

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

EDWARD HARDEMAN,)	
)	NO. C 16-00525 VC
Plaintiff,)	
)	<u>PAGES 891 - 892</u>
)	<u>FILED UNDER SEAL</u>
VS.)	<u>BY ORDER OF THE COURT AND BOUND</u>
)	<u>SEPARATELY</u>
MONSANTO COMPANY,)	
)	
Defendant.)	
_____)	

San Francisco, California
Friday, March 1, 2019

TRANSCRIPT OF PROCEEDINGS

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I N D E X

Friday, March 1, 2019 - Volume 6

PLAINTIFF'S WITNESSESPAGE VOL.PORTIER, CHRISTOPHER

By Video Testimony (not reported)

858 6

TURK, ROGER

By Video Testimony (not reported)

871 6

TURLEY, RICHARD

By Video Testimony (not reported)

888 6

YE, JEFFREY

By Video Testimony (not reported)

890 6

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PROCEEDINGS

1 Friday - March 1, 2019

8:19 a.m.

2 P R O C E E D I N G S

3 ---000---

4 (Proceedings were heard out of presence of the jury:)

5 **THE COURT:** No need to call the case. We all know why
6 we are here.

7 You-all said you had a couple things to talk to me about.

8 **MR. STEKLOFF:** Actually, I think we resolved the main
9 thing we thought we might be discussing, which is the Dr. Ye
10 deposition. I do think it might be worth -- now might be a
11 good time, since we are heading into the weekend, to give you
12 an update on whether -- we have collectively discussed where we
13 think things are heading next week.

14 **THE COURT:** Okay.

15 **MR. STEKLOFF:** The Plaintiffs told us yesterday that
16 they are not calling Dr. Nabhan.

17 **THE COURT:** Okay.

18 **MS. MOORE:** For Phase One.

19 **MR. STEKLOFF:** For Phase One, yes. So in addition to
20 the depositions that you are aware of, I think there are two
21 remaining live witnesses, Mr. Hardeman and Dr. Weisenburger.
22 And I think based on that, both of us -- both sides anticipate
23 that the Plaintiffs will rest some time on Tuesday. I don't
24 think -- we don't think it will be first thing in the morning,
25 but --

PROCEEDINGS

1 **THE COURT:** Okay. Wait. So there is -- so that means
2 Shustov is not coming either?

3 **MS. MOORE:** That's correct, Your Honor. We had told
4 them that last week. I apologize.

5 **THE COURT:** I probably heard that but forgot it. So
6 Hardeman and Weisenburger plus the doctors, the treating
7 doctors.

8 **MS. MOORE:** Yes.

9 **THE COURT:** Plus the remainder of Portier. How much
10 is left in Portier?

11 **MS. MOORE:** It is a little over two hours, Your Honor.

12 **THE COURT:** And then Reeves.

13 **MS. MOORE:** Reeves will depend on the Court's rulings.

14 **THE COURT:** Right. And so that would be it -- and
15 Farmer.

16 **MS. MOORE:** Dr. Farmer, yes, Your Honor. That's very
17 short. It's less than 20 minutes right now.

18 **THE COURT:** Okay. And that -- and that would be it
19 for the Plaintiffs?

20 **MS. MOORE:** That's correct, Your Honor.

21 **THE COURT:** For Phase One. And then on Reeves, I will
22 just let you know, my guess is that Reeves is not going to
23 happen today because I want to have a discussion about some of
24 the -- some of the designations about Reeves at lunchtime. I
25 will issue an order before we come out, hopefully at 8:25. I

PROCEEDINGS

1 can leave; issue the order on Reeves before we start the trial
2 day.

3 **MS. MOORE:** Okay.

4 **THE COURT:** And we can have a discussion about it at
5 lunch. You should plan on not putting Reeves on today, I
6 think. The other thing I can do is I can look at Farmer while
7 I'm on the bench here.

8 **MS. MOORE:** That would be really helpful, Your Honor.

9 **THE COURT:** And maybe you can get Farmer teed up and
10 the treating doctors.

11 **MS. MOORE:** The treating doctors are ready to go,
12 except there is one issue. And I don't think -- on Dr. Turk --
13 so, Your Honor, there was one issue. It was a counter-counter
14 that I believe the defense is not objecting to as putting back
15 in. It was taken out because it was right after an objection
16 that you sustained.

17 **THE COURT:** Okay.

18 **MS. MOORE:** So it is on page 127, lines 16 through 20.
19 It is dealing with --

20 **THE COURT:** Which doctor is this?

21 **MS. MOORE:** Dr. Turk, the primary care physician. It
22 is dealing with the basal cell carcinoma, and our counter to
23 the testimony that is in there about basal cell carcinoma; and
24 I don't think there is an objection from the defense.

25 **MR. STEKLOFF:** We don't object, Your Honor.

PROCEEDINGS

1 **THE COURT:** Okay. That's fine.

2 **MS. MOORE:** All three of the doctors' depositions are
3 cut and ready to go.

4 **THE COURT:** How much time will those take?

5 **MS. MOORE:** Dr. Turk is approximately 38 minutes;
6 Dr. Turley is approximately 19 minutes, and I think Dr. Ye is a
7 little over an hour.

8 **THE COURT:** Okay. So between -- it sounds like -- so
9 we have -- we have the doctors. We have the remainder of
10 Portier.

11 **MS. MOORE:** And Dr. Farmer.

12 **THE COURT:** And we can get Farmer ready and that
13 should be pretty good for today.

14 **MS. MOORE:** I think that's right, Your Honor.

15 **THE COURT:** Okay. And then Hardeman, Weisenburger and
16 Reeves next week.

17 **MS. MOORE:** That's correct.

18 **THE COURT:** Okay. Great.

19 **MR. STEKLOFF:** So with that, I have been very
20 transparent with Plaintiff's counsel about which experts we are
21 calling. None of -- we are calling -- I mean, we might remove
22 some of these, but our current intention, depending on how the
23 rest of the case plays out, is to call Dr. Arber, Dr. Levine
24 and Dr. Mucci. None of them, because of either clinical care
25 or conferences, I believe, are available on Tuesday.

PROCEEDINGS

1 So if the Plaintiff's rest before -- and we have a lot of
2 time, but I also don't want to waste the jury's time. It is
3 going to be extremely difficult, if not impossible. We are
4 pushing all of them -- when we learned this last night about
5 Dr. Nabhan -- to see if anything can shift. I think Tuesday is
6 going to be very, very difficult based on their prior
7 obligations to call a witness.

8 On Wednesday, I know that at least one of them can be
9 here. I think the question is what the other two are seeing if
10 they can move things, and I don't have a current update because
11 of -- again, either clinical care or conferences that they are
12 involved in. So there is a possibility --

13 **THE COURT:** Let me -- there is a possibility that we
14 will have some dead time on Tuesday, is what you are going to
15 say?

16 **MS. MOORE:** We don't think very much, Your Honor.

17 **THE COURT:** I don't think so. I mean, Weisenburger,
18 he is still offering a general causation and a specific
19 causation opinion?

20 **MS. MOORE:** Correct.

21 **THE COURT:** I doubt we are going to have any dead time
22 on Tuesday.

23 **MS. MOORE:** I don't think so either. Obviously some
24 of it depends on their cross-examination. If anything, maybe
25 we finish a few minutes before 2:00, but I don't think we are

PROCEEDINGS

1 going to have a lot of time there.

2 **THE COURT:** That's okay. I understand.

3 **MR. STEKLOFF:** On Wednesday we may have, if we can
4 only get one of the three, a little dead time. We would then
5 be prepared to have the other two here on Friday. And then
6 that -- whether they might roll over a little bit into Monday,
7 but I don't think very far.

8 **THE COURT:** Well, I don't know. I mean, I
9 understand -- so are any of those people local, Arber or
10 Levine, Mucci?

11 **MR. STEKLOFF:** No. Well, Dr. Levine is in LA. She is
12 at City of Hope. Dr. Arber is in Chicago. Dr. Mucci is in
13 Boston.

14 **THE COURT:** Who are you planning on calling on
15 Wednesday?

16 **MR. STEKLOFF:** Dr. Arber can get here on Tuesday
17 night, and I believe has bought a ticket so that he can be our
18 first witness on Wednesday.

19 **THE COURT:** You might need to have Levine ready to go
20 on Wednesday also, just so we are not wasting too much time.

21 **MR. STEKLOFF:** I'm seeing, based on her schedule.

22 **THE COURT:** I don't -- I don't -- you know, I don't
23 think that we should be having any dead time on Wednesday. I
24 understand what you are saying about Tuesday.

25 **MR. STEKLOFF:** Understood, Your Honor.

PROCEEDINGS

1 **THE COURT:** Okay.

2 **MS. MOORE:** Your Honor, if I could just remind the
3 Court briefly, I think we still have a pending Daubert on
4 Dr. Arber's qualifications.

5 **THE COURT:** Yes, I know.

6 **MS. MOORE:** Okay.

7 **THE COURT:** Okay. So let me go put that order out,
8 and then I will be back in in a couple minutes and we can
9 start.

10 **MS. MOORE:** Okay. Thank you, Your Honor.

11 (Recess taken at 8:26 a.m.)

12 (Proceedings resumed at 8:35 a.m.)

13 (Proceedings were heard out of presence of the jury:)

14 **THE COURT:** You can go ahead and bring in the jury.

15 (Proceedings were heard in the presence of the jury:)

16 **THE COURT:** Good morning, everyone. Welcome back. We
17 have Part 2 of the Portier movie for you today and then some
18 other video deposition testimony. And then I think it is
19 Monday we are returning to live testimony, right?

20 **MS. WAGSTAFF:** Yes, Your Honor.

21 **MS. MOORE:** That's correct, Your Honor.

22 **THE COURT:** So you can go ahead and proceed with
23 Dr. Portier's testimony.

24 **MS. MOORE:** Thank you, Your Honor. We may need to
25 switch the input.

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The sidebar contains 25 lines of redacted text. Lines 1, 2, 3, 8, and 18 are full-width bars. Lines 4, 11, 16, and 19 are shorter bars starting from the left margin. Lines 5, 6, 7, 9, 10, 12, 13, 14, 15, 17, 20, 21, 22, 23, and 24 consist of multiple bars of varying lengths and positions, some starting with an indentation. Line 17 has a small bar at the far right. Line 25 is a full-width bar.

