
4 they're looking at, there's one little section about
10:54:09 5 Roundup, and it asks them, on the spot, to not only
6 decide if they've ever used it, how much they've used it
7 daily per year for the last 16 years.

8 They have no access to their records. They
9 can't call their spouse and say hey, did I use Roundup
10:54:27 10 last year? What was that product we used? They can't do
11 any of that. They just have to pick something on the
12 spot. So you're going to get misclassification. People
13 are going to say they were exposed who really weren't.
14 People are going to say they were much more exposed when
10:54:41 15 they really weren't and vice versa. And what happens in
16 the cohort study when you have all that crossing is it
17 just destroys any ability to actually see anything.

18 Don't take my word for it. "Inaccurate exposure
19 classification can produce spurious results. The
10:54:59 20 conventional thinking in epidemiology is that exposure
21 misclassification will most often obscure exposure
22 disease relationships." This is what he's saying before
23 he gets the results. So because of this issue --
24 concerned about this -- they actually studied it.

10:55:16 25 The AHS investigators looked at this issue.

1 They published an article about it. It's called the
2 "Impact of Pesticide Exposure Misclassification on
3 Estimates of Relative Risks in the Agricultural Health
4 Study." Dr. Blair and all of the other people, many of
10:55:39 5 them are on the current AHS publication, they actually
6 looked at this exact issue, this issue of exposure
7 misclassification. And what did they find?

8 I covered this with Dr. Neugut, and what they
9 found was we draw several conclusions. "First, the
10:55:57 10 accuracy of reporting of pesticide use...is comparable to
11 that for many other factors commonly assessed by
12 questionnaire for epidemiologic studies. Second, except
13 in situations where exposure estimation is quite
14 accurate" -- which we know here it wasn't that accurate.
10:56:14 15 But assuming it was -- "and true relative risks are 3 or
16 more" -- which we do not have here, we're talking about
17 relative risks about 1.5 to 2 -- "pesticide
18 misclassification may diminish risk estimates to such an
19 extent that no association is obvious which indicates
10:56:30 20 false negative findings might be common."

21 The investigators address this issue in a
22 publication, and they said, listen, unless you have a
23 really high risk rate because of exposure
24 misclassification, you ain't going to see anything.

10:56:47 25 So what do we know about Roundup? We know that

1 it has about a 2.0 -- maybe 1.5 to 2.0 risk. You're not
2 going to see it in the AHS. And they never did; right?
3 It was published in 2005. They didn't see any risk
4 there. They did find an elevated rate, oddly enough,
10:57:06 5 with multiple myeloma, which is now considered a form of
6 NHL, but that was it.

7 Then they published it again in 2018. That's
8 the JNCI paper. We call it the Andreotti paper.
9 Whatever you want to call it, I don't care. Again, they
10:57:21 10 saw no risk with NHL overall. They did, interestingly
11 enough, see an elevated risk for T-cell lymphoma, which,
12 oddly enough, is exactly what Mr. Johnson has. They
13 studied this. They looked at it and said that you won't
14 see it.

10:57:35 15 So we know before ever seeing the results from
16 the AHS that it won't show risk unless it's really high.
17 So it's not really compelling evidence that there's no
18 risk. It's compelling evidence that the AHS is being
19 properly predicted by the people who ran it. You heard
10:57:51 20 from Dr. Blair. He ran the IARC Monograph. He ran the
21 AHS. He concluded it caused cancer. That should be it.

22 They cite Anneclaire De Roos. She's on the JNCI
23 paper, but she also signed a letter with Dr. Portier
24 saying IARC got it right, this stuff causes cancer. I
10:58:11 25 mean, this idea that the AHS is some profound study that

1 answers the question that we've been trying to solve this
2 whole time is just not true. It tells us exactly what we
3 knew it would, not much.

4 Compounded into this problem with the AHS,
10:58:30 5 separate and apart from the misclassification issue,
6 is -- well, it's actually related -- but it's the change
7 this use in the product; right? We know starting -- the
8 first questionnaire was between 1983 and 1997. This is
9 glyphosate use amongst agricultural workers. This is the
10:58:48 10 same populate. They did a file study between 2001 and
11 2005, and that's where they lost 40 percent of their data
12 and had to impute it. There's all these problems
13 associated with the imputation based on her testimony,
14 but I really don't want to belabor it. The simple fact
10:59:03 15 is even if you use 2005, it's doubled since.

16 What's going on is you're studying a pesticide
17 that has just had a gargantuan increase in use, you can't
18 do that. It just doesn't work. It breaks the model. It
19 breaks the system. That's what they all agreed to.

10:59:24 20 Remarkably, Dr. Mucci said oh, it shouldn't make
21 any difference. It's actually not true. If you actually
22 look at the study -- maybe I'll show it to you on
23 rebuttal, if I have to -- on the last page it says, if
24 there has been changes of use in the product it, will
10:59:38 25 affect the results. Everyone agrees that there has been.

1 Probably the most kind of basic point, though,
2 is that the IARC Monograph spent a lot of time discussing
3 the AHS. You'll have it in evidence to take a look at.
4 They discussed it. They looked at the De Roos 2005 data.
11:00:00 5 They discussed its strengths, weaknesses. It was fully
6 concluded and IARC concluded it was negative; right?

7 So the biggest attack on IARC is now they have
8 the new AHS. Well, the new AHS is negative. So it was
9 negative when they came to their conclusion, and it's
11:00:20 10 negative now. It wouldn't have impacted their results.
11 It's the same study. So this idea that IARC didn't
12 consider all the epidemiology, it's just not true.

13 All right. So those are the reasons that they
14 attack epidemiology. Let's quickly go through the mouse
11:00:38 15 studies. I don't want to spend too much time on it.
16 IARC classified it as sufficient, but let's look at what
17 the charts show. Let's start off with the rats.

18 Monsanto, to this day, has only offered evidence
19 about the skin keratoacanthomas and just refused to offer
11:00:59 20 any testimony about the repeated thyroid tumors, the fact
21 that there's a kidney carcinoma. Here we also see that
22 in mice, it crosses species. Some of these, sure, we
23 agree probably aren't a big deal.

24 Dr. Portier, when he said pick and choose which
11:01:16 25 ones you have to rely, he told you which ones are the

1 strongest. And probably the most interesting one for
2 this case is the skin case. It's not because it's a
3 carcinoma. It's not. It's a benign tumor, but it shows
4 that it creates tumors in the skin. We're dealing right
11:01:34 5 now with a man who has tumors in his skin. His are not
6 benign, but they exist and it shows that there's a
7 plausible mechanism. It's called biological
8 plausibility.

9 But the rat studies really aren't the crazy one.
11:01:50 10 The really intense one is the mouse data, and here we see
11 the kidney ones popping up again. This is a cross-
12 species identification which is something that's really
13 important in assessing the animal data.

14 And the Monsanto study's the first one, but
11:02:04 15 every single study after Monsanto looked at it found some
16 form of malignant lymphoma, every single one. And you
17 saw Monsanto try to explain it away. Dr. Foster went up
18 there and he said listen all of these, yeah, sure, but
19 they're all within the historical range of 12 percent.
11:02:25 20 He put a little chart up. He said it over and over
21 again.

