

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

EDWARD HARDEMAN,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 16-00525 VC
)	
MONSANTO COMPANY,)	
)	
Defendant.)	
_____)	

San Francisco, California
Monday, March 25, 2019

TRANSCRIPT OF PROCEEDINGS

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7:37 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:** Okay. What do we need to talk about? I
6 think there may have been one or two little issues hanging from
7 the depo designations last night.

8 **MR. WOOL:** The Kier and Kirkland Saltmiras is probably
9 the easiest to tee off, and that is one issue that was floating
10 off of the depositions.

11 **THE COURT:** That was the -- that was the issue of
12 whether that 2013 Kier and Kirkland article was an example of
13 Monsanto ghostwriting?

14 **MR. WOOL:** Correct.

15 **THE COURT:** Okay.

16 **MR. WOOL:** So --

17 **THE COURT:** I will tell you my understanding of the
18 evidence from what you submitted to me is that Saltmiras and
19 the folks at Monsanto were always anticipating that he was
20 going to be listed as a coauthor of that article, and then
21 Kirkland said No, it would not be appropriate to have you
22 listed as a coauthor of the article, notwithstanding the fact
23 that you did make some contributions to it.

24 **MR. WOOL:** Well, as a factual matter, before that, the
25 glyphosate task force said no to Saltmiras being listed as an

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1 author. But I think -- kind of separate and apart from whether
2 this fits into the box of ghostwriting -- this is an example of
3 Monsanto going out and having David Saltmiras write the
4 article. They anticipated having him as an author and then
5 paying to have David Kirkland's name slapped on the paper.

6 And the evidence is uncontroverted that from both David
7 Saltmiras and Larry Kier that David Saltmiras is not qualified
8 to be an author on this paper. And so whether Monsanto sort of
9 took the final step in ghostwriting this, they were sort of
10 complicit in this conspiracy, if you will, to have the article
11 published with knowing that it was pretty much written by David
12 Saltmiras and given the appearance that David Kirkland was
13 actually the author to kind of lend credibility to that.

14 **THE COURT:** Okay. So the theories that this is --
15 this is not necessarily an example of ghostwriting, it is an
16 example of having -- paying a scientist to slap his name on an
17 article that he didn't really have significant involvement in
18 creating.

19 **MR. WOOL:** Right.

20 **THE COURT:** And so what -- you want to point me to the
21 evidence of that that you have -- you have designated some
22 testimony. Can you show me where the -- where the testimony is
23 that you have designated that supports that proposition?

24 **MR. WOOL:** Yes. Hold on one second, and I can tell
25 you exactly where it is.

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1 (Pause in proceedings)

2 **MR. WOOL:** So if you go to page 180, line 5 of Kier --
3 sorry, of the Kier --

4 **THE COURT:** Hold on a second. What page?

5 **MR. WOOL:** 180.

6 **THE COURT:** Okay. Hold on.

7 All right.

8 **MR. WOOL:** You will see at line 5 that they were
9 talking about the price really of adding David Kirkland onto
10 the project. And at this point in time, you know, they are
11 estimating he is going to spend fewer than ten days working on
12 it. You know, when David Saltmiras was -- pretty much had a
13 section of the manuscript ready to go, was already drafted back
14 in 2011. And here we are kind of late or mid-2012 at this
15 point.

16 **THE COURT:** Okay.

17 **MR. WOOL:** And you can see --

18 **THE COURT:** But this says he is putting -- this says
19 that Monsanto is planning on paying Kirkland to have him be a
20 coauthor of the article. And he says that his efforts will be
21 less than ten days.

22 **MR. WOOL:** Right.

23 **THE COURT:** So it doesn't exactly say that they are
24 paying him to slap his name on the article. I mean, they are
25 paying him to be involved in the production of the article, it

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1 sounds like.

2 **MR. WOOL:** Well, at this point in time the evidence
3 shows that the article is pretty much substantially complete.
4 And then the evidence that follows this shows that, you know,
5 that by the time David Kirkland even kind of conducts his
6 initial review, it is being -- the article is being circulated
7 to glyphosate task force members.

8 So, you know, we also have drafts of the articles. You
9 can -- the jury would be able to compare or, you know, well,
10 I guess, we don't want to send the articles back to the jury --
11 but the articles kind of before David Kirkland becomes involved
12 and after is virtually identical. The overarching themes are
13 already there.

14 **THE COURT:** Okay. So the idea is that this is an
15 example of kind of paying scientists to -- significant amounts
16 of money, it looks like, to put their name to articles that
17 Monsanto is producing.

18 **MR. WOOL:** Correct. And producing by people who are
19 not even qualified, who are admittedly not qualified to --

20 **THE COURT:** And if it came in, the idea would be that
21 it would be impermissible to argue or imply that this is an
22 example of ghostwriting because it's not. And there is no
23 evidence that it is. But that it is an example of Monsanto
24 paying scientists to put their name on stuff that is favorable
25 to Monsanto.

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1 **MR. WOOL:** Right. Just a general pattern of sort of
2 polluting the scientific literature by giving the appearance
3 that certain people are authoring articles, where, in reality,
4 it is Monsanto's employees.

5 **MR. STEKLOFF:** Good morning, Your Honor.

6 I think there is a little more history here. I think what
7 happened is that the article was drafted -- started in late
8 2011. Then in the summer of 2012 they decided to expand the
9 genotoxicity data that they are looking at. So they expand to
10 all of the data even from other manufacturers of glyphosate
11 products. And that's the point at which Kirkland is added.

12 So there had already been work. Saltmiras -- there had
13 already been submissions in which Saltmiras was going to be an
14 author, but because Saltmiras couldn't look at proprietary data
15 from other manufacturers, Kirkland is -- well, Kirkland is part
16 of that process. He's independent. Saltmiras can't look at
17 it.

18 Obviously, whatever the scope of Kirkland's involvement
19 was, he felt very strongly that he was an active participant in
20 this manuscript along with Dr. Kier, and he insists that Dr. --
21 that Saltmiras not be included on the publication. So I
22 think -- you know, they are trying to argue that it is evidence
23 of ghostwriting because --

24 **THE COURT:** Right. As I said, it is not evidence of
25 ghostwriting; but -- but it seems that it is evidence of

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1 Monsanto paying significant amounts of money to, you know,
2 ostensibly independent scientists to put their -- to publish
3 papers. And why isn't that in itself relevant?

4 **MR. STEKLOFF:** Because I think that the only way it
5 would be relevant is if you are arguing that they weren't
6 truly -- if you are arguing ghostwriting. In other words, I
7 don't think -- I think that what we are hearing is Monsanto was
8 engaging scientists to not really be involved in literature
9 they were publishing when, in fact, in this case we know
10 Kirkland was involved with the literature that he was
11 publishing. And then, in fact, even though Kier and Kirkland
12 decided -- and Saltmiras eventually, you know, agreed to their
13 request not to be an author -- there is also an acknowledgment
14 in the article of Saltmiras' role and Monsanto's role in it.

15 And so I think this is sort of -- to me -- a backdoor way
16 of trying to argue ghostwriting even if they couldn't say this
17 is a perfectly, you know, a square box in a square peg,
18 evidence of ghostwriting.

19 Kirkland was involved. Kirkland did work. Kirkland took
20 pride in that work. And Kirkland said we want this work. We
21 don't want Monsanto -- that Saltmiras to be an author --

22 **THE COURT:** Okay. Briefly last --

23 **MR. WOOL:** Yes. The critical point here that
24 Mr. Stekloff played out is that there was another draft that
25 was going on before this, before they kind of delved into the

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1 proprietary studies. And in that draft David Saltmiras was
2 listed as a coauthor. He had pretty much written the entire
3 thing.

4 And as I pointed out, the testimony is uncontroverted from
5 David Saltmiras that he was not -- it wouldn't have been
6 appropriate for him to be listed as an author on any of those
7 publications. And Larry Kier likewise states that Saltmiras is
8 not a genotox expert. He is not qualified to author these
9 things.

10 And so kind of regardless of the intellectual origins of
11 this, the result is pretty clear, which is that even though
12 David Saltmiras is not a genotox expert and wrote most of it,
13 he is not listed as an author; and this is a study that
14 Monsanto paid for.

15 **THE COURT:** Okay. I think just -- that last comment
16 just highlighted why it would be unfairly prejudicial. So I am
17 excluding it under Rule 403. So that's out.

18 Is there anything else to discuss?

19 **MR. STEKLOFF:** On Saltmiras, Your Honor, now, I think
20 the way -- based on your rulings -- his depo stands, I think it
21 is a little misleading. So I just want to highlight one issue
22 with it.

23 The Plaintiff's affirmatives are very short. They are two
24 minutes and nine seconds. But at line -- page 68, Saltmiras is
25 asked, Well, tell us the different ways --

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1 **THE COURT:** Hold on. Let me go to it.

2 **MR. STEKLOFF:** Sorry, Your Honor. 68, line 11.

3 **THE COURT:** Okay.

4 **MR. STEKLOFF:** And do -- there is that back-and-forth
5 starting at 68, line 11 through 68, 25.

6 **THE COURT:** Yes.

7 **MR. STEKLOFF:** That then leads -- excuse me, Your
8 Honor -- that then leads into a discussion of the Grime paper
9 because that's what he is talking about.

10 **THE COURT:** Okay.

11 **MR. STEKLOFF:** And his explanation of the Grime paper,
12 the way it is cut, it then skips ahead to 88 and talks about
13 other papers that he has been involved in; but I don't think it
14 is pure -- it is not ghostwriting allegations. It is beyond
15 that.

16 So I think as cut, given your ruling on the Grime paper,
17 to leave in that Q and A at page 68 would be misleading and
18 therefore sort of suggests that maybe Saltmiras isn't necessary
19 as a witness.

20 **MR. WOOL:** And, Your Honor, this is -- we think this
21 is a party --

22 (Pause in proceedings)

23 **THE COURT:** Yeah, I mean, I thought that what I -- if
24 I recall correctly, what I -- the order I issued last night
25 said that, you know, that -- in the ruling on the Kier

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1 designations, I said the stuff about Kier and Kirkland 2013 is
2 not coming in. And, oh, by the way, that stuff is not coming
3 in from Saltmiras' testimony either.

4 Isn't that what I ruled last night?

5 **MR. WOOL:** Yes. I think this is a little bit more of
6 a general statement about his activities.

7 **THE COURT:** But, you know --

8 **MR. STEKLOFF:** I'm happy to hand you, Your Honor,
9 page 69, which is the next --

10 **THE COURT:** No. I have it. I have it right here.

11 It just -- I mean, it says -- the first question is, Have
12 you ever ghostwritten.

13 And he says, Yes.

14 And he says -- then the question is, Tell us the different
15 ways you have done it.

16 And then he says, Well, one thing I can think of is Grime.

17 And, again, the point here is that he wanted to be an
18 author. He tried to be an author. Monsanto tried to make him
19 an author, and the author would not let him be listed.

20 **MR. STEKLOFF:** Well, Grime is different. But Grime is
21 2015. So you separately excluded Grime.

22 **THE COURT:** Oh.

23 **MR. STEKLOFF:** Not Kier and Kirkland. This is on Kier
24 and Kirkland.

25 **THE COURT:** Sorry.

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1 **MR. STEKLOFF:** Grime was excluded as part of 2015.

2 **THE COURT:** Okay. So he says that I have -- that one
3 example I can think of is Grime and Grime was 2015.

4 Okay. So what are you saying should be excluded?

5 **MR. STEKLOFF:** Well, I'm saying if 2015 is excluded --
6 and that's his example where he says yes -- then I don't think
7 the testimony on page 68, which is what I think is what they
8 really want in from this, is admissible.

9 **THE COURT:** Well, is there any evidence that he
10 ghostwrote anything else? I can't remember now.

11 **MR. STEKLOFF:** I don't believe so. And I think that
12 that's part of the -- I mean, we have the Kier and Kirkland
13 issue. And then I think that's part of the problem here is
14 that if you look at the way this cuts now, it's then on
15 page 88, transitions to situations where he was managing
16 articles but not listed as a coauthor. But I don't think they
17 are ghostwriting allegations.

18 So this as now played -- where it is clear from the
19 context of the deposition -- when he gives the answer on 68, he
20 is talking about Grime, suggests that he ghostwrote -- I think
21 it says at page 89, nine publications --

22 **THE COURT:** Well, I think -- I think the stuff on 68
23 and 69 has to be cut, but you are not arguing that the stuff on
24 88 and 89 has to be cut?

25 **MR. STEKLOFF:** No. It's 68 -- I think 68 has to be

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1 cut. And then if they want to play 88 and 89, I'm fine with
2 that.

3 **MR. WOOL:** I don't want to belabor the point, but I
4 think the statements on 68 kind of go back to these issues that
5 we were just discussing where he says he has ghostwritten.

6 And if you look at the testimony on page 88, he says, I
7 didn't make technical contributions to those manuscripts; and
8 it wouldn't -- it wouldn't be appropriate for me to be listed
9 as a coauthor of any of these papers.

10 He doesn't say the authors said, I shouldn't be on
11 there --

12 **THE COURT:** Okay. But I think the important thing
13 is -- do you have any evidence that he ghostwrote anything or
14 arguably ghostwrote anything pre-2012?

15 **MR. WOOL:** The Kier and Kirkland article would be the
16 only example.

17 **THE COURT:** Okay. So that testimony from 68 is
18 excluded then.

19 **MR. WOOL:** Okay. And I think there is one more sort
20 of issue with respect to Kier, which is in that section there
21 is a 2015 article, which is a review article on the Bolognesi
22 Paz-y-Mino test studies. And the testimony concerns a comment
23 by Dr. Kier, that he is concerned that those articles are
24 expressed in terms -- they are too absolute; that they will
25 expose him to personal liability. And we want that admitted to

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1 show Monsanto's knowledge at the time that the articles came
2 out; that they presented a risk of genotoxicity.

3 **THE COURT:** Can you show me where that testimony is?

4 **MR. WOOL:** So that's back to Kier. And that's on
5 page 223. So it is starting on line --

6 (Pause in proceedings)

7 **THE COURT:** What does this have to do with the
8 Bolognesi study?

9 **MR. WOOL:** So he wrote a review article on the
10 Bolognesi study. And in the process of getting it peer
11 reviewed, he -- somebody else writes the summary; and he makes
12 the statement that this is expressed in terms that are too
13 absolute such that it would expose him to personal liability.
14 And so this is evidence we would want to introduce to refute
15 Monsanto's central premise that there was no evidence across
16 the board and, therefore, no reason to --

17 **THE COURT:** Okay. I understand the argument. This
18 is -- remains excluded --

19 **MR. WOOL:** Okay.

20 **THE COURT:** -- per my ruling yesterday.

21 Okay. Anything else?

22 **MR. STEKLOFF:** I had two quick issues, Your Honor.

23 One is -- and I have copies of the e-mail. In the Koch
24 deposition, there is an e-mail that you might recall about
25 whether a long-term animal study should be conducted; and there

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1 is a mention of the significant financial investment of
2 \$1.5 million. I wanted to hand that e-mail to Your Honor just
3 to provide --

4 **THE COURT:** Okay.

5 **MR. STEKLOFF:** -- additional context. This is Trial
6 Exhibit 519. And you can see if you look at the -- after "Hi
7 all" at the top of the e-mail --

8 **THE COURT:** Yes.

9 **MR. STEKLOFF:** -- that this is about GM products, so
10 it is about genetically modified products. That is the context
11 in which they are discussing this. It is also --

12 **THE COURT:** Just to be clear, you are asking me to
13 reconsider a ruling from the Koch deposition last night?

14 **MR. STEKLOFF:** Yes, Your Honor.

15 **THE COURT:** Where is it? Where is the testimony?

16 **MR. STEKLOFF:** That, I will have to have someone pull,
17 which -- I apologize. I don't have it right in front of me.

18 **THE COURT:** That's okay. We can also do this one at a
19 break.

20 **MR. STEKLOFF:** I'm fine with that, Your Honor.

21 **THE COURT:** Why don't we do that.

22 **MR. STEKLOFF:** Okay. And then the last question we
23 have, Your Honor, is we -- depending on the basis for your
24 ruling on excluding the second designations that we proposed
25 with respect to Dr. Portier --

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1 **THE COURT:** Yes.

2 **MR. STEKLOFF:** -- we were -- we weren't sure what the
3 ruling was, and so it may have been in part because it was
4 being elicited through Dr. Portier and his personal knowledge.

5 **THE COURT:** No, no. So let me -- I will give you at
6 least a little bit of explanation for now. I thought it would
7 be useful to do a written ruling on this one, both for purposes
8 of this trial and also for purposes of future trials. And I
9 will preview it now, which is that basically what has happened
10 in this case is that each side really wants -- wants in the
11 post-2012 evidence that is good for it and is trying to
12 exclude, under 403 and other grounds, the post-2012 evidence
13 that is bad for it. Right?

14 So you have both sides trying to exclude each other's
15 post-2012 evidence. Basically all of that evidence has been
16 subject to a motion to exclude. And I decided to grant
17 Monsanto's motion to exclude evidence of post-2012 conduct
18 because of the concern that it would be used by the jury to
19 punish Monsanto for conduct that didn't harm Mr. Hardeman.

20 So once you honor that ruling, the domino effect of it is
21 that a lot of the other post-2012 evidence cannot come in even
22 if it might otherwise have come in.

23 So, for example, in a vacuum it might have been
24 appropriate for Monsanto to present evidence that the EPA and
25 all of its experts took a hard look at the glyphosate issue --

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1 again, after the IARC made its decision and continued to
2 conclude that there shouldn't be a warning label and it
3 shouldn't be banned and it is not carcinogenic and all that --
4 however, if you brought that in, then, of course, what would
5 have to come in is Monsanto's efforts to discredit and
6 undermine the IARC.

7 So that's just one example of the domino effect of
8 Monsanto's appropriate request, I think, to keep out -- subject
9 to the limited exceptions that we have discussed so far and
10 that we will discuss a little more this afternoon -- to keep
11 out evidence of the post-2012 conduct.

12 So now, I suppose, you know, if Monsanto had wanted to
13 kind of re-visit that and say, Well, okay, the Jess Rowland --
14 we -- we decided that we want the Jess Rowland stuff to come
15 in, and we have decided that we want the millions of dollars
16 that we spent attacking IARC to come in because we really want
17 the EPA's post-IARC conclusions to come in, that might have
18 been fine.

19 But the whole point was to honor the original ruling about
20 post-use conduct, and so that's kind of what is driving all of
21 this. So it's not -- so the ruling about the Portier stuff is
22 not a Portier-specific ruling. It's a ruling that -- that, you
23 know, that this is one of the dominoes that you prevented from
24 falling by -- through -- by your motion to exclude post-use
25 conduct.

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1 **MR. STEKLOFF:** Thank you, Your Honor. That's helpful
2 because we were wondering if we should try to designate Farmer
3 or Reeves on some of this post-use regulatory actions.

4 **THE COURT:** I mean, I suppose theoretically you still
5 could; but it would bring in the Rowland stuff, and it would
6 bring in, you know, the attacks on IARC and all that.

7 **MR. STEKLOFF:** Understood.

8 **THE COURT:** And probably all this ghostwriting stuff
9 that we were talking about right now.

10 **MR. STEKLOFF:** No. I understand that, and I don't
11 think we intend on doing that. But I do think, then, maybe --
12 I'm sure we will have this discussion later -- it might touch
13 on -- you even, in our letter, saw the door-opening argument
14 that has been made by Plaintiff's arguments, both in opening
15 and through the evidence --

16 **THE COURT:** Yeah.

17 **MR. STEKLOFF:** -- through the RFAs. At a minimum, we
18 obviously think that that was a basis for the regulatory
19 conduct to come in regardless, but even if not, it might touch
20 on what they can argue in closing because --

21 **THE COURT:** Yeah, we can talk a little bit about that.

22 **MR. STEKLOFF:** Just starting with the assumptions of
23 what we all think the jury knows -- I think without us being
24 able to have the evidence, I don't know what the jury knows.
25 So that is part of my concern, but we can discuss that later.

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1 **THE COURT:** All right. Sounds good.

2 **MS. MOORE:** Your Honor, some housekeeping matters
3 that -- as you recall on Friday, we wanted to read into
4 evidence the joint stipulation regarding Mr. Hardeman's medical
5 expenses.

6 **THE COURT:** Okay.

7 **MS. MOORE:** So I have that, Your Honor, if you would
8 like a copy of it. I don't know if that's something you would
9 read or you want us to read.

10 **THE COURT:** Whatever you prefer. I don't care.

11 **MS. MOORE:** It doesn't matter to me.

12 **THE COURT:** Okay. Why don't I --

13 **MS. MOORE:** I think you have --

14 **THE COURT:** I think I have read -- I think there have
15 been a couple other stipulations I have read.

16 **MS. WAGSTAFF:** There is writing on the back of that
17 piece of paper.

18 **THE COURT:** I won't look at it.

19 **MS. MOORE:** I don't know what it is. Okay.

20 And then also the life expectancy table, and I saw your
21 note in the jury instructions, Your Honor. And that was -- I
22 don't know if you have had an opportunity to look at that, but
23 that paper came from the Social Security --

24 **MR. STEKLOFF:** We want to argue that as part of the
25 charge conference. I think -- I don't know if that is -- if

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1 it's going to be read to the jury, it can be read in the
2 instructions. I do think we have some questions about whether
3 that should be read to the jury given the evidence we have
4 heard of noneconomic damages, but I think that can wait until
5 the charge conference.

6 **THE COURT:** In other words, I can take judicial notice
7 of it at the charge conference and include it in the
8 instructions if it is appropriate to include in the
9 instructions?

10 **MR. STEKLOFF:** Correct.

11 **MS. MOORE:** The issue, Your Honor, is by that point we
12 have already closed our case. And so it is our position that
13 you would actually take judicial notice of it during our case
14 in chief and instruct the jury that his life expectancy is
15 14.3 --

16 **THE COURT:** Well, do you want to discuss that issue?
17 And I haven't looked into -- I don't know what your dispute is
18 about that. I have been under the impression that there was
19 agreement about that. But we can discuss that, say, at the
20 lunch break or morning break.

21 **MS. MOORE:** That's fine. I just don't want to close
22 the case without that issue.

23 And then the last one -- and we can do this -- well, there
24 are a couple of other stips, but we can do this on a break.

25 **THE COURT:** Okay. Do you want me to read this

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1 stipulation first thing?

2 **MS. MOORE:** That would be great. Thank you, Your
3 Honor.

4 **THE COURT:** And then who is the first witness?

5 **MS. MOORE:** It will be Dr. Heydens.

6 **THE COURT:** Okay. Good. Why don't we -- let's resume
7 in five minutes.

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

9 **THE CLERK:** Court is in recess.

10 (Recess taken at 8:02 a.m.)

11 (Proceedings resumed at 8:08 a.m.)

12 **THE COURT:** Go ahead and bring in the jury.

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

14 **THE COURT:** Okay. Welcome back, everyone.

15 We are -- in a moment we can proceed to the next witness.

16 First, I want to read you a stipulation. I think you may
17 recall from the previous phase that from time to time the
18 lawyers agree to certain facts to avoid needing to have
19 witnesses come up and testify about them to make the process
20 more efficient, and this is a stipulation that the parties have
21 reached about medical expenses. So I will read that
22 stipulation to you now. And you are to consider this
23 stipulation to be a fact that has been proven.

24 The parties, Edwin Hardeman and Monsanto Company, by
25 counsel stipulate that Edwin Hardeman's medical expenses

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1 incurred for treatment of non-Hodgkin's lymphoma total
2 \$200,967.10. The parties further stipulate that the
3 \$200,967.10 of medical expenses for Mr. Hardeman's treatment of
4 non-Hodgkin's lymphoma from December 26th, 2014 through
5 June 20th, 2018 were medically reasonable and medically
6 necessary.

7 So with that, the Plaintiff can call his next witness.

8 **MS. WAGSTAFF:** Good morning, Your Honor.

9 Ladies and gentlemen of the jury, Mr. Hardeman calls
10 Dr. William Heydens, a Monsanto employee. And the video is one
11 hour and seven minutes.

12 **THE COURT:** All right.

13 (Video was played but not reported.)

14 **THE COURT:** Okay. Probably a good time for a morning
15 break. Why don't we take five minutes and resume at 25 after
16 the hour. Thank you.

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

18 **THE COURT:** Okay. So what is next?

19 **MS. WAGSTAFF:** Your Honor, before we move onto the
20 next deposition, Plaintiff's would move into evidence Trial
21 Exhibits 312 --

22 **THE CLERK:** Hold on. Wait for me.

23 **MS. WAGSTAFF:** Sorry. Plaintiff's would move into
24 evidence Trial Exhibits 312, 315, 317, 322 and 323.

25 **MR. STEKLOFF:** No objection.

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1 (Trial Exhibits 312, 315, 317, 322 and 323 received in
2 evidence)

3 **MR. STEKLOFF:** And we would move in, Your Honor, 147,
4 416, 481, 710 and 711.

5 **MS. WAGSTAFF:** Your Honor, we need to take a look at
6 those. I think 416 is the Williams' article; is that correct?

7 **MR. STEKLOFF:** Yeah, this might come up more broadly
8 in the context of Phase Two when we discuss other exhibits,
9 understanding that it's peer-reviewed literature under the
10 learning treatise. I think for Phase Two where there are --
11 where there is evidence that goes to Monsanto's conduct, I
12 think that it comes in -- we think that it should go back to
13 the jury for a different purpose. So this -- we might have
14 this discussion later about a series of articles. I think it
15 is different than the learning treatise exception in Phase One
16 where I think the purpose behind that exception is so that
17 jurors aren't trying to understand the science themselves and,
18 you know, delve into things about expert testimony. I think
19 here it is different.

20 **THE COURT:** God forbid they would try to understand
21 the science themselves.

22 **MR. STEKLOFF:** They should, of course, but based on
23 the expert testimony.

24 **THE COURT:** Yeah, we can have a discussion about that
25 later. I mean, the question would be whether there is a need

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1 for anything in that paper to go to the jury other than what
2 has been shown to the jury through the testimony. And, you
3 know, if there is anything in that paper that sort of helps you
4 refute the allegations about Monsanto's conduct that you
5 haven't already put in front of the jury by way of testimony
6 and by way of publication, I assume that would be the question
7 to discuss. And I think we probably should discuss it later.

8 **MS. WAGSTAFF:** And that's our position as well, and
9 that is sort of the agreement we have had throughout both
10 phases with peer-reviewed literature.

11 If we could reserve our opinion on those exhibits that you
12 moved to enter in, and we can let you know later when we talk
13 about the Farmer and Martens' exhibits.

14 **MR. STEKLOFF:** Yeah, of course.

15 We can talk about this later. I think even using Heydens
16 2008, which is part of completing the Parry story, I think the
17 full article itself -- we didn't show every portion of the
18 article -- demonstrates the -- arguably we would argue the
19 thoroughness through which Monsanto studied the issue and then
20 reported its issue in a published article available for
21 everyone to review. I think the jury would be able to -- be
22 able to see that to determine Monsanto's reasonableness in
23 Phase Two, I think it goes to a different point than --

24 **THE COURT:** I understand -- I understand the argument.
25 So we can discuss that maybe at the lunch break.

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1 And then anything else to discuss right now?

2 **MR. STEKLOFF:** I will just flag, Your Honor, I don't
3 even think -- I don't need further argument on it, but with the
4 Koch exhibit that I handed you --

5 **THE COURT:** Oh, yeah.

6 **MR. STEKLOFF:** -- which is Trial Exhibit 519, that is
7 discussed on pages 212 through 220 of the Koch deposition.
8 That's where the designations take place.

9 **THE COURT:** Okay. I will go back and take another
10 look at that probably at the next break, or actually maybe I
11 will bring the Koch -- yeah, I will bring the Koch transcript
12 up here and look at it while the stuff is playing.

13 So what is next -- what are the next witnesses?

14 **MS. MOORE:** We are going to call Dr. Portier next,
15 Your Honor, because we have to make some changes to the Kier
16 testimony, and so Mr. Wolfe needs just a few minutes.

17 **THE COURT:** Portier, how long will that be?

18 **MS. WAGSTAFF:** Portier is 29 minutes, Your Honor. And
19 then we will play Kier which, I believe, is 49.

20 **THE COURT:** Okay.

21 **MS. WAGSTAFF:** We are going to be taking out a lot
22 from your ruling this morning, so it will probably be --

23 **MS. MOORE:** Probably more like 30 minutes.

24 **MS. WAGSTAFF:** -- 20 or 30 minutes. And Mr. Wolfe is
25 doing that right now. And then who we have left is Murphy, who

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1 is 7 minutes; Grant, who is 21 minutes.

2 **THE COURT:** Maybe do those three -- Portier, Kier and
3 Murphy -- and then we will take another break probably.

4 **MS. WAGSTAFF:** Sure. That will work.

5 **THE COURT:** All right.

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

7 **THE CLERK:** Court is in recess.

8 (Recess taken at 9:25 a.m.)

9 (Proceedings resumed at 9:34 a.m.)

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

11 **THE COURT:** All right. Go ahead and bring them in.

12 **MS. WAGSTAFF:** Your Honor, before we bring them in,
13 just one housekeeping thing.

14 I had moved -- plaintiff had moved some exhibits into
15 evidence. There was no objection from Monsanto, but the Court
16 never so moved so --

17 **THE COURT:** Oh, I'm sorry. They're admitted.

18 **MS. WAGSTAFF:** Okay. Thank you.

19 **THE COURT:** Sorry about that.

20 (Trial Exhibits 147, 416, 481, 710, and 711 received
21 in evidence)

22 **THE COURT:** Go ahead.