PROCEEDINGS

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(The following proceedings were heard in open court:)

MR. STEKLOFF: May we resume, Your Honor?

THE COURT: You may resume.

(Video was played but not reported.)

MR. STEKLOFF: I think this is a good time for a break.

THE COURT: That sounds fine. Why don't we take about a five-minute break.

(Proceedings were heard out of presence of the jury:)

THE COURT: I want to think about it a little more, but I will give you my tentative views on Farmer testimony right now.

First let me say, that this applies to the Farmer testimony. It applies to the Reeves testimony, and it applies really to all of the deposition testimony and the Portier testimony. A number of times Monsanto made the objection irrelevant to Phase One and I want -- I sustained -- I have sustained a number of those objections, but I want to make clear that in many of those instances I disagree with Monsanto's literal objection, irrelevant. I think that in many

PROCEEDINGS

1 of the instances it is tangentially relevant to Phase One, but
2 it should be excluded under Rule 403. So every time I have
3 sustained that objection, everybody should know that it is
4 either under 401 or 403 that I'm sustaining that objection.

5 With respect to Farmer, looking first at the document, the
6 e-mail, my starting point -- and kind of the philosophy I
7 applied in going through the testimony is that the -- really
8 the only thing that can come in from this e-mail is the
9 paragraph that begins, Many groups have been highly critical of
10 the study. There may be some other benign paragraph in the
11 e-mail that would be used to help identify what she is talking
12 about, the AHS; but that's really the only paragraph that I
13 think -- substantive paragraph -- that is admissible. So with
14 that philosophy in mind, on page 8, the -- that designation I
15 think can come in.

16 On page 18, the first half can come in. The second half
17 beginning at line 9 cannot. On page 56 it can come in. Page
18 222 out, and the one that starts at page 223 out. Page 278 in.
19 Page 284 both of them out, both of the designations out, the
20 ones that start at page 284. 287 out. But the one that starts
21 at the very bottom of 287 and goes over to 288, 289, that is in
22 until page 289, line 19 and the stuff that follows that -- that
23 line and the stuff that follows it is out until page 290, line
24 16. So starting at line 16 on page 290, it comes back in. And
25 then you get to line 9 on page 291. That is out and then the

PROCEEDINGS

1 remainder of the Plaintiff's designations are out.

2 And then page 550 -- these are Monsanto's designations I
3 think -- page 550 in. Page 551 in. And the idea here is just
4 enough to establish who she is but not to get into her
5 credentials extensively. So the one on 552 is out. The one on
6 553 is out. 581 both designations out. 666 out. 667 out.
7 And I believe that's it.

8 So as I said, that is tentative. I'm going to spend a
9 little more time looking at it to make sure I think I have got
10 it right this morning, but it is not that tentative. I feel
11 fairly confident about it. So if you want to start cutting
12 video accordingly, you can do that.

13 And then the only other comment I want to make about that
14 is I believe that I allowed some Reeves testimony in about this
15 as well, and the fact that it is coming in through Farmer makes
16 me want to go back and re-visit whether the testimony from
17 Reeves is cumulative and should come out, okay? So I will do
18 that as well. So that's where we stand on those issues. Why
19 don't we resume at quarter till.

20 **MS. MOORE:** Thank you Your Honor.

21 **MR. STEKLOFF:** Thank you Your Honor.

22 (Recess taken at 9:40 a.m.)

23 (Proceedings resumed at 9:47 a.m.)

24 (Proceedings were heard out of presence of the jury:)

25 **THE COURT:** One additional very quick comment on the

PROCEEDINGS

1 Farmer testimony. It struck me that because of my ruling there
2 may be -- because of how I ruled on it, there may be some other
3 aspects of the Farmer testimony that you want to bring in to
4 make the parts of the testimony that I allowed in more clear.
5 Does that make sense?

6 **MR. WISNER:** Yeah.

7 **THE COURT:** I may have created some sort of artificial
8 line that you want to fix which you can do.

9 **MS. MOORE:** Thank you, Your Honor.

10 **THE COURT:** Go ahead and bring them in.

11 (Proceedings were heard in the presence of the jury:)

12 **THE COURT:** Thank you. We can resume the Portier
13 testimony.

14 (Video was played but not reported.)

15 (Video stopped.)

16 **MR. WOLF:** Can we switch over?

17 **THE COURT:** Why don't we take another five-minute
18 break right now, and we'll aim to resume at quarter till.

19 (Proceedings were heard out of the presence of the jury:)

20 **THE COURT:** Okay. So you -- everyone can be seated.
21 You're always free to be seated as soon as the jury leaves.

22 So about how much more is there for Portier?

23 **MR. WOLF:** We have 28 minutes total for both sides.

24 **THE COURT:** Okay. And then after that, you can be
25 ready to go to one of the treating physicians?

PROCEEDINGS

1 **MS. MOORE:** Yes, Your Honor.

2 **THE COURT:** Okay. Because I assume we will get into
3 that before lunch.

4 **MS. MOORE:** Right. And then we'll have to stop
5 because it's about 38 minutes.

6 **THE COURT:** For all of the treating physicians?

7 **MS. MOORE:** No. Just the first one.

8 **THE COURT:** Okay. And then -- so let me -- so for now
9 let me give you a couple comments on Reeves. I went back
10 through Reeves after having gone through Farmer this morning,
11 and a couple quick comments.

12 Pages 152 to 159, I said overruled as to the objections to
13 those designations. I will change that now -- I'm happy to
14 hear argument about it whenever we discuss it, but I will
15 change that now to sustaining the objections until page 154,
16 line 5, and overruling as to the remainder in that section --
17 in that range of pages 152 to 159.

18 Does that make sense what I said? So previously it was
19 overruled as to the designations on 152 to 159, and now what
20 I'm saying is that for that range, sustained until 154, line 5,
21 overruled as to the remainder in that range.

22 Then on page -- for page 164, I just wrote it wrong in my
23 ruling. As you can see from the parenthetical, what I meant to
24 say is sustained as to both, but the speculation objection is
25 overruled. So it's admissible in Phase II. And I meant

PROCEEDINGS

1 sustained, and I feel even more strongly about that after
2 seeing what's coming in from Farmer.

3 So those were the two things I wanted to say about the
4 Reeves testimony as to where we stand right now on the Reeves
5 testimony.

6 So with that, let's take a break.

7 **MS. MOORE:** Your Honor, as to Portier --

8 **THE COURT:** Sure.

9 **MS. MOORE:** -- this is to address what we talked about
10 at sidebar, the Court had previously sustained our objection to
11 Monsanto playing 583:8 to 584:11; and our suggestion --

12 **THE COURT:** Well, what I said was I was busy reading
13 the Farmer deposition so I didn't know what it was, but it
14 sounded like both sides agreed that whatever document was
15 flashed onto the screen shouldn't have been flashed onto the
16 screen.

17 **MS. MOORE:** That's correct. And when I say
18 "sustained," Your Honor, I meant in the rulings not today. I'm
19 sorry. The prior ruling.

20 **THE COURT:** Okay.

21 **MS. MOORE:** I'm sorry, Your Honor, to clarify.

22 So our suggestion as a remedy to them showing what was
23 excluded on the screen is for us to be able to play back a
24 short testimony, and we can submit that to the other side and
25 we can try to work that out on the break.

PORTIER - VIDEO TESTIMONY

1 **MS. COPE-KASTEN:** We're happy to talk with Ms. Moore
2 about that, Your Honor.

3 **THE COURT:** Okay. So the idea is you would talk to
4 them about it over lunch or something?

5 **MS. MOORE:** We might be able to just talk about it
6 quickly in the next couple minutes because Portier is going to
7 be wrapped up.

8 **THE COURT:** Okay. Why don't you do that. We'll
9 resume in about five minutes. I'll be back out in about five
10 minutes.

11 **MS. MOORE:** Okay. Thank you, Your Honor.

12 (Recess taken at 10:44 a.m.)

13 (Proceedings resumed at 10:55 a.m.)

14 (Proceedings were heard out of the presence of the jury:)

15 **THE COURT:** Okay. Anything that needs argument?

16 **MR. WISNER:** Yeah, Your Honor.

17 So the issue was -- can we have it on the screen? --
18 during his testimony --

19 **MR. STEKLOFF:** I think you'll need the defense
20 control.

21 **THE COURT:** Theresa, can you switch the --

22 **MR. WISNER:** Sorry.

23 (Pause in proceedings.)

24 **MR. WISNER:** So there was testimony --

25 **THE COURT:** And then, Theresa, you can tell the jurors

PORTIER - VIDEO TESTIMONY

1 it will be a couple more minutes. Thanks.

2 **MR. WISNER:** The testimony that they designated was
3 when they read this second sentence into the record while
4 cross-examining him (reading):

5 "The arguments expressed in the open letter reflect a
6 misunderstanding of the evidence used for the EFSA
7 evaluation."

8 **THE COURT:** Yes.

9 **MR. WISNER:** You sustained that and it's out.

10 When they played the video, they showed this on the screen
11 for a sufficient amount of time for everyone to read those
12 sentences. And so while they didn't read it into the record,
13 they did present it to the jury, I mean, long enough that we
14 were able to physically write the whole sentence down --

15 **THE COURT:** Okay.

16 **MR. WISNER:** -- by hand.

17 So, as a remedy to that, we have proposed playing a
18 portion that was previously excluded --

19 **THE COURT:** Okay.

20 **MR. WISNER:** -- and it is the question, if Your Honor
21 remembers -- I don't know, you've been reviewing a lot of
22 testimony -- but the one where I asked "Did it take you a lot
23 of time?" And he goes "Yes." And I said, "Well, then why did
24 you do it?" And he goes on for about a page explaining why he
25 sent these letters and did what he did.

PORTIER - VIDEO TESTIMONY

1 That portion was excluded for grounds -- you know, for
2 whatever reason, but it was excluded, and I think that that
3 would help rebut any prejudice created by showing that
4 sentence.

5 (Pause in proceedings.)

6 **MR. WISNER:** And in that answer, he explains why he
7 thought they were doing it wrong. You know what I mean? It's
8 not just that.