22 At the very end of his examination, I showed him
23 the actual data and he went, yep, I'm wrong. So the
24 actual basis of his opinion is just wrong. It's not
11:02:41 25 12 percent, it's 4 percent. That's what the data shows.

1 And so instead of seeing six tumors in every group, the
2 max you would see is two. And that's really, really
3 important in understanding this, because Dr. Foster, and
4 even the EPA, oddly enough, they do the same thing. They
11:03:01 5 dismiss all the malignant lymphoma because they say it's
6 within the range of historical controls.

7 Now, we know that's in violation of the
8 guidelines. The guidelines say don't do that. They
9 never explain why they do it, but they do that. Putting
11:03:13 10 aside them violating the guidelines, Dr. Portier clearly
11 showed that it's popping up over and over again. And
12 this case is about lymphoma.

13 You're seeing the very tumor in the mice that
14 you would expect -- that you're seeing in humans. It's
11:03:32 15 -- the parallels of the data are overwhelming. And if
16 you were to just to look at the epi and just look at the
17 animal data, you might not connect the dots. But when
18 you look at both, like our experts did, it's pretty clear
19 that there's something going on here, specifically with
11:03:49 20 lymphoma the cancer that starts in the bones and
21 manifests all over your body in different tumor sites.

22 IARC concluded it was sufficient. Now, one of
23 the things that I think came up -- and we didn't really
24 get to talk about it too much because it really came up
11:04:05 25 in Dr. Foster's testimony -- is this idea of the ways

1 that carcinogenesis happens. We have an initiator;
2 right? That's something that directly causes damage to
3 DNA. And after you damage them enough, it eventually
4 mutates in the cells and causes cancer; right? But
11:04:23 5 another way something causes cancer is something called a
6 promoter, and the promoter affects all the other aspects
7 of it. It doesn't initiate, but it takes the initiated
8 cells and progresses them quicker towards a tumor.

9 And both types of carcinogens are accepted and
11:04:42 10 understood, and there's actually a way to test if
11 something is a promotor. It's called a promoter test,
12 and there's only been one that's ever been done on
13 glyphosate. It wasn't done on glyphosate. It was
14 actually done on Roundup. It was done on mice skin.
11:04:56 15 It's called the George study from 2010, and it was done
16 by some scientists in India. And there was some
17 questions, I think, about what was the vehicle and was
18 there a vehicle control, so let me just walk you through
19 that very quickly.

11:05:10 20 So this is the study. This is the "Studies on
21 Glyphosate-Induced Carcinogenicity in Mouse Skin" -- so
22 they're doing a skin-tumor-promoter study -- "A
23 Proteomic Approach." I actually don't know what that
24 means, sorry.

11:05:24 25 Anyway, they do an analysis, glyphosate is

1 widely used, "Here we showed the carcinogenic effects of
2 glyphosate using a 2-stage mouse skin carcinogenesis
3 model and proteomic analysis. Carcinogenicity study
4 relieved that glyphosate has tumor promoting activity."

11:05:43

5 All right. Let me show you what they actually
6 did, so you don't have to take my word for it. We know
7 that they specifically used Roundup original from
8 Monsanto Company, St. Louis Missouri. It's the same
9 stuff here, has the 41 percent glyphosate and the POEA
10 surfactant. The same thing that Mr. Johnson was using.

11:06:00

11 Okay?

12 And they broke it into a bunch of different
13 groups, but the groups that we're interested in are the
14 first two and the last ones. What they do in these
15 studies is they actually give the -- they take the mouse
16 and they actually give it an initiator, right, something
17 we know causes cancer as an initiator, and then they
18 apply the substance like glyphosate to it to see if it
19 promotes the initiation. So was it a promotional effect?

11:06:12

11:06:31

20 And they break it into a bunch -- so DMBA is an
21 initiator. They also have DMBA plus TPA, and TPA is
22 specifically a promoter. We know it's a promoter. This
23 is a complete example. So you have a known initiator and
24 a known promoter; right?

11:06:48

25 But they also, in Group 2, did glyphosate alone.

1 And with glyphosate alone, they used the vehicle which is
2 the substance that gets mixed with it to apply it to the
3 mouse. That was the issue about the vehicle. 50 percent
4 ethanol and acetone, 50 percent solution. And so they
11:07:07 5 did glyphosate just -- had the vehicle in it, and so they
6 looked at what would happen if you just put glyphosate on
7 it without any initiator. But also down here, they did
8 the initiator and then applied glyphosate one week later
9 by topical treatment, three times a week. Okay?

11:07:23 10 So we actually have a control for the vehicle.
11 And what does it show? Here's the table, here's the
12 results. It shows that that group that just had
13 glyphosate had no tumors, zero across the board. So it
14 was not initiating tumors in this relatively short mouse
11:07:46 15 study on the skin. And the one that had the absolute
16 initiator plus the known promoter it had -- 100 percent
17 of the animals had tumors in their skin because it was a
18 known initiator and known promoter.

19 But when you give it a known initiator and
11:08:00 20 glyphosate, 40 percent of the animals had tumors. So
21 what does that tell you? It's a pretty complicated
22 issue. Basically what it tells you is that glyphosate is
23 clearly promoting tumors; right? Because even when they
24 had just the DMBA, the initiator by itself, there was no
11:08:20 25 tumors; right? Glyphosate is doing something not as

1 aggressive as TPA, but it's doing something, and
2 40 percent of them had tumors in their skin.

3 Dr. Foster dismissed this and actually IARC
4 didn't consider it as well and EPA doesn't consider it
11:08:36 5 mostly because there's only 20 animals in the group, even
6 though it's statistically significant, but they didn't do
7 a full histopathical examination. They didn't break
8 apart those tumors to see if they were carcinogenic.
9 Okay, fine.

11:08:52 10 But it doesn't negate what the data does show.
11 It shows that glyphosate, when applied to the skin,
12 induces the promotion of tumors. That's literally what
13 it shows. This is the only promotional study that's been
14 published and shown, and it's overwhelmingly obvious what
11:09:09 15 it shows.

16 THE COURT: Mr. Wisner, we need to take the
17 morning recess now.

18 MR. WISNER: Perfect, your Honor.

19 THE COURT: Ladies and gentlemen, we're going to
11:09:17 20 take a 15-minute recess now, so we'll be in recess for
21 15 minutes until 11:25. Please remember, do not discuss
22 the case. We'll resume at 11:25. Thank you.

23 Counsel, can you please approach.

24 (Recess.)

11:26:24 25 THE COURT: Welcome back, Ladies and Gentlemen.

1 We'll now continue closing arguments with Mr. Wisner.

2 Mr. Wisner, when you're ready, you may proceed.

3 MR. WISNER: Thank you, your Honor.

4 All right. So I just want to show you another
11:26:39 5 document that's in evidence, 366. This is an e-mail sent

6 from Ashley Roberts at Intertek to Dr. Farmer and

7 Dr. Heydens to the people you've seen testify to in this

8 case. Just so you know, Donna Farmer in her testimony

9 she actually said she considers herself the spokesperson

11:26:59 10 for Monsanto on safety issues and Roundup and Mr. --

11 Dr. Heydens is her boss. That all came out in the

12 testimony. I just want to point that out because one of

13 issues in punitive damages is were these individuals

14 considered managing agents sufficient to either speak for

11:27:16 15 the company or -- the instructions say what the elements

16 are. They clearly do, but I just want to point that out.

