BAUM HEDLUND

CLIENT FOCUSED. TRIAL READY. BILLIONS WON.

October 7, 2021

Re: Warnings for Exposures to Glyphosate from Consumer Products New Sections 25607.48 and 25607.49

Dear OEHHA,

We write with regard to the "Notice of Proposed Rulemaking, Warnings for Exposures to Glyphosate from Consumer Products New Sections 25607.48 and 25607.49." A warning for exposure to glyphosate from consumer products is wholly consistent with the available scientific evidence (demonstrating that exposure to glyphosate-based products ("GBPs") may be carcinogenic to humans), and conforms to governing regulations and laws, principles of public health, and sound policy. Indeed, several years of personal injury litigation involving exposure to GBPs and the development of cancer—which our firm spearheaded through three trials that returned unanimous, substantial jury verdicts (all affirmed on appeal) on behalf of individuals harmed by GBPs—underscore the need for adequate warning language before Californians are exposed to potentially carcinogenic products. *See Johnson v. Monsanto Company* (2020) 52 Cal.App.5th 434; *Pilliod v. Monsanto Company* (2021) 67 Cal.App.5th 591; *Hardeman v. Monsanto Company* (9th Cir. 2021) 997 F.3d 941. We applaud and welcome OEHHA's continued efforts to fulfill the right-to-know mandate of Prop 65 (the "Act").

However, the instant Notice of Proposed Rulemaking ("NPR"), while generally a step in the right direction, contains a significant factual error which undermines the spirit, purpose and mandate of the Act to

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communicate clear, reasonable, unambiguous and, most importantly, accurate information regarding exposure to a potential toxin. Specifically, the proposed warning contains the following language: "Other authorities, including USEPA, have determined that glyphosate is unlikely to cause cancer, or that the evidence is inconclusive." This sentence is inaccurate and risks misleading the public. Contrary to the impression conveyed by the clause, the USEPA (referred to herein as "EPA") has *not* "determined that glyphosate is unlikely to cause cancer". In fact, as recent investigative efforts and litigation have revealed, EPA's conclusion has historically been *consistent* with the three unanimous jury verdicts cited above that all found glyphosate to be carcinogenic to humans.[1]

In the summer of 2016, the EPA's Office of Research and Development ("ORD") analyzed seven epidemiological studies on the association between glyphosate and the blood cancer non-Hodgkin lymphoma ("NHL"). *See generally* 2016 Internal EPA Rpt.[2] To be clear, these studies consisted of human data evaluating real-world exposure to glyphosate and the risk of developing NHL in exposed populations, and were also relied upon by IARC in rendering its 2015 classification of glyphosate as a "probable human carcinogen". The internal "confidential" report concluded that four of the highest-quality studies "all reported elevated risks of NHL associated with exposure to glyphosate even after controlling for other pesticide exposures." *Id*. at 8. Following review of the seven studies, the report observed that "the

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[1] Lerner, S., *The Department of Yes: How Pesticide Companies Corrupted the EPA and Poisoned America* (The Intercept, June 30, 2021), available at: https://theintercept.com/2021/06/30/epa-pesticides-exposure-opp/.
[2] Available at: https://www.documentcloud.org/documents/20786671-doc101719.

results of seven epidemiologic studies reporting on the association between exposure to glyphosate and risk of NHL were consistent in reporting elevated risks of NHL associated with exposure to glyphosate." *Id*. at 2. Significantly, the report proceeded to conclude that the "available epidemiologic studies provide *suggestive evidence* of carcinogenic potential between glyphosate exposure and increased risk of non-Hodgkin lymphoma." *Id*. at 9 (emphasis added). This is clearly a far-cry from the assertion that EPA has "determined that glyphosate is unlikely to cause cancer", or even that the evidence is "inconclusive".