9 **THE COURT:** So this was shown but not read -- this was
10 shown during Portier's testimony, and Portier's testimony
11 was -- had I ruled that the first sentence could come in and --

12 **MR. WISNER:** That's right.

13 **THE COURT:** -- the second sentence could not come in?

14 **MR. WISNER:** That's right. And they read the first
15 sentence.

16 **MR. STEKLOFF:** Also to be clear, Your Honor, maybe if
17 you could watch the next few seconds of the video, what happens
18 is that the first sentence is called out and highlighted, and
19 then there is testimony about that first sentence.

20 So that the full paragraph is shown but no questions are
21 asked about the language, and then there is specific testimony
22 that is asked about the first sentence with this up and
23 highlighted.

24 **THE COURT:** Okay. I think that the likelihood of that
25 affecting the jury is very -- is exceedingly low. I mean,

PORTIER - VIDEO TESTIMONY

1 almost impossible under the circumstances.

2 I will say, though, why don't you play the video back to
3 me just so I can watch it in realtime.

4 (Video was played but not reported.)

5 **THE COURT:** Can you play it one more time for me?

6 (Video was played but not reported.)

7 **THE COURT:** Fine.

8 So after watching that, I change my view. I think that it
9 was on there and it was in front of the jury long enough to
10 have an impact.

11 So I don't remember -- I have a general memory of the
12 passage that you're talking about, and I think that that is
13 okay to play to the jury to respond to this; but if you want me
14 to look at the specific text again, you can hand it up to me.
15 I don't have Portier's testimony with me.

16 **MR. WISNER:** If you're going to let it in, I don't
17 need you to read it. It's really their discretion.

18 **MR. STEKLOFF:** Well, I guess the only question I have,
19 Your Honor, is --

20 **THE COURT:** My general recollection is that he said,
21 "The reason I did this, the reason I spent so much time on this
22 is because I thought they were doing it wrong; and I was
23 actually involved in sort of creating the standards, and I
24 think it's a big deal that they did it wrong," or something
25 along those lines.

PORTIER - VIDEO TESTIMONY

1 **MR. WISNER:** That's a pretty good paraphrase.

2 **THE COURT:** I think if my memory of that is accurate,
3 I think that that is appropriate under the circumstances to
4 allow in.

5 **MR. STEKLOFF:** Understanding your position, I will not
6 argue against it.

7 **THE COURT:** Okay. You can put that in.

8 **MS. MOORE:** Thank you, Your Honor.

9 **THE COURT:** And you can bring in the jury.

10 **MS. MOORE:** He may need just one minute to do that.
11 You got it?

12 **MR. WISNER:** We're good.

13 **MS. MOORE:** We're good?

14 Never mind. Thank you.

15 **THE COURT:** You knew how I was going to rule on that,
16 didn't you?

17 (Proceedings were heard in the presence of the jury:)

18 **THE COURT:** Okay. Welcome back.

19 You can resume with wrapping up Dr. Portier's testimony.

20 **MS. MOORE:** Your Honor, we may need to switch the
21 monitor.

22 **THE COURT:** Oh. Go ahead.

23 **MS. MOORE:** Thank you.

24 **MR. WOLF:** Thank you.

25 **(Video was played but not reported.)**

PROCEEDINGS

1 **MR. STEKLOFF:** Your Honor, can we switch back?

2 **(Video was played but not reported.)**

3 **THE COURT:** All done with Dr. Portier.

4 **MS. MOORE:** Your Honor, we would move into evidence
5 Exhibits 875, 876, 877, 878, 882 and 883.

6 **THE COURT:** Any objection?

7 **MR. STEKLOFF:** Yes, Your Honor. I think we can
8 discuss it later, though.

9 **THE COURT:** Okay. We will do that.

10 **MS. MOORE:** Okay.

11 **THE COURT:** Do you want to go ahead and present your
12 next witness?

13 **MS. MOORE:** Yes, Your Honor. The Plaintiff calls
14 Dr. Turk.

15 **THE COURT:** Okay. Go ahead and play Dr. Turk.

16 **MS. MOORE:** Thank you.

17 **(Video was played but not reported.)**

18 **MS. MOORE:** Your Honor, this is a good time for a
19 break.

20 **THE COURT:** Why don't we return at 12:30. Remember
21 all my admonitions about staying away from people in the
22 building, not communicating amongst yourselves about the case;
23 not talking to anybody else; not doing any research. Thank you
24 very much.

25 (Proceedings were heard outside the presence of the jury:)

PROCEEDINGS

1 **THE COURT:** Here is what I would propose. I would
2 prepose if we talk about -- if there is anything to discuss
3 about Farmer or anybody has any clarification questions or
4 burning issues they want to raise about Farmer, that we do that
5 now. And I would suggest that we put off Reeves, and that
6 maybe we discuss -- your plan is to call Reeves first thing --
7 excuse me -- Weisenburger first thing Monday morning; is that
8 correct?

9 **MS. MOORE:** It depends on -- we would like to maybe
10 play Reeves and then call Dr. Weisenburger.

11 **THE COURT:** Well, we will have to see if that's going
12 to work.

13 **MS. MOORE:** I understand.

14 **THE COURT:** Depending on whether we are able to get
15 through Reeves.

16 **MS. WAGSTAFF:** And we are also juggling Mr. Hardeman
17 as well. He may be slipped in somewhere.

18 **THE COURT:** Okay.

19 **MS. WAGSTAFF:** Your Honor, I have something I would
20 like to discuss with respect to Dr. Portier --

21 **THE COURT:** Okay.

22 **MS. WAGSTAFF:** -- if that's okay with you. I have a
23 hard copy of his cross, run receipt. I just tagged where I'm
24 going to be.

25 **THE COURT:** Okay.

PROCEEDINGS

1 **MS. WAGSTAFF:** With respect to the motion in limine --
2 I don't know if you want to pull up your motion in limine order
3 81.

4 **THE COURT:** I'm happy to. I may need to go in and
5 grab it. I have it on my iPad, oh wait. Sorry. I forgot.
6 There is too much stuff up here. Just give me one second.

7 (A brief pause was had.)

8 **THE COURT:** Okay.

9 **MS. WAGSTAFF:** So on your last page when you are
10 discussing Plaintiffs' motions in limine, I point you to
11 paragraph 15 where Plaintiffs had moved to introduce
12 Dr. Parry's evaluation and tell the jury about Dr. Parry's --
13 Dr. Parry's story.

14 **THE COURT:** Right.

15 **MS. WAGSTAFF:** And you said at the last sentence, that
16 "If Monsanto presents expert testimony on the genotoxicity of
17 glyphosate or otherwise opens the door through
18 cross-examination on, for example, the EPA's conclusions about
19 the genotoxicity of glyphosate, this evaluation could become
20 admissible on redirect."

21 **THE COURT:** Okay.

22 **MS. WAGSTAFF:** I point you to the cross-examination,
23 and I also -- before we move off of motion in limine 81, I
24 would like to look at your ruling with respect to Plaintiffs'
25 motion in limine number 4 when we talk about -- we were -- we

PROCEEDINGS

1 requested exclusion of foreign regulators.

2 **THE COURT:** Right.

3 **MS. WAGSTAFF:** You stated, "It was granted with a
4 limited exception that Monsanto may briefly cross-examine
5 Dr. Portier on his efforts to convince European regulators to
6 ban Roundup parenteticals in a way that reveal his efforts
7 have thus far been unsuccessful."

8 You go onto say, "This limited exception is inappropriate
9 to allow Monsanto to probe Dr." --

10 **THE COURT:** Wait. Just to make sure the record is
11 clear. "This limited exception is appropriate to allow" --

12 **MS. WAGSTAFF:** Sorry.

13 **THE COURT:** -- "Monsanto."

14 **MS. WAGSTAFF:** That was probably a very -- I didn't
15 mean to do that.

16 -- "is appropriate to allow Monsanto to probe Dr. --
17 Dr. Portier's objectivity and to allow Monsanto to counter any
18 erroneous assumption by jurors that glyphosate is banned in
19 Europe."

20 **THE COURT:** Right.

21 **MS. WAGSTAFF:** So if you combine those two motions in
22 limine together -- and I point you to the cross-examination,
23 which I have flagged; and they cross-examine Dr. Portier on
24 pages 431 to 484 of the actual depo sites, which is on the
25 left, if you see; and what I flag for you is where they

PROCEEDINGS

1 actually -- on page 457, they are actually using EFSA's
2 conclusion, which we think is a clear opening the door because
3 they have already previously in the cross established what you
4 said in your limited -- the limited way that they could use the
5 foreign regulatory. And right here they are now using EFSA's
6 actual conclusion to cross the genotox. We think that they go
7 on on pages 459 with the Bolognesi --

8 **THE COURT:** Hold on. Give me a quick second to absorb
9 this.

10 (A brief pause was had.)

11 **THE COURT:** Okay.

12 **MS. WAGSTAFF:** So we believe that their use of foreign
13 regulatory documents went beyond --

14 **THE COURT:** Sorry, were you going to point me to some
15 other --

16 **MS. WAGSTAFF:** Yeah. We also -- 459, if you continue
17 on where they start questioning him about -- starting on line 9
18 on the next page where they start questioning him about the
19 Bolognesi and the actual --

20 **THE COURT:** Yes.

21 **MS. WAGSTAFF:** And it continues on actually through to
22 page 461 where they actually get in and they say "So the
23 jury" -- 461, line 14, they say, "And just so the jury
24 understands what we are talking about, this was a study that
25 looked at aerial spraying that was being done in South America

PROCEEDINGS

1 to try to eradicate crops relevant to the illegal drug
2 institute, correct."

3 And then they go on and they start challenging the genotox
4 opinions, which we think further opens the door. That's what
5 it says.

6 And then we think that they continue on on page 462,
7 line 16 through 463, line 1, where they say -- they continue to
8 question and challenge the micronuclei testing, which is what
9 shows about the DNA damage.

10 And continuing on all the way through the Bradford-Hill
11 analysis where they say at the bottom of page 463 -- and they
12 cross-examine Dr. Portier on the Bradford-Hill guidelines to
13 assign causality to increase the frequency of BNMN observed in
14 our study, which if you continue reading is micronuclei damage.