17 So Ashley Roberts sends an e-mail to Donna and

18 Bill. He's talking about Keith, who has asked a

19 question, "He has asked if we need to give any

11:27:35 20 consideration to exposures of formulants in the

21 commercial product, at least in the applicators? I was

22 under the impression that these were inert, but reading a

23 response this morning in the Ecologist makes it sound

24 like it's the combination that is toxic"; right?

11:27:53 25 So in response to a colleague that is writing a

1 paper that Monsanto is going to publish, essentially
2 refuting IARC, here's what he said, he says, "Ashley, I
3 think the short answer is no. The focus of this is what
4 is the carcinogenic potential of glyphosate." This is
11:28:07 5 what we see frequently. Just focus on glyphosate, not
6 the formula.

7 But then he says something that's particularly
8 revealing, "That said, the surfactant in the formulation
9 will come up in the tumor promotion skin study" -- that's
11:28:20 10 the one we were just talking about -- "because we think
11 it played a role there."

12 This is actually an admission by their chief
13 top-dog toxicologist at Monsanto saying, "That George
14 study that we just discussed, yeah, we think the fact
11:28:36 15 that it was a formulated product played a role in the
16 promotion of skin tumors." This is in 2015 August. It's
17 important, because Mr. Johnson, at this point -- we're
18 going go through his timeline in a second -- is actually
19 currently actively spraying Roundup at this time at the
11:28:54 20 Benicia school grounds, and at this time, he is still
21 waiting for a response from his second phone call. So
22 that's the context of this.

23 All right. So we've looked at the does it cause
24 cancer. I think we've got it. I'll respond to whatever
11:29:09 25 defense counsel brings up in rebuttal. First question,

1 "Can it be a substantial contributing factor?" Yes.

2 Question -- next one: "Was it a substantial
3 contributing factor in Mr. Johnson's cancer?" And before
4 I get into this, I'm just going to quickly address a
11:29:27 5 couple of the big issues. The first one is something
6 called latency.

7 And Monsanto wants you to believe that the
8 minimum amount of time between exposure and diagnosis for
9 mycosis fungoides because of a pesticide exposure is --
11:29:40 10 it keeps changing what their number is. I think on the
11 opening it was, like, 12 years. I don't know what he's
12 going to say now. Maybe it's 6. I don't know. The
13 simple fact is there is no minimum latency for
14 non-Hodgkin's lymphoma that is more than four months.
11:29:58 15 That's the minimum latency.

16 You don't have to take my word on that. That is
17 the number come up by the 9/11 Commission after exposure
18 to chemicals from the 9/11 incident. They said four
19 months is the minimum amount. That's it. Because
11:30:14 20 Dr. Sawyer explained very clearly that it's a curve;
21 right? And, you know, if it's a lot of exposure, then
22 it's slanted this way. If it's lower exposure, it's
23 slanted that way, but it's a curve. And some people will
24 get cancer in a few months, some will get cancer in four
11:30:30 25 months, and some will get cancer in 25, 30 years; right?

1 But between those two extremes is everybody else.

2 And you have to consider exposures and other
3 potential risk factors, and for Mr. Johnson, there wasn't
4 any. The only thing he had as a risk factor was the fact
11:30:47 5 that he's African American. That's it. Everything else
6 he didn't have for mycosis fungoides, except he had
7 extreme exposures to Roundup for two years or two
8 spraying scenes.

9 There's a big fight about did he have a rash
11:31:02 10 starting in 2013 or early 2014. It's the fall of '13,
11 early '14. It doesn't matter. It's the most bizarre
12 fight I've ever had in a courtroom, because he had two
13 full spraying seasons; right? That's plenty of exposure
14 to get cancer, and so whether it started in the fall or
11:31:22 15 not is irrelevant. Although, the records don't support
16 that it's in the fall. But in any event, it's a red
17 herring. It's a non-issue.

18 All right. So here's the instruction again on
19 substantial contributing factor, and the same instruction
11:31:36 20 that applies to general causation applies to specific
21 causation. And that is: Do you think that it's likely,
22 more likely than not, 51 percent, that Mr. Johnson's
23 cancer was at least contributed to substantially by his
24 Roundup exposure? That's the question. If you think
11:31:55 25 "yes," we're done. We've proven this element.

1 Let's quickly run through the chronology here.
2 I've got 15 minutes before I have to get to the last part
3 of this, so let's see if I can do this.

4 All right. So Mr. Johnson is promoted to
11:32:11 5 integrated pest manager June 2012. He has an entire
6 spraying season. He testified, and there's been no
7 countervailing evidence to this, that the machine that he
8 was using was putting out 50 gallons an hour. He'd go
9 through three full tanks in a morning. Now, they brought
11:32:30 10 up Dr. Al-Khatib who said, "No. That's not how it
11 works." And then I literally showed him printouts from
12 the internet that said the opposite, and he goes "No, no.
13 That's for something else."

14 But his opinion was literally based on this
11:32:41 15 photograph. That's it. He was paid \$70,000, and he
16 looked at a photograph and said, "It's 12 gallons an
17 hour." That's not evidence. That's just rampant
18 speculation.

19 We heard from Mr. Johnson that he'd go through 3
11:32:56 20 full tanks in a morning, and a tank has 50 gallons. It
21 doesn't take rocket science. He was going through about
22 150 gallons per spraying session, and he'd have about 40
23 of them in the summer months and intermittently in
24 between.

11:33:11 25 So going through here, we have intermittent

1 spraying. Then we enter his second spraying season.
2 This is May of 2013. He starts spraying again, and
3 during this time period, we don't know the exact date, he
4 has the Mary Farmar incident. He's at the Mary Farmar
11:33:28 5 School District, and that's when he's pulling the hose on
6 the machine and spraying it everywhere, and it's getting
7 everywhere, and he's spraying it, and something goes
8 wrong. It pops off the machine, and it's shooting out a
9 bunch of Roundup. And what does he do? He doesn't -- it
11:33:40 10 gets all over him. So the first thing he does is he
11 actually creates a dirt pile to prevent it from going
12 down the slope, because he doesn't want the children to
13 be exposed to it.

14 And after he's drenched in it -- he finally gets
11:33:52 15 to the machine, he turns it off, and he's drenched, I
16 mean, head to toe, all over his body. And what does he
17 do? He drives back to his office, which is not there, a
18 couple miles away. He gets there, gets into the office,
19 takes off his clothes, and he wipes himself off, and he
11:34:08 20 doesn't take a shower for another six hours, so he's
21 getting just an incredible amount of exposure during this
22 incident sometime during the summer of 2013. We don't
23 know exactly when it happened. And this is obviously in
24 addition to his just regular drift exposure that happens
11:34:25 25 when he sprays.

1 So he completes it in August of 2013, and this
2 is where this mystery rash issue comes from, but the
3 simple fact is he went and saw a doctor for wasp stings
4 in September of 2013, and he's there for stings, and we
11:34:40 5 read into the record from a medical record, "Negative for
6 rash." So he actually gets a physical examination from
7 doctors at the time, and it doesn't say -- it doesn't
8 omit anything about a rash. It literally says, "Negative
9 for rash."