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

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

25 **MS. WAGSTAFF:** All right. Mr. Hardeman calls

KIER - VIDEO TESTIMONY

1 Dr. Christopher Portier, and the deposition is going to run
2 29 minutes.

3 (Video was played but not reported.)

4 **THE COURT:** Next witness.

5 **MS. WAGSTAFF:** Your Honor, plaintiffs would move into
6 evidence Trial Exhibit 388 and Trial Exhibit 504.

7 **MR. STEKLOFF:** I think we need to discuss 504, but no
8 objection to 388.

9 **THE COURT:** Okay. That's admitted.

10 (Trial Exhibit 388 received in evidence)

11 **MS. WAGSTAFF:** All right. Plaintiff calls next
12 witness a Monsanto employee -- or former employee Larry Kier,
13 and the deposition is 17 minutes.

14 (Video was played but not reported.)

15 **MS. WAGSTAFF:** Your Honor, Mr. Hardeman would move
16 Trial Exhibit 686 into evidence.

17 **MR. STEKLOFF:** No objection, Your Honor.

18 **THE COURT:** Admitted.

19 (Trial Exhibit 686 received in evidence)

20 **MS. WAGSTAFF:** And, Your Honor, Trial Exhibit 160,
21 which we have proffered previously with Martens, but I'm not
22 sure that's actually been moved into evidence yet.

23 **MR. STEKLOFF:** I think it was moved in through
24 Dr. Martens, but we have no objection.

25 **THE COURT:** Okay. Admitted.

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1 **MS. WAGSTAFF:** Okay. Thank you.

2 (Trial Exhibit 160 received in evidence)

3 **THE COURT:** Do you want to call your next witness?

4 **MS. WAGSTAFF:** Sure. Mr. Hardeman calls Monsanto
5 employee Sam Murphy, and the video is 7 minutes.

6 **THE COURT:** And we'll take another break after that
7 one.

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

9 **MS. WAGSTAFF:** Your Honor, Mr. Hardeman would move
10 Trial Exhibit Number 768 into evidence.

11 **MR. STEKLOFF:** Another one for discussion later,
12 Your Honor.

13 **THE COURT:** Okay.

14 All right. Why don't we take another short break. We'll
15 resume in about five minutes.

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

17 **THE COURT:** Okay. So who's next?

18 **MS. MOORE:** Dr. Koch -- or, I'm sorry, Mr. Koch.

19 **MS. WAGSTAFF:** Your Honor, we have about a little less
20 than an hour of total testimony left. We have Dr. Koch, which
21 is 17 minutes.

22 **THE COURT:** So you're going to do your closing today?
23 I'm just kidding.

24 **MS. WAGSTAFF:** You would never do that to us. We know
25 that.

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1 **THE COURT:** You said -- okay.

2 **MS. WAGSTAFF:** We have Koch, who's 17 minutes; we have
3 Hugh Grant, who's 21 minutes; and we have James Guard, who is
4 17 minutes. So about 40 or so minutes. A little less than 40
5 minutes.

6 **THE COURT:** I feel like there's somebody missing.

7 **MS. WAGSTAFF:** Saltmiras and we chose not to play him
8 based on Your Honor's rulings.

9 **THE COURT:** Rulings. Okay.

10 All right. And so that's -- and at this point is Monsanto
11 planning on calling anyone?

12 **MR. STEKLOFF:** I have one issue to raise so that --
13 but other than that, no. I mean, so basically I think that --
14 and I'm going to hand the Court a letter that, based on
15 Dr. Portier's testimony about the EPA and whether it follows
16 its own guidelines, that we should be entitled to play -- I
17 understand I'm revisiting an issue that we discussed this
18 morning -- a very brief segment introducing a December 21st,
19 2018, letter from the EPA from the director of the Office of
20 Pesticide Programs to Australia.

21 We would not be seeking to introduce the Health Canada
22 information that we put in our letter yesterday, but I think
23 now Dr. Portier, based on what was played, has gone even
24 further than what we put in our letter yesterday attacking the
25 EPA for not following its guidelines and saying that he thinks

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1 that they are -- I don't -- I highlighted the testimony, but I
2 think his testimony was that they have let down the American
3 public.

4 And if you look at this letter, I think it demonstrates
5 the EPA's own words in which it followed its own process,
6 followed its own guidelines. I think this is necessary to
7 rebut that testimony.

8 **THE COURT:** And so this would be part -- this would be
9 evidence that you would present in your case?

10 **MR. STEKLOFF:** Yes. And I couldn't raise it in the
11 middle of the Portier testimony, but this would be the only
12 evidence that we would raise in our case.

13 **THE COURT:** Okay.

14 **MR. STEKLOFF:** We are not planning on playing any
15 other evidence.

16 **THE COURT:** Okay. Why don't we talk about that at
17 lunch. I mean, my gut reaction to that is -- well, maybe we
18 should talk about it before lunch because if it doesn't come in
19 or even if it does come in, we could play it before lunch and
20 then let the jury go home; right?

21 **MR. STEKLOFF:** I think it would be five minutes,
22 Your Honor. Our total -- I haven't counted, but our total
23 designations as of yesterday that we submitted were 10 minutes,
24 but that had some Health Canada stuff in it. So if this letter
25 comes in, it's less than 10 minutes for sure.

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1 back to the portion of the Koch testimony that you raised with
2 me this morning.

3 **MR. STEKLOFF:** Yes.

4 **THE COURT:** I sustained that testimony that you
5 raised.

6 **MR. STEKLOFF:** I don't -- I'm being told no,
7 Your Honor, by both sides.

8 **MS. MOORE:** I don't think so, Your Honor.

9 **THE COURT:** Maybe I misread that.

10 So we're talking about the pages -- you flagged pages 212
11 to 220 for me of the Koch depo?

12 **MR. STEKLOFF:** Yes, Your Honor.

13 **THE COURT:** I sustained the objections to those.

14 **MS. MOORE:** Your Honor, there's a section -- I don't
15 think they objected to all of that.

16 **THE COURT:** Oh, I see. Well --

17 **MS. MOORE:** So what we did is when you did those group
18 ones, we went through and we removed wherever the objection was
19 that was sustained. The rest of the testimony would have
20 stayed.

21 **THE COURT:** Okay.

22 **MS. MOORE:** Let me get my --

23 **THE COURT:** But I don't remember where exactly the
24 objections are, but I sustained all the objections to testimony
25 that appeared between pages 212 and 219, line 22.

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1 **MR. STEKLOFF:** I see that as well, Your Honor. I
2 don't know what was submitted in our objections when it was
3 submitted to the Court.

4 **MS. MOORE:** Here. I have it, Your Honor.

5 (Pause in proceedings.)

6 **MS. MOORE:** So on page 212, Your Honor, it looks like
7 212, 1 through 5, is not objected to. This is really small.

8 **MS. WAGSTAFF:** I've got it a little larger.

9 **MS. MOORE:** Sorry. Go ahead.

10 **MS. WAGSTAFF:** 212, 1 through 5, was not objected to.
11 216, 7 to 15, was not objected to.

12 **THE COURT:** Okay. Wait. So -- right.

13 And it may be that that's fine to come in even if -- I
14 mean, I guess I don't know what's going on here because I was
15 handed this exhibit -- right? -- this e-mail exchange, and
16 there's a lot of dialogue about this e-mail exchange; and I
17 think I sustained all the objections -- I think I sustained the
18 objection to the e-mail exchange and to all the dialogue about
19 the e-mail exchange.

20 **MR. STEKLOFF:** I think what happened, Your Honor, we
21 objected to the e-mail, and then I think there are sections
22 where parts of the e-mail are read where maybe we didn't have
23 objections; but I think we objected to the e-mail itself and
24 then should have -- I mean, I think we objected to parts of the
25 testimony about the e-mail and not others. But I think if the

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1 e-mail is out, there should be no testimony about the e-mail;
2 and what was just read on pages 212, 216, is referring to the
3 e-mail and using the e-mail as context for the questions.

4 **MS. MOORE:** It actually doesn't, Your Honor.

5 **THE COURT:** Well, I mean, that exchange itself -- I
6 mean, what I'm going to say is you didn't object to that
7 exchange and, therefore, that exchange is coming in. It
8 doesn't -- that exchange does not specifically refer to or call
9 out that e-mail.

10 **MR. STEKLOFF:** Okay.

11 **THE COURT:** So that's coming in.

12 So you're saying that the remainder of the testimony on
13 212, 213, 214, I sustained the objections to that testimony;
14 right?

15 **MS. MOORE:** And that's been taken out, Your Honor.

16 **THE COURT:** And that's been taken out.

17 **MR. STEKLOFF:** And then there's testimony on 216,
18 Your Honor, lines 7 through 15, where we didn't -- my
19 understanding is while we objected to the exhibit, did not
20 include a separate objection to the testimony; but that is
21 reading the --

22 **THE COURT:** And that should not come in because the
23 exhibit is not coming in.

24 **MR. STEKLOFF:** Okay.

25 **MS. MOORE:** Right, Your Honor. And the reason it

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1 wasn't taken out, 7 through 15, is they did not object to it.

2 **THE COURT:** Right. Right.

3 And both sides, you know, had little, you know, kind of
4 typos in their objections here and there, and that's fine.
5 This is obviously a typo to not include this, so that's fine.

6 So that's on page 216. Yeah, I mean, basically all
7 testimony that is about this e-mail and makes clear that it's
8 about this e-mail should be excluded.

9 So is there anything else?

10 **MR. STEKLOFF:** Well, I think it continues. So 216,
11 7 through 15; 216, 18 through 20; and then 218:9 through 219:8,
12 where, again, questions are being asked about the e-mail.

13 **THE COURT:** Yeah, but, again, I thought I sustained
14 all those objections.

15 **MS. MOORE:** Again, Your Honor, they didn't object to
16 that.

17 **THE COURT:** Okay.

18 **MS. WAGSTAFF:** We were working off the Excel
19 spreadsheet.

20 **MR. STEKLOFF:** So I think basically through 220,
21 line 1, that there are designations by plaintiffs that all
22 refer to the e-mail, and they should all be struck except what
23 Your Honor just said on page 212.

24 And then at 221, line 22, it continues on a separate
25 subject, that is fine.

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1 **MS. MOORE:** Your Honor, we -- you know,
2 notwithstanding the fact they didn't object, we understand your
3 ruling. So we will take out 216, 7 through 15; 216, 18 through
4 20; and 218:9 through 219:8; but the question and answer at
5 219:24 through 221 is not tied to the e-mail, and so we would
6 ask that stay. And they did not object to that originally.

7 **THE COURT:** 219 what?

8 **MS. MOORE:** 24 to 221. The question is (reading):

9 "When there's not a scientific need, that would be a
10 bad precedent?

11 "Yes."

12 **THE COURT:** Yeah, but it's all in the context of this.

13 **MS. MOORE:** Okay.

14 **THE COURT:** I think that would be prejudicial to
15 include that little snippet that was about the e-mail and not
16 have the jury know what it's about.

17 **MS. MOORE:** That's fine. I understand, Your Honor.
18 Then we'll pick up at 221:22. Okay.

19 **THE COURT:** So are we clear on that?

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

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

22 **THE COURT:** Okay. So that's the Koch testimony.
23 And then there's an issue of Portier?

24 **MR. STEKLOFF:** Yes, Your Honor. Can I hand up,
25 please --

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1 **THE COURT:** Sure.

2 **MR. STEKLOFF:** -- Trial Exhibit 1330, which is the
3 letter? And I've given Ms. Moore a copy.

4 **THE COURT:** Right. So let's go back and recap what
5 came in through Portier in Phase I. Okay?

6 **MR. STEKLOFF:** Yes, Your Honor.

7 **THE COURT:** My recollection, and you have to correct
8 me if I'm wrong, I didn't go back and look at the transcript,
9 but my recollection is that what came in through Portier in
10 Phase I is that he was trying to persuade the European
11 regulators to -- and I think this was post-IARC, if I remember
12 correctly --

13 **MS. MOORE:** It was.

14 **THE COURT:** -- that he was trying to persuade the
15 European regulators to change their mind on glyphosate and he
16 was trying to persuade the EPA to change its mind on
17 glyphosate, and they both rejected him. Am I misremembering
18 that?

19 **MR. STEKLOFF:** You are remembering that correctly. I
20 think -- and just to give a little context, I think with
21 Europe, the document was displayed. With EPA, there was no --
22 to the best of my recollection, there was no document
23 displayed. There was a Q&A about the fact that he also tried
24 to persuade EPA post-IARC, and they rejected that.

25 **THE COURT:** And they rejected it.

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1 **MR. STEKLOFF:** I'm pretty certain on that. I'm not --

2 **THE COURT:** Okay.

3 **MR. STEKLOFF:** I did not show -- I remember in my
4 closing of Phase I, I showed portions of the Europe documents.
5 I don't think there was -- I did not show the EPA document.

6 **THE COURT:** So what that means, and this is sort of
7 before we get to this letter, I mean, what that means is as the
8 state of the evidence is now -- right? -- you are -- the
9 plaintiffs can argue to the jury that glyphosate is still on
10 the market, there's still no warning, and Monsanto still hasn't
11 done the studies that we think Monsanto should do; right?

12 Monsanto can argue that, you know, as you learned from the
13 testimony that Dr. Portier gave, you know, he took a run at
14 them and -- he took a run at the EPA even as recently as last
15 year or whatever, and they rejected his position.

16 **MR. STEKLOFF:** It was 2016.

17 **THE COURT:** Okay. And so those things can come in.
18 The fact of the IARC classification can be used.

19 I don't think -- I mean, part of me was expecting the
20 plaintiffs to establish in Phase II that all of the IARC stuff
21 was based on pre-2012 studies. I don't believe that evidence
22 came in, but I may be misremembering that. That will be
23 something we can discuss later this afternoon.

24 Okay. So that's sort of the state I think of what can be
25 argued to the jury with respect to post-2012 more or less. I

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1 may be forgetting something.

2 Now you're saying that you want -- because Dr. Portier has
3 said that he disagrees with the EPA -- which, of course, he
4 said in Phase I also -- and because he has said that the EPA
5 has let down the American public, you should be able to put in
6 the EPA's analysis as reflected in this letter to some
7 regulators in Australia; is that the argument?

8 **MR. STEKLOFF:** Yeah. I mean, I think the argument
9 ties back to what we argued yesterday and that in combination
10 with what we heard today.

11 So the plaintiffs are undoubtedly in closing going to
12 argue that: To this day, nothing has ever happened. To this
13 day, Monsanto should have put a warning on. To this day, they
14 haven't run tests. You need to send a message. You need to
15 send them -- if they're not going to do the right thing on the
16 label, you need to punish them financially.

17 I mean, I think we're all going --

18 **THE COURT:** And you can respond "To this day the EPA
19 has not" -- I think, I mean, you're nodding your head.

20 **MS. MOORE:** That's in evidence.

21 **THE COURT:** -- that "To this day, you know, the EPA
22 has not changed its mind about glyphosate."

23 **MR. STEKLOFF:** But that's in evidence through
24 omission, and I guess that's --

25 **THE COURT:** Through what?

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1 **MR. STEKLOFF:** Through omission. In other words, they
2 would have presented evidence if the EPA had done something
3 different to this day, but I don't think that there is
4 affirmative evidence that I can show that the EPA -- how
5 seriously they have taken this question and how seriously they
6 stand by their guidelines, how seriously they stand by their
7 review of glyphosate; and that even until December 2018, they
8 say that glyphosate is not carcinogenic.

9 And that's the problem I have is I can't argue it by
10 omission because I can say, "Of course, if the EPA would have
11 done something different, you would have seen it"; but to say
12 that there's one Q&A or, you know, short Q&A where they
13 disagreed with Dr. Portier.

14 So it's not even that they've done this broad
15 comprehensive review that has nothing to do with Dr. Portier
16 and some letter that he sent them. That is what's
17 demonstrated, I think, here, and it's different.

18 And so I think I'm at a huge disadvantage to sort of argue
19 this point "By omission you haven't heard evidence so we can
20 all -- we all know that the EPA hasn't done anything." I think
21 it is necessary for me to be able to establish, based on what
22 we know the plaintiffs will argue, the process through which
23 the EPA has gone.

24 And I think if you look at this letter, it describes the
25 process generally. The first page starts with "U.S. EPA's

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1 process for reviewing and reassessing the safety of
2 pesticides." It isn't even tied to sort of post-use process.
3 It's their general process relating to FIFRA, transparency, and
4 independence policies, data collection, scientific approaches
5 used to assess evidence.

6 And then they go specifically to their glyphosate review
7 that was done. They say they took it even more seriously after
8 IARC, which I think we're also going to hear something from the
9 plaintiffs, but that --

10 **THE COURT:** Well, wait. What?

11 **MR. STEKLOFF:** -- their review was independent.

12 **THE COURT:** What do you think we're going to hear from
13 the plaintiffs? I mean, I'm not sure --

14 **MR. STEKLOFF:** That IARC got it right, and that -- I
15 think this argument that you're saying -- whether the evidence
16 has come in or not, we might need to discuss it later -- that
17 Monsanto should have done what IARC did, and we know IARC got
18 it right and Monsanto didn't do that.

19 Now, the EPA is saying, "Well, we've looked" -- I mean,
20 this isn't a big part of the letter, but "We've looked -- we
21 took IARC seriously and we did our own review, and it is
22 comprehensive and we stand by the determination."

23 And so I think I need this affirmative evidence to be able
24 to paint a fair picture; and I don't think this letter, to the
25 points we were discussing this morning, then goes back to

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1 Jess Rowland and other things. It talks --

2 **MS. MOORE:** But it does, Your Honor.

3 **MR. STEKLOFF:** It talks about the process --

4 **THE COURT:** Don't interrupt.

5 **MR. STEKLOFF:** It talks about the process both
6 pre-2012 and post-2012, but it gives me something to be on even
7 standing. I don't think right now by omission I'm on even
8 standing.

9 **THE COURT:** Well, except, you know, I guess there are
10 two concepts; right? And I want to kind of disentangle two
11 concepts that you have sort of brought into this discussion.

12 One is the concept of, you know, needing to respond to,
13 you know -- well, let me put it another way.

14 One is that you want to make the point that to this day,
15 the EPA has not changed its mind. The other point that you
16 want to make is that in not changing its mind, the EPA has
17 taken the matter very seriously and conducted a rigorous
18 analysis and all that; right?

19 On the first point, I get it; right? I understand, and I
20 think that it -- you know, if there -- I thought the evidence
21 came in that Portier took another run at the EPA after the
22 IARC, and that the EPA said, "We disagree with you." I thought
23 that came in pretty clearly so I think you -- I think that
24 evidence put you in a position to say, "You know, to this day
25 the EPA hasn't changed its mind."

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1 I mean, I know it wasn't quite "to this day," but I think
2 colloquially speaking, you know, given the context of this
3 case, it is.

4 If that didn't adequately come in, the concept that to
5 this day, the EPA has not changed its mind, I think it may be
6 appropriate for you to get that in, and I do not take the
7 plaintiffs to be arguing that you shouldn't be able to get in
8 the basic point that to this day the EPA has not changed its
9 mind.

10 But when you get to the question of whether you should be
11 able to present to the jury sort of how seriously the EPA has
12 taken this and how serious and thorough their analysis has
13 been, I agree with you that you're entitled to present that to
14 the jury. I don't think anybody ever thought that you weren't
15 entitled to present that to the jury.

16 The question is: What does it open the door to? And I
17 believe that if you, for the reasons that we discussed this
18 morning, if you present to the jury -- if you want to start
19 putting in evidence about how serious the EPA's analysis was
20 post-IARC and all of that, then the plaintiffs have the right
21 to come back with all of the stuff we talked about this
22 morning, which is Rowland, which is the efforts to sort of
23 discredit the IARC and all of that.

24 So I think that's sort of always been the choice for you,
25 and I certainly understand why you would want to make the

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1 choice that you've made thus far; but I do not think it would
2 be appropriate to put in this letter in an effort to show how
3 thorough and objective or whatever -- transparent, whatever you
4 want to call it -- the EPA's analysis was post-IARC.

5 But if there's something that you want to get in through
6 Portier that makes more clear than has already been made that
7 the EPA stands by, you know, the position that it's held over
8 the last four decades or whatever, I think that's fine, and I
9 don't take the plaintiffs to be objecting to that issue.

10 **MS. MOORE:** I mean, we would have to see the
11 testimony, Your Honor, obviously.

12 And, I mean, to your point, what you said this morning
13 about being a domino effect, in this letter that they want to
14 admit, 1330, on page 4, it talks about following an IARC
15 decision regarding glyphosate. It's at the very bottom of
16 page 4, Your Honor (reading):

17 "The EPA Office of Pesticide Programs" -- the OPP --
18 "Cancer Assessment Review Committee" -- CARC, which is
19 what Jess Rowland was in charge of -- "conducted an
20 independent review."

21 And so, I mean, I do think what you were saying this
22 morning, it's a domino effect. If they want to put something
23 like this in, we have to put rebuttal about Rowland and the
24 relationship.

25 **THE COURT:** Yeah, I mean that's my view. So if you

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1 want to propose -- and that continues to be my ruling. So if
2 you want to propose something, you know, to get in on the small
3 point, you know, to the extent that it's necessary, to the
4 extent that it's not already in there, you know, you can
5 certainly do that.

6 **MR. STEKLOFF:** Well, one suggestion I might have,
7 Your Honor, is that there might be a way to redact this. I
8 mean, we could take out the references to IARC. If you look at
9 the first three pages, three and a half pages, it talks about
10 the process generally up until glyphosate's review.

11 And then I think you could have, for example, the first
12 page -- the first paragraph of glyphosate's review talks about
13 all the different arms, disciplines within EPA that are part of
14 the review; you could redact the next one, two, three, four
15 paragraphs; and then you could go to (reading):

16 "EPA is confident in its conclusion that glyphosate
17 is not likely to be carcinogenic to humans. EPA's
18 conclusion is consistent with other countries and
19 regulatory authorities," and then list those.

20 And I think that -- I would have to look at the last
21 couple of paragraphs, but I actually think that would solve the
22 problem, is just literally playing the testimony where this
23 Portier document is introduced, and he does -- and then not
24 reading any portion about IARC and then allowing me to then
25 argue from it.

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1 And I think that that satisfies, I think, both elements
2 without opening -- based on -- first of all, based on what
3 Dr. Portier testified in the plaintiff's affirmative testimony
4 that we just heard now and addresses this concern about opening
5 the door further to other Monsanto post-use conduct.

6 **THE COURT:** I mean, I'm at a little bit of a
7 disadvantage because I haven't read this letter before, and
8 I -- you know, so I don't have a good sense of what it is that
9 you're proposing should come in from it and what shouldn't, and
10 then I also don't have in front of me the Portier testimony
11 that would relate to the portions --

12 (Sound coming from gallery.)

13 **UNIDENTIFIED SPEAKER:** I'm really sorry.

14 **THE COURT:** -- that would relate to the portions of
15 the letter that you think should come in.

16 **MS. MOORE:** And our position, Your Honor, would be
17 that you can't piecemeal this letter. You have to go back and
18 look at the process; and what CARC did is that this is
19 following IARC, and so here it is the EPA is now reviewing
20 everything after the IARC decision comes out.

21 And so to say, "Well, we can solve this by just taking out
22 references to IARC," that misses the point of why EPA was
23 actually doing the review in 2000 -- from 2016 to 2018.

24 And so, again, it's -- you know, they're the ones that
25 didn't want this information in to begin with. Now they want

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1 to bring it in. And if they do, that's, you know, one thing;
2 but if they do, then we have to be able to show what was
3 happening in order to have a full and complete picture for the
4 jury.

5 **THE COURT:** I mean, there must be -- again, to the
6 extent it hasn't already come in, there must be some snippet of
7 Portier testimony that can be played that kind of establishes
8 that the EPA, you know, continues to take this view to this
9 day.

10 **MR. STEKLOFF:** I mean, I think -- I mean, hindsight is
11 20/20, but I think it was this letter because this letter was
12 December 21st, 2018.

13 And I understand the -- I understand what is being said,
14 but I think if you -- if we walk through this letter, and --
15 you know, if we all read this letter, if you take out, again,
16 the entire middle of the section about glyphosate's review, the
17 rest of it is entirely neutral about the EPA's process, that
18 it's not tied to anything post-2012. It is the EPA's general
19 process under FIFRA and the laws that the EPA is held
20 accountable for in reviewing pesticides. It talks about their
21 data collection process and other things. That continues up
22 through page 4, and --

23 **THE COURT:** Isn't there also a hearsay issue with
24 this? I mean, I suppose I could take judicial notice of a
25 document like this. I'm not sure. But it still wouldn't come

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1 in for its truth; right? And what would you be putting it in
2 for?

3 **MR. STEKLOFF:** Well, I think it's -- I mean, I don't
4 know that I have a red ribbon copy of it, but I think it's a
5 public record. So I think that this is not hearsay. It's a
6 public record. The director of the Office of Pesticides
7 Program on behalf of the EPA is writing to the Australians --
8 to Australia's equivalent of the EPA. That's within his
9 duties, it is an official government action. I don't think
10 there's any dispute about the authenticity of this letter, and
11 so I don't think it's hearsay.

12 And I think that it should come in for the truth about the
13 EPA's process, and I think that it should come in for the truth
14 about the EPA's conclusion to this day by stating that it's not
15 carcinogenic.

16 Because I agree if we were in a post-2012 notice issue, it
17 might go to mitigation, which I think we'll discuss later in
18 the context of punitives, but I think this would come in for
19 its truth.

20 **MS. MOORE:** You just can't separate, Your Honor, what
21 we were talking about this morning that if something like this
22 comes in, this letter, 1330, when it's talking about -- whether
23 it's talking about in the letter or not CARC, which, of course,
24 the letter is talking about CARC, is that you can't separate
25 the entire genesis for why the EPA reopened its cancer review

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1 of glyphosate, and what was going on behind the scenes with
2 Monsanto and EPA and with Monsanto spending \$17 million to
3 debunk IARC at the same time the EPA is going through its
4 review process.

5 They can't have it both ways. They can't say, "Oh, look,
6 we're going to hide behind the EPA," and say "Well, here's
7 their conclusion" without being able to show the jury
8 everything they were doing.

9 **THE COURT:** Yeah. I mean, I basically -- I think you
10 and I agree on this issue. I guess the question -- I'm just
11 kind of glancing through the letter, but what about the first
12 paragraph and on page 5 the one paragraph which says "EPA is
13 confident in its conclusion"?

14 **MS. MOORE:** I'm sorry, Your Honor. "EPA is
15 confident"?

16 **THE COURT:** Yeah. Just the first paragraph of the
17 letter and then page 5, the one paragraph that says "EPA" -- it
18 starts "The EPA is confident in its conclusion."

19 **MS. MOORE:** And that one sentence, not going into the
20 foreign regulatory?

21 **THE COURT:** Well, I mean, I guess I -- we've already
22 established through Portier that the Europeans disagree with
23 him.

24 **MS. MOORE:** And our position would be that taking
25 these two snippets out, it's cumulative because it's already in

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1 evidence from the questioning of Portier from both Phase I and
2 Phase II; and so to highlight this and single it out I think
3 would be prejudicial to the plaintiffs, especially with us not
4 being able to give the entire story.

5 **THE COURT:** Just the first sentence? Just the first
6 sentence of the paragraph, "EPA is confident in its conclusion
7 that glyphosate is not likely to be carcinogenic to humans"?

8 I mean, the other thing is there may be some testimony
9 from Portier, you know, about this that doesn't -- and the
10 letter doesn't need to go in, but Portier concedes that the EPA
11 continues to take the position.

12 **MS. MOORE:** And I think that's already, you know, in
13 evidence, Your Honor. I mean, that was in Phase I when they
14 went back and asked questions of Dr. Portier on cross about
15 that.

16 But this statement made at this time went in with respect
17 to the climate of what was going on following IARC. So it just
18 can't be separated out. It's not giving us the opportunity to
19 paint the full picture.

20 **MR. STEKLOFF:** I have a couple comments. One, I think
21 the problem is Dr. Portier fought this general notion at his
22 deposition. So he was asked (reading):

23 "Do you recall that after you submitted those public
24 comments, the EPA came to the judgment that for cancer
25 descriptors, the available data and weight of evidence

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1 clearly do not support the descriptors?"

2 It goes on (reading):

3 "And do you recall that?

4 "No."

5 Then we tried to show him a 2017 EPA document. He
6 wouldn't really agree with that.

7 And so I do think this document, consistent with what you
8 just proposed, is necessary. I mean, the -- I feel, again, to
9 be able to have to respond to a cumulative argument --

10 **THE COURT:** No, no. You don't have to respond to a
11 cumulative argument.

12 **MR. STEKLOFF:** So I think this even shows that there
13 will be some pushback on exactly what the EPA has done up to
14 this day; and absent -- arguing by omission is not -- I
15 actually should be able to argue affirmative, and I think the
16 solution you just proposed is a good one. We would accept
17 that.

18 In just allowing Dr. Portier -- I mean, they could -- we
19 don't even have to play Dr. Portier. They could stipulate that
20 this document was sent on December 21st, 2018, and we could
21 redact everything except the two paragraphs you said, and then
22 I can argue from it. But I think we need the evidence.

23 **THE COURT:** Or the first paragraph and the first
24 sentence from that paragraph.

25 **MR. STEKLOFF:** But I think that the second sentence --

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1 I mean, now this is a different issue. I think that the second
2 sentence goes to the extent your instructions instruct the jury
3 that post-2012 regulatory conduct or regulatory conduct from
4 other countries can be considered in considering, you know,
5 whether Monsanto acted reasonably based on what was known and
6 knowable -- and I'm sort of paraphrasing -- that it is relevant
7 to Monsanto's state of mind, that all these other regulatory
8 bodies around the world, both up till 2012 but then also up
9 through today, for the same reasons that the EPA is relevant up
10 to today, that all these other bodies. And so I think that
11 having that full paragraph in is appropriate.