15 This is a clear cross-examination on the genotoxicity,
16 which we believe under your motion in limine opens the door to
17 allow us to present the Dr. Parry story to the jury. And we
18 would like to present to you through Dr. Martens, who is a
19 employee of Monsanto, and we would give you deposition cuts
20 over the weekend or on Monday morning.

21 **THE COURT:** Okay. I'm happy to consider it. It
22 sounds like something that doesn't need to be decided now, and
23 I can read this testimony more carefully and consider the
24 proposed testimony you are giving from Dr. Martens more
25 carefully before I rule. Do you want to respond briefly now?

PROCEEDINGS

1 **MR. KILARU:** Yes, Your Honor. We oppose that. I
2 don't think -- we understood -- in particular the colloquy we
3 had about Parry, we understood that any cross-examination on
4 the topic of genotoxicity would open the door to Parry.

5 **THE COURT:** I don't think it does categorically. It's
6 a question of what came out --

7 **MR. KILARU:** And I believe that what was done here was
8 asking him about the Bolognesi study, which is one of the
9 studies that Dr. Parry asked. And I think if you remember at
10 the very end of the cross, Mr. Wisner actually asked, Did
11 Mr. Schmidt contest the results of any of the positive findings
12 that you put here as to genotoxicity.

13 The witness said, No, we didn't go back into that.

14 So I think our cross-examination on genotoxicity was very
15 narrow. It was intended to comply with that ruling and not
16 open the door to Parry.

17 **THE COURT:** Potentially the bigger issue is -- and,
18 again, I need to read this more carefully -- but it seems to me
19 the bigger issue is the first point Ms. Wagstaff made, which is
20 that you put in testimony or evidence about -- was it the
21 European regulators?

22 **MS. WAGSTAFF:** EFSA.

23 **THE CLERK:** EFSA's conclusion about the genotoxicity
24 of glyphosate, and the point was -- the motion -- I mean, the
25 ruling on motion in limine Number 15 said that you open the

PROCEEDINGS

1 door if you present, for example, evidence on the EPA's
2 conclusions about the genotoxicity of glyphosate. So it seems
3 to me that you did bring in material that potentially opened
4 the door to Dr. Parry's second evaluation. And then the
5 question is, so -- the question is how significant was that bit
6 of testimony that you brought in and is the remedy to strike it
7 or is the remedy to allow, you know, the Parry report in which
8 they -- which then may, of course, permit Monsanto to bring in
9 more stuff on genotoxicity, and maybe that's the appropriate
10 solution.

11 **MR. KILARU:** We will think about that as well,
12 Your Honor. I think my gut instinct right here is that we
13 think that none of this should be in, so we would prefer to
14 strike the testimony. I can assure you we wouldn't argue about
15 it in closing.

16 **THE COURT:** I'm guessing that's what you would prefer.
17 The question is whether or not that is the appropriate --

18 **MR. KILARU:** Right. The reason I would say that is
19 among the reasons, I think it was a pretty small snippet of
20 testimony about EFSA in the grand scheme of things; and the
21 testimony about Parry would be somewhat extensive about the
22 back and forth and involve company documents and things like
23 that.

24 **THE COURT:** And then presumably Monsanto may wish to
25 bring in more evidence to rebut that.

PROCEEDINGS

1 **MR. KILARU:** Right.

2 **THE COURT:** But maybe that's fine, because it's not as
3 if, you know, the genotoxicity stuff is -- in contrast to, you
4 know, the IARC process, the EPA process. I mean, the
5 genotoxicity science is, of course, highly relevant to
6 Phase One. So that, I think, is the issue.

7 And -- do you all want to -- I mean, I don't like to make
8 people do briefing in the middle of trial; but maybe it would
9 be worth each of you filing a short brief, and part of it would
10 be, you know, explaining -- the Plaintiffs explaining with more
11 specificity what evidence they want to bring in relating to
12 Parry's evaluation, you know, sort of describing it; and then
13 Monsanto explaining with specificity what evidence it would
14 want to bring in if the Parry evaluation came in.

15 **MS. WAGSTAFF:** So, Your Honor, I propose it might be
16 best if you actually see our proposed depo cuts instead of just
17 categories of testimony. And I actually took the Dr. Martens
18 depo, so I can cut that with someone on Monsanto and have it to
19 you -- I don't want to speak for them -- but this weekend
20 sometime.

21 **THE COURT:** Okay.

22 **MS. WAGSTAFF:** And also it was our understanding if
23 you look at the testimony on page 472, starting with line 22,
24 where it says, "It's not the purpose of genotoxicity assays to
25 establish that glyphosate causes NHL," that that would be sort

PROCEEDINGS

1 of the cross-examination the Court was proposing. And that
2 when you put in your motion in limine an example of opening the
3 door with, you know, regulatory conclusions, that that is
4 exactly what Monsanto did. And so --

5 **THE COURT:** I think it is more an issue of -- that
6 is -- that -- I think I disagree with you about that because
7 that cross-examination is about what -- what is the importance
8 in the grand scheme of things of the genotoxicity studies, not
9 whether anybody's particular conclusion about genotoxicity was
10 right or wrong; whereas, the quote from the European regulators
11 is more -- goes more to who is right or wrong about
12 genotoxicity.

13 **MS. WAGSTAFF:** Right. I think we are saying the same
14 thing. I'm agreeing with you.

15 **THE COURT:** Oh, okay. All right.

16 **MS. WAGSTAFF:** So perhaps we can agree to get the
17 judge cuts proposed cuts on Dr. Martens by Sunday at noon?

18 **MR. KILARU:** We can try to make that work. We haven't
19 seen any of this yet, but we are happy to work to make this
20 happen.

21 **THE COURT:** Sure. That sounds fine.

22 Do you want to talk about Farmer?

23 **MR. KILARU:** Farmer, I don't think --

24 **MR. STEKLOFF:** I think both sides agree to accept your
25 rulings. No argument.

PROCEEDINGS

1 **THE CLERK:** Okay.

2 **MR. WISNER:** We have worked it out. We added a few
3 extra things we agreed on.

4 **THE COURT:** To clarify the testimony, okay. Good.

5 So then I think what I would propose is that we -- I mean,
6 I will defer to you-all. I mean, we can talk about -- I don't
7 have too much more time after the trial day although that may
8 depend. So how much more testimony do we have prepared for
9 today, including Farmer?

10 **MS. MOORE:** Your Honor, how much did we play of
11 Dr. Turk's? We have about 20 minutes of Dr. Turley and an hour
12 of Dr. Ye.

13 **MS. WAGSTAFF:** We have 25 of Turk left.

14 **MS. MOORE:** Okay. So we have about probably two hours
15 and 16 minutes left of testimony left to be played today.

16 **THE COURT:** Okay. Good.

17 **MS. MOORE:** Should get us right where we need to be, I
18 think.

19 **THE COURT:** Yeah, I think so. So we could talk about
20 the Reeves' testimony now if you wanted to. We could talk
21 about it briefly -- briefly after the jury leaves for the day,
22 but I do not have that much time after the jury leaves for the
23 day or we could talk about it Monday morning.

24 **MS. MOORE:** Your Honor, it is whenever you prefer. I
25 mean, it's your lunch hour, so -- I mean, we are prepared to

PROCEEDINGS

1 talk about it now or we can wait until after today.

2 **MR. KILARU:** Likewise.

3 **THE COURT:** Why don't we spend, 10, 15 minutes talking
4 about it right now. Maybe 10 minutes, because I want everybody
5 to have a break for lunch.

6 **MS. MOORE:** That would be nice. Thank you.

7 **THE COURT:** Spend 10 minutes and we will resume after
8 the trial day if we need to.

9 **MS. MOORE:** That's good. Thank you, Your Honor. I
10 will turn it over.

11 **THE COURT:** Okay. So who is most unhappy with this
12 ruling?

13 **MR. KILARU:** That's a good question, Your Honor. I
14 mean, I know the *Knezevich & Hogan* --

15 **THE COURT:** The goal is always to make both of you
16 unhappy.

17 **MR. KILARU:** I guess we should probably say both of
18 us.

19 I think from our side the main issue is talking about the
20 mouse study. I suspect the Plaintiffs may have some other
21 objections to other aspects of the rules as well, so we can
22 start on either side of that.

23 **THE COURT:** Okay. Why don't we -- why don't you tell
24 me what is wrong with what I have done with respect to the
25 mouse study?

PROCEEDINGS

1 **MR. KILARU:** Sure, Your Honor. I think we have a
2 proposal we can make to maybe go a little further than what we
3 have offered earlier. I think the broader point I would make
4 is one of the reasons we haven't come forward with something
5 initial yet is we kind of wanted to see how the evidence would
6 come in on this study. And as it has come in. It is unclear
7 to us that we need to get into the back-and-forth about one
8 tumor versus zero tumors in the control group through this
9 deposition. Dr. Portier was asked about the kidney tumors in
10 the *Knezevich & Hogan* study. And he said what he said, which,
11 I believe, was that there was a trend in the study; and he
12 talked about that piece of the study. We did cross-examine on
13 that.

14 The cross-examination that we did on *Knezevich & Hogan* was
15 about the malignant lymphoma data. You may remember the
16 statistical significance discussion. It was not about the
17 kidney tumor data. We don't really intend to get into that any
18 further, so I don't think there will be -- there won't be any
19 witness testimony from us saying actually there was one tumor
20 in the control group, nor do I think that in closing we would
21 intend to argue, at least in Phase One -- we acknowledge this
22 is more of a Phase Two issue -- but in Phase One I don't think
23 we come in and say dismiss *Knezevich & Hogan* because there
24 actually was a tumor in the control group.

25 So under the circumstances, we continue to think they

PROCEEDINGS

1 shouldn't be admitted at all; but I really question now whether
2 however much there is -- 50 pages or whatever the case is --
3 should come in. It is almost sort of -- I don't mean this with
4 the intent, the component that comes with it, but it's also an
5 issue about whether there was a tumor or not. For purposes of
6 Phase One we are not really disputing --

7 **THE COURT:** The upshot is -- the upshot is you -- for
8 purposes of Phase One, you are not contesting the absence of a
9 tumor in the control group in that -- for that study.

10 **MR. KILARU:** Right. For Phase One, I think as the
11 proofs come in, we are not going to go any further than what
12 has already been heard.

13 **THE COURT:** Okay.