11:34:57 10 Now, Dr. Kuzel took the stand and said he had a
11 rash on his face and on the side of his neck at this
12 time. How could any doctor looking at a person's rash on
13 their face write into a medical record "negative for
14 rash" if there was a rash there? There just wasn't.

11:35:14 15 The only treating physician to have testified in
16 this case, the only one, is Dr. Ofodile. She came out
17 here on her own dime to testify from Atlanta because she
18 cared so much about Mr. Johnson. And she said, "Yeah,
19 there's no evidence that it actually started in 2013."

11:35:31 20 That her record, when she said it was a year prior, it
21 was late in the day, and if he had a rash, he would have
22 come into the hospital, because he was very good about
23 seeking treatment when he was injured. So that's the
24 testimony.

11:35:44 25 Separately, there's another medical examination

1 in December, a few months later, and the medical record
2 says, "No deformities, no shift, no scarring, no
3 swelling." Again, no mention of any rash.

4 In February of 2014, this is when he has his
11:36:00 5 second, sort of, mishap at work. At this point, he's
6 using a backpack sprayer for some reason. He only used
7 it a couple times, but one of the few times he did, it
8 leaked through his suit and actually saturated his whole
9 back, and he actually thought it was sweat until he
11:36:19 10 realized, "Oh, my God. I'm literally drenched in
11 Roundup." We don't know how long he was exposed for. It
12 could have been for an hour or two. We don't know, but
13 it happened in February of 2014.

14 And then the first evidence of any serious rash
11:36:33 15 is May of 2014, so just a few months after. And if, in
16 fact, Roundup is a promoter, this is, kind of, what you'd
17 expect; right? You'd start expecting the tumors to start
18 manifesting after you have repeated exposures. After his
19 second season and another major exposure, he starts
11:36:46 20 seeing it occur.

21 After -- following several biopsies, he's
22 finally diagnosed -- well, sort of diagnosed, it's a
23 preliminary diagnosis -- in August of 2014, and his final
24 diagnosis was actually made by Dr. Ofodile, who testified
11:37:02 25 here, and that was in October of 2014. And this is what

1 he looked like. Okay? You can see by October 2014, he
2 has plaques all over his skin, on his leg, on his chest.
3 There's some stuff on his face.

4 There is absolutely zero evidence that he had
11:37:17 5 this in the fall of 2013, but again, I stress it doesn't
6 matter. So this is what he looks like.

7 After October 2014, we have that same month,
8 same month that he's diagnosed, IARC says they're going
9 to look at glyphosate. All right. We have an internal
11:37:37 10 email from Dr. Heydens talked about the IARC evaluation,
11 it's being sent to Dr. Farmer. And in this email, he
12 acknowledges, "At this time, we have vulnerability in the
13 area of epidemiology. We also have potential
14 vulnerabilities in the other areas that IARC will
11:37:55 15 consider, namely exposure, genotox and mode of action.
16 If there was a force working against glyphosate, there is
17 ample fodder to string together to help the cause, even
18 though it's not scientifically justified in its purest
19 form."

11:38:11 20 I don't know what that means, purest form. But
21 anyway, this is -- this is what he says in October of
22 2014. This is in response to IARC saying they're going
23 to look at it. A month later, Mr. Johnson calls
24 Monsanto. So we have their main toxicologist saying,
11:38:27 25 "Yeah, we have vulnerabilities here. There's a lot of

1 science showing a risk." He called them. He told me he
2 works for a School District in California and about nine
3 months ago, February of that year, had a hose break on a
4 large tank sprayer. This resulted in him being soaked to
11:38:45 5 the skin on his face, neck and head with Ranger Pro. He
6 said he was wearing a white exposure suit, and it even
7 went inside that. A few months after this incident, he
8 noticed a rash -- again, a few months after
9 February 2014, which might be consistent with what we
11:38:59 10 know to be true -- on his knee, on his face and later on
11 the side of his head. He has changed his laundry
12 detergent, dryer sheets and used all creams available to
13 him, but nothing seemed to help. His entire body is
14 covered in this now, and the doctors are saying it's skin
11:39:14 15 cancer.

16 He's just trying to find out if it all could be
17 related to such a large exposure to Ranger Pro. He asks.
18 Dr. Goldstein says, "I'll call him," and we know he never
19 did.

11:39:28 20 After this, February 2015, Monsanto starts
21 plotting how it's going to deal with the IARC ruling.
22 There's another email from Dr. Heydens to Dr. Farmer and
23 others. In this email, they're talking about creating
24 science, and he specifically says, "A less expensive/more
11:39:46 25 palatable approach might be to involve experts only for

1 the areas of contention, epidemiology and possibly MOA
2 (depending on what comes out of the IARC meeting) and we
3 ghostwrite the tox -- exposure tox and genotox section."

4 He says, "ghostwrite." This is the guy in 2015
11:40:06 5 saying, "We're going to ghostwrite." And he goes on:
6 "Another option would be to add these people's names to
7 the publication, but we would be keeping costs down by us
8 doing the writing and they would just edit and sign their
9 names, so to speak. Recall that's how we handled
11:40:21 10 Williams Kroes 2000."

11 He said, "Yeah, remember that's how we
12 ghostwrote that thing 15 years ago." And we know that
13 that was relevant, because in Exhibit 373, they say --
14 this is in 2010 -- "Williams has served us well in
11:40:37 15 toxicology over the last decade." They create the
16 science and then sign to it.

17 This is in February of 2015. They come up with
18 a plan. This is dated February 23rd, 2015. It's before
19 IARC's classification. Prepared as an engagement plan.
11:40:49 20 First point is to protect the reputation and freedom to
21 operate of Roundup by communicating the safety of
22 glyphosate. They want their freedom to operate, which
23 means no regulation, sell it to whoever they want, make
24 billions. And this is before the Monograph has come out.
11:41:07 25 Okay. So they don't even know what the result's going to

1 be. They don't know what the Monograph's going to say,
2 what data they relied upon. And they plan to orchestrate
3 outcry with the IARC decision. That's not science.

4 Okay. You don't plan to attack an adverse scientific
11:41:26 5 ruling before you've seen it. That's called deliberate
6 disregard for human health.

7 I have no problem with a company making money.
8 This is America, but I've got a problem when they don't
9 do it honestly, and that's what this is showing. This is
11:41:41 10 February of 2015. A month later, a few weeks later, IARC
11 classification comes out, and then just three weeks
12 later, Mr. Johnson calls again. A second time he reaches
13 out to them and says, "Hey, guys. I need some help
14 here."

11:41:59 15 He goes on -- I'm not going to read all of this,
16 but he describes in detail that he's been using it for
17 his job, that he's been spraying with a 50-gallon tank.
18 He talks about the mixtures that he's using. He's
19 talking about his protective equipment. He states he
11:42:16 20 continues to get unexplained rashes and nodules all over
21 his body.

22 "The caller's level of fear is rising over his
23 continued use of Ranger Pro." One -- one phone call.
24 That's all it took, just one phone call to tell this guy,
11:42:33 25 "Hey, you know what, there's science that says it might

1 cause cancer."

2 This is what he looked like in March of 2015.

3 And as you can see, it's getting much worse. He has
4 plaques all over his body, lesion on his arms and legs.

11:42:47

5 This is the sarcoma one, that we found out later is not
6 the MF. It's on his head. You can see it's breaking.

7 So he reaches out to them, and because Monsanto
8 hasn't said anything to him, Dr. Ofodile actually writes
9 a letter to the Benicia School District saying, "Hey,

11:43:03

10 maybe he should stop spraying it."