However, notwithstanding its own conclusion based on sound human data, the internal report from the summer of 2016 never saw the light of day. Instead, as investigative journalist, Sharon Lerner, recently noted, "[EPA] released reports in 2016 and 2017 that clearly drew on the earlier document—several sections have identical wording—but reached the opposite conclusion: that glyphosate is 'not a probable carcinogen.'"[3] The EPA's 180 degree turn in the later published 2016 and 2017 reports was not due to newly discovered data that was unavailable at the time of the mid-2016 internal report. Indeed, as Lerner observed, the published 2016 and 2017 reports that reached the opposite conclusion were based on the same human data and contained verbatim sections lifted from the unpublished 2016 report. The real reason for the disconnect between the data and the agency's conclusion in the later reports is, to be frank, insidious. In her 2021 report, Lerner interviewed more than a dozen former EPA Office of Pesticide Programs ("OPP") employees—the very office within the EPA responsible for

[3] Lerner, *supra*, available at https://theintercept.com/2021/06/30/epa-pesticides-exposure-opp/.

regulating glyphosate—who described the agency as "unable to stand up to the intense pressures from powerful agrochemical companies, which spend tens of millions of dollars on lobbying each year and employ many former EPA scientists once they leave the agency."[4]

Lerner's disturbing revelations of regulatory capture—and willingness by the EPA to interpret scientific data in a light most favorable to perpetuating the federal registration of glyphosate—are further supported by the substantial evidence presented throughout the three glyphosate cancer trials. During the second trial, *Pilliod v. Monsanto Company*, the trial court held the following with respect to evidence of Monsanto actively pressuring and influencing the EPA vis-à-vis the agency's determination of glyphosate carcinogenicity:

> There was clear and convincing evidence that (1) Monsanto internally made little to no effort to follow up on indications that glyphosate and/or Roundup might be carcinogenic, (2) Monsanto externally made a substantial effort to influence scientists to state that glyphosate and/or Roundup were not carcinogenic, (3) *Monsanto externally made a substantial effort to influence the EPA to find that glyphosate and/or Roundup were not carcinogenic.*

Exh 1. Order Denying Motion for JNOV at 3-4 (emphasis added).[5] The *Pilliod* trial court's order echoed that of the court in the earlier 2018 trial of *Johnson v. Monsanto Company*, which likewise found overwhelming evidence of Monsanto's efforts to dictate the EPA's glyphosate classification and a

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[4] Lerner, *supra*, available at https://theintercept.com/2021/06/30/epa-pesticides-exposure-opp/.

[5] Although the "tentative" order is cited here, the court later entered the tentative order as the "final" order of the court.

strategy to "influence the scientific literature to prevent its internal concerns from reaching the public sphere and to bolster its defenses in products liability actions." *Id*. at 4. Indeed, such evidence presented during both the *Johnson* and *Pilliod* trials was later affirmed by the California Court of Appeal, with the *Johnson* appellate court specifically noting that "Monsanto's actions in attempting to influence regulatory agencies evinced an indifference to public safety…Shortly after the IARC announced that glyphosate was probably carcinogenic, representatives of Monsanto met with staff from the EPA…the jury could have inferred that these meetings were intended primarily to protect Monsanto's bottom line." *Johnson*, 52 Cal.App.5th at 458; *see also Pilliod,* 67 Cal.App.5th at 643-646 (noting that there was sufficient evidence for the jury to infer that the EPA's later glyphosate evaluations were tainted by Monsanto's influence and that "this evidence supports an inference that Monsanto acted to manipulate the scientific discourse with conscious disregard for public safety."). The documentary evidence underlying the damning trial and appellate court opinions is publicly available for OEHHA to consult.[6]

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[6] Tellingly, in the pending case of *National Association of Wheat Growers et al. v. Becerra et al*., (E.D. Cal., Case No. 20-16758), the EPA submitted statements to the federal court regarding the carcinogenicity of glyphosate that were inconsistent with the agency's mid-2016 internal report. And, in 2019, just days before the jury in *Pilliod v. Monsanto* Company was slated to begin deliberations, an EPA preliminary report on glyphosate—overseen by an EPA official (Mr. Billy Smith) with no relevant scientific background—again declared that glyphosate is not a probable carcinogen. The timing and substance of the EPA's submission to the federal court in the *National Association of Wheat Growers* case and the introduction of a slap-dash preliminary report at the tail end of the *Pilliod* matter (which was excluded by the trial court for being unreliable) further evince the iron hand that