14 **MR. WOOL:** Your Honor, and you just heard this,
15 Monsanto impeaches Portier with the EPA's CARC decision, which
16 is in part predicated on this finding of the tumor in the
17 control group. So the jury is probably now wondering, Well,
18 why does Dr. Portier have a different conclusion than EPA does
19 as to this data.

20 And so we think that even though they might not contest
21 the tumor in the control group, they have nonetheless sort of
22 opened the door to this and made this an issue by contrasting
23 Dr. Portier's testimony with the CARC report.

24 **MR. KILARU:** That, Your Honor, I don't know that
25 anything -- I don't know that in any way the jury would connect

PROCEEDINGS

1 the discussion in the CARC report to a mouse tumor back in
2 1983. The fact of EPA approval since then is what it is, and I
3 think it has been admitted. But as to what the EPA thought
4 about this study before it really concluded back in 1985 or '86
5 that it should approve it, that I think is really far afield
6 what the jury has heard about the EPA or about this study.

7 **THE COURT:** I mean, the thing about it is we have had
8 so much that has happened since 1985, right; and we have had
9 these epidemiology studies. We have had the IARC
10 classification. You know, we have had -- we have had Portier
11 trying to convince the EPA to do something. We have had
12 Portier trying to convince the European regulators to do
13 something.

14 And I suppose if this case were about the state of affairs
15 in 1987 or something like that, there might be a stronger
16 argument that Monsanto's shenanigans with the mouse study are
17 relevant, even if Monsanto had not challenged Dr. Portier on
18 the absence of a tumor in the control group because presumably
19 the background assumption would be that that -- that animal
20 study from 1985 was much more relevant to the EPA's
21 consideration or the European regulators' consideration than it
22 would be in 2018 or 2016 or 2015.

23 So I wonder if, given how long ago this was and given how
24 much science that has come out since then and given that
25 Monsanto is not contesting Dr. Portier on the absence of a

PROCEEDINGS

1 tumor in the control group for the study, I wonder if it -- if
2 that makes it -- that makes it a lot more unduly prejudicial
3 than probative. And I hadn't thought -- the thing I hadn't
4 thought about was the possibility that Monsanto was not going
5 to challenge Portier on the absence of a tumor in the control
6 group.

7 **MR. WOOL:** Right. And we hadn't thought that they
8 were going to do that either. I think we actually proposed a
9 stipulation to say there was no tumor in the control group.

10 And I think there is also a second point here, and you
11 heard about this from Monsanto in opening, which is that the
12 doctors never connected Mr. Hardeman's NHL to Roundup, right?
13 And that sort of goes to what happened with the EPA in the late
14 '80s and early '90s with respect to this tumor. You know, I
15 think that they would reasonably have been expected to hear a
16 lot more about glyphosate potentially being carcinogenic had
17 all of this not happened in the 1980s.

18 **MR. KILARU:** Well, I --

19 **THE COURT:** But you are presuming that if -- so what
20 you are saying is had the tumor not been found in the control
21 group, the doctors would have known that -- would have looked
22 at glyphosate as a potential risk factor for Mr. Hardeman?

23 **MR. WOOL:** Well, we think it is certainly possible.

24 **THE COURT:** It seems pretty speculative, doesn't it?

25 **MR. WOOL:** I mean, I think there is some speculation

TURK - VIDEO TESTIMONY

1 there, and we would concede that. But I think you would have
2 to say that the EPA's categorization from 1985 would have stood
3 for longer; and that sort of goes directly to, you know, the
4 doctor sort of connecting this.

5 **THE COURT:** Okay.

6 **MR. WOOL:** Which was a point of emphasis for them
7 during opening.

8 **THE COURT:** It certainly was. I grant you that.

9 So let's -- let's resume this discussion about the magic
10 tumor later, maybe at the end of the trial day.

11 Is there anything you want to articulate -- any separate
12 beefs that you had with my rulings on Reeves? I guess I said
13 that argument was -- well, you know what, let's give everybody
14 a lunch break. Let's resume this discussion after the end of
15 the trial day. All right?

16 **MR. WOOL:** Yes.

17 **MR. KILARU:** Thanks, Your Honor.

18 (Luncheon recess was taken at 12:07 p.m.)

19 **AFTERNOON SESSION**

12:32 p.m.

20 (Proceedings were heard in the presence of the jury:)

21 **THE COURT:** Welcome back. You can resume the
22 testimony.

23 **MS. MOORE:** Thank you, Your Honor.

24 (Video was played but not reported.)

25 **THE COURT:** Next witness?

PROCEEDINGS

1 **MS. MOORE:** Our next witness is Dr. Richard Turley,
2 Your Honor.

3 **THE CLERK:** Okay.

4 **MS. MOORE:** Your Honor, before I do that, just
5 housekeeping, we would move to admit into evidence, Exhibit 66,
6 67 and 68.

7 **MR. STEKLOFF:** When I find out what they are, I can
8 tell you whether there is an objection.

9 (A brief pause was had.)

10 **MR. STEKLOFF:** Your Honor, we have no objection. We
11 might also later list some of the medical records that were
12 discussed but --

13 **THE COURT:** That's fine. Those will be admitted for
14 now.

15 (Trial Exhibits 66, 67, and 68 received in evidence)

16 **MS. MOORE:** Thank you, Your Honor. Dr. Turley will be
17 next.

18 **(Video was played but not reported.)**

19 **THE COURT:** Why don't we take our afternoon break. We
20 will resume at 1:30.

21 (Proceedings were heard out of presence of the jury:)

22 **THE COURT:** How long did you say Dr. Ye's testimony
23 is? I can't remember.

24 **MS. MOORE:** It is an hour, Your Honor. And Dr. Farmer
25 is five minutes.

PROCEEDINGS

1 **THE COURT:** Dr. Farmer is down to five minutes?

2 **MS. MOORE:** Yes. I think we can play both of them.

3 **THE COURT:** Okay. That's fine.

4 So we will resume at 1:30, and you can play both of those,
5 and we will be done for the day.

6 **MS. MOORE:** Great. Thank you so much.

7 When we come back on the record, do you want me to move to
8 admit the exhibits? Do you want to do that before the jury
9 comes back in?

10 **THE COURT:** You want to do it right now?

11 **MS. MOORE:** That would be great.

12 Plaintiff would then move to admit into evidence Trial
13 Exhibits 27 [sic], 29, 30, 31 and 32.

14 **MR. STEKLOFF:** We have no objection to any -- the
15 specific pages of any medical records coming in. We will
16 clarify, I think we have one composite medical record exhibit.
17 I will work with counsel to identify the specific records we
18 identified in our examination so we can move those in as well.

19 **THE COURT:** All right. Those are admitted.

20 **MS. MOORE:** Thank you, Your Honor.

21 (Trial Exhibits 28, 29, 30, 31, and 32 received in
22 evidence)

23 (Recess taken at 1:22 p.m.)

24 (Proceedings resumed at 1:31 p.m.)

25 (Proceedings were heard out of the presence of the jury:)

YE - VIDEO TESTIMONY

1 **THE COURT:** You can go ahead and bring in the jury.

2 (Proceedings were heard in the presence of the jury:)

3 **THE COURT:** Okay. You can resume.

4 **MS. MOORE:** Thank you, Your Honor.

5 Plaintiffs call as our next witness Dr. Jeffrey Ye, and
6 this will also be by video.

7 **THE COURT:** Okay.

8 **MS. MOORE:** Thank you.

9 **(Video was played but not reported.)**

10 **THE COURT:** Why don't we take another five-minute
11 break. Folks, you can stand up, stretch, grab some coffee if
12 you need to back there, and we'll resume at five after the
13 hour.

14 (Proceedings were heard out of the presence of the jury:)

15 **THE COURT:** Can I have a brief sidebar with the
16 lawyers?

17 **(Pages 891 through 892 were placed under seal by Order of**
18 **the Court and bound separately.)**

19

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25

YE - VIDEO TESTIMONY

1 (The following proceedings were heard in open court:)

2 THE COURT: Okay. I'll be back in a minute.

3 (Recess taken at 2:05 p.m.)

4 (Proceedings resumed at 2:09 p.m.)

5 (Proceedings were heard out of the presence of the jury:)

6 THE COURT: The jury seems pretty anxious to go. They
7 had told Kristen a couple of days ago that if at all possible,
8 they don't want to be kept past 2:30 because traffic gets bad.
9 So we're just going to do -- we'll just finish with Dr. Ye, and
10 then I'm going to let them go for today. Sorry about that.

11 MS. MOORE: Okay. Thank you.

12 (Pause in proceedings.)

13 MS. MOORE: Well, Your Honor, it's 30 minutes for Ye.
14 So do you want to --

15 THE COURT: That's fine.

16 MS. MOORE: Is that okay?

17 THE COURT: Yeah. I prepared them for the possibility
18 we'll stay little late, but I don't also want to do Farmer.

19 MS. MOORE: I understand.

20 THE COURT: Yeah.

21 (Proceedings were heard in the presence of the jury:)

22 THE COURT: Okay. You can resume.

23 MS. MOORE: Thank you, Your Honor.

24 (Video was played but not reported.)

25 (Video stopped.)

YE - VIDEO TESTIMONY

1 **THE COURT:** Okay. Is that it?

2 **MS. WAGSTAFF:** That it's it.

3 **MS. MOORE:** Thank you, Your Honor.

4 **THE COURT:** Okay, great.

5 Thank you for staying a little bit late. We were able to
6 get through the testimony of Dr. Ye.

7 This marks the end of our first week. I will let you
8 know, of course, as I told you at the beginning, scheduling is
9 a little bit unpredictable, but it does appear that we are
10 somewhat ahead of schedule so far just to let you know.

11 And so please, you know, the weekend is coming so I know
12 that you've heard all this many times from me, but it's
13 particularly important for me to remind you on a Friday
14 afternoon when you're going to be gone for two days that you
15 need to be very careful not to talk about the case with
16 anybody. You need to be very careful not to expose yourself to
17 any media reports about the case, and you need to be careful
18 not -- you certainly need to ensure that you don't do any
19 independent research looking up terms or anything like that at
20 all.

21 And if it comes to your attention that -- if you've been
22 exposed to some information, you should let us know right away,
23 Kristen or myself. And if it comes to your attention that
24 anybody else has been exposed inappropriately to some
25 information, you should let us know that.