11 So Monsanto's going to come in here and they're
12 going to tell you all of his treating physicians don't
13 think Roundup caused his cancer, and that is a flat-out
14 lie. Flat-out lie. The only person who's testified was

11:43:20

15 Dr. Ofodile. That's the only person. And what
16 Dr. Ofodile said is she told him to stop spraying it.
17 Yeah, she doesn't know for sure if it caused it, but
18 she's sure concerned. Concerned enough to write a
19 letter.

11:43:30

20 Finally -- not finally. Then in May, a few
21 months later, Monsanto creates a new plan. This is worth
22 taking a look at. What we see here is, you know, why do
23 more? They're talking about how to respond to IARC.

24 They can see there's a severe stigma associated with it,

11:43:47

25 and they need to provide new science to provide

1 additional support, care cover for future regulatory
2 reviews. They needed to combat the ATSDR evaluation. We
3 talked about that with Jess Rowland.

4 And the litigation support. I mean, they're
11:44:05 5 getting ready to fight off litigation. And they won't
6 even call back Mr. Johnson and tell him, "Hey, maybe you
7 should stop spraying." It gets worse. They talk about
8 creating a genotox MOA plan. Could be important for
9 future litigation support. So they're more concerned
11:44:26 10 about litigation than they are about just calling the guy
11 back and saying, "Hey, maybe you should be careful."

12 So after this -- now we're in September 2015.
13 I'm going to spend a few minutes, and then I'll move on.
14 There's these two documents in evidence. I want you to
11:44:43 15 read them closely, so the first one is this email, and
16 this is in response to a newspaper article about labeling
17 Monsanto's Roundup carcinogenic, and it gets sent to
18 Steven Gould, who's the guy who actually deals with
19 Mr. Johnson's distributor, and he's saying, "It's hard to
11:45:00 20 understand how all science and law can do this."

21 And in response, the distributor says to him --
22 this is in reference to people using this in
23 California -- "We are being overrun by liberals and
24 morons, sort of like a zombie movie, so we just have to
11:45:18 25 start taking them out one at a time, starting with the

1 elections next year." This is 2015. The elections next
2 year are the next presidential elections. How does
3 Monsanto's employee respond to this? "I like this
4 analogy." And he sends it on to other Monsanto
5 employees. Liberals and morons.

11:45:36

6 At the same time, they actually conduct a cost
7 analysis of IARC's classification. They talk about
8 there's going to be a gradual reduction in use. School
9 districts are another big risk with the Healthy Schools
10 Act and increased attention. They frequently use PROMAX
11 and PRO Concentrate today, and it even says, "Customers
12 that I'm aware of that have already stopped using
13 glyphosate since the IARC ruling, Irvine Unified School
14 District and several Bay Area cities and school
15 districts." Yeah, that's right. Schools in San
16 Francisco don't use Roundup. It's right there in black
17 and white.

11:45:57

11:46:12

18 But you know what they didn't do, call up a man
19 who was spraying at a school district in the Bay Area and
20 say, "Hey, there's an IARC ruling," because at this time,
21 in September 2015, he's still spraying, because they
22 never called him back. And in 2015, it transforms. It
23 goes from being a scary, although controllable type of
24 cancer, to the indolent form. It became a death
25 sentence.

11:46:46

1 Finally, in January of 2016, Mr. Johnson
2 succeeds in stopping the spraying, and as we know, the
3 story goes on. The cancer gets worse. This is
4 August 2016. You can see the lesions and the plaques are
11:47:03 5 getting worse, concentrated. December 2016, they're
6 getting higher and thicker, and you can start seeing the
7 plaquing all over his skin. You can see just chunks of
8 skin basically falling off his body. This is January of
9 2017. You can see it's literally everywhere, all over
11:47:19 10 his body.

11 June 2017, this is one of those ruptures that
12 you talked about where it's exposed skin and it's
13 painful. This is literally on his eyelid, so this is --
14 every time he blinks, he's in pain. Every time. It's
11:47:35 15 all over his back, his feet, his legs. This is
16 November 2017. This is getting worse and worse. And
17 this is January of 2018.

18 Monsanto called a doctor who took this stand and
19 said to you that Mr. Johnson was in complete remission.
11:47:54 20 What the heck is he talking about? I mean, there's
21 offensive, and then there's completely bonkers.

22 Mr. Johnson is not in complete remission. He's
23 starting chemo in a few weeks. And everyone agrees --
24 and I'm sorry, but everyone agrees that if he makes it to
11:48:13 25 2020 -- he won't make it to 2020 absent a miracle.

1 That's the facts.

2 That Monsanto would call someone up here and
3 speculate about bone marrow transplants that no one has
4 ever offered to him, that he might live until he's 30,
11:48:30 5 when his most recent scan showed the exact opposite, is
6 outrageous. It is disgusting. It is reprehensible.
7 That man has no dignity. I'm thankful I wasn't here
8 for that direct. I was writing a brief in the back room
9 for most of it. When I was reading the transcripts, I
11:48:46 10 turned red.

11 I go to sleep every night thinking about this
12 man and his family, because I know the consequences of
13 what's happening to him. It haunts me, and he cavalierly
14 says complete remission.

11:49:05 15 We have testimony from Dr. Nabhan -- I'll be
16 quick about this -- it's about the differential
17 diagnosis. He looked at all the potential risk factors.
18 All of them didn't play. The only one that made sense
19 was Roundup. Supported by the animal data. Supported by
11:49:21 20 the epidemiology.

21 And so the question is: Did -- is there
22 evidence, more likely than not, that Roundup
23 substantially contributed to his cancer? Absolutely.
24 There is no real -- I mean, this is overwhelming
11:49:37 25 evidence.

1 As part of this process, you're going to have to
2 figure out damages. Now, the economic damages, that's
3 the stuff we can calculate, and we actually stipulated to
4 it. And this is this number right here. It will be in
11:49:53 5 your jury verdict form, so you don't have to remember it.
6 You just have to add that to whatever you do.

7 The hard part is the noneconomic damages. And
8 this is a -- sort of, an awkward thing to deal with,
9 right, because you're trying to pay someone money for
11:50:11 10 physical pain, mental suffering, the loss of enjoyment in
11 life, disfigurement, physical impairment, grief, anxiety,
12 humiliation, emotional distress.

13 It's almost -- it's so weird to talk about this
14 in the context of money, because it's such a personal
11:50:29 15 thing. But we heard testimony from Mr. Johnson and his
16 wife -- I don't know, it moved me. It really did -- that
17 he's -- that he's, like -- you know, he's at night crying
18 to himself so his children don't see that he's afraid.
19 That he's afraid to get into a pool, because he's afraid
11:50:51 20 people will see his cancer and not want to get in the
21 pool after him. That he can't wear clothes that rub his
22 skin, because the lesions are so painful. That he can't
23 sleep at night. That he gets chemotherapy time after
24 time after time again. It's so bad he can't even leave
11:51:12 25 his bedroom for days at a time, and while this is

1 happening, while he's fighting this fight, his wife is
2 working 14 hours a day, two jobs to just pay the bills.