12 **MS. MOORE:** And, again, Your Honor, we cannot separate
13 the date and what led up to them writing this, the EPA writing
14 this, in December of 2018. I mean, it's taken out of context.

15 And they have the absolute right if they want to call a
16 witness. They could do that, but they're trying to, like,
17 piecemeal our expert's testimony in order to get this letter
18 in. And now --

19 **THE COURT:** Well, I don't know about piecemeal. I
20 mean, you can obviously -- it may be that you can -- you know,
21 you can counterdesignate something or you can bring something
22 in on rebuttal.

23 So I don't -- I mean, I guess what I would propose is that
24 we bring the jury back in and we play the remaining testimony
25 for them, and then you-all -- what do we have left? Remind me

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1 what we have left.

2 **MS. MOORE:** Your Honor, we have --

3 **THE COURT:** Koch, Grant, and Guard; right?

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

5 **THE COURT:** Why don't we start playing that for them.
6 You-all can scramble a little bit to give me a little bit more
7 of a concrete proposal --

8 **MS. MOORE:** That's fine.

9 **THE COURT:** -- for what testimony would be played from
10 Portier. I sort of pretty strongly lean toward just the first
11 sentence, not a statement from the EPA about what other
12 regulatory authorities believe. I mean, the consideration of
13 this issue is very much in flux and so to say that the EPA can
14 speak for other regulatory agencies around the world on an
15 issue that's very much in flux I don't think is appropriate.

16 But why don't you kind of -- you know, why don't you
17 figure out a more concrete proposal for getting in the basic
18 concept of where the EPA stood as of December 2018 and some
19 specific proposal about the Portier testimony that would come
20 in on it or how you would get it in; and why don't you start
21 thinking about what, if any, you would counterdesignate for
22 that basic proposition.

23 **MS. MOORE:** I understand.

24 **THE COURT:** And then we'll take a break after the
25 remaining testimony.

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

2 And then the only other --

3 **THE COURT:** You could even just do that, like, at the
4 beginning of the day tomorrow if we need to.

5 **MS. MOORE:** We could, Your Honor.

6 The other thing is that we did file last night a letter
7 brief -- I don't know if you've had an opportunity, probably
8 not yet -- but --

9 **THE COURT:** No, I read them.

10 **MS. MOORE:** -- on Seralini.

11 **THE COURT:** Yeah.

12 **MS. MOORE:** And as you'll recall from our discussion
13 before was that you said --

14 **THE COURT:** I read your letter, I understand your
15 argument, and I'm not reconsidering any of the evidence about
16 Seralini.

17 **MS. MOORE:** Okay. Thank you, Your Honor. I did find
18 stuff in 2009 so that's why I brought it back to your
19 attention.

20 So, okay.

21 **THE COURT:** Okay.

22 **MS. WAGSTAFF:** Your Honor, we would like for
23 Your Honor to read a stipulation between a couple of the --

24 **MS. MOORE:** We can do that.

25 **MS. WAGSTAFF:** -- depositions.

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1 **THE COURT:** Is that about the damages?

2 **MS. MOORE:** Yeah, the damages.

3 **THE COURT:** Net worth and stuff?

4 **MS. MOORE:** It will be before Grant.

5 **THE COURT:** Before Grant.

6 **MS. WAGSTAFF:** I will cue you, Your Honor.

7 **THE COURT:** Yeah, you can cue me.

8 Do you-all want to take a two-minute break before we --

9 **MS. MOORE:** That would be great, Your Honor. Thank
10 you. I appreciate it.

11 **THE COURT:** Okay.

12 (Recess taken at 11:06 a.m.)

13 (Proceedings resumed at 11:11 a.m.)

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

15 **THE COURT:** So before we bring in the jury, the only
16 other thing I want to say is the plaintiffs should also look
17 for testimony from Portier that already established the point
18 that he wants to establish again because that may have some
19 relevance to our discussion.

20 Go ahead and bring in the jury.

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

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

23 So I think Kristen mentioned to you we're a little bit
24 ahead of schedule, so what we're going to do is go for about
25 another 50 minutes to an hour today and then that's going to be

KOCH - VIDEO TESTIMONY

1 it for today.

2 And as I indicated to you last week, tomorrow morning we
3 will have closing arguments for Phase II. There may be a
4 little more -- it's not quite clear yet, there may be a little
5 more evidence that comes in tomorrow morning, maybe not; but,
6 in any event, we'll have closing arguments tomorrow morning,
7 and you'll be able to begin your deliberations for the second
8 and final phase of the case at some point tomorrow.

9 So with that, do you want to call your next witness?

10 **MS. WAGSTAFF:** Sure. Mr. Hardeman calls Monsanto
11 employee Michael Koch, and his video is just over 15 minutes.

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

13 **MS. WAGSTAFF:** Your Honor, Mr. Hardeman moves into
14 evidence Trial Exhibit 426 and Trial Exhibit 245.

15 **MR. STEKLOFF:** Preserving our prior objections, no
16 objection now, Your Honor.

17 **THE COURT:** Okay.

18 (Trial Exhibits 245 and 426 received in evidence)

19 **MS. WAGSTAFF:** And, Your Honor, I would request that
20 you please read the stip into evidence.

21 **THE COURT:** Okay. Sounds good.

22 We have another stipulation from the parties. This one
23 relates to the issue of punitive damages. I'll read it to you
24 now.

25 The parties, Edwin Hardeman and Monsanto Company, by

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1 counsel stipulate the following regarding Monsanto's finances:

2 1. Bayer Corporation acquired Monsanto in June 2018 for
3 \$63 billion.

4 2. Prior to Bayer's acquisition, Monsanto's net worth was
5 \$7.8 billion with \$2.4 billion cash on hand.

6 You can call your next witness.

7 **MS. WAGSTAFF:** Thank you. Mr. Hardeman calls
8 Hugh Grant, Monsanto's former CEO. The video is 21 minutes.

9 (Video was played but not reported.)

10 **MR. WOLFE:** Sorry, Your Honor. I just have to
11 restart.

12 **THE COURT:** No worries.

13 (Video was played but not reported.)

14 (Pause in proceedings.)

15 **THE COURT:** Do you-all want to take a -- shall we take
16 a quick break?

17 **MR. WOLFE:** Yes, Your Honor.

18 **THE COURT:** All right. Why don't we take a quick
19 break just for a couple minutes just to deal with the technical
20 issue.

21 (Recess taken at 11:39 a.m.)

22 (Proceedings resumed at 11:40 a.m.)

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

24 **MR. STEKLOFF:** Your Honor, I think there was some
25 confusion about what should be played or not, but everything

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1 that's been played is fine and I think we're ready to proceed
2 again.

3 **MR. WOLFE:** If I could just have one minute.

4 **THE COURT:** Take your time.

5 (Pause in proceedings.)

6 **MS. MOORE:** Your Honor, while we're waiting on that,
7 we did have an opportunity to look at their designations and
8 counter; and I think as the jury just heard from Dr. Koch, I
9 think the issue has been resolved already and there's no need
10 to play Dr. Portier again.

11 Dr. Koch just went through and he was -- I don't know if
12 it's Koch or Koch. I keep saying it both ways.

13 **THE COURT:** No, I heard all that too and some came in
14 from Grant as well.

15 **MS. MOORE:** From Grant as well.

16 **THE COURT:** But, you know, I'm not going to sustain an
17 objection just on the ground that it's cumulative for all the
18 reasons we've discussed.

19 **MS. MOORE:** Well, it's not just that it's cumulative,
20 Your Honor. His argument was the jury hasn't heard this and he
21 wants to be able to play another piece of testimony where it's
22 actually been heard. I mean, I understand that's cumulative,
23 but --

24 **THE COURT:** And, you know, all of this is undisputed.

25 **MS. MOORE:** That's right.

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1 **THE COURT:** I mean, the stuff that the Monsanto
2 witnesses are now saying, it's undisputed that the EPA has
3 given its sign-off and these other regulators; but if they want
4 to do something more on that in their case, I think it would be
5 very unfair for me to prevent them from doing so simply because
6 it's cumulative given all the cumulative testimony --

7 **MS. MOORE:** I understand.

8 **THE COURT:** -- I've allowed in on the plaintiff's
9 side.

10 **MS. MOORE:** I understand, Your Honor. And then we
11 would have a counter to that as well, and we have that ready.

12 **THE COURT:** I haven't even seen the proposal for what
13 they're going to play.

14 But what I would propose to do -- since the jury is not
15 here, what I would propose to do is let's get done with the
16 plaintiff's case -- okay? -- and then we'll talk about -- we
17 have to talk about jury instructions.

18 **MS. MOORE:** Right.

19 **THE COURT:** We have to talk about the verdict form.
20 We have to talk about closing arguments, and we'll also at that
21 point talk about what it is precisely that Monsanto wants to
22 bring in --

23 **MS. MOORE:** Okay.

24 **THE COURT:** -- and what your objection would be to it.

25 **MS. MOORE:** Okay.

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1 **THE COURT:** And then if it comes in, it will come in
2 tomorrow morning.

3 **MR. STEKLOFF:** That's fine, Your Honor, and we're
4 putting together a short clip report so you can see exactly
5 what we're proposing.

6 **THE COURT:** Okay.

7 **MS. WAGSTAFF:** And, Your Honor, we will point you to
8 where in Phase I Dr. Portier was asked about the EPA.

9 **THE COURT:** Well, point it to me --

10 **MS. WAGSTAFF:** Now or later?

11 **THE COURT:** Point me to it later this afternoon.

12 **MS. WAGSTAFF:** Okay.

13 **THE COURT:** So that we can -- are you ready?

14 **MR. WOLFE:** Yes, sir. Thank you.

15 **THE COURT:** Okay. Go ahead and bring them in.

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

17 **THE CLERK:** Please be seated.

18 **THE COURT:** Okay. Thank you. Sorry about the glitch.
19 You can continue.

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

21 **THE COURT:** Okay. One more witness, is that right,
22 for today?

23 **MS. WAGSTAFF:** Yes, Your Honor. Mr. Hardeman calls
24 Monsanto employee James Guard. The video is 16 minutes and 55
25 seconds.

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1 **THE COURT:** All right. And that will be it for today.

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

3 **THE COURT:** Okay.

4 **MS. WAGSTAFF:** Your Honor, Mr. Hardeman, if I may --

5 **THE COURT:** Go ahead.

6 **MS. WAGSTAFF:** -- moves into evidence Trial Exhibits
7 788 and 791.

8 **MR. STEKLOFF:** And we just want to confirm with
9 counsel a few things overall.

10 **THE COURT:** That's one of the many things that we will
11 all be working on this afternoon. We don't want to keep you
12 here while we are doing that. So, as I said, there may be a
13 little bit of evidence that -- additional evidence that comes
14 in tomorrow or we may go straight to closings, but either way
15 you will hear closing arguments tomorrow and be able to begin
16 your deliberations.

17 So why don't we -- why don't we plan to start at
18 8:30 tomorrow. Plan to start at 8:30. So be ready to come in
19 here at 8:30 sharp. And remember all the restrictions that
20 have been imposed on your conduct between now and then, and we
21 will see you tomorrow morning.

22 Thank you.

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

24 **THE COURT:** Okay. Everybody remember that you are --
25 everybody is required to stay here for five minutes before

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1 leaving the courtroom to allow the jurors to escape.

2 Why don't we -- but after you-all stay here for five
3 minutes, why don't you then leave and then go have lunch. And
4 why don't we come back at 1:30 to discuss exhibits, jury
5 instructions, verdict form, this Portier issue, and anything
6 else that we need to discuss.

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

8 **MS. WAGSTAFF:** Your Honor, I think I have -- I printed
9 out -- and I have a copy for you as well.

10 **MR. STEKLOFF:** Yep.

11 **MS. WAGSTAFF:** This is from the run report that was
12 actually played from Dr. Portier. And in it it talks a little
13 bit about the European stuff and then the EPA.

14 **THE COURT:** This is from Phase One?

15 **MS. WAGSTAFF:** Phase One, yep.

16 **THE COURT:** Okay.

17 **MR. STEKLOFF:** Your Honor, just a few logistics.
18 First, I have -- this does not have the counters that were
19 included in the letter submitted yesterday from Dr. Portier.
20 Here is the three minutes that we would propose playing
21 regarding the issues we have been discussing today.

22 **THE COURT:** Okay.

23 **MR. STEKLOFF:** And then while the record is open, I
24 failed to move in and to admit two exhibits from what was
25 already played from Dr. Portier. I'm happy to discuss them

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1 over the break with counsel. But they were 1179 and 1668, and
2 I will make sure Ms. Melen has those when she returns as well.

3 **THE COURT:** Okay.

4 **MR. STEKLOFF:** And then to the extent the Plaintiff is
5 formally resting, we obviously make a motion that has been --

6 **THE COURT:** I don't think they have formally rested
7 yet. I thought we would leave that open until tomorrow
8 morning, just in case anything we discuss today changes the
9 equation.

10 **MS. WAGSTAFF:** Yes. We would like that, Your Honor.

11 **MR. STEKLOFF:** Thank you, Your Honor.

12 **MS. WAGSTAFF:** We will see you at 1:30.

13 **THE COURT:** Yeah, 1:30.

14 **THE CLERK:** Court is in recess.

15 (Luncheon recess was taken at 12:21 p.m.)

16 **AFTERNOON SESSION**

1:33 p.m.

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

18 **THE COURT:** Okay. What do you want to do first,
19 exhibits or have you taken care of exhibits?

20 **MS. MOORE:** Exhibits will be fine, Your Honor.

21 **MR. STEKLOFF:** I was going to ask if we could do jury
22 instructions, verdict form, and directed verdict motions last
23 because I may -- with your permission -- seek to excuse myself
24 to go work on closings. Mr. Kilaru and Ms. Matthews Johnson
25 are here. I was hoping we could deal with exhibits, the

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1 Portier testimony -- to the extent we need to discuss it
2 further -- and then I guess what is on or off limits for
3 closing arguments.

4 **THE COURT:** Okay.

5 **MR. STEKLOFF:** So from my perspective it does not need
6 to be a long discussion.

7 **THE COURT:** Okay.

8 **MS. MOORE:** So we are starting with exhibits?

9 **MR. STEKLOFF:** Yes, we can start with exhibits.

10 **MS. MOORE:** All right. Your Honor, I think we have
11 agreement on the Martens exhibits. So we had moved
12 provisionally -- we had moved to enter into evidence 155, 156,
13 157, 158, 159, 160, 161 and 208, and we would ask that those be
14 entered into evidence now.

15 **MR. STEKLOFF:** No objection to any of those, Your
16 Honor.

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

18 (Trial Exhibits 155 through 161 and 208 received in
19 evidence)

20 **MS. MOORE:** And then --

21 **MR. STEKLOFF:** Then with respect to --

22 **MS. MOORE:** Martens.

23 **MR. STEKLOFF:** -- Monsanto and Martens, we had
24 Exhibit 154.

25 **MS. MOORE:** And that's it.

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1 **MR. STEKLOFF:** And that's it. And I believe there is
2 no objection.

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

4 **THE COURT:** Okay. That's admitted.

5 (Trial Exhibit 154 received in evidence)

6 **MS. MOORE:** And then for Reeves, we had
7 provisionally -- we had moved to admit into evidence -- it's
8 all the ones listed on 320. Do you want me to list them out,
9 Kristen?

10 **THE CLERK:** It's okay. I can get them.

11 **MS. MOORE:** So we would move those to be entered into
12 evidence now. I can list it: 86, 89, 220, 249, 250, 251, 254,
13 413, 443, 448, 449, 450, 451, 452, 453, 495, 499, 503, 515 and
14 516. And we would ask those be entered into evidence at this
15 time.

16 **MR. STEKLOFF:** So did you move 413?

17 **MS. MOORE:** I did.

18 **MR. STEKLOFF:** So 413 may depend, Your Honor, on how
19 we are going to handle learned treatises in general.

20 **MS. MOORE:** Sorry. That was not supposed to go. I
21 withdraw 413.

22 **MR. STEKLOFF:** Okay.

23 **MS. MOORE:** And --

24 **MR. STEKLOFF:** And 451 and 452?

25 **MS. MOORE:** Yes, sorry, about that.

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1 **THE CLERK:** So those are withdrawn?

2 **MS. MOORE:** Yes.

3 **MR. STEKLOFF:** And did you move in 495 and 499?

4 **MS. MOORE:** Yes. I agree that 495 and 499 do not go.

5 **MR. STEKLOFF:** Okay.

6 **MS. MOORE:** Sorry. I was reading off a different
7 list.

8 **MR. STEKLOFF:** So with all of that, I have no
9 objection to the remaining exhibits on that list.

10 **THE COURT:** Okay. Those are admitted.
11 (Trial Exhibits 86, 89, 220, 249, 250, 251, 254, 443,
12 448, 449, 450, 453, 503, 515 and 516 received in
13 evidence)

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

15 **MR. STEKLOFF:** Then with respect to Monsanto on
16 Reeves, Your Honor, this is maybe a time to tee up the argument
17 I made about some learned treatises earlier. So we move into
18 evidence Exhibit 241 and 1697 -- so -- and I think there are
19 objections to both, Your Honor.

20 I will start with 241, which, again, probably applies more
21 broadly. That specifically was the Farm Family Exposure Study;
22 and I think that -- similar to the argument I made earlier in
23 Phase Two -- it is really coming in for Monsanto's state of
24 mind and it goes to their conduct and their reasonableness
25 overall.

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1 So I think that those studies -- so we are not just
2 talking about the Farm Family Exposure Study but, for example,
3 the Heydens 2008 study where they did some of the follow-up
4 tests recommended by Dr. Parry, the Williams study, for
5 example, where there are ghostwriting allegations; and the
6 acknowledgment section has been displayed to the jury.

7 I just think that the jury now can view those for a
8 different purpose. They have already determined causation.
9 They wouldn't be viewing these to gauge whether or not Roundup
10 is capable of causing cancer. They would be viewing it to
11 determine whether or not Monsanto in publishing these studies,
12 in doing the tests that they have done, with their being
13 criticized for not doing a lot of tests has acted reasonably.
14 And so for that purpose in Phase Two I think -- and here we are
15 talking about specifically the Farm Family Exposure Study --
16 that is our position.

17 **THE COURT:** So did I just hear you argue that we want
18 the ghostwritten article to go to the jury because it helps
19 show that Monsanto acted reasonably?

20 **MR. STEKLOFF:** Well, I think -- with respect to that
21 one, Your Honor, I think that, one, it goes -- that is a
22 different purpose. But I think it goes to show -- I mean, I
23 will argue that it was not, in fact, ghostwritten; that the
24 acknowledgment section is in there. Sort of less concerned
25 about that one because I can show the acknowledgment section

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1 regardless. I think on the studies that Monsanto itself
2 conducted and published, I think that is more directly tied to
3 what Your Honor just stated.

4 **THE COURT:** Well, I don't think there is -- I mean,
5 your -- well, let's put aside the Williams paper for a second,
6 okay. That sort of threw me for a loop. So let's put that
7 aside and think about the other ones.

8 I mean, you are right that the jury is not going to be
9 called upon to decide the issue of causation. And so to the
10 extent there is extraneous material or material that wasn't
11 covered in expert testimony or something like that, if the jury
12 were to look at that, it wouldn't be prejudicial from the
13 standpoint of the causation question.

14 But I suppose -- I mean, I suppose it could still be
15 prejudicial from the standpoint of -- or potentially confusing
16 or potentially misleading from the standpoint of the question
17 of whether the cancer risk was knowable. I suppose it could
18 still have sort of the same -- the same effect in Phase Two on
19 that question.

20 **MS. MOORE:** And, Your Honor, our position is -- this
21 is why we objected. We think it opens -- not necessarily opens
22 the door, but it is a slippery slope because then we can argue
23 that all the published studies that we -- you know, we talked
24 about in Phase One should then go back to the jury because that
25 shows all the knowledge and the facts and the evidence that

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1 were out there pre-2012 that Monsanto knew or should have known
2 that Roundup causes cancer. And so to cherrypick the one that
3 they wrote which says, It's not cancerous, and send that back
4 to the jury is unfair and prejudicial to the Plaintiff because
5 that's not -- that's not the true story of the knowledge that
6 they would have had pre-2012.

7 **THE COURT:** Then I suppose you might also say that you
8 were kind of operating on the assumption that the way we were
9 proceeding in this trial with these studies is that whatever
10 you want to call out from the studies, you call out and it goes
11 before the jury.

12 **MS. MOORE:** That's right.

13 **THE COURT:** And the study itself doesn't go back into
14 the jury room.

15 **MS. MOORE:** That's right. And that's how we have been
16 operating throughout Phase Two as well. In fact, I just agreed
17 with Monsanto to withdraw certain objections to Reeves, which
18 were studies.

19 **THE COURT:** You mean you agreed with them to withdraw
20 the request to admit certain studies?

21 **MS. MOORE:** Right. I rattled off the exhibits, and I
22 didn't realize that that included some. So -- and I agree with
23 them that those shouldn't go back. But I also think that the
24 one that they want, which happened to be written by Monsanto,
25 shouldn't go back either. I don't think any of them should,

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1 just like we had agreed previously.

2 **THE COURT:** Okay. I understand. I think that the --
3 the rule that we have been applying to studies should continue
4 to apply to these ones that we are talking about here. So I
5 will rule that they are not going to be admitted into evidence.

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

7 And then the second Reeves exhibit, over which there is a
8 pending objection, is 1697. So 1697, Your Honor, was a -- was
9 testified by Dr. Reeves as something he put together and is one
10 of the authors. It is a pamphlet, for lack of a better word,
11 Benefits and Safety of Glyphosate. It was a much longer
12 document that had a lot of information about the benefits of
13 glyphosate and safety of glyphosate.

14 If I can hand Your Honor a copy, this is what we propose
15 going back to the jury, which is actually just the title page.
16 We redacted the date, which off the top of my head was
17 December 2016. So that is the bottom left. For that purpose
18 we redacted it.

19 Then there is one page in that table -- in that document,
20 table 2, that we think should be admitted.

21 **THE COURT:** So this was called up to the jury, and he
22 testified about this particular chart or table?

23 **MR. STEKLOFF:** No. He did not testify about this
24 particular table.

25 **MS. MOORE:** This was not published to the jury at all,

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1 Your Honor. And we have objected to it, one, coming into
2 evidence and definitely going back to the jury.

3 First of all, it was not on their will-use trial list,
4 which I'm not going to make a big deal about that; but it was
5 not on there. It was also not shown to the witness during the
6 deposition. And it is a publication that Monsanto put out in
7 2016. So it is not within the time period that we have been
8 operating under either.

9 And for those reasons we don't think it should come in,
10 especially not being extracted to this degree. I mean,
11 there -- this is -- this is showing a table that they have --
12 Monsanto has put together. It's -- and the underlying
13 information here wouldn't be admissible either. We haven't
14 been putting in these reports from any of these foreign
15 regulatory agencies.

16 **THE COURT:** Yeah, I understand. This is not -- this
17 is not admitted.

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

19 **THE COURT:** That objection is sustained.

20 **MR. STEKLOFF:** That covers Reeves, Your Honor.

21 **THE COURT:** Okay.

22 **MS. MOORE:** And then, Your Honor, we had on Farmer --
23 and it's my understanding there are no objections from the
24 Defendant, but I will read through that list. It's -- I have
25 to make sure -- it is 429, 435, 442, 444, 448, 449, 254, 314,

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1 461, 462, 463, 464, 466, 467, and 468. And we have redacted
2 the one that they have asked to be redacted, 429.

3 **MR. STEKLOFF:** I'm doubling-checking.

4 **THE COURT:** Take your time.

5 **MR. STEKLOFF:** What was the one before 314?

6 **MS. MOORE:** 254.

7 **MR. STEKLOFF:** That is correct, Your Honor. And just
8 429 is the document -- is the 2015 e-mail that discussed the
9 Williams article, but we have agreed on the redactions. So as
10 redacted -- I mean, obviously pending our previous
11 objections -- we have no further objections.

12 **THE COURT:** Okay. Those are admitted.

13 (Trial Exhibits 429, 435, 442, 444, 448, 449, 254,
14 314, 461, 462, 463, 464, 466, 467 and 468 received in
15 evidence)

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

17 **MR. STEKLOFF:** And I think with respect to the
18 Defense, Your Honor, in Dr. Farmer's deposition, we move in 479
19 and -- well, I will just read all the numbers: 479, 480, 481,
20 482, 483, 484, 485, 493, and that is all, and I think all of
21 those are objected to. So I'm happy to walk through what those
22 were.

23 **THE COURT:** Okay.

24 **MR. STEKLOFF:** 479 and 480 were the two summary charts
25 that I showed during opening in Phase Two under Federal Rule Of

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1 Evidence 1006. One shows the genotox testing of surfactants.
2 The other shows the genotoxic testing of the formulated
3 products. So we believe those are admissible.

4 **THE COURT:** Well, the problem is -- I mean, summaries
5 of evidence usually go to the jury when the actual evidence
6 goes to the jury. And, you know, we give the jury an
7 instruction -- I thought we talked about this pretrial.

8 **MS. MOORE:** We talked about it in Phase One, Your
9 Honor.

10 **THE COURT:** But the jury gets an instruction that says
11 the summary of the evidence is only as good as the underlying
12 evidence so, you know, your memory of the underlying evidence
13 controls or whatever. So I think that it was appropriate to
14 call out those charts in the same way that the studies have
15 been called out, but I don't think it is appropriate to admit
16 them -- admit those charts and send them back to the jury.

17 **MR. STEKLOFF:** As long as -- understood. I can still
18 refer to them --

19 **THE COURT:** Yes.

20 **MR. STEKLOFF:** -- on the course of closing.

21 Just while we are on that topic, this one might be a
22 little bit different. Exhibit 493 was a summary chart that you
23 may recall where there was follow-up to each of Dr. Parry's
24 recommendations.

25 So Dr. Farmer presented a chart for A through I in the

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1 recommendations and would have things that predated Dr. Parry's
2 first report, and then steps that occurred afterwards, or
3 sometimes it said N/A if, in Monsanto's view, he had not made a
4 firm recommendation. So you may have the same view on it, but
5 I also think some of that underlying evidence is coming in. So
6 I don't know if that one is a little bit different.

7 **THE COURT:** It is a little too abstract for me as I
8 sit here because I don't remember the chart well enough.

9 **MS. MOORE:** Your Honor, it is basically somewhat of a
10 summary -- thank you.

11 We objected to it for the same reason we objected to the
12 other ones, Your Honor, is that everything on here would not be
13 admissible. And so for those reasons, we don't think it is a
14 proper summary under 1006.

15 **THE COURT:** Well, this is a list of all the different
16 tests and stuff --

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

18 **THE COURT:** -- that were and were not --

19 **MS. MOORE:** Yes.

20 **MR. STEKLOFF:** And this was discussed in some detail
21 in Dr. Farmer's designations for Monsanto.

22 **MS. MOORE:** It was published.

23 **THE COURT:** Same ruling on this one, which is that you
24 can call it out and, you know, sort of use it to remind the
25 jury of Dr. Farmer's testimony. But it shouldn't go back to

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1 the jury.

2 **MR. STEKLOFF:** Understood.

3 And then the last category of documents, I think --

4 **MS. MOORE:** You can probably group them together.

5 **MR. STEKLOFF:** Yeah, sort of group them together. 481
6 and 482, Your Honor, are EPA documents. So the first, for
7 example, is the RED document that there has been testimony
8 about. And then 483 is I think a -- European document, a
9 regulatory action. 484 is that World Health Organization 2004
10 review document. And 485 is a similar version of that.

11 And so I think this is -- we are moving to admit those.

12 And in Phase One there were some EPA documents that came
13 in, for example, related to the -- we can all just call it now
14 the magic tumor, so I think -- we think that these documents
15 should come in, but we are looking for your guidance.

16 **THE COURT:** I was sort of assuming when I was
17 reviewing the testimony of -- regarding those documents that
18 they would come in, but, again, I don't have -- it's a little
19 too abstract to me right now. Can you put them in front of me?

20 Or let me just get a clarification. Do you object to
21 those documents coming in?

22 **MS. MOORE:** We do, Your Honor. In similar to how the
23 IARC Monograph didn't come into evidence, we believe that -- we
24 understood your ruling that --

25 **THE COURT:** You never asked for the IARC Monograph to

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1 come in in Phase Two, right?

2 **MS. MOORE:** Okay, I understood --

3 **THE COURT:** I mean, my ruling was that the IARC stuff
4 would be re-visited after Phase One, and you didn't ask for it
5 to come in so.

6 But anyway -- so strike the similar to the IARC Monograph,
7 but you -- what is your point about these EPA documents?

8 **MS. MOORE:** Well, that some of those -- and I don't
9 have --

10 **MR. STEKLOFF:** I have them.

11 **MS. MOORE:** Oh, great. Thanks. Thank you.

12 Kill a couple more trees. Okay.

13 That these are actually -- some of these are akin to
14 actual studies too. There is one -- let's see -- here is the
15 RED. So 481 is the RED, Your Honor. And, again, if -- it was
16 our understanding that these types of documents would not be
17 coming in and going back to the jury, based on your motions in
18 limine rulings. And there is also hearsay within the documents
19 too.

20 (Pause in proceedings)

21 **MS. MOORE:** And, Your Honor, I think what they wanted
22 from these documents they got from the actual testimony itself.
23 And to send all this back to the jury, one, I don't think it is
24 proper; and, two, I don't think it is necessary.

25 (Pause in proceedings)

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1 **THE COURT:** Yeah, I mean the problem is there is also
2 a lot of extraneous stuff in here. I think in light of that,
3 in light of the way the parties have been treating these kinds
4 of documents throughout the trial, I think at least the red
5 document should -- should not come in. But you can -- whatever
6 testimony you elicited about it is appropriate to call out to
7 the jury.