PROCEEDINGS

1 So with that, have a nice weekend. We'll see you
2 bright-eyed and bushy-tailed on Monday. Thank you.

3 (Proceedings were heard out of the presence of the jury:)

4 **THE COURT:** Okay. Why don't -- you know, my rule
5 about lunchtime and people staying in the courtroom for five
6 minutes -- first of all, again everybody is free to sit down.
7 You don't have to remain standing once the jury has left.

8 My rule about sequestering the courtroom for five minutes
9 at the beginning of the lunch hour will also apply to the end
10 of the trial day so that the jurors can have five minutes to
11 take off before people in the courtroom leave. And usually, of
12 course, I keep talking anyway so people stay.

13 So on that note, one brief comment on leading questions.
14 I thought it was appropriate to tolerate a good number of
15 leading questions in the examination of the doctors given that
16 their testimony didn't really involve any facts that are
17 significantly in dispute, but I will remind both sides that
18 when the experts come to testify next week, I will not allow
19 those kinds of leading questions other than to, you know, set
20 up -- if you want to use leading questions to be efficient
21 about establishing their qualifications and stuff, that's fine;
22 but for the substantive opinions, that is not appropriate.

23 Let's see... Oh, very quickly, Dr. Arber. I went back
24 and looked at the -- saw that there's this kind of lingering
25 objection to Dr. Arber even after the ruling that I issued on

PROCEEDINGS

1 the plaintiff's -- on the defendant's specific causation
2 experts. I don't think that objection is well taken, but let
3 me just make sure I understand it.

4 So Arber is going to offer basically two opinions, as I
5 understand it. One is that the plaintiff's specific causation
6 experts didn't do a good job on hep C; is that right?

7 **MR. KILARU:** Yes. More or less, Your Honor. I think
8 the primary focus of his examination is what he found on the
9 pathology slides, the hepatitis C.

10 **THE COURT:** That's what I was going to ask about, what
11 he found on the pathology slides and that they did a bad job
12 into looking into hep C; is that right?

13 **MR. KILARU:** Yes.

14 **THE COURT:** On the pathology slides, I guess, my
15 question is: Is there anything in dispute that necessitates
16 his testimony? Because it seems like everybody agrees that
17 there is nothing about NHL that would allow you to identify
18 from an examination -- from a pathological perspective --
19 identify the cause of the cancer. And it seems like everybody
20 is in agreement based on how the evidence has come in so far
21 that whether it is caused by Roundup or hep C or some unknown
22 cause, there is no marker to the NHL. So why is that testimony
23 necessary at this point?

24 **MR. KILARU:** Well, for a couple of reasons,
25 Your Honor. I think the Plaintiff, as we all know, has the

PROCEEDINGS

1 burden of proving that the NHL was caused by Roundup. So I
2 think having a pathologist come in and look at the slides and
3 identify there is nothing about Mr. Hardeman's particular
4 cancer --

5 **THE COURT:** But isn't that just a ruse? I mean, if
6 everybody agrees that no pathologist on the planet can go and
7 look at those slides and identify the cause of his cancer, then
8 why is it necessary to bring in an expert who says, I went and
9 looked at the slides and there is nothing about them that
10 indicates that Mr. Hardeman's cancer was caused by Roundup?

11 **MR. KILARU:** It goes to the other point, Your Honor,
12 which is it is not true that a pathologist can never look at a
13 slide and say, I can't determine the cause of this person's NHL
14 or testify to that. There are certain causes of NHL that would
15 be reflected in the pathology, and they will further testify
16 that there are certain aspects of Mr. Hardeman's pathology that
17 are more consistent with other causes besides Roundup.

18 **THE COURT:** What is that testimony? What is that
19 opinion?

20 **MS. MOORE:** That is undisclosed to us, Your Honor.

21 **MR. KILARU:** I don't think that's the case, your
22 Honor. In his report he talks about the specific genetic
23 mutations that were found in Mr. Hardeman's pathology, and we
24 have disclosed literature that shows whether some of those gene
25 markers are more consistent with hepatitis C or more consistent

PROCEEDINGS

1 with Roundup.

2 **THE COURT:** I'm pulling up his expert report right
3 now. And by the way, if I surprised you with this line of
4 questioning and you want to --

5 **MR. KILARU:** No, that's fine, Your Honor. I think the
6 only thing I would add is the Plaintiffs are also calling a
7 pathologist, Dr. Weisenburger. And I think it is important for
8 us to be able to call our own pathologist to the extent their
9 pathologist is saying that Roundup is a cause, that is valid in
10 the field of pathology.

11 **THE COURT:** It begs the question whether there is any
12 dispute on the issue that the expert is being called to testify
13 about. And I understand, of course, he can testify -- first of
14 all, he is qualified to testify about both of these things. So
15 to the extent the Plaintiffs are objecting that he is not
16 qualified to testify about one of these things, that objection
17 is overruled.

18 But in looking at it, I -- I found myself scratching my
19 head about why it is necessary -- why it would be helpful to
20 the jury or relevant for Archer -- sorry -- Arber to testify
21 about this -- the pathology. So where -- can you show me where
22 in his report that that issue is raised?

23 **MR. KILARU:** Sure, Your Honor. I don't have the
24 report in front of me, but I believe on -- I think it is either
25 the second page. It would be one of the left-facing pages.

PROCEEDINGS

1 **THE COURT:** Seared into your brain?

2 **MR. KILARU:** Very much so.

3 He talks about the specific findings on the pathology in
4 Mr. Hardeman's case. He talks about FISH tests that were done.
5 He talks about -- there are a lot of numbers and letters there,
6 the KI67 that was talked about here. Then he talks about FISH
7 test and DCL6 and DCL2 and a MIC mutation, and those various
8 things.

9 **MS. MOORE:** I think he is referring to paragraph 18,
10 Your Honor. And we wondered the same thing because we were
11 told last week by defense counsel that they wanted the
12 pathology slides to bring into court to show to the jury, and
13 it's a little bit puzzling because everyone has agreed that NHL
14 is not disputed in this case, and the doctors have testified
15 that you can't tell from the pathology a cause of NHL. So I
16 think under 401 --

17 **THE COURT:** Let me just interrupt and ask you this:
18 Can you tell from the -- does anybody contend that you can tell
19 from the pathology whether it was caused by hep C or hep B?

20 **MR. KILARU:** There is -- I believe there is a debate
21 about that, Your Honor. I think there is literature suggesting
22 that there are certain -- there are certain genetic mutations
23 that are more associated with hepatitis C or at least
24 correlated with hepatitis C. Those same things are not
25 correlated --

PROCEEDINGS

1 **THE COURT:** Does he offer an opinion --

2 **MR. KILARU:** He is planning to.

3 **THE COURT:** -- that the pathology is -- well, the
4 question is: Has he disclosed an opinion that the pathology
5 suggests that it was caused by hep C?

6 **MR. KILARU:** We believe he has, Your Honor. I think
7 the background here is useful. He talks about the pathology.
8 On the next page of the report he talks about how he doesn't
9 believe the experts have sufficiently ruled out hepatitis C.

10 Now, the Plaintiffs have not deposed him and learned the
11 further basis of those conclusions; but I think on the four
12 corners of the report, he said that he doesn't think that they
13 had really ruled out hepatitis C -- including Dr. Weisenburger
14 who is a pathologist -- and on the previous slide, he talks
15 about -- I have it with me now -- what the markers and the
16 other genetic mutations are that he found in the tumor based on
17 his review of the slides.

18 **MS. MOORE:** Your Honor, we are talking about two
19 different things, though. Genetic mutations versus a viral
20 infection, which is what hepatitis C and B are. And there is
21 absolutely no evidence or no testimony or no disclosed opinion
22 that says that hepatitis C can be determined as a cause of
23 someone's NHL from looking at the pathology. We don't think it
24 is relevant.

25 **THE COURT:** I certainly don't recall ever seeing

PROCEEDINGS

1 that -- I don't recall that being suggested by Mr. Stekloff in
2 his opening statement. I don't recall that being suggested by
3 any lawyer during cross-examination of any specific causation
4 expert in this case. I may not -- I may simply may not be
5 remembering.

6 **MR. KILARU:** Yes, Your Honor. Actually when
7 Ms. Matthews Johnson cross-examined Dr. Weisenburger during the
8 Daubert hearing, she specifically asked questions about whether
9 the DCL6 mutation is associated with hepatitis C. She also
10 asked Dr. Weisenburger whether Mr. Hardeman had that mutation,
11 and she presented him with literature, the Tarone article,
12 showing that that mutation is associated with hepatitis C as
13 well. We have done this before.

14 In opening what Mr. Stekloff said, I believe, is that the
15 experts will say that hepatitis C is the most likely cause, and
16 that's what Dr. Arber's testimony and I think and Dr. Levine's
17 testimony is designed --

18 **THE COURT:** Right. And I understand that they
19 testified that it is the most likely cause. The question is
20 whether there is any dispute that has properly been teed up
21 about whether you can determine that from the pathology or that
22 you can discern that it is more likely or less likely based on
23 the pathology.

24 **MR. KILARU:** And I think in his initial report and in
25 his supplemental report where he looked at the actual slides

PROCEEDINGS

1 and continued to say Nothing about this allows me to attribute
2 to Roundup, and his continued conclusion that hepatitis C --
3 and the experts, including their pathologists, have not
4 appropriately ruled out Roundup -- excuse me -- have not
5 appropriately ruled out hepatitis C, we are there. And I think
6 Plaintiffs could have deposed him to ask him the further bases
7 for those opinion; they chose not to.

8 So I don't think that given the report -- I think it is
9 fairly within the four corners of the reports. And I think
10 Plaintiffs could have asked him if they wanted to about whether
11 he had more specific opinion. They chose not to do so in this
12 case.

13 **MS. MOORE:** Your Honor, under Rule 26 for expert
14 disclosure opinion, we are not required to take a deposition of
15 an expert. The purpose of Rule 26 is to prevent unfair
16 surprise at trial. And so we have to rely on the disclosed
17 opinion in the report, and he did two reports. And I'm looking
18 at his supplemental report and he specifically states in his --

19 **THE COURT:** Can I -- I want to say one thing to you.