3 What is that worth? I mean, how do you put a
4 price tag on -- I wish that upon no one. My worse enemy,
11:51:36 5 I would not wish that upon them. So it's a hard thing to
6 do, and Mr. Dickens talked about that a lot in jury
7 selection, and we threw around -- and I think the -- the
8 cleanest way is to think about his life expectancy;
9 right?

11:51:53 10 What we know is that he's had four years of
11 this, since 2014 he was diagnosed, and he will live
12 between 2 more to 33 years.

13 The number's simple: A million dollars per
14 year. For all that suffering, all that pain, it's a
11:52:13 15 million dollars per year.

16 And if he lives for only two years, then the
17 remaining years that he doesn't get to live is also a
18 million dollars.

19 So it doesn't matter if he dies in two years or
11:52:26 20 dies in 20. It's because he deserves that money. And so
21 the noneconomic damages are \$37 million.

22 That's the kind of money that fixes his
23 situation to the best we can, that he can spend the last
24 few years of his life, and pray to God it's more -- maybe
11:52:43 25 he'll be able to afford some experimental treatments.

1 But he'll be able to spend it with his wife. She sure
2 isn't going to have to work 14 hours a day. His children
3 will be taken care of in the sense that he will now have
4 the personal pride of knowing that he's taken care of his
11:53:02 5 family. And his last few years of life can be spent
6 where it's deserved: In essential luxury instead of
7 never seeing his family and crying alone at night.

8 But will he stop? Probably not. I mean, will
9 the fear abate because he knows he's dying? Of course
11:53:22 10 not. But this is the best we can do.

11 And so when you combine both together, the
12 economic damages plus the noneconomic damages, it's this
13 number: \$39,253,209.23.

14 I wish we didn't have to do this. I'd rather
11:53:51 15 not be here, actually, at all. I'd rather he been taking
16 his kids to a football game today. But he won't be able
17 to today or tomorrow or the day after, because he can't
18 be in the sun. It hurts his skin condition.

19 And in a few weeks, when he starts chemo, he'll
20 be laid out again. Hopefully this time the chemo doesn't
21 actually kill him. It came pretty close last time.

22 So that's the compensatory damages.

23 But separate and apart from compensatory damages
24 is the third issue here. And that is: Did Monsanto act
11:54:20 25 with knowing disregard of human health?

1 In the jury instructions, the Court has defined
2 malice. And malice is, sort of, and old-timey word;
3 right? It sounds like what somebody has in their mind
4 before they actively shoot somebody or stab them or
11:54:41 5 something. But that's actually not what malice is here.

6 It's anyone who -- will willful and knowing
7 disregard to the rights or safety of another. A person
8 acts with knowing disregard when he or she is aware of
9 the probable dangers -- dangerous consequences of his or
11:54:58 10 her conduct and deliberately fails to avoid those
11 consequences.

12 So if you know there's a risk, if you know
13 there's an issue, and you decide not to act -- knowing
14 that by not acting people will get hurt, that's malice.
11:55:15 15 And that fits what Monsanto has done here to the T.

16 Now, the standard by which you have to do this
17 is slightly different; right? Before, it's that feather
18 weight scale, that 51 percent. That's the compensatory
19 stuff. But for punitive, it's bigger.

11:55:32 20 Certain facts must be proven by clear and
21 convincing evidence, which is a higher burden of proof.
22 But what that means is the party must persuade you that
23 it is highly probable that the fact is true. Highly
24 probable that the fact is true.

11:55:47 25 So is it highly probable that Monsanto, a

1 multi-billion dollar corporation, was so concerned about
2 making money, specifically about making money in school
3 districts, that it didn't call Mr. Johnson back? That's
4 not rocket science. It's pretty obvious.

11:56:06

5 We have a host of information. Just literally a
6 host of evidence. And, actually, you're going to get two
7 big binders that go back into the evidence with you. And
8 that's the evidence that you're going to look at. And
9 it's replete with emails and damning documents. I

11:56:23

10 know -- I think the only document that helps Monsanto in
11 this entire piece of evidence is this EPA document, which
12 you can't even consider for the truth of the matter. It
13 can only be used to reflect a state of mind of Monsanto,
14 starting in December 2016. Long after Mr. Johnson was
15 given his death sentence.

11:56:38

16 So look at the evidence. And I could go through
17 it -- I'll probably go through some of it in rebuttal,
18 just to see what needs to be responded to.

11:56:52

19 But here's what we know: Dr. Parry, in 2000,
20 issued two different reports saying, "This stuff is
21 genotoxic, and you need to study the formulated product
22 in real people."

11:57:04

23 Monsanto redid one of those studies and never
24 did a single one after that. So they failed to test.
25 And they did that deliberately. You have an email from

1 Dr. Heydens, where he says, "We are not going to do the
2 studies Parry suggests."

3 More importantly, neither of those reports were
4 ever given to anybody. They were buried. They were not
11:57:19 5 given to the EPA, and they should have been. That is
6 deliberate mischief. That is somebody who's trying to
7 hide something.

8 At the same time that Dr. Parry's report comes
9 out, they ghostwrite and publish the Williams article in
11:57:36 10 2000.

11 So to compound the failure to disclose to the
12 EPA and everyone else, they then make up science that
13 says the opposite. There couldn't be more clear evidence
14 of intent that you could ask for.

11:57:49 15 Now, I couldn't find an actual employee to go up
16 there -- well, we did find an employee, but he was a
17 former one, Dr. Azevedo. But we couldn't find an actual
18 current employee of Monsanto to say, "Yes, I intended to
19 hurt people." Okay. That's not the defense. The
11:58:06 20 defense is: What does the document say?

21 We know that they actively secured Freedom to
22 Operate, which is a deliberate companywide program to
23 avoid regulation. They attacked IARC. Not just kind of.
24 They orchestrated outcry, and they did that before they
11:58:25 25 even knew the results. That's deliberate disregard for

1 human health.

2 They refused to test. You heard back in 1985
3 there was a scientific advisory panel that says, "Hey,
4 these kidneys that we're seeing in the mice, redo that
11:58:40 5 study. Let's see if we see the kidney tumors again."
6 Monsanto's response, "Hell no."

7 Because they didn't want to turn over any
8 stones. That is deliberate disregard. And if they had,
9 and it had shown tumors, then it would have been
11:58:56 10 classified as a Class C carcinogen by the very EPA that
11 they rely upon.

12 But by stonewalling them in the '80s, they were
13 able to hide that risk. And to this day, that test has
14 never been done. Never.

11:59:09 15 And, sure, other people have done tests. Sure.
16 But they all continued to show tumor, after tumor, after
17 tumor. And Monsanto has done absolutely nothing to
18 address that beyond simply ghostwriting literature and
19 criticizing it. And that's literally their job.

11:59:28 20 We heard about the Greim article that everyone's
21 relied upon where that mysterious virus in the Kumar
22 appeared. It was written by Monsanto.

23 We also have them targeting schools. They
24 literally were targeting selling to school districts in
11:59:45 25 California to make money at the time of the -- after the

1 IARC classification.

2 I don't know how gross of an organization it can
3 be to do that. If you have any suspicion that your
4 product can cause cancer, you don't try to increase sales
11:59:58 5 at schools. That is reprehensible conduct. And that's
6 what they were doing.