8 I think certainly the same with the European Commission
9 document, which has the additional problem of having been
10 identified as a working document that doesn't necessarily
11 reflect -- represent the views of the Commission services.

12 And let me look at this third one here, Number 482.

13 (Pause in proceedings)

14 **THE COURT:** Yeah, same thing with this document. Same
15 ruling.

16 **MR. STEKLOFF:** Understood. And I will accept the same
17 ruling on the two WHO documents without handing them up.

18 **THE COURT:** Okay. Can I hand this back to you?

19 **MS. MOORE:** You don't want more documents?

20 Okay. Your Honor -- do you have anything else on Farmer?

21 **MR. STEKLOFF:** I do not.

22 **MS. MOORE:** Your Honor, from today, we had moved on
23 Dr. Heydens' deposition, and I don't believe there is an
24 objection now for 312, 315, 317, 322 and 323, and we just ask
25 for those to be admitted into evidence.

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1 **MR. STEKLOFF:** I thought those were --

2 **MS. MOORE:** I'm sorry. Too many things. Thank you.

3 And the Kier one was already admitted, 686.

4 **THE CLERK:** Yes.

5 **MS. MOORE:** And Portier, 388, was admitted. But they
6 reserved an objection on 504.

7 **MR. STEKLOFF:** That's correct, Your Honor.

8 504, Your Honor, I have one copy, is the IBT -- July 1983
9 OPP document about the IBT.

10 **THE COURT:** Right.

11 **MR. STEKLOFF:** So if there is a -- now, if there is a
12 goose-gander, I will put this -- you are going to hear me say
13 what is good for one side is good for the other. There is a
14 lot of extraneous information about the IBT review that goes
15 well beyond Monsanto in this document.

16 **THE COURT:** Oh, I don't -- I have little question that
17 that's true. I mean, I remember the stuff that was called out
18 in the testimony all seemed totally appropriate, but I can't
19 imagine that that document -- I mean, I will look at it, if you
20 want me to; but I can't imagine that there is not a lot of
21 extraneous stuff in that document that shouldn't go to the
22 jury.

23 **MR. STEKLOFF:** I would think now the same rule
24 applies. Anything that was shown during the testimony -- for
25 example, I think it was during Mr. --

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1 **MS. MOORE:** Dr. Portier.

2 **MR. STEKLOFF:** Either one. But if they showed
3 something to a witness from this document, then they could
4 bring it up. And I remember, for example, they showed the one
5 line where the animal study on carcinogenicity --

6 **MS. MOORE:** There is two.

7 **MR. STEKLOFF:** -- was an I, and if they want to make a
8 slide of that for closing, that's fine. I don't think the
9 document should go back.

10 **MS. MOORE:** And our position is that this is similar
11 to the documents that came in about the magic tumor from
12 Phase One. And the issue is that it lists the other
13 pesticides. We can redact that in those pages. And so then
14 the only lines that would be highlighted on those pages would
15 be on glyphosate. We could get rid of that. That is pretty
16 easy to do.

17 **THE COURT:** Well, let me take a look at the document.

18 (Pause in proceedings)

19 **THE COURT:** I guess at that point -- if you are
20 redacting 99 percent of the document, or 99 point --

21 **MS. MOORE:** Well, the charts.

22 **THE COURT:** -- 9 percent of the documents, at what
23 point do you just say -- well, because then -- the problem I
24 think -- and this may be an argument that you wish to adopt
25 when it comes to the letter that went to Mr. Portier -- I mean,

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1 to the Australian folks.

2 **MS. MOORE:** Right.

3 **THE COURT:** The problem is when you are redacting
4 99 percent of the document, then the jury is --

5 **MS. MOORE:** Wondering.

6 **THE COURT:** -- sitting there speculating what else is
7 in this. And if you have already established the point through
8 testimony that you want to establish from this document, then
9 what's the problem --

10 **MS. MOORE:** That's fair, Your Honor.

11 **THE COURT:** -- with just calling out that testimony?

12 **MS. MOORE:** That's fair.

13 **THE COURT:** It is admissible evidence.

14 **MS. MOORE:** And then in closing I will call out those
15 lines that we called out here in Dr. Portier. So that's fine.

16 **THE COURT:** Okay. So the same ruling applies to that
17 document.

18 **MS. MOORE:** Yeah.

19 **MR. STEKLOFF:** Your Honor, there were two in Heydens,
20 which I didn't have a chance to raise, which were on the
21 Monsanto side: 710, which is a 1990 rat study report. And
22 then 711, which was the GLP audit of Monsanto's labs in
23 September 1993.

24 The second item -- maybe it falls into these broader EPA
25 documents, but first the 1990 rat study report I think should

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1 be admitted, which is Exhibit 710.

2 **MS. MOORE:** And again, Your Honor, that would be the
3 only rat study that will be going back.

4 **THE COURT:** Well, I was just going to ask -- it's not
5 clear to me why -- why does this rat study need to be admitted
6 when no other is admitted? Which -- what is the 1990 rat
7 study?

8 **MR. STEKLOFF:** I will concede off the top of my head,
9 I don't know the difference --

10 **MS. WAGSTAFF:** It is that important.

11 **MR. STEKLOFF:** -- between that rat study and any other
12 study; but I think we played testimony about it and moved to
13 admit it. If they wanted to play testimony about any other rat
14 study --

15 **THE COURT:** Is this the follow-up to the magic mouse
16 study?

17 **MS. RUBENSTEIN:** It is, Your Honor.

18 **MS. MOORE:** It is.

19 **THE COURT:** Okay. Same ruling will apply to that.

20 **MR. STEKLOFF:** And then just so the record is
21 complete, I understand the ruling ahead of time. But we had
22 moved in 147, which was the Heydens 2008 article, which was
23 sort of a publication after Parry. I understand the ruling.

24 **THE COURT:** Same ruling.

25 **MR. STEKLOFF:** And then 416 was the Williams article.

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1 I understand the ruling.

2 **THE COURT:** 416 was what?

3 **MR. STEKLOFF:** The Williams 2000 article.

4 **THE COURT:** Yeah, same ruling.

5 **MS. MOORE:** 481 was excluded.

6 **MR. STEKLOFF:** I think we already excluded that.

7 **MS. MOORE:** Okay. You good on that?

8 **MR. STEKLOFF:** On Dr. Portier, Your Honor, we moved in
9 Exhibit 1179, which is a 1998 report from the EPA. And I
10 understand that you will sustain their anticipated objection to
11 that.

12 **THE COURT:** Sustained --

13 **MR. STEKLOFF:** Just for the record.

14 **THE COURT:** Sustained the anticipated objection.

15 **MR. STEKLOFF:** Yes.

16 Jennifer, we are ready.

17 **MS. MOORE:** Okay. Then we had identified an exhibit
18 with Mr. Murphy, 768, but we are withdrawing that.

19 **THE COURT:** Okay.

20 **MS. MOORE:** And then on Dr. -- Michael Koch, I think
21 those were both already admitted, 426 and 245. And then the
22 last one --

23 **THE COURT:** Hold on. They are seeming like they are
24 trying to confirm.

25 **THE CLERK:** Yes, they were.

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1 **MS. MOORE:** Thank you.

2 And then the last one, Your Honor, was Mr. Guard, and we
3 moved to enter into evidence 788 and 791. And I think
4 Defendants were going to look at those.

5 **MR. STEKLOFF:** Yeah, we object to those, Your Honor.
6 I'm happy to hand those both up. These are, to be clear,
7 internal Monsanto documents. I think the same problem applies.
8 There was specific testimony about specific pages or parts of
9 pages that we don't object to. Obviously preserving our prior
10 objections.

11 But there's -- both of these documents -- I'm happy to go
12 through them in either order -- have lots of extraneous
13 information. One of them is a PowerPoint that is focused on
14 GMOs in our view and things happening in Europe and in France,
15 largely around GMOs. There was not testimony about 95 percent
16 or more of this document.

17 The second one has various financials in it relating to
18 products that aren't even part of this trial. Admitting it is
19 Roundup products in general, but not Roundup products that
20 Mr. Hardeman has used.

21 Again, to the extent they want to either admit with the
22 99 percent redaction issue or refer to them in closing, we
23 don't object. But I don't think all the other information in
24 either of these should come in.

25 **MS. MOORE:** Your Honor, our position on these is that

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1 a proper foundation was laid during the deposition of
2 Mr. Guard. He was actually designated as a corporate
3 representative for Monsanto. So these documents -- he was
4 examined about both of these documents, and so we believe they
5 are proper to enter into evidence. And I don't think a proper
6 objection is that they are internal documents or that they
7 refer to their financials. That information is all relevant
8 for the jury.

9 **MR. STEKLOFF:** I'm not objecting that they shouldn't
10 be admitted because they are internal documents or involve
11 financials. I'm objecting to -- under 401 and 403.

12 And it is sort of the same problem we have with the Reeves
13 document I showed earlier. I mean, we are not allowed to admit
14 a table -- he also authenticated the document and put in the
15 document, and we weren't allowed to show a table from it, and
16 wasn't discussed and shown in designations before Your Honor.
17 We run into the same problem here where there is lots of
18 extraneous information that has no bearing on what has been
19 discussed in front of the jury.

20 **THE COURT:** Well, I mean, the principle you are
21 articulating sounds right. But I'm just flipping through the
22 presentation to see if it is really true that there is lots of
23 extraneous information because at least at first glance, I
24 mean, it seems like -- it seems like less of the information is
25 extraneous in this presentation.

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1 So hold on. Let me just -- give me a minute to just kind
2 of flip through it.

3 **MS. MOORE:** The other thing, while you are doing that,
4 Your Honor, I will just say that 788 is from 2009 and 791 is
5 from 2000. So these are within the relevant time period as
6 well.

7 **MR. STEKLOFF:** Right. And 788, Your Honor, on the
8 front page I think makes clear that this is an attack on
9 Monsanto relating to GMOs, not on the e-mail but on the third
10 page, I guess, of the document. And then it -- when it walks
11 through the rest of the attacks on Roundup, it is in the
12 context of GMOs.

13 **THE COURT:** Okay. Let me just -- can I just read it
14 for a sec?

15 **MR. STEKLOFF:** Of course.

16 (Pause in proceedings)

17 **THE COURT:** Who gave this presentation?

18 **MS. MOORE:** Are you looking at 788 or 791, Your Honor?

19 **THE COURT:** 788.

20 **MR. STEKLOFF:** The front page, Your Honor, it is
21 from -- at least the e-mail is from someone named Martin Voss,
22 and there is a series of people it was emailed to, none of whom
23 testified in the case. It came up because Mr. Guard was a
24 30(b)(6). He was not -- there is no evidence he was personally
25 involved in this.

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1 **THE COURT:** Remind me what he testified with respect
2 to this presentation.

3 **MR. STEKLOFF:** I think he was shown, Your Honor, on
4 the first page -- sorry. I keep saying the first page. On the
5 third page it says at the top, Roundup FTO as part of the
6 growth initiatives why. He was questioned about that middle
7 bullet. Roundup is key to Monsanto in many aspects.

8 I don't recall if there was other testimony about this
9 document.

10 **MS. MOORE:** There was.

11 **MR. STEKLOFF:** But that at a minimum was shown. There
12 may have been one other section that was shown.

13 **MS. MOORE:** There was, Your Honor. He was designated
14 on this topic. And so given that he was a corporate
15 representative under 30(b)(6), this is a proper topic to be
16 examined on. And it was authenticated and the proper
17 foundation was laid. We do believe that given that, the
18 exhibit should be admitted into evidence.

19 **MR. STEKLOFF:** I don't know if that changes what the
20 jury was shown. The jury was only shown that one bullet, Your
21 Honor, on page 3 of the document.

22 **MS. MOORE:** Well, it was more than that, Your Honor;
23 but I don't think you have to go through every single line of a
24 document in order to get a document admitted.

25 **THE COURT:** No, you don't. But I'm examining it

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1 mainly to test it against the principle that we have been
2 applying to these other documents, which is -- I know it is a
3 different type of document, but if it's -- you know, if it is
4 the kind of thing where you are pulling one small item out of
5 the document and eliciting testimony on it, and the rest of the
6 document is kind of about something different or, you know, far
7 afield, you know, that's one thing.

8 **MS. MOORE:** I don't think --

9 **THE COURT:** As I said, it doesn't -- I don't think it
10 immediately seems to me that this document fits that
11 description. So I'm just trying to flip through it.

12 **MS. MOORE:** I don't think so, too, Your Honor. It is
13 about Roundup and the way they are defending Roundup back in
14 2009.

15 **THE COURT:** But there is a ton of stuff in here that
16 is not, for example -- well, "a ton" may be an overstatement.
17 But there is a lot of stuff in here that is off point.

18 For example, I'm looking at one -- they don't have page
19 numbers, but there is one kind of towards the middle that is
20 talking about farmers and retailers and what we need to do
21 vis-à-vis farmers and retailers. It says, We need to reassure
22 them on toxicity, ecotoxicity, resistance, usage, regulatory
23 evolutions.

24 So only a portion of that is what this case is about,
25 right?

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1 **MS. MOORE:** Well, maybe. I mean, it is to farmers and
2 retailers.

3 **THE COURT:** Well, this is not about ecotoxicity, for
4 example, right?

5 **MS. MOORE:** Okay. All right. That might be fair.
6 But, I mean, they are basically telling one thing internally
7 and a separate thing externally. And externally they are
8 including retailers where Mr. Hardeman bought this from a
9 retailer. And they want to provide basic information on
10 Roundup to the retailer and reassure them that there is nothing
11 wrong with the product. I think that is directly on point.

12 **THE COURT:** I think -- I'm looking at this, and I'm
13 thinking about -- I'm looking at water detection and GMOs and
14 what is going on in France and ecotoxicity and all that stuff.
15 I think you need to be limited to what the testimony you
16 elicited about this document.

17 **MS. MOORE:** Well, Your Honor, if we could, we go
18 through -- we could have a meet-and-confer with the Defense
19 this afternoon and see if we can meet out an agreement as to
20 what they believe --

21 **THE COURT:** I think at this point in the trial, I
22 think that it's -- we are simply going to apply that principle
23 to it. So you can call out the testimony you elicited on it.

24 **MR. STEKLOFF:** Then we have the same objection, Your
25 Honor, to -- for 791. I know, for example --

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1 **THE COURT:** And this came in through?

2 **MS. MOORE:** From Guard, who is the corporate
3 representative, Your Honor.

4 **THE COURT:** Okay.

5 **MS. MOORE:** This is -- this is about financial.

6 **THE COURT:** Right.

7 **MS. MOORE:** And I would ask not to be limited -- I
8 mean, obviously I'm not going to bring up a product that is not
9 relevant; but I do think that this presentation, which was put
10 together and then produced in response to a 30(b)(6) notice on
11 financials is relevant and should come into evidence.

12 **THE COURT:** Well, just because it was produced in
13 response to 30(b)(6) doesn't mean it is admissible.

14 **MS. MOORE:** Well, that's true, Your Honor. But the
15 foundation was laid, and it is directly on point as to Roundup
16 sales.

17 **MR. STEKLOFF:** And just to be clear, Your Honor, they
18 showed, I believe, at the minimum page 4 to the jury, and so --
19 and they elicited testimony about the Roundup sales discussed
20 on that chart. So I think the same rule would apply. But I
21 think there is a lot of -- again, there is a lot of products in
22 this that have not been discussed and are not part of this
23 trial and are not products -- specific Roundup products that
24 Mr. Hardeman used. So I don't know why the rest of this would
25 come in.

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1 But -- I mean, again, subject to our prior objections and
2 deposition designations, I have no problem sitting here now to
3 the charts in this document that were shown to the jury during
4 Mr. Guard's testimony.

5 **THE COURT:** I mean, this one even more than the one I
6 was just looking at -- which I think was 788 -- has just tons
7 of extraneous stuff in it.

8 **MS. MOORE:** What we would ask, Your Honor, is that we
9 be allowed to admit into evidence on 791, the cover page, which
10 is Roundup products line review; and then page 4, which was
11 shown to the jury, which is Roundup dollar sales; and then page
12 8, which is the concentrate, which is what Mr. Hardeman used.

13 **THE COURT:** Any objection to that? I mean, this is a
14 little different from like a report that has a bunch of
15 information jumbled together. I mean, this is a slide
16 presentation. If you are just talking about one slide from the
17 presentation that -- about which testimony was elicited, what
18 is the problem with that?

19 **MR. STEKLOFF:** Well, I have no objection to the cover
20 page or page 4 going back. I don't believe page 8 was shown to
21 the jury, and I'm not sure --

22 **THE COURT:** What is page 8 again?

23 **MS. MOORE:** Page 8 is the concentrate. And it has the
24 unit sales 1999, and it has the amount -- I can hand that to
25 you, Your Honor, if you want to see it.

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1 **MR. STEKLOFF:** It has unit sales and dollar sales for
2 all concentrates in 1999 with a projected growth rate in 2000.
3 We are picking one year out of the 26 years. I'm not sure why
4 that -- given the other evidence they have that goes to the
5 financial condition for punitive -- why this is necessary.

6 **MS. MOORE:** I mean, Your Honor, as you recall, we
7 wanted to put into evidence as a stipulation that the sales now
8 are \$2 billion a year, and they would not agree to that. And
9 so we have gone back and, you know, this is clearly the
10 projected growth going out to 2000 on Roundup concentrate,
11 which is what Mr. Hardeman used. I do think that is relevant
12 and should come into evidence.

13 **THE COURT:** Okay. The -- whatever you elicited
14 testimony about from there, you can pull those slides and admit
15 them into evidence.

16 (Trial Exhibit 791 received in evidence)

17 **MS. MOORE:** Okay. Thank you, Your Honor.
18 I think that's it on exhibits, Your Honor.

19 **THE COURT:** Could I ask also on 788, could I just take
20 one more look at that again?

21 **MR. STEKLOFF:** Yes, Your Honor.

22 **THE COURT:** If you could, tell me which slides
23 testimony was elicited about.

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

25 **MR. STEKLOFF:** I need to confirm, but I think the

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1 cover e-mail, and at a minimum, just part of the third page,
2 that middle part that starts, Roundup is key to Monsanto in
3 many aspects. And then --

4 **THE COURT:** Okay. So on the theory that I just
5 articulated about 791, what would be the problem -- assuming
6 our memory is correct that it was just about the elicited
7 testimony about the cover page and about this one slide.

8 **MS. MOORE:** It is more than one, Your Honor.

9 **THE COURT:** Of course, there are a number of other
10 slides in this presentation that are totally irrelevant, or
11 largely irrelevant, to this case, but if they elicited
12 testimony about this one slide, why can't that be admitted into
13 evidence?

14 **MR. STEKLOFF:** I understand -- I mean, again,
15 preserving our prior objections about all of the testimony
16 about this document.

17 **THE COURT:** Yes.

18 **MR. STEKLOFF:** I don't object to that.

19 **THE COURT:** Okay. So you can -- so that part of it
20 can be admitted into evidence.

21 (Trial Exhibit 788 received in evidence)

22 **MS. MOORE:** We will go back and look at that, Your
23 Honor.

24 **THE COURT:** I will give this back to you, Kristen.

25 **THE CLERK:** Did we address 1668?

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1 **MR. STEKLOFF:** 1668, let me see if that -- 1668. We
2 will sustain it and --

3 **THE COURT:** Go ahead and make it.

4 **MS. MOORE:** Objection.

5 **MR. STEKLOFF:** It is a JNPR, one of the WHO reviews
6 prior to 2015 where they said --

7 **THE COURT:** Okay. Same ruling as to that sustained as
8 the other many documents that we have talked about.

9 **MR. STEKLOFF:** Yep.

10 **MS. MOORE:** I think that's it for exhibits, Your
11 Honor.

12 **MR. STEKLOFF:** Yes, we agree, Your Honor.

13 **THE COURT:** Okay. On the Portier thing, my view after
14 looking through the testimony that you-all -- that both of you
15 submitted and looking through the letter a little bit more, I
16 kind of -- I think I foreshadowed my thinking on this in a
17 comment I made earlier, but I think it would just be pretty
18 weird to put in the document when every sentence of it is
19 redacted except for that one.

20 You elicited testimony from Portier about the contents of
21 that sentence, about that very sentence. I think the testimony
22 he gave about that sentence and about the conclusion can come
23 in.

24 **MR. STEKLOFF:** Okay.

25 **THE COURT:** But the -- but I don't think under the

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1 circumstances it makes sense under 403 to admit the document.

2 So just to be very clear what I'm saying: I think that if you
3 look at the testimony you gave me, you have got -- the passage
4 from 854 to 855 can come in. The passage from 855 to 856,
5 line 1 can come in.

6 **MR. STEKLOFF:** Okay.

7 **THE COURT:** Then the passage from 862, line 14 to 862,
8 line 19 can come in.

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

10 **THE COURT:** And the rest of it cannot.

11 **MS. MOORE:** Then, Your Honor, we will -- we will look
12 at our counters and get those to them this afternoon. I don't
13 think it will be, you know, even a minute.

14 **THE COURT:** Okay.

15 **MS. MOORE:** Thank you.

16 **MR. STEKLOFF:** Then I realize some of this may -- if I
17 can be excused, I realize --

18 **THE COURT:** Of course.

19 **MR. STEKLOFF:** -- some of this may change. But to the
20 extent there needs to be a discussion about sort of the
21 limitations of closing arguments in Phase Two --

22 **THE COURT:** You don't want to be involved in that
23 discussion.

24 **MR. STEKLOFF:** No. I'm hoping we can have that now --

25 **THE COURT:** Okay. Sure.

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1 **MR. STEKLOFF:** -- to the extent -- yes.

2 **THE COURT:** I have a couple items, but why don't --
3 does anybody -- do you want to raise any concerns, either side
4 raise any concerns they have about what might be said?

5 **MR. STEKLOFF:** No. I mean, obviously I know this is
6 sort of a fundamental rule on the punitive side. I think I
7 just want to -- we have discussed various arguments that might
8 be made, both here and earlier in the case, but I think just
9 the golden rule should not be violated. I know that sort of
10 goes without saying. I think that would be the one place I
11 would have to pop up, and I'm hoping that doesn't happen. In
12 terms of trying to put the jurors in the mindset of
13 Mr. Hardeman and the anxiety he experienced related to his
14 diagnosis or future diagnoses, those types of arguments I think
15 should be obviously precluded.

16 **THE COURT:** What do you mean by -- when you say
17 putting them -- urging them to go into his mindset, what do you
18 mean?

19 **MR. STEKLOFF:** Well, I don't think -- I think they are
20 allowed to --

21 **THE COURT:** You are referring to it as the golden
22 rule, which suggests that I should be more familiar than I am,
23 so go ahead.

24 **MR. STEKLOFF:** Sure. So I think that it would be
25 appropriate to ask that Mr. Hardeman be compensated, for

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1 example, the anxiety he and Mrs. Hardeman experience every time
2 they go for his -- for his check-ins to make sure he remains in
3 remission or has hadn't any new diagnoses. I'm sure they are
4 going to argue that. I'm sure they are going to argue that he
5 is going to have to experience that for many years. I think
6 that is within the bounds and does not violate any sort of
7 golden rule on noneconomic damages.

8 I think -- the argument I think that would be
9 inappropriate would be to say, you know, almost is to
10 personalize it with the jurors, and say, Imagine if you were in
11 that position or if you had to go through this or if it was
12 your family member or if you and your spouse or significant
13 other were experiencing some of this, that -- you know, that
14 you should somehow factor that into the pain and suffering that
15 the Hardemans are going through, and I think that is barred.
16 So I just want to make sure we don't sort of cross that
17 threshold there.

18 **THE COURT:** Agreed.

19 **MS. MOORE:** I'm not going to ask the jury to put
20 themselves in Mr. Hardeman's shoes.

21 **MR. STEKLOFF:** And then the other argument I think
22 that sort of jumped out was this argument that Your Honor
23 raised earlier about IARC. I think given the lack of evidence
24 that has come in about the IARC review, while I think they can
25 reference the IARC review, I don't think -- in some context I

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1 don't think it would be appropriate, given how Phase Two has
2 played out, to say that Monsanto essentially should have known
3 or done what -- performed what IARC did or it was therefore
4 known or knowable to Monsanto based on what IARC did prior to
5 2012 because they haven't elicited that.

6 **THE COURT:** I mean, I think you might be right about
7 that. I just don't remember how the evidence came in either
8 during Phase One or Phase Two on what IARC considered. I think
9 in Phase Two basically nothing came in on what IARC considered,
10 right?

11 **MR. STEKLOFF:** That's correct. And I think it was --
12 appropriately so -- limited in Phase One, but I don't think
13 there is the evidence to be able to support any such article --

14 **THE COURT:** There was evidence that IARC conducted its
15 own meta-analysis, right?

16 **MR. STEKLOFF:** Yes.

17 **THE COURT:** And IARC's own meta-analysis consisted of
18 considering, I believe, it came in -- I may be
19 misremembering -- but I believe IARC's own meta-analysis was
20 analysis of the data from the various epidemiological studies
21 that had already been conducted; is that right?

22 **MS. MOORE:** I think that's right, Your Honor. And
23 also under Dr. Portier, he actually testified that IARC
24 considered the same as what Chang did in that meta-analysis,
25 which is the one that Monsanto had funded. So that all was

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1 elicited during Phase One.

2 **THE COURT:** So, I mean, it is kind of a -- there is a
3 little bit of a strange disconnect between the evidence you --
4 that came in on what IARC considered and the evidence that you
5 believe the jury should consider, right, because what -- you
6 are saying you ought to not just consider the epidemiology, but
7 the toxicology and the genotox stuff.

8 And, of course, IARC did consider all of that. But the
9 only evidence that came in in Phase One on what IARC
10 considered -- and this was never -- we never re-visited this in
11 Phase Two -- was the epidemiology data that the jury
12 considered.

13 **MS. MOORE:** Right. And --

14 **THE COURT:** So I guess it probably is okay for you to
15 say -- I mean, again, if there is a dispute about this, we
16 should hash it out this afternoon. We should look at how the
17 evidence came in. But I'm -- at least based on my memory of
18 it, it probably is okay for you to say, Look, you know, the
19 folks at IARC looked at all the epidemiology stuff that was in
20 existence and that -- and that Dr. Weisenburger testified to
21 you about in Phase One, and the IARC came to its conclusion
22 based in part on that.

23 Of course, the problem is -- as I'm talking, I'm
24 remembering what the big problem is, which is that the IARC
25 concluded that the epidemiological evidence was limited, right?

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1 And that -- if I recall correctly, the IARC came to, after
2 significant amount of discussion, sort of a stronger conclusion
3 about the animal toxicity evidence, right?

4 **MS. MOORE:** Right. But we also -- I guess there are
5 two things I would say, Your Honor. First to that point
6 directly is that, as you will recall, in Phase One, we
7 attempted to designate Dr. Blair and Dr. Ross who actually
8 participated in IARC. And their testimony is very clear as to
9 what IARC considered and relied on in forming their conclusions
10 in all three of those categories. So if that is an issue, we
11 would like the opportunity to play, like, seven minutes or so
12 of Dr. Blair or Dr. Ross tomorrow morning. That would be very
13 brief.

14 But regardless of that, Your Honor, our position is the
15 jury instruction is about what Monsanto knew or should have
16 known during the relevant time period. And for that purpose,
17 you know, what IARC relied on or did not rely on really doesn't
18 matter.

19 **THE COURT:** Okay.

20 **MS. MOORE:** I mean, it is more about here is all of
21 the information out here for all these years, and they still
22 say there is nothing.

23 **THE COURT:** Okay.

24 **MS. MOORE:** So I don't know --

25 **THE COURT:** So it sounds like --

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1 **MS. MOORE:** It is not hinging on IARC.

2 **THE COURT:** It sounds like I was maybe anticipating an
3 argument that you weren't planning on making anyway.

4 **MS. MOORE:** Which made me nervous, which made me think
5 I missed something.

6 **THE COURT:** No. I think that's right.

7 **MS. MOORE:** That's the instruction.

8 **THE COURT:** Right. That here is all this stuff that
9 Dr. Weisenburger told you about and you reached your
10 conclusion --

11 **MS. MOORE:** And Dr. Ritz and Dr. Portier.

12 **THE COURT:** If you are capable of reaching that
13 conclusion, why is Monsanto not capable of reaching --

14 **MS. MOORE:** Right.

15 **THE COURT:** Fine. Okay.

16 **MR. STEKLOFF:** I mean, I don't like the argument, but
17 I have no objection to --

18 **MS. MOORE:** It is fair.

19 **MR. STEKLOFF:** -- to making that argument that was
20 just articulated, not tieing it IARC.

21 **THE COURT:** Okay. Fair enough.

22 **MS. MOORE:** We are all on the same page.

23 **THE COURT:** Okay. So do you have anything else?

24 **MR. STEKLOFF:** I have nothing else, Your Honor.

25 **THE COURT:** What about you?

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1 **MS. MOORE:** The only thing we have, Your Honor, is we
2 submitted a letter brief last night about this.

3 **THE COURT:** Oh, yeah.

4 **MS. MOORE:** The motion in limine on there. And it is
5 really saying, as you recall, the cross-examination, there was
6 some questions about ant spray and wasp spray and gasoline,
7 motor oil; but there wasn't anything -- we would ask for a
8 motion in limine to exclude or preclude any arguments that
9 those had labels that warned about cancer.