20 Be careful the standard you are seeking to impose on
21 disclosure of opinion in expert reports.

22 **MS. MOORE:** I understand, Your Honor.

23 **THE COURT:** Because the standard is going to apply to
24 both sides, and I have a pretty strong suspicion that it is
25 going to hurt the Plaintiffs a lot more than it is going to

PROCEEDINGS

1 hurt Monsanto if you apply very stringent standards to that.

2 **MS. MOORE:** I appreciate what you are saying,
3 Your Honor. But I do think when you are talking about a
4 conclusion that a pathology can tell us the cause of
5 Mr. Hardeman's NHL, that is not getting to the weeds of his
6 report. That is the summary of his opinion. And nowhere in
7 either of those reports does he say that the pathology slides
8 tell me that his NHL is caused from a genetic mutation. And
9 that's different than saying, Okay -- I'm not saying you have
10 got to lay out every single word in your report. That would
11 not be -- that is not realistic for anyone to do, either side.
12 But the conclusion of your opinion should be set forth in your
13 report.

14 **THE COURT:** But if there is -- so if he says something
15 along the lines of -- and, you know, I will go back and read
16 his report obviously, and I will go back and -- this is
17 something that just popped in my mind based on the way the
18 evidence has come in at trial, right. But it might also be
19 useful to go back and read your briefs about Dr. Archer [sic]
20 with this in mind to see what Monsanto said about the opinions
21 that Archer [sic] was going to offer; but it seems to me --
22 what I was going to say is that it seems to me if Archer [sic]
23 said something to the effect of, you know, they didn't even --
24 you know, they didn't even look at the pathology or they didn't
25 give adequate consideration to pathology, that would be enough,

PROCEEDINGS

1 I would think.

2 So I would -- you know, it sort of depends on -- depends
3 partly on what kind of standard the Plaintiffs want to apply to
4 disclosure of opinion in expert reports, and it depends on what
5 has been said about this up until now.

6 **MR. KILARU:** Can I just be very clear on exactly what
7 his testimony we anticipate will be? It is not quite as
8 described. He is not going to say, as we anticipate, that
9 Mr. Hardeman's NHL was caused by a particular genetic mutation.
10 That is not the nature of the testimony.

11 **THE COURT:** Right.

12 **MR. KILARU:** What he would say is, I have looked at
13 the pathology. Here is what I have found from that pathology.
14 I have found certain genetic abnormalities that are present in
15 his tumor that are also present in some other tumors. He is
16 going to say, I have looked at literature; and I haven't seen
17 anything in literature on Roundup that would suggest those
18 mutations have anything to do with it, those translocations and
19 so on. But I have looked at literature on hepatitis C, and I
20 have seen -- as Dr. Weisenburger admitted during the Daubert
21 hearing -- that some of those mutations or translocations are
22 associated with hepatitis C. To me that makes it more likely
23 that hepatitis C is a cause, and it also makes me think that
24 the experts on the Plaintiffs have inappropriately ruled out
25 Roundup as a cause, including Dr. Weisenburger. It is

PROCEEDINGS

1 different than just saying it was caused by a particular thing.

2 **THE COURT:** Well, the point about -- I haven't seen
3 those -- I haven't seen those mutations associated in the
4 literature with Roundup. I mean, is there literature on -- so
5 what is the literature that he relies on to support the point
6 that Roundup does not cause those mutations?

7 **MR. KILARU:** Well, I think his point is the absence of
8 any literature. I mean, there is no literature on that. And I
9 think part of our case is that there is, in fact, no published
10 literature on a lot of those things. If there were literature,
11 he would have looked at it; but there is no comparable
12 literature with relation to Roundup. We don't want him to get
13 into -- pursuant with your orders -- on general causation
14 evidence. I think his point is, I can look to that literature
15 about hepatitis C, and I can tell you that there are
16 associations between those two things. There is not something
17 on the Roundup side similar to that.

18 **MS. MOORE:** Your Honor, that crosses the line to the
19 general causation opinion, and Dr. Arber was not disclosed as a
20 general causation expert and did not go through Daubert on that
21 opinion.

22 **THE COURT:** Well, no. I mean, I think you may have a
23 strong argument that he shouldn't be allowed to testify on this
24 point, but I don't think it is because it crosses the line into
25 a general causation opinion. I don't see that.

PROCEEDINGS

1 It is just -- I mean, to me it's -- you know, as I
2 understood what -- coming into this discussion, as I understood
3 what he was going to testify to on the issue of pathology, it
4 seemed like it was not a matter in dispute and, therefore, it
5 was not useful to have an expert come and testify.

6 Now -- so now they are saying that he is going to offer an
7 opinion that is somewhat different from the one that I was
8 assuming. If he were to offer that opinion, it may be helpful;
9 but then there may be a question about whether this was
10 adequately disclosed. And, again, as I said a couple times
11 now, raises questions about what -- you know, what standard we
12 should apply to that given the very lenient standard I have
13 applied to the Plaintiffs going all the way back to the general
14 causation phase about their experts and what was disclosed in
15 their reports.

16 So you want to just leave me to think about that or does
17 anybody want to file anything that will help provide a better
18 explanation of what?

19 **MS. MOORE:** If we can re-visit that on Monday after
20 testimony, Your Honor, and we will -- we will discuss whether
21 we want to file a brief. We would let the defense know if we
22 were to plan to file something before Monday afternoon, but I
23 would like the opportunity to go back through and now that we
24 have a better understanding based on what counsel said as to
25 why they wanted to use the pathology slides, then we will look

PROCEEDINGS

1 back over both of his reports.

2 **THE COURT:** Okay.

3 **MS. MOORE:** Thank you, Your Honor.

4 **MR. STEKLOFF:** Your Honor --

5 **THE COURT:** You-all can be heard about it. This won't
6 be the last opportunity to be heard about it.

7 **MS. MOORE:** Thank you, Your Honor.

8 **THE COURT:** If you want to say something briefly.

9 **MR. KILARU:**

10 **MR. STEKLOFF:** Just briefly, Your Honor.

11 On the more basic point, the opinion you thought he was
12 going to offer coming in, without the additional context that
13 Mr. Kilaru added, I think we have to step back.
14 Dr. Weisenburger is now going to be their only specific
15 causation expert. He is a pathologist. He is using a
16 differential diagnosis that you have allowed to survive, but I
17 think it is weak.

18 I think the notion that we shouldn't be allowed to call
19 our own pathologist to then talk about what pathologists do in
20 the context of Mr. Hardeman and then criticize the fact that
21 their only specific causation expert, Dr. Weisenburger, is
22 doing something that pathologists don't do --

23 **THE COURT:** Well, what if you cross-examine him and he
24 says, Yeah, you know, there is -- you know, there is -- you
25 cannot look at the pathology and establish any link between the

PROCEEDINGS

1 particular NHL and Roundup? I mean, I don't remember what, if
2 anything, he has said about that in the past --

3 **MR. STEKLOFF:** I think --

4 **THE COURT:** -- but I'm sort of assuming that that's
5 what he is going to say based on the way the evidence has come
6 in so far.

7 **MR. STEKLOFF:** Right -- I don't think he will say
8 that -- but then he is going to take it a further step to say,
9 Nonetheless, as a pathologist, because he is technically -- all
10 based on his background as a pathologist. I know he has been
11 involved in epidemiology studies, but he has always made -- he
12 has been a pathologist in those studies.

13 **MS. MOORE:** Hematologist.

14 **MR. STEKLOFF:** Even if he says that, I think that it
15 is still relevant to our defense to have a pathologist come in
16 and say that is not what pathologists do. This is what
17 pathologists do; and outside of this courtroom, not only can
18 you not use a pathology test, but pathologists don't use
19 differential diagnosis. And I don't agree with the specific
20 causation methodology that Dr. Weisenburger has used including
21 because of the way he has ruled out hep C. And that is all in
22 his report, and I think that --

23 **THE COURT:** Including because of the way he has ruled
24 out hep C, I mean, I think that's fair game. It is just a
25 question of, you know, the -- how does that link back to the

PROCEEDINGS

1 pathology?

2 **MR. STEKLOFF:** But the --

3 **THE COURT:** That's the question I am -- I have. You
4 started off this discussion by saying even assuming the -- my
5 description of what he would testify to were accurate, that
6 would be important for you. And I understand the point about
7 hep C being important for you; but if -- if he is merely going
8 to be testifying that, I looked at the slides and the slides
9 didn't show any connection to Roundup, right, there was no
10 indication in the slides that there was a connection to
11 Roundup, that, I think, is a totally noncontroversial
12 proposition at this point. So that's the part I'm having
13 trouble getting.

14 **MR. STEKLOFF:** And I agree that it should be
15 noncontroversial. I also think it is relevant to educate the
16 jury about the way that patients are treated outside of this
17 courtroom when they have non-Hodgkin's lymphoma; and that when
18 they look specifically at Mr. Hardeman, there is nothing unique
19 about his non-Hodgkin's lymphoma or his diffuse large B-cell
20 lymphoma, and understanding the pathology if we use --

21 **THE COURT:** Well, I think you may have established
22 that already through the testimony of the treating physicians,
23 you know, so -- you know, I think this discussion can probably
24 benefit from my being more educated about the ins and outs of
25 Archer's -- is it Archer?

PROCEEDINGS

1 **MR. KILARU:** Arber.

2 **THE COURT:** -- Arber's report and, you know, perhaps
3 the literature he cites and stuff. But I just want to raise
4 that because I had this hey-wait-a-minute moment when I looked
5 back at Arber's proposed testimony.

6 **MR. STEKLOFF:** And I understand that, but I mean, I
7 think from Dr. Weisenburger we will hear from the third witness
8 about the epidemiology and the -- and their -- I'm sure we will
9 hear the Bradford-Hill criteria. They have chosen to use their
10 time like that. If we choose to use 20 to 30 minutes of our
11 time to provide some background about Mr. Hardeman's
12 non-Hodgkin's lymphoma from a pathologist, I think that --

13 **THE COURT:** That may --

14 **MR. STEKLOFF:** -- is fair game.

15 **THE COURT:** Maybe that's fair. Anyway, we can talk
16 more about that. And maybe Dr. Weisenburger's testimony will
17 elucidate this somewhat.