7 The evidence of the materials safety data sheet
8 currently warns but the label that goes to consumers does
9 not. There's absolutely no excuse for that. They cannot
12:00:16 10 excuse it. That's conscious disregard.

11 And they never called Mr. Johnson back. I don't
12 know what kind of person knows about risks, has a guy
13 call you twice saying, "Hey, is this stuff causing my
14 cancer," you refuse to call him, and then it transforms
12:00:32 15 into the aggressive type.

16 That is -- that is not just conscious disregard,
17 that is conscious disregard for this man in this room
18 today. It is unacceptable.

19 So how do we calculate punitive damages? It's a
12:00:49 20 tough conversation. It's not about Mr. Johnson; right?
21 It's not about how we pay him or -- that's the
22 compensatory part. The question is: How do we punish
23 the company?

24 It says -- "Of Monsanto's financial condition,
12:01:02 25 what amount is necessary to punish it and discourage

1 future wrongful conduct?"

2 Right now, Ms. Buck -- she's sitting over there
3 in that corner. On her cell phone is a speed dial to a
4 conference room in St. Louis, Missouri. And in that
12:01:18 5 conference room, in that board room, there's a bunch of
6 executives waiting for the phone to ring. Behind them is
7 a bunch of champagne on ice.

8 MR. LOMBARDI: Your Honor, I object. This is
9 supposed to be about the evidence. This is complete
12:01:30 10 fantasy.

11 THE COURT: Sustained.

12 MR. WISNER: The number that you have to come
13 out with is the number that tells those people -- they
14 hear it, and they have to put the phone down, look at
12:01:43 15 each other, and say, "We have to change what we're
16 doing."

17 Because if the number comes out and it's not
18 significant enough, champagne corks will pop.
19 "Attaboys," are everywhere.

12:01:58 20 MR. LOMBARDI: Your Honor, it's the same
21 objection.

22 THE COURT: Sustained.

23 Mr. Wisner, please do not engage in speculation.
24 You may continue.

12:02:11 25 MR. WISNER: Their net worth is \$6.6 billion.

1 They have in cash, on hand, \$3.1 billion. The annual
2 interest on just the cash on hand -- that means the
3 amount of money they make for doing nothing, and at a
4 2 percent interest rate, which that kind of money, you
12:02:32 5 could probably get better results. But at a 2 percent
6 interest rate, \$62 million a year. For doing nothing.

7 And I have been wracking my brain about what is
8 the proper publish for Monsanto? What is the number that
9 will make them deter future wrongful conduct? And I came
10 up with it.

11 Mr. Johnson was exposed in 2014. And by all
12 estimates, it looks like he will probably lose to his
13 cancer by 2020. That's six years. Six years of their
14 failure to warn and its effects on Mr. Johnson. I want
12:03:14 15 every dollar they made on interest for those six years.
16 Six times 62 is \$373 million.

17 That's a number that makes people change their
18 way. That's a number that sends a signal to Monsanto and
19 everybody that works there.

12:03:35 20 We will not tolerate this kind of conduct. It's
21 the kind of number that makes sure that next time
22 somebody calls Monsanto and says, "Hey, should I keep
23 spraying this stuff," they call him back.

24 It's the kind of number that makes that label
12:03:51 25 change tomorrow. This is what we request in punitive

1 damages.

2 Now, of course you can go higher. You can go
3 lower. Same thing with compensatory, by the way. You
4 can go higher or lower. That's entirely up to you.

12:04:06

5 But this is a number I'd like you to stay
6 around, because this is a number that I think is
7 appropriate for this case and this conduct.

8 Let's talk about the verdict form.

9 Let's go to the Elmo. Thanks.

12:04:33

10 So you're going to be presented with a verdict
11 form. And this is what it looks like. And you're going
12 to be asked to, sort of, answer a bunch of questions.

13 And what I'd like you to do is to answer "yes"
14 to every question, except Number 6, answer "no." That's
15 the shorthand. I'm actually going to walk you through
16 the questions. Now, that's what I'd like you to do.

12:04:46

17 The first question is: "Are Roundup Pro or
18 Ranger Pro products ones about which an ordinary consumer
19 can form a reasonable minimum safety expectation?"

12:05:06

20 Simply put, in using Roundup as it's sold on the
21 market today, would you think that it causes cancer?
22 Typically the label specifically says it doesn't have any
23 risk of that. So the answer is obviously "yes"; right?

12:05:23

24 You can look at a Roundup product and say, "Oh,
25 yeah. I have a minimum expectation of safety."

1 "Did Roundup fail to perform as safely as an
2 ordinary consumer would have expected when used or
3 misused in an intended or reasonably foreseeable way?"
4 So when you follow the label, would you expect to get
12:05:39 5 cancer?

6 The label is in evidence. Take a look at it.
7 There is nothing about cancer. And all it says is that
8 it's non-toxic to animals. That's what it says. And
9 there might be an eye irritant.

12:05:52 10 So if you follow the directions, there is no
11 reason to believe that it causes cancer.

12 "Was the Roundup Pro or Ranger Pro design a
13 substantial factor in causing harm to Mr. Johnson?" So
14 did the fact that it had glyphosate and it had the
12:06:08 15 surfactants and all the stuff and impurities that go into
16 it -- we heard testimony about formaldehyde, ethyl
17 dioxide. There's still, like, a bunch of really bad
18 known carcinogens in the mixture. Did any of that design
19 contribute to his injury?

12:06:25 20 Absolutely it did; right? Because without the
21 surfactant, the one that they used, it wouldn't have been
22 able to penetrate his suit, his skin and get to him.

23 So it's the design itself that's the problem.
24 And we know, because we heard testimony about it, there's
12:06:38 25 other types of surfactants they could use that are not as

1 problematic.

12:06:52 2 We saw a slideshow from Monsanto's own employee
3 saying, "This stuff is toxic, POEA." There's no reason
4 why they have to use POEA in this country. There's no
5 reason for it.

6 Now we're on to the next -- that was, by the
7 way, the design defect claim. Okay?

12:07:08 8 Now we're on to the next claim. Strict
9 liability, failure to warn. "Did Roundup have potential
10 risks that were known or knowable in light of the
11 scientific knowledge that was generally accepted in the
12 scientific community at the time of their manufacture,
13 distribution or sale?"

12:07:20 14 So did Monsanto know or should they have known
15 that it could cause cancer? They have studies that
16 started in the 1990s onward. There is absolutely no
17 question. And if you look at the documents, they
18 constantly raise along. This adds fuel to the fire about
19 Hardell. How do we combat this? That's from Eriksson in
12:07:38 20 2008.

21 The evidence is overwhelming that they knew
22 about the risk. So they knew about it. Not even
23 knowable. They knew about it based on the published
24 literature at the time.

12:07:49 25 "Did the potential risks of Roundup Pro or

1 Ranger Pro present a substantial danger to persons using
2 or misusing the products?" Yes, they did; right?

3 Obviously anybody who used it, there's a
4 potential risk of cancer they didn't warn about. That's
5 clearly a potential risk.

12:08:05

6 This is the "no." "Would ordinary consumers
7 have recognized the potential risk?" Of course not;
8 right?

9 It's not on the label. How do you know Roundup
10 causes cancer? Mr. Johnson was actually told -- he was
11 told by the Horizon distributor that it's safe enough to
12 drink.