10 **THE COURT:** I don't think that's why they pursued that
11 line of questioning. I mean, I assume what they intend to
12 argue from that -- and what I assume is appropriate to argue
13 from that -- is that there was this dispute about how seriously
14 Hardeman took the Roundup label, and there was conflicting
15 testimony from Mr. Hardeman about whether he really looked at
16 the label or how much he really looked at the label. And you,
17 you know -- and you saw that he used these other products that
18 one might be concerned about, and he -- he testified that he
19 never looked at the label or he doesn't think he looked at the
20 label for any of those other products that you might also be
21 considered about. And that sheds light on his testimony about
22 his reliance on the Roundup label.

23 I mean, I think that -- is that basically what your
24 argument is?

25 **MR. STEKLOFF:** I couldn't have said it better.

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1 **MS. MOORE:** And that --

2 **THE COURT:** What is wrong with that?

3 **MS. MOORE:** That assumes facts that are not in
4 evidence, Your Honor, because those other labels, there is
5 absolutely no evidence whatsoever that they contain any kind of
6 warnings, that they have any warning of cancer.

7 **THE COURT:** I mean, jurors are allowed to use their
8 common sense. And, you know, if you are spraying bug spray
9 inside the house -- or what were the other examples?

10 **MS. MOORE:** It was wasps, ants, using motor oil, and I
11 think gasoline for your lawn mower.

12 **THE COURT:** Right.

13 **MS. MOORE:** And paint.

14 **THE COURT:** And paint, right.

15 **MS. MOORE:** And paint.

16 **THE COURT:** I mean, why can't a jury use their common
17 sense and say, Well, I don't know whether that stuff causes
18 cancer or not, but if Mr. Hardeman really cared about whether
19 the products he was using were dangerous, why didn't he read
20 the labels of those products?

21 **MS. MOORE:** I think --

22 **THE COURT:** Now, I think his testimony was a little --

23 **MS. MOORE:** He didn't say he didn't.

24 **THE COURT:** He was a little unequivocal about whether
25 he did, but the point for purposes of our discussion is why is

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1 that not an appropriate argument for Monsanto to make, based on
2 how the evidence came in? As long as they don't do anything to
3 suggest that, in fact, those products do cause cancer. That
4 would, of course, be inappropriate; but I didn't take them to
5 be --

6 **MS. MOORE:** And we weren't sure --

7 **THE COURT:** -- going in that direction.

8 **MS. MOORE:** We weren't sure if they were going there
9 because from the examination it appeared that they were
10 assuming -- and as the Court is aware under the Ninth Circuit,
11 you have to have expert testimony when you are talking about
12 whether something causes cancer. And so just to say -- you
13 know, just kind of drop it out there and say, Well, you are
14 using this ant spray and basically implying that that causes
15 cancer too; and you didn't read that label so, you know, come
16 on now -- that's where we have the issue, that they don't need
17 to stand up -- they cannot stand up in closing and say, Well,
18 you know, he says that he would have used it if we put cancer
19 on there.

20 **THE COURT:** Well, I thought you were trying to prevent
21 them from arguing this point altogether.

22 **MS. MOORE:** No. I --

23 **THE COURT:** I mean, if all you're doing is preventing
24 them from arguing or implying that these products cause --

25 **MS. MOORE:** Yes.

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1 **THE COURT:** -- cancer, that's fine. I mean, I didn't
2 take them to be intending to do that, and I'm happy to tell
3 them that they can't do that because that would not be
4 appropriate.

5 **MR. STEKLOFF:** I was not intending on doing that.

6 **MS. MOORE:** Okay. All right.

7 I mean, so just to be clear, then, you know, if they want
8 to make the argument "We don't believe he reads labels," then
9 that's one thing and, I mean, you know, they can try to attack
10 him on that; but to go to the next step and say "And the reason
11 that's important or what we're implying is, you know, he would
12 have still used it if we had put a cancer label on there,"
13 that's where I have the issue because you still have to have
14 proof that these other products had warnings on them, and
15 there's no evidence at all that these products had warnings.

16 **THE COURT:** Well --

17 **MR. STEKLOFF:** That, I think, is a different -- I
18 think I --

19 **THE COURT:** Yeah. I don't understand that last point
20 because the point is he's using these products that one might
21 be concerned about, and he's not reading the labels; and so you
22 should not -- you should not take -- I don't know how they
23 would say it, but you shouldn't take seriously when he says, "I
24 read this label and had it said 'cancer,' I wouldn't have used
25 the product," because you, jury, could conclude that he never

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1 would have read the label in the first place, that he never did
2 read the label in the first place.

3 **MS. MOORE:** But what it infers is that the reason they
4 picked out these types of products is that they're inferring
5 that those actually have cancer warnings on them when there's
6 nothing in evidence.

7 **THE COURT:** No, because those are the kinds of
8 products that you might say, "Hey, maybe I should stop and read
9 the label before I use this product." That's the point and
10 that's appropriate.

11 **MS. MOORE:** Okay. All right. But there's not going
12 to be argument that they, in fact, did warn of cancer or had
13 any -- or even had any warnings on them.

14 **THE COURT:** I think you're chasing ghosts at this
15 point.

16 **MS. MOORE:** Okay. That's fine. All right. I
17 understand, Your Honor.

18 The other thing -- I don't think I had anything else for
19 closing, Your Honor, but we do have that life table issue too
20 that we need to --

21 **THE COURT:** Okay. On closing, I just -- I wanted to
22 revisit a couple things. It sounds like the evidence came in
23 pretty clearly that to this day -- I mean, there's this one
24 phrase that Ms. Wagstaff kept using during opening -- right? --
25 which is "To this day, Monsanto hasn't conducted an

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1 epidemiological study, a tox study," whatever, long-term,
2 whatever. It sounds like people are in agreement that that --
3 kind of like the EPA continues to say it's safe, the IARC, you
4 know, says it's not safe, Monsanto still hasn't done any
5 studies --

6 **MS. MOORE:** And there's RFAs to that effect too.

7 **THE COURT:** -- we're sort of in agreement on that
8 point, right, about the state of the evidence?

9 **MR. STEKLOFF:** Yes, Your Honor.

10 **MS. MOORE:** I think so.

11 **THE COURT:** So the only other concern I had was about
12 this issue of post-2012 evidence as it relates to Monsanto's
13 arguments about punitive damages. You know, it strikes me that
14 the post-2012 evidence has some relevance to whether Monsanto
15 should have known pre-2012 about the risk.

16 So, in other words, well, EPA has been approving -- you
17 know, the whole time between 1974 and 2012, the EPA approved
18 it. The EPA concluded it was safe. In fact, they still
19 haven't, you know, banned it. And so the fact that they still
20 haven't banned it is relevant to whether Monsanto should have
21 known something way back in 2012. In other words, hey, I
22 didn't even -- you know, it hasn't even happened now, let alone
23 2012; right?

24 **MS. MOORE:** Yes. Right.

25 **THE COURT:** So it strikes me that that -- it's sort of

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1 appropriate for the jury to know the current state of affairs,
2 both for that and for the punitive damages issue; but what I
3 think would probably not be appropriate is for -- well, what
4 position do you take -- let me just ask the question.

5 What position do you take about the relevance of the EPA's
6 current conclusions to punitive damages?

7 **MR. STEKLOFF:** Our position -- so I think one way in
8 which this will come up is in the section on mitigating
9 circumstances in the punitive damages instruction, and you had
10 asked -- I think may ask momentarily why that should come in.

11 I think that the EPA's current position is mitigating
12 evidence, that even if the jury were to find that between --
13 somehow -- at some point or the entire time period between
14 1986-2012 that Monsanto acted recklessly -- I know that's not
15 the exact phrase -- that the fact that the EPA has still --
16 still takes the position that it does -- mitigates Monsanto's
17 failure to act during that relevant time period 1986 to 2012.
18 So I think -- whether it ties directly to the instruction on
19 mitigating circumstances or not, whether that sentence is read
20 to the jury or not, I think the concept applies.

21 **THE COURT:** But the -- I mean, maybe this is a
22 discussion we should have for, you know, later with Mr. Kilaru
23 or whatever, but I don't know.

24 I mean, as I recall the instruction on punitive damages,
25 this concept of mitigation comes in when you're deciding the

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1 amount. So if the jury has already decided that Monsanto's
2 conduct was reprehensible such that punitive damages should be
3 awarded, then is the -- despite the fact that EPA has been
4 approving it for 50 years or whatever, what -- then does EPA
5 approval still have relevance to sort of the question whether
6 there are mitigating circumstances that should affect the
7 amount of the punitive damages?

8 **MR. STEKLOFF:** I think it does because I think we are
9 going to hear the argument given the up-to-today language that
10 we just discussed, that part of the reason punitives need to be
11 assessed is to send a message today. In other words, put aside
12 1986 to 2012, today the only way to send a message to Bayer or
13 Monsanto -- I don't know how they're going to phrase it -- is
14 to give some huge award in punitive damages.

15 And I do think that it's relevant that, I mean, to this
16 day, EPA and every other foreign regulator has said no, and I
17 think that goes to the amount. It's all part of the calculus
18 to me of what message needs to be sent up to today since I
19 think we're going to hear that phrase a lot.

20 **THE COURT:** By the way, I assume everyone agrees it
21 would not be appropriate to say "send a message to the EPA."

22 **MR. STEKLOFF:** I agree with that.

23 **THE COURT:** You agree with that.

24 **MS. MOORE:** I'm not going to say that, Your Honor.

25 If they're trying to argue that the punitive damage amount

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1 should be lowered because the EPA has continued to approve the
2 product, including, you know, 2017 or 2018, then we absolutely
3 should have the right on rebuttal to show the relationship with
4 Jess Rowland.

5 **THE COURT:** Well, I mean, again, we've sort of --
6 we've struck a balance on what can come in and what can't come
7 in, and I've precluded them from bringing in all the details
8 of, you know, how the EPA reached its conclusion after the IARC
9 and all that stuff, and that's sort of -- that's a balance that
10 we've struck and we've, you know, kind of crossed that bridge
11 at this point.

12 **MR. STEKLOFF:** If I can make a suggestion. I mean,
13 maybe the point is that they shouldn't -- in terms of the
14 amount of damages -- the amount of damages, they shouldn't be
15 allowed to say "up to today" because the amount of damages
16 really has to apply to Mr. Hardeman and it needs to apply to
17 that time period that he was using it, 1986 to 2012.

18 And to be clear, I think the mitigating circumstances
19 sentence can be debated momentarily, but I don't plan on
20 arguing -- I mean, I don't -- while I think that I could argue
21 it, I don't plan on arguing that the amount of punitive
22 damages -- I mean, you're asking just a sort of general
23 question. I don't need to argue and don't -- I wasn't planning
24 on arguing that the amount of punitive damages should be lower
25 because of the EPA's approval of today. I think could I

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1 hypothetically? Yes, but I think this is -- we don't need to
2 fight it because I don't need to argue that.

3 But I actually think this raises a separate question,
4 which is whether they should be allowed to argue somehow that
5 the amount of punitive damages should be tied to the conduct
6 today. It should stop at 2012. They can argue --

7 **THE COURT:** Well, if they can say "You need to put a
8 stop to this" -- right? I mean, you know, the fact is, and
9 everybody -- and it's in evidence -- right? -- Roundup is still
10 being sold today. Monsanto continues to disagree with the view
11 that it causes cancer. Monsanto continues to disagree with the
12 view that there should be a warning. And if -- you know, and
13 part of punitive damages is to deter future misconduct --
14 right? -- so to deter the kind of misconduct -- alleged
15 misconduct that Monsanto engaged in at the hands of people like
16 Mr. Hardeman up to 2012.

17 So I don't know. I mean, I -- you know, I'm not sure
18 there's a way -- I'm not sure it would be reasonable to
19 restrict that.

20 **MR. STEKLOFF:** I mean, I guess at least on the conduct
21 side, whether Monsanto's behavior constituted the standard for
22 punitive damages, I think that clearly needs to stop at 2012.
23 I don't think in that context the "up to today" arguments
24 should be made because that -- I think that's the whole point
25 of the post-use conduct.

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1 Maybe in the amount. I think now we're focusing on the
2 amount of punitive damages, if the jury gets there, that's
3 different.

4 But to be clear, I don't need to argue that because -- I
5 mean, I think I should be allowed to argue a lot about what the
6 EPA today -- I mean, a lot -- the EPA in response to that
7 argument about up to today, but I don't know if I'm going to
8 directly tie it to somehow, therefore, you should give less
9 money in punitive damages.

10 **MS. MOORE:** And, Your Honor, as you were saying, I
11 mean, what's in evidence right now before the jury is their
12 request for admissions where they've admitted they haven't
13 tested. You know, they haven't done the long-term tests.
14 They're not precluded from doing those tests simply because of
15 the EPA.

16 I mean, the EPA is not on trial. It's Monsanto. It's
17 Monsanto's duty, not the EPA's duty. And, in fact, it's not a
18 defense for them to say, "Well, the EPA..."

19 And so the fact that they still haven't tested and they
20 still say there's absolutely no evidence after, you know, the
21 jury has heard all this and the jury has already made a
22 decision on causation, I think that's fair game on closing
23 argument for me to be able to say.

24 **THE COURT:** "Put a stop to this. When you're deciding
25 whether to award punitive damages and how much to award" --

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1 **MS. MOORE:** Right.

2 **THE COURT:** -- "put a stop to it."

3 **MS. MOORE:** Yeah.

4 **THE COURT:** I mean, I think that's probably right.
5 I'll think about that a little bit more.

6 **MR. STEKLOFF:** Just because the jury knows something
7 because the way the trial plays out doesn't mean that that's an
8 appropriate argument. So --

9 **THE COURT:** Well, what's inappropriate about it? I
10 mean, what's --

11 **MR. STEKLOFF:** Again, put aside the amount. I think
12 that -- whether or not Monsanto engaged in the type of behavior
13 that necessitates or allows for punitive damages, in other
14 words, whatever question there is, has plaintiff met his burden
15 by clear and convincing evidence that he is entitled to
16 punitive damages -- I don't have the verdict form right in
17 front of me -- that should -- the argument about that question
18 I think, under all of the precedent that you relied on in
19 making the post-use conduct inadmissible, forces them to argue
20 pre-2012 or earlier behavior.

21 **THE COURT:** Well, but, I mean, again, it's a difficult
22 needle to thread, but what if the facts of this case were
23 different? What if Mr. Hardeman got NHL in 2012, and then the
24 IARC classification came out in 2016? And then in 2017
25 Monsanto said, "You know what? We don't -- you know, we're

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1 still not really sure that this causes NHL, but we are going to
2 put a warning on the label because, you know, IARC is a
3 respected scientific body and, you know, we -- you know, the
4 issue is continuing to be studied; and in the meantime, we want
5 to be careful with people's safety and so we're going to put a
6 warning label on here that says 'The IARC has concluded that
7 Roundup is a probable carcinogen. You know, if you're
8 concerned about this, use protective equipment,' " blah, blah,
9 blah. Whatever.

10 If this case were in trial right now and Mr. Hardeman were
11 seeking punitive damages and you had done that, surely it would
12 be appropriate for you to say, "When you consider the issue of
13 punitive damages, you should consider the fact that we are
14 now -- you know, after the IARC did its thing, we're now --
15 we've now got this on the label." Right?

16 **MR. STEKLOFF:** But I think that it would be --

17 **THE COURT:** "And when you're deciding the amount of
18 punitive -- they've told you to put a stop to this. You know,
19 Ms. Moore just got up in front of the jury and said, 'You need
20 to put a stop to this.' Well, look at what we're doing now.
21 So you should consider that both with respect to whether to
22 award punitive damages and with respect to how much."

23 **MS. MOORE:** And that's the mitigating.

24 **MR. STEKLOFF:** Right. Exactly. I think it would go
25 to the amount only. In other words, if the circumstance that

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1 you describe happened, they would stand up and say, "We still
2 get to argue for punitive damages. They should have done
3 everything that they did in 2016," under your hypothetical,
4 "well before 2012 because it was too late for Mr. Hardeman; and
5 everything that they did before 2012 was egregious and terrible
6 and reckless and malice. And the fact that they did it in
7 2016, well, that's too little too late. So you need to award
8 punitive damages."

9 Now then they would make an argument about what the
10 damages should be, and I think that we would then be entitled,
11 based on the mitigating circumstances, to say, "Well, really,
12 they want you to send a message? Look at what's happening now.
13 We already got the message," or whatever.

14 **THE COURT:** Right. But by the same token, I mean, if
15 you can say, "Award less in punitive damages because however
16 reprehensible our conduct was in 2012, look what a good citizen
17 we are now in 2017," then surely they can say, "And when you're
18 deciding how much to award in punitive damages, you can
19 consider the fact that this continues to be on the market and
20 there's no label"; right?

21 **MR. STEKLOFF:** But I think not going back to where we
22 were, I think I was arguing that they should be limited to
23 making that type of argument in the amount argument. I don't
24 think that the fact -- they shouldn't be allowed to make it as
25 part of the reprehensibility argument.

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1 **THE COURT:** Oh. I'm sorry. I didn't understand that.

2 **MR. STEKLOFF:** That, I think needs to stop at 2012.

3 **THE COURT:** Yeah.

4 **MR. STEKLOFF:** The argument about whether Monsanto
5 acted with malice and oppression and everything else needs to
6 stop at 2012, and it shouldn't tie to, you know, the fact that
7 there's no warning on the label today.

8 **THE COURT:** "But when you're considering amount, you
9 know, still to this day they haven't done an epidemiology
10 study. Still to this day they haven't done, you know, a
11 two-year rat study or whatever it is. And, you know, still" --

12 **MS. MOORE:** And there's no warning.

13 **THE COURT:** -- "to this day there's no warning label
14 and they continue to sell the product." You can say "Still to
15 this day" -- and this goes to the original question that I
16 asked about mitigation -- "Still to this day EPA says we can do
17 this."

18 **MR. STEKLOFF:** Right, and everyone else, and they all
19 say that it doesn't cause cancer. But, yes, I think I can
20 argue that.

21 **THE COURT:** Okay. I get that. I get that.

22 **MS. MOORE:** And just to make sure I understand,
23 Your Honor, so -- but I do think I should be able to argue that
24 it's reckless on their part that from 1975 to 2012 there was
25 all of this information out there and they still say there's no

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1 evidence. And, in fact, they said that in this courtroom, that
2 that there's no evidence.

3 **THE COURT:** I think what he's saying, and I think this
4 is a good point, is when they are determining whether
5 Mr. Hardeman is eligible for punitive damages, whether
6 Monsanto's conduct was reprehensible, that is the conduct that
7 harmed Mr. Hardeman. That's what -- so you say: What is the
8 conduct that was reprehensible? It has to be the conduct that
9 harmed Mr. Hardeman. And so you really are talking about
10 conduct that took place up until 2012, but it does seem like --
11 and this is not a nuance that I had focused on until this
12 discussion --

13 **MS. MOORE:** It is definitely a nuance, yeah.

14 **THE COURT:** -- I think it's exactly right, that, you
15 know, when you're talking about -- it's when you start talking
16 about the amount of punitive damages that it becomes
17 appropriate to say, you know, that you can take -- and it
18 sounds like you agree with this, that it becomes appropriate to
19 say they're still doing it.

20 **MS. MOORE:** Right.

21 **THE COURT:** And it becomes appropriate for them to
22 say, "Yeah, the EPA is still letting us do it."

23 Is that basically your point?

24 **MR. STEKLOFF:** Yeah. I mean, Mr. Kilaru is showing me
25 the current draft instructions, which I think talk about

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1 post -- the relevance of post-2012 conduct to punitive damages
2 generally on page 22 --

3 **THE COURT:** Right.

4 **MR. STEKLOFF:** -- but --

5 **THE COURT:** But that's my current draft, which was
6 before we had this discussion.

7 **MR. STEKLOFF:** Understood.

8 **THE COURT:** I think the point you're making is a very
9 good one, that that -- you know, that your EPA stuff is
10 relevant to mitigation.

11 **MR. STEKLOFF:** Yes.

12 **THE COURT:** The fact that you haven't changed your
13 behavior is relevant to the amount of punitive damages; but on
14 the issue of reprehensibility, is that --

15 **MR. STEKLOFF:** Yes.

16 **THE COURT:** Do I have that basically right?

17 **MR. STEKLOFF:** Yes, Your Honor. I think that's right.
18 I mean, I -- yes. Given that "to this day" stuff has come in
19 but also I don't think it's limited to EPA. I think regulators
20 around the world, both through affirmative evidence, for
21 example Europe, but also by omission, also haven't said that
22 it's carcinogenic or required a warning, I think I can argue
23 that.

24 And so I think that's where we've been now for a couple
25 days and that's where we are. So this distinction between

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1 whether or not the conduct qualifies for punitive damages
2 should be limited to 2012. The amount, I think, that's where
3 we've been and that's where we are.

4 **THE COURT:** Well, we'll think about this a little more
5 when we're discussing the actual instructions, but I think it
6 probably makes sense to tweak the language that I inserted
7 about post-use conduct maybe to make that sort of a little more
8 clear. I mean, we can discuss it further, but --

9 **MS. MOORE:** And just two things, Your Honor, and I
10 want to make sure I'm clear on this. Because my argument is
11 that, you know, during that whole time that Mr. Hardeman was
12 using it, they hadn't done the tests. They were ignoring all
13 the data and the science out there, and their position is
14 there's no evidence across the board even though you have all
15 that.

16 And it sounds like I can say all that because --

17 **THE COURT:** As to the time period leading up to --

18 **MS. MOORE:** 2012.

19 **THE COURT:** -- 2012, yes.

20 **MS. MOORE:** Yes. Yes.

21 I guess where I want to make sure that I understand,
22 because I think it is a very fine nuance, their position at
23 this trial has been there is no evidence. And so that's what I
24 wanted to argue, is that their position is there's no evidence,
25 and I should be able to do that when I'm talking about the

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1 knowledge or should have known up to 2012. Their position is
2 there's no evidence. Is that accurate? I just want to make
3 sure.

4 **THE COURT:** I think so. I mean, I think Monsanto's
5 consistent position from 1974 until today --

6 **MS. MOORE:** They've been saying the same thing.

7 **THE COURT:** So their position has always been there's
8 no -- you know, there's no evidence, but I think -- you know, I
9 think you need to kind of -- when you're talking about whether
10 the conduct was sufficiently reprehensible to justify an award
11 of punitive damages, you need to limit yourself to the conduct
12 that was engaged in pre-2012.

13 **MS. MOORE:** I understand. And I guess, you know, to
14 be really clear about it, like Dr. Reeves, their corporate
15 representative, he testified, it's a party admission, that
16 their position is there's no evidence across the board, and I
17 think that goes right to the position they were doing up to
18 2012.

19 **THE COURT:** Yeah. I mean, I understand the problem
20 you have because he testified in 2019; right?

21 **MS. MOORE:** Right, but that's --

22 **THE COURT:** I understand.

23 **MS. MOORE:** -- their position. It's their position in
24 2012. It's their position today.

25 **THE COURT:** Yeah.

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1 **MR. STEKLOFF:** But I don't think -- what I would say
2 is I don't think it's that complicated. I think she can say --
3 I don't agree with the characterization, but taking their
4 characterization, she can argue there was no -- they think that
5 the science up to 2012 demonstrated that none of that was
6 evidence of carcinogenicity. There was no evidence up to 2012
7 based on all the science that there was cancer.

8 **MS. MOORE:** Yeah. And my point is that came in
9 through Dr. Reeves. I mean, that's the evidence in the case.

10 **MR. STEKLOFF:** I mean, the slide was used at opening
11 and I can already imagine --

12 **MS. MOORE:** I just want to make sure.

13 **THE COURT:** You have to be able to use that kind of
14 testimony --

15 **MS. MOORE:** Yes.

16 **THE COURT:** -- to make your point about the
17 position --

18 **MS. MOORE:** Exactly.

19 **THE COURT:** -- that Monsanto -- Monsanto's approach to
20 the evidence up to 2012, I agree with that.

21 **MS. MOORE:** Yes.

22 **THE COURT:** But you have to couch it in terms of
23 Monsanto's conduct --

24 **MS. MOORE:** Up to 2012.

25 **THE COURT:** -- up to 2012.

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1 **MS. MOORE:** I understand. And then when I get to
2 talking about "Here's the amount for punitive damages," then I
3 go to, "You know, and they still today, they still think
4 there's no evidence. Their position is they don't test. They
5 don't put a warning on." That's when I can get to that; is
6 that fair?

7 **THE COURT:** That's --

8 **MS. MOORE:** Okay.

9 **THE COURT:** I think that's right. I mean, like I
10 said, we can talk about it further as we're going through the
11 instructions, but I think that's a nice point that I didn't
12 really focus on when I was preparing the instructions.

13 **MS. MOORE:** And I appreciate the clarification.

14 The other point I just want to raise really quick is that
15 Mr. Stekloff just raised, he said "omission" and "evidence by
16 omission," and I wasn't -- when you're talking about foreign
17 regulatories, and that raised a concern to me --

18 **THE COURT:** Me too.

19 **MS. MOORE:** -- that he's going to stand up here and
20 argue that there are other countries or regulatory agencies
21 that they haven't even heard about that haven't found that. I
22 don't think that's appropriate.

23 **THE COURT:** Yeah. I would not think that it would be
24 appropriate to start talking about what Japan and India do.

25 **MR. STEKLOFF:** That was unclear. I think I can argue

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1 were there another -- they've heard about Europe. They've
2 heard about the EPA. But if there were some other regulator
3 around the world that had come in and said "You need to put a
4 warning on the product if you're going to sell it in our
5 country," they would have presented that. I think that's a
6 fair argument because they would have presented that.

7 **THE COURT:** That's probably right.

8 **MR. STEKLOFF:** That's what I meant by it. It's sort
9 of they have the burden, and they didn't present that evidence
10 because it doesn't exist; and had it -- so I think I can
11 argue -- that's what I meant by "omission." I'm not going to
12 affirmatively state what Japan or New Zealand or some other
13 entity does.

14 **THE COURT:** Okay.

15 **MS. MOORE:** Okay. All right.

16 **THE COURT:** So is that all you want to talk about?

17 Shall we maybe take a break and then get to the jury
18 instructions and verdict form and whatever else we need to talk
19 about?

20 **MS. MOORE:** That's fine. If you want to talk about
21 the life table when we talk about the jury instructions.

22 **THE COURT:** You want to talk about the life table?

23 **MR. STEKLOFF:** Mr. Kilaru was going to handle that.

24 **THE COURT:** Okay. Then why don't we take a break
25 right now --

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1 **MS. MOORE:** Okay. That will be great.

2 **THE COURT:** -- and then return in ten minutes.

3 **MS. MOORE:** Okay. Sounds good. Thank you,
4 Your Honor.

5 **MR. STEKLOFF:** And may I be excused, Your Honor?

6 **THE COURT:** Of course.

7 **MR. STEKLOFF:** Thank you very much.

8 (Recess taken at 2:55 p.m.)

9 (Proceedings resumed at 3:12 p.m.)

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

11 **THE COURT:** Okay. Shall we go through the jury
12 instructions one by one?

13 **MS. WAGSTAFF:** Your Honor, before we do that --

14 **THE COURT:** Yeah.

15 **MS. WAGSTAFF:** -- this might be something we can just
16 quickly do.

17 **THE COURT:** Yeah.

18 **MS. WAGSTAFF:** So the Portier cut that you are
19 allowing in --

20 **THE COURT:** Yeah.

21 **MS. WAGSTAFF:** -- that was a subset of something that
22 they had filed with you previously.

23 **THE COURT:** Yes.

24 **MS. WAGSTAFF:** So we took a subset of our counter --

25 **THE COURT:** Okay.

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1 **MS. WAGSTAFF:** -- which I was going to show to you in
2 this highlighted -- it's just that highlighted part, and I've
3 showed it to Monsanto. And Mr. Stekloff told me they object,
4 but he's seen that before and that's been sent to you before.

5 **THE COURT:** I've seen this before.

6 **MS. WAGSTAFF:** That would be in response to the
7 portion that you were just -- you're going to allow regarding
8 the EPA and the Australian letter. Just that designated
9 highlighted portion at the bottom. And I can give you the
10 testimony that you're allowing in if it would help you.

11 Ms. Melen, could you hand this to him?

12 **THE CLERK:** Yes.

13 **MS. WAGSTAFF:** The three sections that you're allowing
14 in are marked 1, 2, 3 on this.

15 **THE COURT:** Yes. And if I recall correctly, one of
16 the objections was that one of these chemicals is Monsanto's.

17 **MR. KILARU:** Yeah. I think our objection is that it
18 runs afoul of the MIL on other products.

19 **THE COURT:** Right. And what is it? Dioxins? Is that
20 what --

21 **MR. KILARU:** I don't have that in front of me.

22 **MS. WAGSTAFF:** I think PCBs.

23 **MR. STEKLOFF:** I think PCB.

24 **THE COURT:** PCBs? I mean, does anybody know that PCB
25 is a Monsanto product?

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1 **MR. KILARU:** I don't know what they know. We didn't
2 ask about it. So if a juror knows, you know, they know.

3 **MS. WAGSTAFF:** And our position would be that this is
4 being introduced, you know, at the request of -- at the
5 response of something Monsanto is requesting to just show that
6 the EPA has, you know, gotten it wrong before and that it's
7 just a list of chemicals. And I think you're right, that
8 there's no evidence in the case that PCBs belong to Monsanto.

9 **THE COURT:** Let's Google PCBs.

10 **MR. KILARU:** I think it will show up, Your Honor.

11 **MS. WAGSTAFF:** Baum Hedlund is going to show up. Just
12 kidding.

13 **MS. MOORE:** Brent's face.

14 **MR. KILARU:** Yeah, I think we may be the only North
15 American producer of PCBs.

16 **MS. WAGSTAFF:** But regardless of that, that --

17 **THE COURT:** Oh, I know, but I'm just...

18 (Pause in proceedings.)

19 **THE COURT:** Do you have any problem with this
20 testimony other than that?