The facts are unequivocal. The EPA concluded internally in 2016 that the existing human data provides "suggestive" evidence of an association between exposure to glyphosate and cancer—the very same scientific evidence tried and held to pass muster in three trial courts and three appellate courts, and upon which IARC relied in its 2015 glyphosate classification. Monsanto's sustained efforts to align the agency's determination with its corporate agenda—as repeatedly affirmed by independent juries and judges based on the company's own internal documents—were instrumental in ensuring that the EPA's published glyphosate analyses departed from the agency's 2016 internal finding. Based upon this record, it is nothing short of misleading for a proposed warning to convey the impression that the EPA has held that glyphosate is "unlikely" to cause cancer or that the agency deemed the data "inconclusive". The EPA concluded in no uncertain terms in 2016 that the "available epidemiologic studies provide suggestive evidence of carcinogenic potential between glyphosate exposure and increased risk of non-Hodgkin lymphoma." 2016 Internal EPA Rpt. at 9.[7] Monsanto's lobbying ensured that an opposite conclusion—*based on the same data*—was published, the same tainted conclusion that now serves as the basis of the warning language proposed by the instant NPR.

Monsanto and industry exercise over the agency, to such an extent that the EPA is willing to contradict its own internal scientific conclusions to bolster litigation outcomes in favor of industry. Indeed, such conduct by the EPA, driven by the will of industry, is one of the reasons that IARC classifications —impartial and authoritative—are sufficient to trigger a Prop 65 warning.

[7] Available at: https://www.documentcloud.org/documents/20786671-doc101719.

We urge OEHHA to provide Californians with the opportunity to exercise informed consent based on facts, not the orchestrated fraud for which Monsanto has been held liable in courts throughout our State. As such, the proposed warning language should omit any reference to the EPA's published classification of glyphosate. Whether viewed through the prism of the 2016 internal report, or Monsanto's tireless campaign to influence the agency's public position, the EPA's glyphosate classification is simply not reliable; it should certainly not serve as the basis for public health decisions made under the ambit of an Act intended to provide a "clear and reasonable" warning to Californians before they expose themselves to a carcinogenic product.

To be sure, OEHHA may still strike a balance between complying with the requirements of the Act as well as the order issued in the pending *National Association of Wheat Growers* action (currently on appeal before the 9th Circuit Court of Appeals). For example, the proposed warning language may inform consumers of the IARC glyphosate classification while generally referencing the conclusions of other agencies without identifying the EPA for the reasons stated above. California deserves a warning that comports with the facts, an utmost concern for public health, and basic honesty. We are confident that OEHHA can fulfill this imperative task.

Please do not hesitate to contact us should we be of further assistance with this matter.

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Sincerely,

BAUM HEDLUND, ARISTEI, & GOLDMAN, P.C.

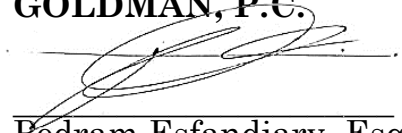

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EXHIBIT 1

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ALVA AND ALBERTA PILLIOD, Plaintiffs, v. MONSANTO COMPANY; WILBUR-ELLIS COMPANY, LLC; and WILBUR-ELLIS FEED, LLC, Defendants.	Case No. RG 17862702 [TENTATIVE] ORDER (1) DENYING MOTION OF DEFENDANT FOR JNOV AND (2) CONDITIONALLY GRANTING MOTIONS OF DEFENDANT FOR NEW TRIAL. DATE 7/19/19 TIME 9:00 AM DEPT 21

The motions of Monsanto JNOV and for new trial came on for hearing on Friday 7/19/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Good cause appearing, IT IS HEREBY ORDERED: The motion of Monsanto for JNOV is DENIED. (CCP 629.) The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $_____. The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY

GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $_____.

(CCP 662.6(a)(2).)

MOTION FOR JNOV

The motion of Monsanto for JNOV under CCP 629 is DENIED.

STANDARD

The court may enter judgment notwithstanding the verdict and enter a directed verdict. (CCP 629.) "A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Magic Kitchen LLC v. Good Things Int'l, Ltd.* (2007) 153 Cal. App. 4th 1144, 1154 (2007.) (CCP 629.)

CAUSATION

All claims required plaintiffs to prove that Roundup caused the Pilliods to get NHL.