12:08:15

13 So clearly there was no warning about it causing
14 cancer. So the answer to this one is "no."

12:08:29

15 "Did Monsanto fail to adequately warn?" Yes,
16 because they didn't say it could cause cancer.

17 "Was the lack of a sufficient warning a
18 substantial factor in causing Mr. Johnson's harm?"

12:08:44

19 Of course it was. He testified unequivocally he
20 would never have used it if he had known it would cause
21 cancer.

22 And as soon as he found out he had cancer, and
23 he was suspicious about it, he did everything in his
24 power to stop using it. So clearly if they had warned,
25 he wouldn't have used it, and it probably wouldn't have

12:08:59

1 gotten worse.

2 So that's the first claim. The -- that's the
3 strict liability, failure to warn.

4 Now we're on to claim of negligent failure to
12:09:09 5 warn. "Did Monsanto know or should have reasonably known
6 that that Roundup Pro or Ranger Pro were dangerous or
7 were likely to be dangerous when used or misused in a
8 reasonably foreseeable manner?" The same issue, did they
9 know or could they have known it caused cancer? The
12:09:24 10 answer is "yes."

11 "Did Monsanto know or should it reasonably have
12 known that users would not realize the danger?"

13 Well, if it doesn't say on the label, how could
14 they have known? The only people who knew that it could
12:09:37 15 cause cancer were the people who were studying the
16 literature. And a reasonable consumer is not somebody
17 who would be doing that. So the answer here is "yes."

18 "Did Monsanto fail to adequately warn of the
19 danger or instruct on the safe use of Roundup or Ranger
12:09:56 20 Pro?" Yes.

21 "Would a reasonable manufacturer, distributor or
22 seller under the same or similar circumstances have
23 warned of the danger or instructed on the safe use?"
24 Obviously; right?

12:10:06 25 It's not just what a -- this is the law. If you

1 have something that causes cancer, then you warn. And
2 you have to warn.

3 And so would they have done it? Absolutely.
4 Monsanto, of course, didn't care. They wanted to make
12:10:19 5 money, so they didn't.

6 And then: "Was it a substantial contributing
7 factor in causing harm?" Yes. We've discussed this.

8 Then below that is the claim of damages. We've
9 talked about what are Mr. Johnson's damages. And this
12:10:35 10 one, you can write in, you know, past noneconomic
11 damages. We estimated that at 4 million. Future
12 noneconomic damages, that was 33 million based on his
13 potential life expectancy over the years he won't live.

14 Then we get to punitive damages. "Do you find
12:10:55 15 by clear and convincing evidence that Monsanto acted with
16 malice," as we defined earlier, "or oppression in the
17 conduct, which you base your finding of liability for
18 Mr. Johnson?"

19 So if you think they acted with reckless
20 disregard for human health in failing to warn
21 Mr. Johnson, then the answer is "yes."

22 If you think it's highly probable that that's
23 what was going on, then you answer "yes" to this
24 question.

12:11:18 25 And then: "Was the conduct constituting malice,

1 oppression, committed, ratified or authorized by one or
2 more officers, directors or managing agents of Monsanto
3 acting on behalf of Monsanto?"

4 We've already discussed Dr. Heydens and
12:11:35 5 Dr. Farmer. Dr. Goldstein, the guy who didn't call
6 Mr. Johnson back, he's actually the lead toxicologist for
7 Monsanto. I think he testified that he's been personally
8 responsible for human toxicological needs for over
9 19 years. So the answer here is "yes."

12:11:56 10 And obviously you put in the punitive damages
11 amount here, and then the presiding juror will sign it
12 and date it.

13 Now, one of the things that you're going to have
14 to do when you go back in the jury room, and we're going
12:12:12 15 to be wrapping up in a second for lunch, is you're going
16 to have to pick a presiding juror. And that's really
17 important.

18 If you want to be the presiding juror, speak up.
19 Say, "Hey, I want to be -- to be the foreman." That's
12:12:25 20 what they typically call them. But we call them
21 presiding juror in California.

22 And your role, really, is just to help
23 facilitate the conversation. And a lot of you are going
24 to have questions. And what's great about a jury is you
12:12:34 25 get to ask each other questions. And hopefully you guys

1 can help answer them. And if there's evidence you need
2 to see, testimony you want to read, you ask us for it.
3 All right? That's our job. And your job is to base your
4 decisions on the record. I think the record here is
5 pretty overwhelming.

12:12:47

6 Monsanto didn't really put up much of a defense.
7 Their defense really, for what it's worth, consists of
8 EPA, EPA, EPA. We all know that that is not enough.
9 Because the EPA gets things wrong. And we know it got it
10 wrong here.

12:13:05

11 So in a minute Mr. Lombardi -- or after lunch,
12 Mr. Lombardi's going to come up here, and he's going to
13 plaster up parts of the EPA. And that's what he's going
14 to do. That's what he did in his opening. That's what
15 he's going to do here.

12:13:17

16 But where is the Monsanto employees? I mean,
17 think about this for a second. They're being sued. I
18 think we have a valid case here. And they didn't bring a
19 single human being from the company to look into your
20 eyes and say why they did what they did. They didn't
21 bring a single live human being here to talk to you, talk
22 straight, and say, "Here, this is what we thought. This
23 is why we did it."

12:13:33

24 Why? Why didn't they bring anybody? There's
25 two possibilities. One, they couldn't find somebody who

12:13:49

1 could do that and not commit perjury. Or, two, they were
2 afraid of all the documents I would have to run through
3 them showing that there's no conceivable way they didn't
4 know the risk.

12:14:02

5 You have to look at the quality of the evidence
6 presented. Look at the quality of the experts we
7 presented. Literally the leaders in their field.

12:14:20

8 I mean, literally nobody knows glyphosate better
9 than Dr. Portier. I don't think anybody would even
10 dispute that. He's been studying it on his own, going
11 out and talking to regulators on his own dime, because he
12 cares. He did this for a living for the federal
13 government, and he's outraged that the EPA is violating
14 their own guidelines.

12:14:33

15 Why does Monsanto get special treatment from the
16 EPA? I don't know. Maybe it's Jess Rowland. Maybe
17 there's something more sinister. I don't know. But what
18 I do know is they got it wrong.

12:14:46

19 And today, in this room, tomorrow in
20 deliberation, and when you return a verdict, we're going
21 to make it right. And your verdict will be heard around
22 the world. And Monsanto will have to finally do
23 something, conduct those studies they never conducted,
24 and warn those people they never will.

12:15:08

25 Thank you for your time.

1 THE COURT: All right. Ladies and Gentlemen,
2 we're going to break now for the lunch recess. Please
3 remember during the lunch recess: Do not discuss the
4 case with anyone. Do not do any research.

12:15:22

5 We ran till 12:15 today, so we'll resume again
6 at 1:45.

7 (Time Noted: 12:15 p.m.)

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1 REPORTER'S CERTIFICATE

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I certify that the proceedings in the within-titled cause were taken at the time and place herein named; that the proceedings were reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said proceedings were thereafter transcribed into typewriting.

I further certify that I am not of counsel or Attorney for either or any of the parties to said Proceedings, not in any way interested in the outcome of the cause named in said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand:
August 7th, 2018.

<%signature%>
Leslie Rockwood Rosas
Certified Shorthand Reporter
State of California
Certificate No. 3462

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