21 **MR. KILARU:** I don't think so, Your Honor. I think
22 that would be the question and answer about other products that
23 we propose to strike.

24 **THE COURT:** Are all of these Monsanto products?

25 **MR. KILARU:** I do not know the answer to that. I

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1 suspect not, but I don't know.

2 **THE COURT:** Do you want to just cut out PCBs and say
3 dioxins, polyfluorinated compounds?

4 **MS. WAGSTAFF:** PCB is the last one? I haven't
5 memorized them.

6 **THE COURT:** No. It's the middle one.

7 **MS. WAGSTAFF:** If we can, we will, and I'll let you
8 know if we can't.

9 I assume that your tech person is going to be doing the
10 cutting.

11 **MR. KILARU:** Yeah, we can do that.

12 **MS. WAGSTAFF:** So we can try; and then if you send it
13 to us, we'll listen to it and then tomorrow morning if we think
14 it screws it up too much, we'll bring that up to you.

15 **MR. KILARU:** And I will find out if there are other
16 products on that list that we make, in which case --

17 **THE COURT:** In which case the answer may be too bad.

18 **MR. KILARU:** Well...

19 **THE COURT:** But we'll see.

20 **MS. WAGSTAFF:** Okay. Thank you, Your Honor.

21 And if I could have those back just because they have
22 handwriting all over them.

23 **THE CLERK:** That's one.

24 **MS. WAGSTAFF:** Yes. And there was --

25 **THE COURT:** Is there anything else I owe you? This

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1 one?

2 **MS. WAGSTAFF:** Yeah.

3 All right. And just for the record, the testimony that
4 you've just allowed is 885:10 to 885:14, 885:17 to 885:19,
5 886:20 to 887:3, and 887:6 to 887:8, with us trying to cut out
6 PCBs from 888:7, if that makes sense.

7 Thank you, Your Honor.

8 **THE COURT:** Okay.

9 All right. Jury instructions. Why don't we just go
10 through them one by one.

11 Any objection to the first instruction?

12 **MR. KILARU:** Your Honor, if it streamlines, I didn't
13 have anything until Number 11 so --

14 **THE COURT:** Okay.

15 **MR. KILARU:** -- everything before that seemed okay.

16 (Pause in proceedings.)

17 **MS. MOORE:** Your Honor, we have no objection to the
18 first 10 and Number 11 as well too.

19 **THE COURT:** Okay. So Number 11 Monsanto has an
20 objection to?

21 **MR. KILARU:** Yes, Your Honor.

22 **THE COURT:** Okay.

23 **MR. KILARU:** We have a few things. I mean, first,
24 there's a global objection we have to the jury being instructed
25 on design defects. I think you saw we filed a motion for

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1 directed verdict earlier today. I think the --

2 **THE COURT:** I have not.

3 **MR. KILARU:** Okay. Well, we did. I believe I gave a
4 copy to Ms. Melen.

5 **THE COURT:** Okay.

6 **MR. KILARU:** So if you need another copy, I'm happy to
7 give it to you, but I'm sure she has distributed it.

8 We don't think that their -- I think the only theory of
9 design defect that remains based on PTO 116 and their response
10 to that is this theory that Roundup should never have been sold
11 to residential users, and I don't think there has been a single
12 piece of evidence on that topic from the plaintiffs in this
13 case.

14 I mean, none of the expert witnesses in Phase I talked
15 about that, a categorical ban on sale; none of the expert
16 witnesses that they could have called that they did not call in
17 Phase II testified that there should be a categorical ban on
18 sale; and I don't think that there's any evidence certainly
19 from the Monsanto employees that they called in part of their
20 case that there should be a categorical ban on sale.

21 So I think we also list some legal deficiencies that I
22 think are arguments that in the main we have raised before when
23 we were briefing, what tests to apply and then also whether the
24 claim is viable as a matter of law, but I think that's kind of
25 the most fundamental objection to this going to the jury at

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1 all.

2 **THE COURT:** Yeah. And, I mean, I think, you know,
3 there's an issue there. I mean, I guess before I have you
4 respond to that question, could I ask you what is maybe a
5 precursor question, which is I asked you to think about sort of
6 which claims you wanted to continue to present to the jury and
7 which you didn't. Have you given any thought to that?

8 **MS. MOORE:** Where we are on that, Your Honor, is that
9 we would like to move forward with all three of the claims.

10 **THE COURT:** Okay. So design defect, strict liability,
11 failure to warn, and negligence?

12 **MS. MOORE:** Correct, Your Honor.

13 **THE COURT:** Okay. And we'll talk, I guess, about
14 strict liability, failure to warn, and negligent failure to
15 warn in a minute; but on design defect, I mean, so what is your
16 design defect argument? Is it that they -- that this product
17 being sold without a warning constitutes a design defect, or is
18 it that this product should never be sold to people for home
19 use or what?

20 **MR. WOOL:** Right. So it's mostly the first one,
21 Your Honor. And you sort of highlighted a point that where you
22 have an inherently dangerous product, which is what we allege
23 here, that you can defend that by pointing to an adequate
24 warning, which they don't have here.

25 **THE COURT:** Okay. And that's what happened in the

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1 *Johnson* case as well; right?

2 **MS. MOORE:** That's right. Yes, it is, Your Honor.
3 All three of those claims went to the jury in *Johnson*.

4 **THE COURT:** And they're basically the same claims. I
5 mean, it doesn't seem like there's any meaningful distinction
6 between any of the three claims that you're presenting to the
7 jury. All three of them are this product should have come with
8 a warning about cancer and it did not.

9 **MS. MOORE:** With a twist on design defect also. I
10 mean, under consumer expectations, it's one that a consumer
11 would ordinarily expect to be safe.

12 **THE COURT:** Right.

13 **MS. MOORE:** And I understand that what you're saying
14 it kind of ties to you would expect it to be safe because you
15 can buy it off the shelf and there's no warning on it that
16 tells you anything bad is going to happen to you, but it's a
17 little different but not much on that.

18 **THE COURT:** Well, can you articulate for me how it is
19 different? I mean, with the --

20 **MS. MOORE:** Well, the design defect doesn't say that
21 they had to have a warning on it. We're saying it's an
22 inherently dangerous product itself and for which, you know,
23 the ordinary consumer would not realize that.

24 **THE COURT:** But I thought in *Johnson* you argued that
25 the reason it was defective is because it didn't come with a

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1 warning. Am I misremembering that?

2 **MS. MOORE:** I'm not sure if that's how they argued the
3 design defect in *Johnson*. I know they used consumer
4 expectations.

5 **THE COURT:** So why don't you just tell me what you --
6 what is your argument to the jury on why this is -- why there
7 is a design defect in Roundup. Explain to me what your
8 argument is.

9 **MS. MOORE:** My consumer expectations expert here.

10 **MR. WOOL:** Well, I wouldn't say "expert."

11 Because glyphosate and with a surfactant in a formulation
12 is inherently dangerous. It cannot be made safe. That the
13 only option that Monsanto would have in that situation would
14 actually be to provide an adequate warning, which I don't think
15 there's any question here that if we can prove that Roundup
16 caused Mr. Hardeman's cancer and that it's more dangerous than
17 a normal consumer would expect, that because there's not a
18 warning here, that would not be a defense that they could
19 pursue here.

20 **THE COURT:** So the reason that this product was
21 defective is because it did not carry a warning? It sounds
22 like that's what you just said.

23 **MR. WOOL:** No. I wouldn't say that. I would say that
24 the product is defective because of the way that the molecule
25 kind of interacts with human beings and then causes cancer.

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1 This could be defended by showing that there's a warning, but
2 it's not defective because there's an absence of a warning, if
3 that makes sense.

4 **THE COURT:** No, it doesn't make sense because on your
5 argument, the presence of a warning is not a defense to the
6 design defect claim it sounds like.

7 **MR. WOOL:** Well, no, no. In this case --

8 **THE COURT:** I mean, it sounds like what you're
9 preparing to argue -- and I'm not putting words in your mouth,
10 I'm just trying to understand -- it sounds like what you're
11 preparing to argue is that this product is defective and
12 whether they had included a warning or not, even if they had
13 included a warning, you would be liable -- Monsanto would be
14 liable to Mr. Hardeman.

15 **MR. WOOL:** Well, no, there's some facts. So if they
16 had included a warning, which they didn't do, then that would
17 open up the door to certain affirmative defenses, and then they
18 would be able to defend the design defect claim.

19 **THE COURT:** What's the affirmative defense?

20 **MR. WOOL:** I think it's Comment j to the Second
21 Restatement.

22 **THE COURT:** But, I mean, there's nothing about a
23 warning -- Comment j to the Second Restatement? What does that
24 say?

25 **MR. WOOL:** That says that where you have an inherently

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1 dangerous product that can't -- where the danger cannot be
2 designed away, that you can -- that you can avoid liability
3 under a design defect theory by including a warning that is
4 adequate and warns consumers of the dangers inherent in the
5 product.

6 **MR. KILARU:** But I think that's if we argue that it's
7 an inherently dangerous product and therefore... An inherently
8 dangerous product, I believe, is itself an affirmative defense
9 that the defense can bring.

10 So I think the argument that's being made actually has
11 nothing to do with whether this is a valid design defect claim
12 or not. I think if their claim is that it's defective in
13 design because it doesn't have a warning, that's not a design
14 defect claim. That's a failure-to-warn claim.

15 There's a reason there's a separate claim for not warning
16 about a product. I think a design defect claim has to be about
17 whether there's some aspect of the design independent of the
18 warning that means the product shouldn't be sold.

19 And here, if they're arguing that the defect is the
20 failure to warn, I think there's the first problem I just
21 mentioned; but there's also a problem that a couple weeks ago
22 you asked them to articulate what design defect claim they were
23 going to bring and whether it was different from the claim that
24 the product shouldn't be sold at all, and they didn't do that.
25 So now evidence has come in about -- you know, whether or not

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1 evidence has come in about that theory, other theories haven't
2 been explored.

3 If the claim is instead you should never sell this product
4 at all, there is no evidence at all to support that in the
5 record, no expert testimony, which as you'll see in our motion
6 we believe is required, but really no testimony at all that
7 Roundup shouldn't be sold.

8 **THE COURT:** But putting aside for the moment -- I
9 mean, look, you know that I'm going to deny your motion for a
10 directed verdict without prejudice to you reraising the issues
11 posttrial. Let's talk about what we're going to instruct the
12 jury.

13 Like, I'm telling you, I think this -- I think their
14 design defect claim is defective. I think there's probably a
15 real problem with it, but there wasn't a motion for summary
16 judgment on it, and I want to -- and we're going to instruct
17 the jury on it and we're going to see what the jury says. And
18 it may be that this claim should never have been brought and
19 the verdict on that claim might need to be taken away.

20 **MR. KILARU:** Well, I understand. Just on that point,
21 Your Honor, I understand that we didn't make the summary
22 judgment motion, but we are entitled to file a motion for
23 judgment of law at any time after the case has been submitted.
24 We have filed it now before the case goes to the jury, and we
25 believe there's a real defect in the evidence and the legal

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1 theory for that claim that shouldn't allow it to go to the
2 jury.

3 **THE COURT:** I think you might be right but,
4 nonetheless --

5 Can I just ask you one more time to try to explain what
6 your -- how your design defect theory is different from your
7 failure-to-warn theory?

8 **MR. WOOL:** Well, so, it's more limited in a way. So
9 the design defect theory is that Roundup as formulated is
10 inherently and unreasonably dangerous, and that is the claim in
11 a nutshell. And you can --

12 **THE COURT:** That it shouldn't be on the market?

13 **MR. WOOL:** Well, I wouldn't say that it shouldn't -- I
14 mean, it doesn't go that far. Whether --

15 **THE COURT:** Well, then, what does it mean to say that
16 it's inherently and unreasonably dangerous?

17 **MR. WOOL:** Well, it means that you can sell your
18 product in an inherently and unreasonably dangerous fashion and
19 be liable for design defect claims; or, as I sort of mentioned
20 before, you can put a warning on the product and that would --

21 **THE COURT:** It's Restatement Second what?

22 **MR. WOOL:** Comment j.

23 **THE COURT:** Restatement Second?

24 **MR. WOOL:** Second. I think it's Section 402A,
25 Comment j.

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1 **MR. KILARU:** 402?

2 **MR. WOOL:** Yeah, I think 402A.

3 **THE COURT:** "The reporters of the" -- I'm reading
4 something -- an article now on the Third Restatement and it
5 says (reading):

6 "The reporters of the Third Restatement referred to
7 the Comment j emphasis on product warnings as unfortunate
8 language which has elicited heavy criticism. In response
9 to this perceived criticism, the Third" -- I'm just
10 reading this out loud right now. I don't even know what
11 it says yet. Okay? -- "the Third Restatement shifts the
12 emphasis away from product warnings and towards safer
13 product design. The core provision of the Third
14 Restatement, Section 2, states that 'a product is
15 defective when, at the time of sale or distribution, it
16 contains a manufacturing defect, is defective in design,
17 or is defective because of inadequate instructions or
18 warnings."

19 Oh, okay. It goes on to define each category of strict
20 liability separately (reading):

21 "A product is defective because of inadequate
22 instructions or warnings when the foreseeable risks of
23 harm posed by the product could have been reduced or
24 avoided by the provision of reasonable instructions or
25 warnings by the seller or other distributor or a

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1 predecessor," blah, blah, blah.

2 Okay. So that's -- but -- so it sounds like, just from a
3 quick read of this, and I haven't read their motion yet and
4 I'll do so tonight, but it sounds like from a quick read of
5 this maybe you can present a theory like that, but I still
6 don't understand how the theory is any different from the
7 failure-to-warn theory.

8 It may be that that's fine. I mean, maybe you're
9 presenting two different theories that are basically
10 indistinguishable in the context of this case, and maybe you're
11 exposing yourself to, you know, potential reversal based on the
12 possibility of inconsistent verdicts; but, you know, I suppose
13 there's nothing inherently wrong with presenting two sort of
14 different legal -- giving them two different legal hooks to
15 hang their -- hang the factual hat on.

16 **MR. WOOL:** Right. And I think that we see and
17 understand the potential inconsistencies, you know, between the
18 two theories but have, nonetheless, sort of decided that, you
19 know, that risk is --

20 **THE COURT:** And why is that? Why? Why is that risk
21 worth it? Why is the risk of inconsistent verdicts -- because
22 it seems like -- again, if you want to try to articulate the
23 difference between your three theories, go ahead and do so; but
24 it seems like all three legal theories that you're presenting
25 to the jury are identical and, therefore, you're running the

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1 risk of inconsistent verdicts. And so the question is: Why
2 are you willing to run that risk?

3 **MR. WOOL:** Well --

4 **MS. MOORE:** I think it is a little bit different,
5 Your Honor, because the negligence is based on reasonableness
6 and strict liability obviously is not. So there is a
7 difference there.

8 And, you know, the evidence as to the reasonableness of
9 Monsanto's conduct comes into play when you're looking at the
10 negligence failure to warn. Their reasonableness does not come
11 into play when you're talking about the strict liability either
12 under the design -- under the design defect and also under the
13 failure to warn strict liability. I mean, it's not about their
14 conduct. It's about the product itself.

15 And, you know, that's one of the reasons why we wanted to
16 present the negligence claim in addition to the strict
17 liability.

18 **THE COURT:** Can you articulate for me a theory that
19 the jury could rationally articulate for why -- to hold
20 liable -- hold Monsanto liable under one theory but not one of
21 the others?

22 **MS. MOORE:** No. My position to the jury is going to
23 be they should check "yes" for all three.

24 **THE COURT:** No, I'm not asking you what you're going
25 to tell the jury. I'm asking you: Is there a rational way

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1 that the jury could find for you on one of these three claims
2 but for Monsanto on another of these three claims?

3 **MS. MOORE:** I think that would be highly unlikely,
4 Your Honor.

5 **THE COURT:** Okay. So if the jury found for you on one
6 of these three claims and Monsanto on another of these three
7 claims, would the verdicts be inconsistent such that the whole
8 thing would have to be thrown out?

9 **MS. MOORE:** I don't think so, Your Honor.

10 **THE COURT:** Why not?

11 **MS. MOORE:** I think it depends on which ones they
12 found for. If --

13 **THE COURT:** But you would have to articulate a
14 rationale.

15 **MS. MOORE:** Here, for this example, if they found for
16 the plaintiff on strict liability design defect and did not
17 find for the plaintiff on strict liability failure to warn and
18 negligent failure to warn, I don't think that the case would
19 have to be thrown out on that. So I think that's one.

20 **THE COURT:** And why? Tell me what is the jury --
21 what's the jury's theory for why Monsanto is liable on the
22 design defect claim but not the failure-to-warn claim.

23 **MS. MOORE:** Well, you can look at the difference in
24 the language of the instructions. I mean, under design
25 defect --

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1 **THE COURT:** Well, what's the set of facts that the
2 jury finds that would fit into the design defect claim but not
3 fit into the failure-to-warn claims?

4 **MS. MOORE:** Because they could say that the product
5 itself is so dangerous and -- that the product itself is so
6 dangerous and there's -- the ordinary consumer would not expect
7 it to be such, and they could find for the plaintiff on the
8 design defect for that. They don't have to go to the failure
9 to warn part of it.

10 I mean, they can just say, you know, right here that the
11 product is one in which an ordinary consumer can form
12 reasonable minimum safety expectations. Mr. Hardeman testified
13 that he didn't expect to get cancer from using Roundup for all
14 those years.

15 And then the next one is Roundup used by Mr. Hardeman did
16 not perform as safely as --

17 **THE COURT:** But he didn't get -- he testified that --
18 I mean, he didn't expect to get cancer from using Roundup
19 because they didn't warn him; right?

20 **MS. MOORE:** No. It's two different things.

21 **THE COURT:** If they had warned him, he wouldn't have
22 used it.

23 **MS. MOORE:** No. He said he didn't expect to get
24 cancer from Roundup.

25 **THE COURT:** Okay.

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1 **MS. MOORE:** And he also testified he didn't expect
2 that Roundup was dangerous. Those are two separate things from
3 saying "If I had -- if they had warned me it was causing
4 cancer, I wouldn't have used the product." It's separate.

5 **THE COURT:** Okay.

6 **MS. MOORE:** And so when I asked him those questions, I
7 did not tie your expectation and whether you thought it was
8 dangerous to the failure to warn. Those were separate.

9 **THE COURT:** Okay.

10 **MS. MOORE:** And so that's how -- I mean, again, that
11 would be my argument on design defect.

12 **THE COURT:** So that argument is that even if Monsanto
13 had provided an adequate warning, it would still be liable on
14 the design defect claim; or is your argument only --

15 **MS. MOORE:** That's going --

16 **THE COURT:** -- is your argument only that Monsanto is
17 liable on the design defect claim because Monsanto didn't
18 provide a warning?

19 **MS. MOORE:** What I was articulating was that under the
20 instruction itself, it does not require the jury to make any
21 finding about a warning. It requires the jury to make a
22 finding that the product is one that an ordinary consumer would
23 form reasonable minimum safety expectations -- in other words,
24 they don't expect to get cancer from using Roundup -- and then
25 the last part of it is it did not perform as safely as you

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1 would expect because he got cancer.

2 That's all they have to find under consumer expectations.
3 They don't have to go to the warning. They have to go to that
4 next step under the design defect under consumer expectations.
5 It's what you --

6 **THE COURT:** Under what next step? What is the next
7 step that they need to take?

8 **MS. MOORE:** Well, I think what you were talking about
9 was failure to warn, was the warning. And so under consumer
10 expectations, they expect the product to be safe, and it turns
11 out the product was not safe because he got cancer. And so
12 right there they're liable if we show that, which I think we
13 have shown, and so that's how they can find for us under design
14 defect.

15 Under design -- under strict liability failure to warn,
16 they have to show that there was -- that they failed to
17 adequately warn of the risk of cancer. Well, they've
18 admitted -- Monsanto admitted they've never warned for the risk
19 of cancer, and so that's what they have to find under strict
20 liability failure to warn.

21 When you get to negligence failure to warn, there's
22 another prong of that, and I'm abbreviating all this, but
23 there's another prong of that and we have to show, we have the
24 burden to show that Monsanto knew or reasonably should have
25 known Roundup was dangerous, and that's that time period we've

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1 been talking about from '75 to 2012. We have to show that they
2 knew or should have known that it was dangerous and that the
3 user would not have realized it, and then they failed to warn.

4 So there's -- you know, I understand, Your Honor, it was
5 very similar, but there are some nuanced differences on that.

6 I understand, Your Honor, it is very similar, but there
7 are some nuance differences on that. And, you know, I mean,
8 they are going to argue that he didn't read the label. He
9 would have used, you know, the product anyway. You know, so
10 that -- I mean, that could be how you could end up with
11 separate ones. I mean, I think -- I think they are either
12 going to check yes to all three or no to all three. I don't
13 think there is going to be -- you know, I can't predict.

14 **MR. KILARU:** Your Honor, can I be heard on a few
15 aspects of that?

16 So, first of all, I don't think that counsel can say
17 because they look at the instruction -- the instruction can
18 only be given if there is a valid theory of liability
19 supporting the instruction. You can't just say the jury can
20 look at the instruction and find us liable if there is not a
21 theory for why that instruction should be given in the first
22 place. That is Point Number 1.

23 Point Number 2 is -- I don't have Comment J in front of
24 me, so I'm operating a little bit off of memory -- but I'm
25 pretty sure that the way that comments and other comments talk

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1 about things, they use the term "design defect" in two
2 different ways. One way is to say all three manufacturing
3 defect, failure to warn, and design defect are design defects
4 because they are saying something was wrong with the product.

5 When you are talking about the actual theory of liability
6 for jury instruction purposes, you have to have a valid design
7 defect argument that is not the same as the failure to warn
8 because a design defect isn't a warning. You would never need
9 to have either failure to warn or design defect liability.

10 **THE COURT:** That's why I'm trying to pin them down on
11 what their design defect argument is.

12 **MR. KILARU:** And that's why I think this really
13 matters because I think there is a fair amount of indeterminacy
14 about which design defect theory they are pursuing, and that
15 affects whether it approves giving the instruction or not or a
16 legal basis to support giving --

17 **THE COURT:** Okay. Your argument is that if their
18 design defect theory is that it doesn't carry a warning, then
19 it is duplicative of the --

20 **MR. KILARU:** It's not just that it is duplicative. It
21 is not a valid design defect claim.

22 **THE COURT:** Okay. And if their design defect theory
23 is that the product is simply unfit to be sold, then you are
24 saying there was no evidence that it was --

25 **MR. KILARU:** There is no evidence from anyone that the

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1 product is unfit to be sold to residential users.

2 **THE COURT:** What form does that evidence have to take?

3 **MR. KILARU:** I think, as we cite in our brief, it has
4 to take the form of expert testimony because it involves
5 basically arguing that a product should be banned from the
6 market for a class of users. But I would note that -- I mean,
7 take the experts out of it for a second and look at the
8 testimony we have in this case. In Phase One even their
9 experts didn't say --

10 **THE COURT:** What about like the -- I'm sorry to
11 interrupt you.

12 **MR. KILARU:** That's fine. Of course, of course.

13 **THE COURT:** I was just going to ask, what about like
14 in the tobacco cases, right? Were those design defect cases or
15 were they failure-to-warn cases or both?

16 **MR. KILARU:** They were both.

17 **THE COURT:** Okay. And so the -- is the argument that
18 these are products that are not fit to be on the market?

19 **MR. KILARU:** No. So actually I think the tobacco
20 cases -- we cite them in our brief -- they are instructed on
21 two points. One, the Courts generally apply risk-benefit, not
22 consumer expectations because what they were looking at is
23 there is some aspect of the actual design of the cigarette,
24 whether a filter or, you know, some type -- I don't know the
25 details that well, but we cite these cases in our brief -- some

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1 aspect of the actual design of the product that can be changed
2 to solve what they are claiming is a defective design. And
3 that was the kind of thing that we think might be a valid
4 design defect claim that was not the sort of claim they are
5 supporting here. I don't believe the --

6 **THE COURT:** Well, the answer with cigarettes is no. I
7 mean, there is no way you can design cigarettes.

8 **MR. KILARU:** Well, I think the argument in some of
9 those cases was that there are arguments you can make; either
10 having the absorption level drop or have less nicotine get into
11 the system or whatever the case may be. I don't know whether
12 those arguments were successful or not, but those were the
13 types of design defect arguments that I believe are being
14 talked about in the cases we cite.

15 And in those case the Court said, You have to have expert
16 testimony because it is sort of a complicated scientific
17 question and people have to come in and say what aspect of the
18 design should be different -- I think in at least the cases we
19 cite -- they say the experts haven't provided that.

20 But I think to take it back to here if the theory is that
21 you shouldn't have Roundup on the market at all, I don't think
22 there is any evidence of that. Even in Phase One their experts
23 didn't say -- I mean, Dr. Weisenburger's testimony -- he is the
24 only expert who testified -- is that you need to have exposure
25 to Roundup at some high level to cause cancer. And he said, I

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1 think it was a little bit of I will tell you when I see it.

2 But be that as it may, his argument wasn't, If you buy Roundup
3 and use it one time, you are at risk of cancer.

4 And so for that reason alone, I think there is no
5 testimony that you should take this product off the shelves and
6 not sell it to residential users. So if that's their theory,
7 there is not evidence to support it.

8 And if the theory is -- this failure-to-warn theory, it is
9 not a legally valid theory. And I think -- the reason I keep
10 emphasizing this is that certainty needs to exist on the
11 front-end before the claim goes to the jury because -- the
12 instruction is what it is, but I think the jury can read this
13 instruction and absent being told that is the actual theory of
14 liability the Plaintiff is bringing, you could theoretically
15 get a verdict on this that is not supported by any evidence or
16 a valid theory of design defect.

17 **THE COURT:** Okay. So let me -- let me try and ask you
18 one more time: What is the theory of design defect liability
19 that you are going to articulate -- so the purpose of asking
20 this question is so that I can go back and look at their
21 motion. And they contend that if -- if you are asserting a,
22 quote-unquote, design defect theory that involves failure to
23 have an adequate warning, then it is not a separate theory from
24 your failure-to-warn theory and it shouldn't be given to the
25 jury for that reason.

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1 Then they argue that if, in fact, your design defect
2 theory is that regardless of warning, it is not a product that
3 should be on the market for residential users or whatever, then
4 you haven't presented any evidence to support that.

5 Putting aside their argument about -- putting aside
6 whether they are right that one -- you know, that the
7 failure-to-warn design defect theory is not a separate design
8 defect theory, putting aside their argument about whether you
9 presented sufficient evidence about whether it is a product
10 that should be on the market, what is your theory? Is it the
11 former or the latter? Is it based on the absence of a warning,
12 or is it -- is it irrespective of the absence of a warning?

13 **MR. WOOL:** So it's -- this is sort of hard to
14 articulate because what we are contending is that it is
15 inherently dangerous. It would be able to defend this claim by
16 showing that -- that there was a valid warning, but that is
17 their affirmative duty. That would be an affirmative defense
18 for them.

19 And so they can defend the claim that Roundup is
20 inherently dangerous and, therefore, defective under California
21 law by saying, We did have an adequate warning, in which case
22 that would eliminate the design defect claim. But I think that
23 sort of the discussion we are having now is a little bit -- or
24 sort of is getting into shifting the burden a little bit to
25 Plaintiffs because I think that is sort of the distinction here

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1 is that for the design defect claim, you know, we do not have
2 to prove that Roundup contained an adequate warning, where it's
3 inherently dangerous and caused Mr. Hardeman's harm.

4 You know, and that is sort of distinguishable from the
5 failure-to-warn claim. I don't know if this is making sense.
6 There is a lot of sort of nuance here, but they could -- they
7 can defend the design defect claim by saying that Roundup did
8 have an adequate warning, but on its face without them sort of
9 showing that -- the claim stands.

10 **THE COURT:** Okay. I mean, I'm at a little bit of a
11 disadvantage because I haven't read their motion yet; but let's
12 focus on -- let's act on the assumption that this design defect
13 claim is going to the jury, okay.

14 So the claim is going to the jury. They say they don't
15 have to say anything about warnings in connection with their
16 design defect claim. All they need to say is that -- that
17 Monsanto manufactured and distributed -- and sold it; that an
18 ordinary consumer can form reasonable, minimum safety
19 expectations about the product, about this type of product; and
20 then it didn't perform safely because it gave him non-Hodgkin's
21 lymphoma.

22 So what -- is there -- well, let's assume they are right
23 about that, that that's all they have to put forward. Anything
24 wrong with this jury instruction, any sort of specific
25 objection?

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1 **MR. KILARU:** Yes, we do have a few, Your Honor.

2 **THE COURT:** Talk to me about that.

3 **MR. KILARU:** They come from disagreeing that those are
4 the only things they have to prove. This is separate from the
5 argument I just made.

6 **THE COURT:** Okay.

7 **MR. KILARU:** So first I think -- and I know this
8 collapses into a little bit about what we just talked about,
9 but I do think it is important. So in the second sentence
10 there is a statement: In Phase Two Mr. Hardeman claims that
11 Roundup's design was defective because it didn't perform as
12 safely as an ordinary consumer would expect it to perform.

13 We would argue that instead of using that phrase, there
14 should be an articulation of the theory of design defect
15 liability of which the claim is going to the jury so that the
16 jury is actually finding design defect liability on something
17 that Your Honor has said is a legally viable theory. So
18 perhaps that would be -- that Roundup should never have been
19 sold to residential users. I mean, it is perhaps a warning
20 claim. I mean, it is sort of up to them to decide which of
21 those they want to pursue. But I think that is important to
22 put that in here so you don't necessarily have an abstract
23 verdict disconnected from a valid theory of what --

24 **THE COURT:** I had a little bit of an opposite reaction
25 to what you said, which is I would be inclined to cross out the

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1 words "because it did not perform as safely as an ordinary
2 consumer would have expected it to perform."