The court finds the evidence can support a finding that Roundup caused the Pilliods to get NHL. The evidence was disputed regarding general causation. For example, NHL can be idiopathic. The evidence was disputed regarding specific causation. For example, in addition to being potentially idiopathic, there was evidence that each Pilliod had one or more risk factors that suggest other causes of the NHL.

Causation is, however, a fact issue. The court found that plaintiff's experts could present evidence under *Sargon* and that it was the responsibility of the jury to consider and weigh that evidence. The evidence supports a finding of causation. (*Johnson & Johnson Talcum Powder* Cases (2019) 2019 WL 3001626 at *20-25.) .

WARNINGS CLAIMS.

The claim for failure to warn required plaintiffs to demonstrate that Roundup's alleged risk of NHL was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge" at the time that Monsanto distributed the Roundup that allegedly caused their injuries. The evidence supports the verdict on the warning claims.

DESIGN DEFECT CLAIMS

The claims for strict liability and negligent design required Plaintiffs to prove that there was a defect in the design of Roundup and that the defect caused their harm. (*Trejo v. Johnson & Johnson* (2017) 13 Cal. App. 5th 110, 142. The evidence supports the verdict on the design defect claims.

PUNITIVE DAMAGES

The claim for punitive damages required plaintiffs to prove by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. (Civ. Code § 3294.)

The court finds the evidence can support a finding by clear and convincing evidence that Monsanto committed malice, oppression, or fraud. The evidence did not show that Monsanto consciously disregarded a known or probable danger as shown in the public scientific literature.

There was clear and convincing evidence that (1) Monsanto internally made little to no effort to follow up on indications that glyphosate and/or Roundup might be carcinogenic, (2) Monsanto externally made a substantial effort to influence scientists to state that glyphosate and/or Roundup were not carcinogenic, (3) Monsanto externally made a substantial effort to influence the EPA to find that glyphosate and/or Roundup were not carcinogenic. In a pretrial motion on a case with similar evidence and claims Judge Karnow stated:

> The internal correspondence noted by Johnson could support a jury finding that Monsanto has long been aware of the risk that its glyphosate-based herbicides are carcinogenic, and more dangerous than glyphosate in isolation, but has continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public sphere and to bolster its defenses in products liability actions.

(*Johnson v. Monsanto* (Cal. Superior Court, 2018) 2018 WL 2324413.) There was evidence in this case that would permit a jury to make those findings based on clear and convincing evidence. The malice, oppression, or fraud that supports punitive damages can be based on Monsanto's efforts to avoid or prevent reasonable and objective inquiry into matters that might reveal a danger.

The court finds that due process requires the court to decrease the amount of damages. The court addresses this in the motion for new trial.

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MRS. PILLIOD'S FUTURE ECONOMIC DAMAGES

"Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. … The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.)

Mrs. Pilliod's entire future economic damage case was based on her need for a lifetime supply of Revlimid. Mrs. Pilliod presented evidence that would support the finding that her future cost of medication is likely to be approximately $15,000 per month, approximately $200,000 per year, and a total of $2,957,710. This finding required the jury to make implicit findings both about the cost of the medication and that she would be required to pay for medication in the future. There is sufficient evidence to support both findings.

FIFRA PREEEMPTION

The motion for JNOV based on FIFRA preemption is UNDECIDED. The court addressed FIFRA preemption in the order of 3/18/19 at 17-19.

After the Order of 3/18/19, the United States Supreme Court on 5/20/19 issued *Merck v. Albrecht* (2019) 139 S.Ct. 1668, which held that the question of whether FDA would have approved of a change to a drug's label is a question of law for the court to decide, rather than a question of fact for a jury to decide. PARTIES TO ADDRESS (1) whether Monsanto has waived this by not bringing it up before entry of judgment, (2) whether this requires a reopening of the preemption issue and an evidentiary hearing on the issue of impossibility.

MOTION FOR NEW TRIAL

The motions of Monsanto for a new trial as to Alva and Alberta Pilliod are CONDITIONALLY GRANTED.