18 So what do we have happening on Monday morning?

19 **MS. MOORE:** On Monday morning, Your Honor, we will --
20 at some point Monday we will play Dr. Farmer, since we didn't
21 get to her today, and then we will also be calling
22 Dr. Weisenburger on Monday.

23 **THE COURT:** Okay.

24 **MS. MOORE:** And we will also be calling Mr. Hardeman
25 on Monday.

PROCEEDINGS

1 **THE COURT:** Okay. So you -- it sounds like what you
2 are saying is you are not -- I was sort of anticipating
3 Weisenburger would take at least a full day. You are not
4 anticipating that?

5 **MS. MOORE:** I think he will probably carry over,
6 Your Honor, to Tuesday. I haven't decided because I thought we
7 would get to Farmer today. I haven't decided the order for
8 Monday, but we will do that and we will notify --

9 **THE COURT:** Sorry.

10 **MS. MOORE:** I had a couple of housekeeping matters
11 really quick.

12 **THE COURT:** The one thing I was going to say about
13 that is that what that means is we can probably put off further
14 discussion of Reeves until Monday --

15 **MS. MOORE:** That's fine, Your Honor.

16 **THE COURT:** -- which I would prefer to do, if
17 possible.

18 **MS. MOORE:** That's fine, Your Honor. We can do Reeves
19 on Monday.

20 And then the other housekeeping matter, Your Honor, is
21 that earlier when I entered into evidence the Dr. Turley
22 exhibits, I started with 27 and it should have been 28. So I
23 apologize. I told the Defense counsel -- 27 was a CV, and it
24 should not have been entered. So I will replace 27 with 28.

25 And then we still have before the Court, we moved to enter

PROCEEDINGS

1 into evidence the exhibits during Dr. Portier's testimony, and
2 I believe that defense was going to look at that.

3 **THE COURT:** Oh, yeah, okay. So is there any objection
4 to the admission of any of the exhibits?

5 **MR. STEKLOFF:** No, not to any of the exhibits used
6 during the treater depositions.

7 **THE COURT:** No, no. We are talking about Portier now.

8 **MR. STEKLOFF:** Yes. During Portier the exhibits,
9 Your Honor, that they want to use are all demonstratives. So
10 they were demonstratives that were used by Mr. Wisner during
11 his examination of Dr. Portier. Our position is -- and this
12 goes both ways, to be clear -- that demonstratives should be
13 demonstratives and shouldn't be submitted back to the jury. So
14 we do object on that ground.

15 **MS. MOORE:** Your Honor, the difference on these is
16 that these are actually summaries by Dr. Portier. As you
17 recall, what they are is the mouse and the rat study and the
18 in vitro --

19 **THE COURT:** But they are demonstratives that he
20 prepared to assist the jury in understanding his opinion?

21 **MS. MOORE:** Well, Your Honor, I think summaries under
22 Rule 1006, under Rules of Evidence 1006, it is summaries to
23 prove the content. Instead of going through every single
24 one --

25 **THE COURT:** But under that rule a summary can't come

PROCEEDINGS

1 in unless the evidence is coming in, and he is providing
2 summaries of studies that are not coming into evidence. So
3 that rule doesn't apply.

4 **MS. MOORE:** Okay.

5 **THE COURT:** So those will not be admitted.

6 Anything else to discuss today?

7 **MS. MOORE:** And, Your Honor, then we would also move
8 to enter into evidence the exhibits from Dr. Ye, and that is
9 Trial Exhibits 39, 40, 44, 45, 46, 47, 50, 52, 54, 55, 57, 59,
10 and 60.

11 **THE COURT:** Any objection to those?

12 **MR. STEKLOFF:** No, Your Honor.

13 **THE COURT:** Those are admitted.

14 **MS. MOORE:** Thank you, Your Honor.

15 (Trial Exhibits 39, 40, 44, 45, 46, 47, 50, 52, 54,
16 55, 57, 59, and 60 received in evidence)

17 **MR. STEKLOFF:** I just want to make one statement,
18 which is that -- I don't want to hold us here any longer.
19 Mr. Kilaru was prepared to offer alternatives or have further
20 discussion about Dr. Reeves. So I don't want us over the
21 weekend to have to submit something from one of the company
22 witnesses, Dr. Martens, by noon on Sunday. I think we have --
23 this is --

24 **THE COURT:** Sorry, you lost me.

25 **MR. STEKLOFF:** On the Parry issue.

PROCEEDINGS

1 **THE COURT:** On the Parry issue.

2 **MR. STEKLOFF:** I think that we -- our position is that
3 we have -- and we could discuss it now, but I think maybe it
4 could wait until Monday. I think we have other things that we
5 think should be discussed in terms of this opening the door
6 issue. And so I don't know if you want to see something from
7 Dr. Martens, but we have either a curative instruction that we
8 would offer -- we don't think the door has been opened to
9 Parry. We will start there. But putting that aside, even if
10 we did, we have steps that we think should be taken or
11 considered before Dr. Martens --

12 **THE COURT:** You're going to designate -- my
13 recollection of this discussion is that they were going to
14 designate -- they were going to propose some depo designations
15 to deal with that?

16 **MS. WAGSTAFF:** Yes, Your Honor, Dr. Martens. And we
17 were going to get you our proposal by Sunday at noon.

18 **THE COURT:** Okay.

19 **MS. WAGSTAFF:** And --

20 **MR. STEKLOFF:** I guess what I'm saying is without
21 being able to argue it now -- unless we just do competing
22 submissions -- we would propose, first of all, that none of
23 this comes in. Second, that there be a curative instruction
24 that we have read. And third, that even based on your order,
25 you suggested that if the door is open, it should be handled on

PROCEEDINGS

1 redirect of the expert; and there are portions of Dr. Portier
2 where he was asked about this. I think the parties did it in
3 Phase Two. So we would think if we are going to go down a
4 hierarchy here, that would come next; and that the last
5 resort -- if, for some reason, those three steps were
6 insufficient -- only then would you have to go to Dr. Martens.

7 **THE COURT:** So how can we -- without discussing it
8 further now, how can we tee up that issue for decision in a way
9 that is not going to be too unduly disruptive for you-all?

10 **MS. WAGSTAFF:** So Dr. Martens was actually played at
11 the Johnson trial. So it is not like re-cutting it will take
12 that much time or effort.

13 **THE COURT:** Okay. But the -- my only question I have
14 got right now is how do we tee this issue up?

15 **MS. WAGSTAFF:** Right. So we could submit to you, as
16 proposed earlier, deposition designations proposals on Sunday.

17 **THE COURT:** Okay.

18 **MS. WAGSTAFF:** We can have someone bring you a hard
19 copy somewhere, or we could file them on ECF or whatever
20 Your Honor likes.

21 **THE COURT:** I assume they are short.

22 **MS. WAGSTAFF:** I think in total the Johnson one played
23 was around an hour.

24 **MS. MOORE:** I think it was a little longer than that.

25 **MS. WAGSTAFF:** I'm thinking about half of that.

PROCEEDINGS

1 **MS. MOORE:** We have already -- Your Honor, we have
2 already submitted Dr. Martens, but it would have to be narrowed
3 down. That was one of the ones that was filed I think on
4 February 19th. And so what we are going to do is streamline
5 that to show what we think should come in now, given that the
6 door was open in our opinion. And so we can just streamline
7 that and then give that to you on Sunday.

8 **THE COURT:** Okay. But it seems like it would come in
9 on -- would it come in on rebuttal regardless? I mean, I don't
10 know. I guess, it doesn't really --

11 **MS. WAGSTAFF:** Well, I mean if it's --

12 **THE COURT:** The point is if -- I don't know. I mean,
13 I think probably the best solution at this point is you can --
14 if you are talking about half an hour of new deposition
15 testimony to respond to that, that sort of causes me to raise
16 my eyebrows. But you can submit what you want on Sunday and we
17 can talk about it on Monday.

18 **MR. STEKLOFF:** I think we might submit, Your Honor,
19 then, a proposed curative instruction that would hopefully
20 avoid any -- we think because no deposition testimony on this
21 is necessary or as an alternative, we might look back at the
22 Portier deposition.

23 **THE COURT:** And propose some testimony there, that
24 would be helpful. So why don't you both submit that by Sunday.

25 And then let me see. Is there anything else that would be

PROCEEDINGS

1 helpful to just briefly discuss right now? Let me flip through
2 my papers.

3 (A brief pause was had.)

4 **THE COURT:** Just the other thing I wanted to mention
5 on the Reeves issue, on the -- and in particular the magic
6 mouse tumor is -- I'm saying that just in jest. I'm not taking
7 the position that it is a magic mouse tumor. It is just an
8 easy way to remember it.

9 But I have been pondering the argument that you made that
10 it shouldn't come in at all now, and I disagree with that
11 argument. So I still think that this issue is relevant to the
12 trial. I think it is quite likely that it would be reasonable
13 for the Plaintiffs to respond to the assertion that the doctors
14 didn't know anything about Roundup with -- in thinking about
15 fast forwarding to closing argument, I think it would probably
16 be appropriate for them to respond in part with the -- with the
17 magic mouse tumor.

18 And I think that it is -- it remains relevant because as
19 stated in the -- in limine ruling, it -- you know, the line
20 that we are trying to draw is to the extent Monsanto was trying
21 to influence regulators or influence public opinion, that's
22 Phase Two stuff. But to the extent Monsanto was actually
23 involved in moving the needle on the science, that is relevant
24 to Phase One; and this seems to me to clearly fall on that side
25 of the line. So I think it comes in.

PROCEEDINGS

1 So the real challenge for you is to -- you know, if you
2 have a real problem with the way my ruling on -- my tentative
3 ruling on Reeves, the real challenge for you to is to propose a
4 sort of narrower, less incendiary way of getting that in.

5 **MR. KILARU:** Okay.

6 **THE COURT:** With that, we will see you-all on Monday.

7 **MS. MOORE:** Thanks, Your Honor.

8 (Proceedings adjourned at 3:13 p.m.)

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3 CERTIFICATE OF REPORTERS

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.
6

7 DATE: Friday, March 1, 2019
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12 _____
13 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
14 U.S. Court Reporter

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17 Marla F. Knox, RPR, CRR
18 U.S. Court Reporter
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