3 In other words, In Phase Two, Mr. Hardeman claims that
4 Roundup's design was defective, period. To establish this
5 claim, Mr. Hardeman must prove all of the following -- and then
6 we can argue about what he needs to prove and what he doesn't
7 need to prove, but it actually strikes me that that last line
8 is kind of somewhat like partially redundant of the elements
9 and, therefore, probably should not be in there.

10 **MR. KILARU:** I think it is -- I agree. It is
11 redundant of the elements, but I don't think that just deleting
12 it is the answer.

13 **THE COURT:** Okay.

14 **MR. KILARU:** And -- for the reason I just mentioned.
15 I think the jury -- the proof that the jury is deciding this
16 case on should be tethered to a valid theory of liability. It
17 shouldn't just be sort of in the abstract, Does Roundup have a
18 defect in design. So we think that that language, if that is
19 their theory, should be put in here so the jury knows what they
20 should be thinking about in evaluating this question of
21 defective design.

22 And it is, in fact, not true -- this goes to my point
23 raised earlier -- that all they have to prove is that he used
24 the product and suffered an injury that he didn't expect. I
25 mean, there is case law on this in the CACI instructions.

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1 **THE COURT:** Not that he didn't expect, but that the
2 ordinary consumer --

3 **MR. KILARU:** Sure, sure, sure. But I don't think
4 that's all he has to prove. I think, again, in our motion we
5 cite cases showing that even in a consumer expectations case,
6 you have to prove that there is a defect and that the defect
7 caused the injury. So that's what we're -- that's what I'm
8 relying on, when I say that the theory of what the defect is
9 should be included in this instruction.

10 **MS. MOORE:** And, Your Honor --

11 **THE COURT:** So does that -- does that -- should that
12 be one of the elements or should that be in the sentence that
13 you just flagged? I mean, if that's -- if that's really -- if
14 it is really true that they have to prove that there was --
15 they have to define the defect, and they have to get the jury
16 to buy into the definition of the defect, it sounds like maybe
17 that is supposed to be an element?

18 **MR. KILARU:** Well, I think it should be an element. I
19 think the question is if you want the language of the actual,
20 you know, words -- of the specific elements to track the model
21 instruction, the reason I proposed putting it higher up is
22 because it sort of grounds what the jury is finding on those
23 elements in this broader argument that there is a design
24 defect. I mean, we had proposed over the weekend --

25 **THE COURT:** It is 1203, right?

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1 **MR. KILARU:** Yes, I believe.

2 **MS. MOORE:** It is 1203, Your Honor. And we think our
3 proposed instruction under 1203, which is the consumer
4 expectation test, and that is what, Your Honor -- your draft is
5 also based on with the modification that they had already made
6 a couple of the findings from Phase One.

7 **THE COURT:** Right.

8 **MS. MOORE:** I will point out that there is California
9 case law that is directly on point about this. And under
10 *Arnold versus Dow Chemical*, which is a California appellate
11 case from 2001, the Court held it is sufficient to allege that
12 a pesticide is toxic and that the consumer didn't expect it to
13 be toxic in order to have a design defect claim. And that's --
14 you know, we've kind of gone round and round on this --

15 **THE COURT:** That's right.

16 **MS. MOORE:** So that's --

17 **THE COURT:** I forgot about that case, yeah.

18 **MS. MOORE:** The *Arnold versus Dow Chemical*. I have
19 the cite if you need it, Your Honor.

20 **THE COURT:** No. That's okay.

21 Hold on a second.

22 (Pause in the proceedings.)

23 **THE COURT:** Okay. So your argument, Mr. Kilaru, is
24 that there needs to be an articulation of the defect, and the
25 articulation of the defect needs to be either that it was

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1 just -- it was not a product that should have been sold for
2 these purposes? Or that it didn't come with a warning?

3 **MR. KILARU:** Those are the theories that have been
4 articulated. So those are the theories that I think would come
5 in here, if one of those indeed --

6 **THE COURT:** Okay. Any other arguments regarding this
7 instruction?

8 **MR. KILARU:** Yes. Just a couple quick ones, Your
9 Honor.

10 **THE COURT:** Yes.

11 **MR. KILARU:** I think on Number 2, we would propose
12 adding language about what -- what the expectations relate to.
13 And what I mean by that is it's not just reasonable -- we think
14 it should just be reasonable and expectations in general, it
15 should be about the risk of causing NHL based on everyday
16 experience with the product, and that is the expectation that
17 they are talking about here. And I think that language is
18 important, both as a statement of what the expectation is that
19 we are talking about the consumer and also relevant to the
20 scientific background that the jury is evaluating.

21 **MS. MOORE:** Your Honor, that would increase our burden
22 because under the model instructions, the language -- which is
23 taken right from the model instructions -- which is ordinary
24 care and can form reasonable minimum safety expectations --
25 does not require that to be specified more than that or to be a

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1 higher burden.

2 **THE COURT:** Okay.

3 **MR. KILARU:** If I can point you to case law on that,
4 Your Honor, it is cited in 1203 itself in sort of the notes to
5 that but at least a few bullets down in the sources and
6 authority, it would be the seventh bullet. There is a case
7 called *Pannu* -- and there are other cases -- I think that's the
8 main one -- where the Court says: The critical question in
9 assessing the applicability of the consumer expectation test is
10 not whether the product considered in isolation is beyond the
11 ordinary knowledge of the consumer but whether the product in
12 the context of the facts and circumstances of its failure is
13 one about which ordinary consumers can form minimum safety
14 expectations. And that's what I think this additional language
15 would go to.

16 **THE COURT:** Okay.

17 **MS. MOORE:** Your Honor, I did pull up the Johnson jury
18 instructions, and they are exactly the way the Court is
19 proposing with the exception of the harm has already been
20 determined. But the language is exactly identical.

21 And the claim there was that the defect -- is that it
22 failed to perform according to the expectations of an ordinary
23 consumer. I mean that's our claim, Your Honor, for defective
24 design.

25 **THE COURT:** Okay. I understand the arguments. I will

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1 think about it a little bit.

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

3 **THE COURT:** More anything else on that instruction?

4 **MR. KILARU:** The last thing, Your Honor. We had --
5 just for preservation purposes, I guess, we had two things, I
6 guess. One is very -- we know your position on this. But we
7 had proposed changing this used or misused and intended or
8 reasonably foreseeable way language to a language about in
9 accordance with widespread and commonly recognized practice. I
10 take it from what is on the page, that Your Honor disagreed
11 with that.

12 **THE COURT:** Correct.

13 **MR. KILARU:** The last thing I would say is: I do
14 think that Element 4 of the model should still be included in
15 this instruction. And that is that Roundup's failure to
16 perform safely was a substantial factor in causing his NHL.
17 And this goes I think to the point that I was trying to make
18 earlier, which is that there is even in this context, there is
19 a difference between medical causation which we understand has
20 been established and legal causation; that what they are saying
21 is the defect in design is what caused his injury as opposed to
22 the mere use itself. And, again, this ties back to our motion.
23 We cite some cases in there pointing out that mere use alone
24 doesn't establish proximate causation.

25 **THE COURT:** Well, I mean, I understand how that point

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1 goes to your argument that this isn't a real design defect
2 claim or this shouldn't go to the jury. I understand that, but
3 assuming it goes to the jury, what -- I guess I don't -- I
4 mean, given that they already found that Roundup caused his
5 NHL, what -- what would be left for the jury to find with
6 respect to that element?

7 **MR. KILARU:** Well, I guess, it goes to -- it does sort
8 of collapse into my earlier argument because they have to find
9 that there was a failure to perform safely that we think
10 relates to the design.

11 **THE COURT:** Right.

12 **MR. KILARU:** As opposed to just sort of what happened
13 to Mr. Hardeman based on his use.

14 **THE COURT:** I get that. I get that.

15 And -- but I think that simply goes to your argument that
16 this claim should not go to the jury. I don't think it goes to
17 your argument about how the jury should be instructed if the
18 claim goes to the jury, but I want to make sure.

19 **MR. KILARU:** I think it actually -- I think it does
20 because it is a different place for what I said should be -- I
21 think what I'm proposing to add now is sort of a different way
22 of articulating the point that I articulated earlier, that you
23 should put the theory in the instructions -- in the
24 instructions, somewhere in there the jury has to find that the
25 design defect was what caused Mr. Hardeman's injury.

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1 **THE COURT:** Well, they are going to say that the
2 product fails to perform safely because it causes NHL. And --
3 I mean, that's -- that's the reason that they say the product
4 does not perform safely. And the jury has already concluded
5 that it does cause NHL and it caused Mr. Hardeman's NHL. So
6 I'm just left -- let's put it this way: If this element were
7 in here, what would you argue to the jury about why this
8 element is not met?

9 **MR. KILARU:** What is the defect and design that they
10 are claiming injured him? What is the thing about Roundup they
11 are saying that should -- you know, that it didn't perform
12 safely?

13 **THE COURT:** It causes NHL.

14 **MR. KILARU:** I know that's what happened, but I guess
15 my point is what is the aspect of the design of Roundup that
16 did that as opposed to just the product itself.

17 **THE COURT:** I understand that point, but I don't think
18 that's what the fourth element is about. I mean, the fourth
19 element is that the product failure to perform safely was a
20 substantial factor in causing the Plaintiff's harm, so --

21 **MR. KILARU:** I think that ordinarily that language
22 encompasses both legal causation and medical causation. Here,
23 medical causation has obviously been resolved. Our argument is
24 that legal causation still has not been taken off the table by
25 the jury's Phase One finding.

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1 **MS. MOORE:** But that is encompassed then, if you look
2 at the element before that, Your Honor, they have to know --
3 they have to find that Roundup is a product by which an
4 ordinary consumer can perform reasonable and minimal safety
5 expectations. And if they say, Okay, you can form reasonable
6 minimum safety expectations, and then they say next that, It
7 did not perform safely, I mean, that's it. I mean, they have
8 already made the determination that Roundup causes NHL. And
9 they are basically wanting to rehash Phase One.

10 **THE COURT:** Well, let me ask you this: Your colleague
11 said that it would be appropriate to -- for -- well, said it
12 would be appropriate for them to come back and say, Well, we
13 have a warning. And so the reason -- you know, the product's
14 failure to perform safely was not the substantial factor. It
15 was the failure to adhere the warning that was the substantial
16 factor, right? So I know there is no warning in this case.
17 But --

18 **MS. MOORE:** Right.

19 **THE COURT:** -- it sounds like from what your colleague
20 was saying, they could argue that in response to a design
21 defect claim, right? So why couldn't they argue in response to
22 this claim, you know, the fact that -- well, now, it doesn't --
23 actually, as I'm saying it, it doesn't really make sense.

24 But I guess what I was going to -- I will say it anyway.
25 What if they argued, Look, a warning wouldn't have mattered for

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1 Mr. Hardeman because you can't believe him when he says that he
2 read the label. He would have used the product anyway.

3 **MS. MOORE:** I mean, they can make --

4 **THE COURT:** The fact that the product is not
5 performing safely isn't really the substantial factor in
6 causing his harm. I don't think that makes any sense.

7 **MS. MOORE:** I don't think either. And I don't think
8 that's probably what they are going to argue. I mean, they are
9 going to argue that it doesn't cause cancer again, but I
10 mean --

11 **THE COURT:** I don't think they are going to argue that
12 one. I don't think -- that would not be very smart.

13 **MS. MOORE:** Maybe.

14 But on this, I just think we are being repetitive, Your
15 Honor. I think the way that you had it written originally
16 makes the most sense, given the findings from Phase One. I
17 mean, the -- this is an independent cause of action from the
18 failure-to-warn claim and -- and I think we have set forth the
19 elements in the proposed instructions by the Court.

20 **THE COURT:** Okay. So let's say this element is
21 included, this fourth element, the failure of the product to
22 perform safely. I mean, again, part of it is that I'm
23 struggling to understand your design defect theory. But I
24 assume what you would say about the fourth element is that,
25 Yeah, it gave him cancer. And you already found in Phase One

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1 the fact that this product creates a cancer risk was a
2 substantial factor in him getting cancer.

3 **MS. MOORE:** Right.

4 **THE COURT:** So would there be any harm in this element
5 being in here?

6 **MS. MOORE:** I mean, it is already the law in the case.
7 And I think that's why you have it at the very beginning of the
8 instructions because they don't need to -- if it is the law of
9 the case, you don't need to make a judicial -- a jury finding
10 on that. They don't need to be weighing the evidence on it.

11 **THE COURT:** Okay. Anything else on this instruction?

12 **MR. KILARU:** No, Your Honor. If it is a
13 warning-related theory, then I do think 4 would do some work.
14 I think that the fact that the product -- our argument could be
15 whether the product had a warning or not wouldn't --

16 **THE COURT:** Wouldn't have mattered.

17 **MR. KILARU:** -- wouldn't have mattered based on what
18 we know about Mr. --

19 **MS. MOORE:** I mean, I will just say -- to wrap this
20 one up -- the defect itself is that consumers don't expect to
21 get cancer from Roundup. That is the defect, so --

22 **THE COURT:** Right. But that kind of begs the
23 question.

24 **MS. MOORE:** Yes, but there is still independent --

25 **THE COURT:** It begs the question whether you are

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1 saying the defect can be cured by a warning or the defect
2 should be cured by it not being on the market in the first
3 place.

4 **MS. MOORE:** I understand. The defect itself might be
5 in one instance --

6 **THE COURT:** There are lots of things that give people
7 cancer that are on the market.

8 **MS. MOORE:** I understand. And the failure to warn,
9 may be a predicate for that, but that doesn't mean they are not
10 independent causes of action.

11 On your next instruction, Your Honor --

12 **THE COURT:** Number 12?

13 **MS. MOORE:** Yes, Number 12. We didn't have any
14 objection to that.

15 **THE COURT:** Okay.

16 **MR. KILARU:** We had two brief things, Your Honor.

17 One, in the second sentence we think the phrase "potential
18 risk" should be changed to "the risk of NHL." I think there is
19 case law that potential risks aren't enough and that actually a
20 specific risk --

21 **THE COURT:** I think that's right. I think "potential"
22 should come out, and it should say "the risk of NHL," right?

23 **MR. KILARU:** Yeah, that's our position.

24 **MS. MOORE:** Which line is that? I'm sorry.

25 **MR. KILARU:** Right here.

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1 **MS. MOORE:** Potential risk.

2 Can we -- to be consistent, Your Honor -- we have "cancer"
3 down here. Can we say "potential risk of cancer."

4 **THE COURT:** I think either one is probably fine.

5 **MR. KILARU:** Well, I think that actually goes to my
6 second point, which throughout it should be NHL.

7 **THE COURT:** Okay.

8 **MR. KILARU:** It should be that Roundup lacks
9 sufficient warnings of the risk of NHL. And then I think
10 throughout where it says "cancer," I think substituting "NHL"
11 would be more appropriate, sticking with the nature of the
12 claim of the elements.

13 **THE COURT:** I think that's probably right.

14 **MS. MOORE:** That's fine, Your Honor. Just as long as
15 we are consistent with it.

16 **THE COURT:** So it would say -- I was also going to
17 propose taking out the first sentence from Instruction
18 Number 12 just because it is repetitive.

19 **MS. MOORE:** The only thing I would hesitate on that,
20 Your Honor, then I think we would have to have a separate
21 instruction on the finding from Phase One.

22 **THE COURT:** The first instruction.

23 **MR. KILARU:** Yes, it is in the first instruction,
24 I believe. It is "In the first phase of the trial, you
25 determined that Roundup was a substantial factor in causing

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1 Mr. Hardeman's NHL."

2 **THE COURT:** I think if we -- if I ended up taking away
3 the design defect claim, then we would leave it in there. But
4 assuming not, I just think it becomes repetitive. We have
5 already said it, like, three times.

6 **MS. MOORE:** I understand what you are saying, Your
7 Honor.

8 **THE COURT:** So I'm going to take that first sentence
9 out of Instruction Number 12.

10 **MR. KILARU:** Your Honor, just for preservation
11 purposes, the Bates argument I made earlier can we just say
12 that cuts across all three --

13 **THE COURT:** Absolutely.

14 **MR. KILARU:** -- so I don't have to repeat it.

15 **THE COURT:** Absolutely.

16 It would say "In Phase Two Mr. Hardeman also claims that
17 Roundup lacked sufficient warnings of the risk of NHL."

18 Anything else on that? And then I will -- then in
19 Element 2, I will just say that Roundup's NHL risk --

20 **MR. KILARU:** Right. I think you can just find and
21 replace that all the way down.

22 **THE COURT:** Anything else on that instruction?

23 **MR. KILARU:** Not from us.

24 **MS. MOORE:** One second, Your Honor.

25 (Pause in proceedings)

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1 **MS. MOORE:** I do think that the word "potential" has
2 to be in there, Your Honor. It is part of the form instruction
3 as well. So I think it would read "lacks sufficient warnings
4 of potential risk of NHL."

5 **THE COURT:** I mean, if you want it in there, that's
6 fine. I don't know why you would ever want it in there when
7 the jury has already found that there is a risk. I mean, the
8 model instruction presumes that the jury has not found --

9 **MS. MOORE:** That's a fair point, Your Honor. That's
10 fine.

11 **THE COURT:** Okay.

12 **MS. MOORE:** Then the only other changes to 12 would be
13 where it says "cancer," it would change to "NHL."

14 **THE COURT:** Yes.

15 **MS. MOORE:** Okay. That's fine.

16 (Pause in proceedings)

17 **THE COURT:** Okay. Number 13?

18 **MS. MOORE:** Your Honor, our only objection to this is
19 Subsection 6.

20 **THE COURT:** Okay.

21 **MS. MOORE:** I don't think that's required under the
22 model instructions.

23 **MR. KILARU:** I think it's a way -- if I understand
24 that proposal correctly, Your Honor, it is a way of getting a
25 legal causation versus medical causation.

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1 **THE COURT:** Yeah, I'm going back to the
2 failure-to-warn instruction. Hold on a second here. Sorry.
3 So you are objecting to that in 13 but not 12?

4 **MS. MOORE:** I missed that in 12. I'm sorry, Your
5 Honor.

6 **THE COURT:** Okay.

7 **MS. MOORE:** Give me one second, Your Honor. I'm
8 sorry.

9 **THE COURT:** Okay. Remind me which -- where the model
10 instruction is again.

11 **MR. KILARU:** It is for strict liability --

12 **MS. MOORE:** 1205 for strict liability to warn and it
13 is 12 --

14 **MR. KILARU:** 1222 for negligence.

15 **THE COURT:** Okay.

16 **MS. MOORE:** Let me just pull that up, Your Honor.

17 **MR. KILARU:** Which one were you planning to start
18 with?

19 **THE COURT:** Sorry.

20 **MR. KILARU:** Just so I'm looking at the right one,
21 which one were you planning to look at?

22 **THE COURT:** 1205 right now, but I think the point is
23 the same for both, right?

24 **MS. MOORE:** It is, Your Honor.

25 **THE COURT:** This is just providing a more specific

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1 causation instruction. In other words, they have to be
2 instructed the lack of sufficient instructions or warnings was
3 a substantial factor in causing his harm. Well, we already
4 know that Roundup was a substantial factor in causing his harm.
5 So most of that you have already proved. The only thing that
6 is left to prove is that he wouldn't have used Roundup if -- if
7 he had been adequately warned. So it is a way of sort of
8 pairing back what it is that you need to prove to establish
9 that element. That's why I did it that way.

10 **MS. MOORE:** I understand. And the model rules simply
11 says -- and I understand our case is a little different from
12 that -- but that Defendant's failure to warn was a substantial
13 factor in causing Plaintiff's harm. And I think when we are --
14 the inclusion that Mr. Kilaru wanted on Instruction Number 11,
15 which was to add that Roundup's failure to perform safely was a
16 substantial factor causing Plaintiff's harm, I think it is a
17 similar argument then on 12 and 13 going back to the model --
18 to the CACI instruction because this is -- I think this changes
19 it a little bit more than necessary, the way it is worded under
20 the Court's proposal.

21 **THE COURT:** So you would propose something like -- and
22 I'm not sure -- in the context of this case, I'm not sure what
23 the difference is, but you might propose something like "The
24 failure to warn" -- the Number 6 would be "that the failure to
25 warn about the NHL risk was a substantial factor in causing

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1 Hardeman's NHL"?

2 **MS. MOORE:** I don't think you have to say the NHL
3 twice, Your Honor. I think the way the model instruction is,
4 is it focuses on the Defendant's conduct, not on the
5 Plaintiff's conduct. I think that changes -- I think the way
6 you have it written is that it is focused on the Plaintiff
7 versus the Defendant, and the model instruction says it would
8 be Monsanto's failure to warn or instruct was a substantial
9 factor in causing Mr. Hardeman's harm, instead of shifting it
10 over to what Mr. Hardeman should or shouldn't have been doing.

11 **THE COURT:** So the failure to warn was a substantial
12 factor in causing Hardeman's harm?

13 **MS. MOORE:** Correct, Your Honor.

14 **THE COURT:** Hardeman's NHL.

15 **MS. MOORE:** I think it should actually be harm in that
16 case because that would encompass all of his harm and losses in
17 the case. It is not just that he got NHL. I mean, they have
18 already found he got NHL. This is -- we are now talking about
19 his damages too. I think "harm," which is the word from the
20 model instruction, is more inclusive of that.

21 **THE COURT:** But the harm is the cancer. I mean --

22 **MS. MOORE:** It is everything that goes with it too.

23 **THE COURT:** -- the model instruction uses "harm"
24 because we don't know -- they haven't found it yet, right? Or
25 they are being general about it, right?

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1 **MS. MOORE:** But they're -- but he is not -- he is
2 entitled to be compensated for his harms, not just that he had
3 NHL. It is all the harms that go along with that. And so I
4 think it would be better to leave it with the word "harm"
5 versus limiting it to "NHL."

6 **THE COURT:** So you think it should be "The failure to
7 warn was a substantial factor in causing Mr. Hardeman's harm"?

8 **MS. MOORE:** If we are going to continue to have
9 something about substantial factor in there or causation, I
10 think that's the proper way to do it versus saying that
11 Mr. Hardeman would not have used Roundup had Monsanto
12 adequately warned him of the cancer risk. I think that shifts
13 it. It shifts the focus from the Defendant to the Plaintiff.

14 And that would apply for 12 and 13. I apologize, Your
15 Honor. I missed that on 12.

16 **MR. KILARU:** Your Honor, I don't think there is a
17 shift in focus because there is still the phrase "had Monsanto
18 adequately warned him," so I think it sort of ends up in the
19 same place.

20 **THE COURT:** But what is -- what would be wrong with --
21 you know, I don't know how much any of this matters, but what
22 would be wrong with the failure to warn was a substantial
23 factor in causing Mr. Hardeman's NHL? Or a substantial factor
24 in causing Mr. Hardeman's harm?

25 **MR. KILARU:** I think it should be the failure to warn

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1 about the risk of NHL as opposed to just a failure to warn.

2 **THE COURT:** Yeah.

3 **MS. MOORE:** That's fine.

4 **MR. KILARU:** I don't know if there is a huge
5 difference between the two, but --

6 **THE COURT:** Okay.

7 **MS. MOORE:** And then that would be the same for 12 and
8 13?

9 **THE COURT:** Presumably. I can't imagine why there
10 would be a difference.

11 **MR. KILARU:** Yeah.

12 **MS. MOORE:** Okay.

13 **THE COURT:** Do you have any comments about the failure
14 to warn about "The risk of NHL was a substantial factor in
15 causing Mr. Hardeman's harm"? Do you have any --

16 **MR. KILARU:** No, as long as we are not -- the argument
17 you articulated here is one that we intend to make. So I
18 understand -- I don't understand the switch in wording to make
19 the arguments we want to make so --

20 **THE COURT:** Okay.

21 **MS. MOORE:** Nothing else on that instruction, Your
22 Honor.

23 **THE COURT:** When you say "on that instruction"?

24 **MS. MOORE:** On 12 or 13.

25 **THE COURT:** Okay. Anything else on 13?

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1 **MR. KILARU:** Couple things on 13, Your Honor.

2 I think the instruction, the model instruction use, I
3 think that's what has been carried over, uses the term that
4 Roundup was dangerous or was likely to be dangerous. And I
5 think in this case, given the finding in Phase One, that should
6 be substituted, sort of like the previous instruction, with
7 language about NHL as opposed to dangers that haven't been
8 proven and aren't really relevant.

9 **THE COURT:** I think that makes sense.

10 **MS. MOORE:** So what would be the language then?

11 **THE COURT:** So, for example, in Number 2, I think it
12 can be changed to something like, that Monsanto knew or
13 reasonably should have known of Roundup's NHL risk when used or
14 used in a reasonably --

15 **MR. KILARU:** And you can say that users would not
16 realize the risk of NHL. It sort of goes down the line.

17 **MS. MOORE:** I mean, our position was that we want to
18 follow the model instruction, which is what the Court has put
19 in its proposal for Instruction Number 13.

20 **THE COURT:** Yeah, but I'm saying that they have a good
21 point, that since we already have a jury finding that it caused
22 his NHL, and that this case is all about NHL risk and not about
23 any other dangers that Roundup might have -- might pose, what
24 is wrong with -- why wouldn't we want to change it to make it
25 more specific to the facts of this case?

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1 **MS. MOORE:** I'm always hesitant, Your Honor, to switch
2 it from what the model instruction says. That's just my
3 hesitancy on that. And so I would prefer the language of the
4 model instruction.

5 **THE COURT:** Okay. So -- I will change that throughout
6 so that it refers to the NHL risk.

7 **MS. MOORE:** And, Your Honor, just to follow up on that
8 a little bit, yes, they found that it was a substantial factor
9 in causing Mr. Hardeman's cancer; but, you know, our arguments
10 are that it is genotoxic; that it causes oxidative stress. I
11 mean, I don't think that limits us in any way. But I just want
12 to make sure that it is clear that those are our arguments as
13 well.

14 **THE COURT:** I didn't understand that. I mean, this
15 case is only about whether Roundup causes NHL. Are you saying
16 you want to -- you are going to argue that it is dangerous in
17 some other way?

18 **MS. MOORE:** No. I'm saying that -- that really goes
19 to the method as to how it causes NHL. It's fine, Your Honor.

20 I understand the Court's ruling. Our position is that it
21 should stay as the model instruction, but I understand the
22 Court's ruling.

23 **THE COURT:** So --

24 **MR. KILARU:** I think they are just going back to
25 our --

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1 **THE COURT:** Let's go through this instruction.

2 **MR. KILARU:** Sure.

3 **THE COURT:** -- and talk precisely about how we will
4 change the language just to make sure we are on the same page.

5 **MR. KILARU:** So I think --

6 **THE COURT:** Let's start at the beginning.

7 **MR. KILARU:** Sorry.

8 **THE COURT:** So "Hardeman also claims that Monsanto was
9 negligent by not using reasonable care to warn or instruct
10 about Roundup's NHL risk."

11 **MR. KILARU:** You could also say about whether Roundup
12 could cause NHL. I think that is a different phrasing. Either
13 way it is the same point. That is what we are talking about
14 with the warning.

15 **MS. MOORE:** And, Your Honor, my concern is that is
16 there any case law to support Monsanto's position that the
17 manufacturer would have to have knowledge of the precise harm
18 versus just saying that the product is dangerous like the model
19 instruction says?

20 **THE COURT:** Well, I don't know, but in this case there
21 has been no evidence that Monsanto had any indication that the
22 product caused any harm other than NHL.

23 **MS. MOORE:** Well, part of that too is that there are
24 motions in limine to preclude any argument or references to any
25 other kinds of --

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1 **THE COURT:** Right.

2 **MS. MOORE:** -- harms.

3 **THE COURT:** The question now is what evidence came in
4 in this case. And Mr. Hardeman got NHL. And this whole case
5 has been about whether it causes NHL.

6 **MS. MOORE:** Right.

7 **THE COURT:** So --

8 **MS. MOORE:** Right. But now the focus is on Monsanto's
9 knowledge or what they should have known. And, you know, the
10 language in the instruction does not require it to be a precise
11 harm. And my question was what case law do they have to
12 support that?

13 **THE COURT:** Okay. If you want to write a brief about
14 that, you can. We are not going to waste any time on that now.

15 **MS. MOORE:** Okay. Okay. That's fine. I mean, I was
16 fine with the way it was written, Your Honor, so --

17 **THE COURT:** So "warn or instruct about Roundup's NHL
18 risk" or "about facts that"?

19 **MR. KILARU:** I think it would actually end there. I
20 mean, I think -- I guess you could say about facts that -- I
21 think it actually is just the NHL risk. I mean, this
22 instruction -- we are -- given the phasing, there is one thing
23 we are talking about here. I know the jury has made a finding
24 on that, but that should be the thing that the instruction
25 focuses on. I would end it there.

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1 **MS. MOORE:** It could say "or about facts that made
2 Roundup likely to cause NHL."

3 **THE COURT:** Could say that. I would sort of defer
4 to -- I'm not sure that adds anything. I think it is kind
5 redundant, but I also don't think it matters. So, I guess, my
6 slight preference would be to just say "Mr. Hardeman also
7 claims that Monsanto was negligent by not using reasonable care
8 to warn or instruct about Roundup's NHL risk," given that the
9 jury has already found that Roundup carries an NHL risk. Don't
10 you think that makes sense --

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

12 **THE COURT:** -- in this context? Okay.

13 So to establish this claim, you must prove all the
14 following: Monsanto manufactured, distributed or sold Roundup.

15 Two, that Roundup -- that Monsanto knew or reasonably
16 should have known that Roundup --

17 **MR. KILARU:** You could say of Roundup's NHL risk.

18 **THE COURT:** Of Roundup's NHL risk.