IRREGULARITIES IN THE PROCEEDING

Misconduct during Closing Statement and Misconduct throughout Trial. The motion on this ground is DENIED. Counsel for plaintiff did on occasion overstate matters and violate the court's orders. The court issued curative instructions to the jury. The facts are similar to those in *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.4th 276, 295-298, where the court observed that there were several incidents of misconduct during trial, but that there were also corrective instructions, and that the misconduct did not cause prejudice. The court finds no prejudice to Monsanto on the facts of this case.

This case is one of many in a coordinated proceeding. Therefore, the court also directs counsel to the following statement: "Although we conclude Chao and Oasis have not shown prejudice here, Stern's conduct was improper. Such conduct not only falls below professional standards, it unnecessarily places the client at risk. " '[P]unishment of counsel to the detriment of his client is not the function of the court. [Citation.] Intemperate and unprofessional conduct by counsel ... runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery, and as such is a disservice to a litigant.' " … We expect more from our attorneys; in another context reversal may well have been warranted." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.4th 276, 298.)

Joining Plaintiffs' Separate Claims in a Single Trial. The motion on this ground is DENIED. The court addressed the concerns in the order of 1/25/19. The proceedings during

trial do not persuade the court that it erred in permitting the claims of the Pilliods to be tried in a single case. As noted in the prior order, the evidence that both spouses both used Roundup and both developed NHL would almost certainly have been presented to each jury had the claims been tried separately.

Local pretrial publicity. The motion on this ground is DENIED.

Admission of expert evidence. The motion on this ground is DENIED. The court addressed the concerns in the *Sargon* order of 3/18/19.

Admission or exclusion of evidence.

Proposition 65. The motion on this ground is DENIED. The court admitted EPA information because it was directly relevant. The court initially excluded Proposition 65 information because it concerned a different scientific standard. The court later reasoned that if information regarding non-EPA entities were to be admitted, that it be admitted evenhandedly. For that reason, the court put the parties to an election (1) whether the jury should hear a broad range of information including California's Proposition 65 and also information from various countries or (2) whether the jury should hear a narrow range of information limited to EPA information. The court admitted the broader range of information.

Industrial Bio-Test (IBT). The motion on this ground is DENIED. The court admitted information about the scientific fraud at IBT because it was relevant to Monsanto's initial efforts to obtain information about the safety of glyphosate. Monsanto had the opportunity to present evidence about its subsequent studies.

EPA's 2019 Proposed Interim Registration Decision. The motion on this ground is DENIED. In the middle of trial, on 4/30/19, the EPA released a document stating that the EPA had considered comments and had not changed its position on the safety of glyphosate. The

document stated that the EPA had not changed its position. The document was cumulative information. (Evid Code 352.) In addition, the EPA released the document mid-trial. The science regarding glyphosate is still developing. Therefore, the court must balance the procedural goal of trial (which is to reach a conclusion) and the substantive goal of trial (which to ascertain the truth). The court reasoned that admitting the new EPA document would add cumulative information and unduly consume additional time. (Evid Code 352.)

Trace Contaminants and Impurities. The motion on this ground is DENIED. The occasional information about trace contaminants and impurities was not material. Monsanto had the opportunity to explain that they were not at issue in this case.

POEA (surfactant). The motion on this ground is DENIED. The information about POEA was material because it was an ingredient in Roundup. Monsanto had the opportunity to explain its choice to use POEA and how POEA did or did not affect exposure to and absorption of glyphosate.

"List Price" of Revlimid. The motion on this ground is DENIED. The information about the list price of Revlimid was admissible. The issue in the case is not what Ms. Pilliod paid in the past, but what she might have to pay in the future. The list price was relevant evidence given the uncertainty of her future situation regarding reimbursement, subsidies, and insurance.

INSTRUCTIONAL ERRORS

Consumer Expectation Instruction. The court finds no error in giving this instruction.

Punitive Damages Instruction. The court finds no error in giving this instruction. The court gave CACI 3940. There were two plaintiffs, so the jury had the opportunity to consider punitive damages separately for each.

THE WEIGHT OF THE EVIDENCE

The court finds that there was substantial evidence to support the jury's findings that (1) Roundup was a substantial factor in causing Alva Pilliod's DLBCL, (2) Roundup was a substantial factor in causing Alberta Pilliod's PCNSL, and (3) Roundup was defectively designed. The evidence was disputed, but there is substantial evidence to support the jury's findings.

The court finds that there was substantial evidence to support the jury's findings on the failure to warn claims. There is evidence that Monsanto was in possession of evidence that glyphosate might be hazardous well before the Pilliods were diagnosed and well before they stopped using Roundup. The phrase "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge" is central to the issue.

The legal standard is designed to address the situation where there are a variety of scientific opinions. A plaintiff cannot rely on a minority or outlier theory to support a failure to warn claim. A defendant is permitted to rely on "the generally recognized and prevailing best scientific and medical knowledge" in making its decisions about warnings.

In this case, there was evidence that Monsanto "continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public." (Judge Karnow.) If the jury finds that a defendant has intentionally and successfully sought to influence "the generally recognized and prevailing best scientific and medical knowledge" to minimize scientific discovery or recognition of a risk, then the jury can reasonably infer that the scientific information would probably have been adverse to the defendant. (CACI 203, 204.) From that inference, the jury can reasonably infer that the "generally recognized and prevailing best

scientific and medical knowledge" would have supported a duty to warn if the defendant had not interfered with the development of scientific and medical knowledge.

The court has considered *Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL 3001626 at *26. The court states:

> Viewed in the light most favorable to Echeverria, the evidence established JJCI was aware of studies showing an association between talc and ovarian cancer, studies showing talc could migrate from the vagina to the ovaries, and the theory and corresponding research suggesting talc caused inflammation, eventually leading to ovarian cancer. The evidence further established that, at least between the 1990's and 2006, JJCI's response to these studies was to mount a defense against them. In attempts to influence or persuade agencies such as the NTP and IARC, and in response to media or governmental inquiry, JJCI's strategy was to describe the flaws of these studies, point out inconclusive results, and highlight the absence of any established causal link. The jury could reasonably infer that, faced with the possibility that talc might be shown to cause ovarian cancer, JJCI's response was focused solely on avoiding such a conclusion.

Where *J&J* differs from Monsanto is the next paragraphs, which state:

> However, it was also undisputed that there has not been direct, conclusive evidence establishing genital talc use causes ovarian cancer. … The evidence demonstrated it is not universally accepted in the scientific or medical community that talc is even a significant risk factor for ovarian cancer. …

> There was no evidence JJCI had any information about the dangers or risks of perineal talc use that was unavailable to the scientific or medical community. The company's critiques of available evidence were largely consistent with third party entities' evaluations of the same studies, including nontrade groups such as the IARC and the FDA.

Regarding causation, there is evidence to support findings that glyphosate can cause NHL. Regarding knowledge, there is evidence that Monsanto had internal information that was not available to the scientific or medical community. As a result, the questions of what Monsanto knew and when did it know it for purposes of the duty to warn are not limited to what as available publically.

The court finds that there was substantial evidence to support verdict on the duty to warn claim.

CONSTITUTIONALITY OF THE DAMAGE AWARDS

ECONOMIC LOSS - MRS. PILLIOD'S ECONOMIC DAMAGE

"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty." (*Meister v. Mesinger* (2014) 230 Cal.App.4th 381, 396-397.) There is sufficient evidence to support findings that cost of the medication would be approximately $200,000 per year and that she will be required to pay for medication in the future.

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NONECONOMIC LOSS – PAIN AND SUFFERRING.

"One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. … In a very real sense, the jury is asked to evaluate in terms of money a determent for which monetary compensation cannot be ascertained with any demonstrable accuracy. … Moreover, [n]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.4th 276, 295-300.)

Mr. Pilliod is 77 years old and Mrs. Pilliod is a few years younger. The Pilliods emphasize that they lead the active lives before their diagnoses. The measure of damages is not, however, to compare a plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's younger former self without the injury. The measure of damages is to compare a plaintiff's current combination of age, unrelated ailments, and injury with the plaintiff's hypothetical current combination of age and unrelated ailments without the injury.

In the preference statute, there is a legislatively acknowledged increased risk of death or incapacity due to being over the age of 70. (*Kline v. Superior Court* (1991) 227 Cal.App.3d 512, 515.) The legislatively acknowledged risks that come with age that support a different, and lower, standard for trial preference logically must also be a factor in evaluating whether the

effects of aging or the injury caused by defendant were the proximate cause of the any disability, impaired enjoyment of life, or susceptibility to future harm or injury.

The court has considered *Izell v. Union Carbide* (2014) 231 Cal.App.4th 962. In that case the plaintiff was an 86 year old man with a 2-3 year life expectancy. The jury awarded $10 million in future noneconomic damages. The trial judge decreased the future damages to $2 million. The Court of Appeal affirmed applying the abuse of discretion standard, stating "Though we recognize the remitted amount remains on the high end of noneconomic damages awards discussed in reported mesothelioma decisions—particularly for plaintiffs of the Izells' advanced age—this alone is not sufficient to second-guess the trial judge, who presided over the four-week trial and personally observed "the injury and the impairment that has resulted."" (231 Cal.App.4th at 981.) *Izell* is authority for the proposition that $1 million per year was not an abuse of discretion on the facts of that case, but it is not authority that $1 million per year is appropriate or required in this case.

The jury awarded Mr. Pilliod $8 million for past noneconomic loss and $10 million for future noneconomic loss. The record reflects that Mr. Pilliod went through a one-year period of intense medical care related to his NHL, but that his situation has stabilized. Although Mr. Pilliod's health is impaired, his situation is due not only to the NHL but also to his history of skin cancer and his other ailments. The court finds that the past noneconomic loss is not supportable by the evidence. The court finds that $[_____] is reasonable, based on [$300k-$1m per year] for the period of intense medical care and [$100-300k per year] for each of the other years since the diagnosis.

The jury awarded Mrs. Pilliod $8 million for past noneconomic loss and $26 million for future noneconomic loss. The evidence reflects that Mrs. Pilliod went through a longer period of

intense medical care and that her health has been more impaired by the NHL. Mrs. Pilliod has been relatively healthy other than the NHL. The court finds that the noneconomic loss is not supportable by the evidence. The court finds that $[_____] is reasonable, based on [$600k-$2m per year] for the period of intense medical care and [$200-600k] for each of the other years since the diagnosis.

PUNITIVE DAMAGES

Punitive damages are limited by constitutional considerations. The court must consider three "guideposts" to determine whether a punitive award comports with due process: (1) the degree of reprehensibility of the defendant's actions; (2) the ratio between the compensatory award and the punitive award; and (3) a comparison between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. (*Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712 (2009).

The degree of reprehensibility is sufficient to support a substantial award of punitive damages. The evidence supported a finding that Monsanto "continuously sought to influence the scientific literature to prevent its internal concerns from reaching the public." A defendant can present the science that supports its products and mount a defense in public. That is a public scientific debate based on facts. (*Johnson & Johnson Talcum Powder Cases* (2019) 2019 WL 3001626 at *26.) A jury can, however, find that a defendant has acted reprehensibly if it has improperly influenced the scientific literature, ghostwritten articles, or withheld safety information that it had an obligation to disclose.

The ratio between the compensatory award and the punitive award will depend on the award of compensatory damages.

For Mr. Pilliod, the court is INCLINED to find that appropriate punitive damages are an amount [2-4] times the combined economic and non-economic compensatory damages.

For Mrs. Pilliod, the court is INCLINED to find that appropriate punitive damages are an amount [2-4] times the combined economic and non-economic compensatory damages, excluding the $2,957,710 attributable to the future cost of Revlimid. The court excludes the cost of the Revlimid from the punitive damage calculation because although there is evidence to support the cost of the drug as compensatory damages, the evidence is well short of clear and convincing and therefore the court determines that it is not a proper on the facts of this case to include it in the baseline for the punitive damages ratio test.

ORDER

The motion of Monsanto for JNOV is DENIED.

The motion of Monsanto for a new trial regarding Alva Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $_____. (CCP 662.6(a)(2).)

The motion of Monsanto for a new trial regarding Alberta Pilliod is CONDITIONALLY GRANTED unless Mr. Pilliod consents to entry of judgment in the amount of $_____. (CCP 662.6(a)(2).)

_____ Date

_____
Winifred Y. Smith
Coordination Trial Judge