19 **MR. KILARU:** When used or misused.

20 **THE COURT:** That sounds good.

21 Does that sound good to you?

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

23 **THE COURT:** Okay.

24 In a reasonably foreseeable manner that Monsanto knew or
25 reasonably should have known that users did not realize that --

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1 **MR. KILARU:** The risk of NHL.

2 **MS. MOORE:** Risk of NHL.

3 **THE COURT:** -- risk of NHL.

4 That Monsanto failed to adequately warn of the risk, and I
5 think at that point we can just say "risk." Everybody knows
6 what we are talking about.

7 That a reasonable manufacturer, distributor or seller
8 under the same or similar circumstances would have warned of
9 the risk. And that -- and then we will change Number 6 to the
10 language that we are using for the -- in the previous
11 instruction, and that is, and Number 6, the failure to warn
12 about the risk of NHL was a substantial factor in causing
13 Mr. Hardeman's harm.

14 **MS. MOORE:** Your Honor, Defendant's failure to warn.

15 **THE COURT:** Okay. Monsanto's --

16 **MS. MOORE:** Monsanto's.

17 **THE COURT:** -- failure to warn.

18 **MS. MOORE:** Yes.

19 **THE COURT:** Yeah, that's right.

20 Okay. Anything else on Number 13?

21 **MS. MOORE:** No, Your Honor.

22 **MR. KILARU:** No, Your Honor.

23 Other than we have JMOL, Monsanto's failure to warn, we
24 also have the concern about inconsistent verdicts, which Your
25 Honor has already -- we cited Trejo, was a good example where

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1 the Court says strict liability basically subsumes the failure
2 to warn.

3 **THE COURT:** Right. And so I guess the question for me
4 at this point is if -- it seems to me there is potentially a
5 concern about inconsistent verdicts. But is it -- but the
6 Plaintiff -- like, let's put aside the design defect claim for
7 a second. Let's talk about the two failure-to-warn claims.

8 I'm operating under the assumption -- and correct me if
9 I'm wrong -- I'm operating under the assumption that if the
10 Plaintiffs want to present these two theories to the jury -- I
11 mean, they are two viable, legal theories -- and if, by doing
12 so, they want to run the risk of inconsistent verdicts, that is
13 their problem. It is not for me to deal with at the front end;
14 is that correct? Or do I have some obligation to --

15 **MR. KILARU:** I think that's right, Your Honor. Other
16 than to say, you know, given the time and resources have been
17 expended on the case, we think the Trejo situation is possible.
18 And given the law in that case that the strict liability count
19 basically subsumes the negligent warning claim, I think it
20 would be within your discretion to just say, Let's charge on
21 the one and avoid that. But I think as a general matter if
22 they want to pursue the two claims, that's their choice to do
23 so, subject to your --

24 **THE COURT:** So the idea would be just to charge on the
25 strict liability?

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1 **MR. KILARU:** I believe -- I would have to look back at
2 it. I believe, in Trejo the Court said that strict
3 liability -- there is no negligent failure to warn that
4 wouldn't be encompassed by the strict liability. It might be
5 the other way around, but I'm pretty sure it is the strict
6 liability claim because it is about the state of the science
7 generally would subsume the reasonableness. I can look that up
8 right now actually.

9 (Pause in proceedings)

10 **THE COURT:** I think it was that -- I think it was the
11 opposite of what you were saying, if I remember correctly. I
12 think they said that there is no way they could find for the
13 Plaintiff on negligent failure to warn and for the Defendant on
14 strict liability failure to warn. And so in that respect the
15 verdicts are inconsistent.

16 And I remember thinking, Well, if the jury had found for
17 the Plaintiff on strict liability failure to warn but not
18 negligent failure to warn, that might have been okay. That
19 might not have been inconsistent. That's what I remember
20 thinking when I read that case, but it was a few days ago now.

21 **MR. KILARU:** I think that's right, in terms of the
22 problem. I'm just looking. I thought I had seen this morning
23 language that one of the theories sort of encompasses the
24 other, but I can keep looking.

25 **THE COURT:** I'm guessing, as I sit here now, that it

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1 may be that -- if the jury came back for the Plaintiffs on
2 negligence but for the Defendant on strict liability, then we
3 would have a problem.

4 **MR. KILARU:** Yes, at a minimum --

5 **THE COURT:** And I think the verdict would need to be
6 thrown out then.

7 **MR. KILARU:** I think that's exactly -- I believe
8 that's what happened in Trejo.

9 **THE COURT:** But if they came back for the Plaintiff on
10 strict liability and for the Defendant on negligence, it's
11 not -- I mean, there may be an argument that those verdicts are
12 inconsistent, but it's not as obvious to me that they are.

13 **MR. KILARU:** I would have to think about that a little
14 bit more, Your Honor, because I think embodied in the strict
15 liability is sort of an objective assessment of the state of
16 the science and what a reasonable manufacturer would know. And
17 so if they are saying we acted reasonably in light of that, I
18 think there would be some inconsistency there as well.

19 **THE COURT:** Well, and it -- that the -- for the strict
20 liability, it's that Roundup's NHL risk was known or knowable
21 in light of the scientific and medical knowledge that was
22 generally accepted in the scientific community at the time that
23 Mr. Hardeman was using Roundup.

24 I mean, it's either impossible or almost impossible to
25 imagine how the jury could find for the Plaintiff on that and

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1 not also find for the Plaintiff on Number 2 in the negligence.

2 **MR. KILARU:** Right. I think in Trejo there is a quote
3 here, which sort of caught my eye. It basically says --
4 talking about an earlier Court decision -- the known or
5 knowable -- I think is exactly what you just said -- the known
6 or knowable in light of language in the strict liability
7 instruction at a minimum encompasses the knowing or has reason
8 to know negligence instruction.

9 Under a negligent standard a reasonable manufacturer would
10 not be charged with knowing more than what would come to light
11 from the prevailing scientific and medical knowledge. I think
12 that is the same scenario.

13 **THE COURT:** Right, which is why you could never find
14 for the Plaintiff on the negligence claim while finding for the
15 Defendant --

16 **MR. KILARU:** Right.

17 **THE COURT:** -- on the strict liability claim, but
18 it's -- what I'm not --

19 **MR. KILARU:** I see the point.

20 **THE COURT:** -- as clear on is could you -- could you
21 ever rationally find for the Plaintiff on the strict liability
22 but not the negligence. And -- I think -- I'm sure there are
23 cases where you can. And so the question is just -- is this a
24 case, given the evidence that has come in --

25 **MR. KILARU:** Right.

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1 **THE COURT:** -- would those verdicts be inconsistent on
2 the facts of this case?

3 **MR. KILARU:** Right.

4 **THE COURT:** And the answer may be yes. You know, I'm
5 not as sure though.

6 You know, I mean, I guess, as I sit here right now, you
7 know, unless I had something that sort of definitively, you
8 know, showed me that on the facts of this case, the verdicts
9 would be inconsistent if they came in for the Plaintiff on
10 strict liability and for the Defendant on negligence, I would
11 be pretty reluctant to take -- to be inclined to instruct the
12 jury on -- that on both theories. I think if I were the
13 Plaintiffs, I would be reluctant to present both theories to
14 the jury because of the risk of an inconsistent verdict. I am
15 not sure that's the --

16 **MR. KILARU:** We will -- I will take a look and see if
17 there is anything tonight, but I understand the concern about
18 not charging them both.

19 **THE COURT:** I don't think that's for me to do at this
20 point is my sense. I will think a little bit more about it
21 tonight too. But I think we should operate under -- and I will
22 look at your brief on design defect.

23 And we should all be operating on the assumption that
24 Number 11, 12 and 13 are all going to the jury.

25 **MS. MOORE:** Right. And we will also look at their

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1 brief, Your Honor. It came while we have been in court today.
2 We haven't had a chance to look at that too. Okay.

3 **THE COURT:** But have you looked at Trejo and given
4 thought to the --

5 **MS. MOORE:** Yes, and we have had discussions about it,
6 Your Honor.

7 **THE COURT:** All right.

8 Anything else on Number 13?

9 **MR. KILARU:** Not from us, Your Honor.

10 **MS. MOORE:** Your Honor, I have a copy of the *Arnold*
11 *versus Dow*, and I flagged the page.

12 **THE COURT:** That's okay.

13 **MS. MOORE:** Okay. Thanks.

14 **THE COURT:** Anything else from you on Number 13?

15 **MS. MOORE:** No, Your Honor.

16 **THE COURT:** Okay. Number 14, anything from the
17 Plaintiffs on Number 14?

18 **MS. MOORE:** Your Honor, our only concern here is --
19 let me find it -- is that obviously they are arguing -- we
20 talked about this a lot yesterday, and I don't want to rehash
21 it.

22 **THE COURT:** Sorry, I didn't catch that.

23 **MS. MOORE:** I said we talked about this a lot today,
24 and I don't want to rehash it. But it is not a defense for
25 them to say the EPA approved the product and, therefore, we do

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1 not -- we are not liable. And so I have some concerns about
2 how we word Instruction Number 14.

3 **THE COURT:** Well, that's why we say you don't
4 substitute your judgment for that of the -- you don't
5 substitute the agency's judgment for your own.

6 **MS. MOORE:** And I -- I have no problem with that. I
7 think where you end that, that remains true in Phase Two.

8 **THE COURT:** Yes.

9 **MS. MOORE:** But then you say "however." And that's
10 where I get a little concerned because you may consider the
11 conclusions of those entities when assessing whether Monsanto
12 is legally responsible. And I think that will allow them then
13 to argue that, Well, the EPA approved us so we are not
14 responsible. And that's not correct under the law. And so I
15 would ask that that sentence take -- come out.

16 **MR. KILARU:** Well, Your Honor --

17 **THE COURT:** What if we worded it differently? I mean,
18 I understand your point. But what if the wording were changed
19 to say, that, you know, the conclusions of these -- I'm just
20 speaking off the top of my head now -- but the conclusions of
21 these entities, along with all the other evidence, are relevant
22 to considering whether blah, blah, blah, blah.

23 **MS. MOORE:** That's probably better, Your Honor. It is
24 just my only concern, that doesn't preclude them -- you know,
25 again, you know, under the law it is not a defense that the EPA

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1 approved the label. And so that's my concern with that. I
2 don't know if we need some type of limiting instruction on
3 that.

4 **MR. KILARU:** I guess I can say two things, Your Honor.
5 We are not going to argue we are not liable simply because the
6 EPA approved the label and approved Roundup. But I think much
7 of Phase Two has been litigated on the correct premise that the
8 EPA's actions and other regulator's actions are probative as to
9 whether we acted reasonably, which goes to the liability. So I
10 think that aspect of the instruction, appropriately given the
11 earlier instruction, that you can't just say because EPA
12 decided something you decide the same thing captures where we
13 are.

14 **THE COURT:** I like the idea of dialing back the
15 wording a little bit just to make sure that we are not saying
16 anything that suggests to them that they -- you know, that -- I
17 wouldn't want this instruction to be misread as, Well, you are
18 not supposed to substitute the agency's judgment for your own
19 except on the following questions. I want to make sure that
20 it's not --

21 **MR. KILARU:** Yeah, I don't think it does that because
22 it says "may consider." It doesn't say "shall consider" or
23 "you must consider."

24 **MS. MOORE:** But --

25 **MR. KILARU:** That would be not that different I think

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1 from saying, you know, like all evidence is relevant, but I
2 think that it accurately describes how the jury should -- or
3 can approach this evidence.

4 **MS. MOORE:** My concern is the phrase whether Monsanto
5 is legally responsible. I think that's what can lead them to
6 think, Well, if the EPA has approved it and has reapproved it
7 or that it is registered with the EPA, well, then Monsanto's
8 not responsible.

9 **THE COURT:** Yeah.

10 **MS. MOORE:** That's the language that I think goes too
11 far.

12 **THE COURT:** Yeah, I think -- so I mean, what are
13 the -- what are these conclusions relevant for, right? They
14 are relevant -- they are relevant to whether the NHL risk was
15 known or knowable, right, between 1974 and 2012?

16 **MS. MOORE:** Right.

17 **THE COURT:** They are relevant to the -- it sounds like
18 from the discussion we had today, that we are all in
19 agreement -- that they are relevant to the amount of punitive
20 damages.

21 **MS. MOORE:** Uh-huh.

22 **THE COURT:** I suppose they are also relevant -- the
23 conclusions from pre-2012 are also relevant to punitive damages
24 generally, like eligibility for punitive damages. And it seems
25 like we all agree that that's what these things are relevant

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1 for; is that right?

2 So in other words, the -- you know, the conclusions that
3 these agencies reached pre-2012 and also to a lesser extent
4 post-2012 are relevant to whether the risk was known or
5 knowable; and the conclusions the agencies reached pre-2012 are
6 relevant to eligibility for punitive damages, and the
7 conclusions they reached post-2012 have relevance to
8 eligibility -- I mean, relevance to the amount of punitive
9 damages.

10 So does that -- does that sort of span the issues that --

11 **MS. MOORE:** I think so, Your Honor.

12 **THE COURT:** -- this is relevant for?

13 **MR. KILARU:** Yes.

14 **THE COURT:** So should we specify that?

15 **MS. MOORE:** I mean, that might be --

16 **THE COURT:** Or should we just have a more general
17 statement that is dialed back a little bit from the way it is
18 written now?

19 I mean, my inclination is that we should have a more
20 general statement that -- we shouldn't get into all those
21 specifics, but we should have a more general statement that is
22 dialed back from the way it is written now because your point
23 is well taken about the Monsanto legally responsible for the
24 harm.

25 So what if we just said, However, you make -- however, you

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1 know, the conclusions of those entities, along with the other
2 evidence you have heard, are relevant to Phase -- to the issues
3 you are considering in Phase Two, or something like that?

4 **MS. MOORE:** That's fine, Your Honor. Something like
5 that.

6 **MR. KILARU:** That's fine, Your Honor.

7 **THE COURT:** All right. Let me write that down.

8 However, the conclusions of these entities are relevant --

9 **MS. MOORE:** Were you going to add along with the other
10 evidence?

11 **THE COURT:** Oh, yeah.

12 -- are relevant to the issues you are considering in
13 Phase Two.

14 **MS. MOORE:** And then that would be the end of that
15 sentence?

16 **THE COURT:** I think that's probably better than what I
17 had.

18 **MS. MOORE:** Okay.

19 **THE COURT:** Does that sound okay?

20 **MR. KILARU:** That's fine.

21 **THE COURT:** All right.

22 Number 15.

23 **MR. KILARU:** Your Honor, just so I understand where
24 you are on this -- just for a preservation standpoint, we
25 would -- we believe that this instruction should also include

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1 legal facts about what the EPA is entitled to do and not do
2 with respect to pesticides. I think that is important
3 information for the jury to consider, and I think it is
4 probably something that, because it is a legal obligation,
5 would be best addressed in the form of an instruction.

6 **THE COURT:** Understood.

7 Okay. Number -- anything else on 14?

8 **MS. MOORE:** No, Your Honor.

9 **THE COURT:** 15?

10 **MR. KILARU:** We have a couple things, Your Honor. And
11 this folds into the table issue, so --

12 **THE COURT:** Oh, yeah, the table.

13 **MR. KILARU:** -- but we can do that first or last. It
14 is up to you.

15 **THE COURT:** I don't care.

16 **MR. KILARU:** Maybe just going through in order.

17 In paragraph 3, we -- the second sentence says "The
18 parties have stipulated to the amount of economic damages," and
19 the stipulated amount is already included on the verdict form.
20 I think one concern we have with that sentence just as it is
21 and with the number on the form is that putting the number
22 there may suggest to the jury that they need to get to that
23 number. So we propose putting into this instruction some
24 language about "If you determine that damages should be
25 awarded."

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1 **THE COURT:** Well, why don't we just -- I think we can
2 take out "and the stipulated amount is already included on the
3 verdict form," and -- but I think it is also fine to say --
4 have some language that says if you -- along the lines of what
5 you just suggested. "If you conclude that damages should be
6 awarded."

7 **MR. KILARU:** Yeah. I just don't want the jury to
8 think that we are stipulating to entitlement as opposed to an
9 amount.

10 **MS. MOORE:** And I understand that point, Your Honor.
11 That's how the instruction starts at the beginning, "if you
12 decide," and so that language is already there, the very first
13 thing they would read.

14 **THE COURT:** The issue is, by the way -- I mean, there
15 is no argument that if they find -- if the jury finds that
16 Mr. Hardeman has met his burden of proving the various elements
17 of the design defect and the failure-to-warn claims, there is
18 no argument that he is still not entitled to any damages,
19 right?

20 **MR. KILARU:** No. I think if they check through the
21 form and get to the damages question --

22 **THE COURT:** It is going to be at least 200,000,
23 whatever it is.

24 **MS. MOORE:** Right. That's why I don't think it is
25 necessary to add anything else here because we have that

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1 covered at the beginning.

2 **MR. KILARU:** I think our concern comes from, Your
3 Honor, if the jury has this instruction, but then they see the
4 verdict form that has one thing and only one thing filled out
5 already in the damages section, that might lead them to think
6 they need to get to that part of the form.

7 I think another option would be to put the amount of the
8 stipulation in here and not include it on the verdict form. I
9 just -- our concern is basically that the amount being on the
10 verdict form is very suggestive that the jury needs to get to
11 that part of the form. And we want to think of ways to avoid
12 creating that suggestion.

13 **THE COURT:** Okay. Hold on.

14 (Pause in proceedings)

15 **THE COURT:** Why don't we just say "The parties have
16 stipulated that if you find liability, the amount of economic
17 damages is," and then put it in there in the instruction?

18 **MR. KILARU:** I think that would make more sense, Your
19 Honor.

20 **MS. MOORE:** Well, that is not the stipulation, Your
21 Honor. I mean, I don't want to parse words, but we -- the
22 stipulation is not "if you have found." The stipulation is
23 that "these are his past medical expenses."

24 **MR. KILARU:** I guess you could put the "if you have
25 found" language up front if that helps. "If you have found

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1 they are entitled, the parties have stipulated to," and then
2 everything else you said.

3 **MS. MOORE:** That would be better, Your Honor.

4 **THE COURT:** "If you find liability, the parties have
5 stipulated that the amount of economic damages is" -- what is
6 it again?

7 **MS. MOORE:** It is 200,000 -- let me get the verdict
8 form.

9 **THE COURT:** There is no other form of economic
10 damages, right?

11 **MS. MOORE:** That's right, Your Honor. Well,
12 noneconomic.

13 \$200,967.10.

14 **THE COURT:** Okay. So it will just say "If you find
15 liability, the parties have stipulated that the amount of
16 economic damages is \$200,967.10."

17 **MS. MOORE:** Okay.

18 **MR. KILARU:** And, Your Honor, just on that point.
19 There was a portion of our JMOL brief that addressed what I
20 think were initially claimed as past and future medical
21 expenses and past and future lost earnings, and what we had
22 pointed out in the brief is that we didn't think there was any
23 evidence to support those claims. So if that's the case,
24 then -- that's my point is you don't need to read that part.

25 **MS. MOORE:** We are not making those claims, Your

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1 Honor, so --

2 **THE COURT:** Okay. About future -- so is there --

3 **MS. MOORE:** It is not even -- it wasn't even in our
4 instruction. It is not in your instruction.

5 **MR. KILARU:** My point was to save you some time
6 reading the last few pages of our brief -- I guess it is not
7 the last few pages -- but there are pages of our brief that
8 target future medical expenses and past and future loss
9 earnings. And if they are not seeking those, then I don't
10 think we need to --

11 **MS. MOORE:** We are not --

12 **THE COURT:** They are not in the instruction?

13 **MS. MOORE:** They are not.

14 **MR. KILARU:** I don't believe so.

15 **THE COURT:** Anything else on the compensatory damage
16 instruction?

17 **MR. KILARU:** I think there might just be -- in the
18 interest of candor -- a typo in the next paragraph that says
19 "The amount of damages must include an award for each item of
20 harm." I think that should be "Monsanto's conduct" not
21 "Mr. Hardeman's conduct."

22 **MS. MOORE:** Good catch.

23 **THE COURT:** Okay. Anything else?

24 **MR. KILARU:** On the next page, Your Honor, I don't
25 think there has been evidence about future physical pain or

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1 physical impairment. So we chose to take that out, based on
2 the testimony of Dr. Nabhan, everything else is supporting --

3 **THE COURT:** So future mental suffering, loss of
4 enjoyment of life, inconvenience, grief, anxiety?

5 **MR. KILARU:** Yeah. Those, I think -- I think there is
6 no basis for the jury to find on those. Obviously we disagree
7 with that, but I think the physical pain and physical
8 impairment, I think Dr. Nabhan testified that he is likely to
9 be in remission. That is a good thing for everyone. So it
10 wouldn't be necessarily --

11 **THE COURT:** It is almost impossible that it will come
12 back.

13 **MS. MOORE:** He also testified, Your Honor, that he is
14 at increased risk for developing other types of cancer; and
15 there is no evidence to dispute that increased risk. They
16 didn't bring anyone in here to dispute that evidence. And so I
17 do think that that language should say that we have presented
18 sufficient evidence to the jury.

19 **THE COURT:** That there is evidence -- there is
20 evidence for -- of future physical pain and future physical
21 impairment.

22 **MS. MOORE:** Correct, Your Honor.

23 **MR. KILARU:** I think the risk would actually fall more
24 into the other categories; that there is the possibility of
25 future cancer, which obviously is not a trivial thing, but that

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1 would fall into the sort of mental and emotional distress and
2 loss of enjoyment of life as opposed to actually having some
3 certainty that these things would occur.

4 **MS. MOORE:** The standard is not 100 percent certainty,
5 though, for future pain and suffering. We have shown that he
6 is at an increased risk by expert testimony to develop other
7 types of cancer, and they have not disputed that evidence at
8 all.

9 **THE COURT:** But what if there is a 2 percent risk that
10 he will develop some other type of cancer? I mean, does that
11 mean -- obviously you can recover for that because it's going
12 to cause you anxiety; right?

13 **MS. MOORE:** Uh-huh.

14 **THE COURT:** But if there's a 2 percent risk that he's
15 going to develop some future ailment, can you recover for the
16 physical pain you will experience for that ailment?

17 **MS. MOORE:** It's not about quantifying the chance or
18 the probability of that risk. His testimony is that he is at
19 an increased risk. It could be a 1 percent. It could be a
20 99 percent. He is at an increased risk because of the harm
21 that was caused by the non-Hodgkin's lymphoma.

22 And so because of that, then I think we have presented
23 sufficient evidence to go to the jury on future physical pain
24 and physical impairment, in addition to all the others that are
25 listed there. Because if he's --

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1 **THE COURT:** You didn't answer my question. Let's say
2 that there's a 2 percent risk that he's going to get some other
3 cancer because he had NHL.

4 **MS. MOORE:** Well, the evidence, though, Your Honor, is
5 that he's at an increased risk and they did not explore and say
6 to him, "Okay. Is that 1 percent or is that 99 percent?"

7 **THE COURT:** But neither did you. You didn't adduce
8 any evidence about --

9 **MS. MOORE:** We don't have to, Your Honor.

10 **THE COURT:** Okay. So what is the percentage of --
11 like, how much more likely does it have to become that he's
12 going to get sick or suffer pain or something before you can
13 have this in?

14 **MS. MOORE:** Well, I think we have to back up.

15 So his testimony was within a reasonable degree of medical
16 certainty, Mr. Hardeman is at an increased risk for developing
17 these other cancers. So right there alone is sufficient then
18 to go to the jury on that claim; and --

19 **THE COURT:** On the claim that he's going to develop --
20 that you should compensate him --

21 **MS. MOORE:** You should compensate him for that.

22 **THE COURT:** -- for the pain that he's going to
23 experience from the other cancers he's going to get?

24 **MS. MOORE:** Right, along with the mental suffering and
25 the anxiety, that he has given that opinion. Our burden is to

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1 show that it's probable. We have to provide expert testimony
2 on probable. He testified that it was within a reasonable
3 degree of medical certainty.

4 **MR. KILARU:** Your Honor, I think the next line is
5 actually the key one, and this is a requirement of damages,
6 that he has to prove that he is reasonably certain to suffer
7 that harm, understanding that it's possible or likely that
8 there's an increased risk; but to answer that question,
9 ultimately they have the burden.

10 **MS. MOORE:** If you --

11 **MR. KILARU:** I don't think there's a jury question on
12 whether he's reasonably certain to suffer that harm of future
13 physical pain and physical impairment, not the other things.

14 **THE COURT:** Okay. I understand. I think we have to
15 take out "physical pain and physical impairment."

16 **MS. MOORE:** And, Your Honor, we would just note our
17 objection to that based on the evidence that's come in.

18 **THE COURT:** Okay.

19 All right. What's next?

20 **MR. KILARU:** Last, Your Honor, I think it's been
21 foreshadowed for the last few days, but we object to the
22 inclusion of the life expectancy tables.

23 So just to explain that, I think it's pretty commonplace
24 in cases involving future economic damages to use life
25 expectancy numbers because, say, it's lost earnings in the

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1 future, you calculate how long that's likely to go.

2 But the economic damages are actually a fixed amount here.
3 We just talked about that. And so all we're talking about at
4 this point, as I understand it, in the future are noneconomic
5 damages.

6 **THE COURT:** Okay.

7 **MR. KILARU:** And we don't think there's a basis for
8 using an actuarial table of life expectancy to try to come up
9 with a number for noneconomic damages. I don't -- I think it
10 would inevitably be conjecture to say something like "Pick a
11 random number and then pick it out over the course of the next
12 14 years."

13 That type of argument, you know, we had a case that we
14 found that's called *Bakke versus Union Carbide*, and there were
15 some other problems there; but that case is a 2007 Westlaw
16 4206739, and it basically reversed --

17 **THE COURT:** What's that? Westlaw 420?

18 **MR. KILARU:** 4206739.

19 And in that case there were a few impermissible arguments
20 made. There was definitely this Golden Rule argument that you
21 should imagine what you would do over the next 50 -- I don't
22 know what the number was; but they also argued something to the
23 effect of "Take, you know, \$500,000 and carry that forward for
24 the rest of his life expectancy. That's the -- that's the
25 noneconomic loss he's going to have in the future."

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1 And that type of argument, we think, isn't permissible and
2 we don't think that the use of the life expectancy table would
3 be appropriate because it would suggest there's some kind of
4 formulaic mathematical way to calculate those damages when, in
5 fact, that's not the case.

6 **MS. MOORE:** Your Honor, under the actual Ninth -- I'm
7 sorry. Under the CACI instructions under 3932, the life
8 expectancy, it states that you use those -- it says (reading):

9 "If you decide that the plaintiff has suffered
10 damages that will continue for the rest of his life, you
11 must determine how long he will probably live."

12 That's if you have the instruction, you don't take
13 judicial notice. But it's about damages. It does not break it
14 down between noneconomic and economic.

15 I've actually never had this happen in a case. I've
16 always had the parties agree to the life expectancy table,
17 which we provided to them in January on this. But, I mean,
18 this is something that the Court can take judicial notice of
19 from the life expectancy tables. And, I mean, it's very
20 clearly set forth in CACI 3932.

21 **THE COURT:** Do you have any cases where there were
22 only noneconomic damages being sought going forward and this
23 life expectancy table was given?

24 **MS. MOORE:** I'd have to go back and look, Your Honor.
25 They do cite to -- in the CACI form instructions, they do cite

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1 to *Levy* on pain and suffering, and the cases that they're
2 talking about is that mortality tables are admissible to assist
3 the jury but they -- and it goes on to say that, you know, the
4 life expectancy of the deceased -- well, in that case, that's a
5 deceased so that doesn't matter.

6 In my experience, and I'll go back and look at case law,
7 Your Honor, but in my experience, because I've never had this
8 be a disputed issue, is that you can use life expectancy tables
9 if you can show that there are future damages, and I've never
10 seen it where it's limited solely to economic damages versus
11 noneconomic damages.

12 **THE COURT:** Okay. Why don't you take a look and see
13 if you can find any cases --

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

15 **THE COURT:** -- that stand for the proposition that the
16 life expectancy table is appropriate to be given in a situation
17 where the plaintiff is only seeking future noneconomic damages.

18 **MS. MOORE:** Okay. We will, Your Honor. We'll do
19 that.

20 **THE COURT:** Why don't you file that by 8:00 o'clock.
21 File something on that. You know, you don't even have to
22 have -- you don't have to have briefing. You can just file a
23 letter brief.

24 **MS. MOORE:** Just send you the cases?

25 **THE COURT:** File a letter identifying the cases.

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1 **MS. MOORE:** Okay. We will do that. Thank you,
2 Your Honor.

3 **THE COURT:** Assuming it goes in, is 1430 right? Is
4 that really the life expectancy of a --

5 **MS. MOORE:** A 70-year-old male? Yes.

6 **THE COURT:** I didn't think it was that high.

7 **MS. MOORE:** Yes, it is.

8 **THE COURT:** Okay. Is that right? 14.3?

9 **MS. MOORE:** Yes.

10 **THE COURT:** Okay. Do you agree?

11 **MR. KILARU:** Yeah, I see it on the table, so...

12 **THE COURT:** Okay. Anything else on that instruction?

13 **MS. MOORE:** No, Your Honor.

14 **MR. KILARU:** No, Your Honor.

15 **MS. MOORE:** I'm glad Mr. Hardeman is not here, though.

16 **MR. KILARU:** It's just average. It could be a lot
17 higher.

18 **THE COURT:** Okay. Nothing else on compensatory
19 damages from either of you?

20 **MS. MOORE:** No, Your Honor.

21 **MR. KILARU:** No.

22 **THE COURT:** All right. Number 16?

23 **MR. KILARU:** We had one tweak, Your Honor.

24 **THE COURT:** Okay.

25 **MR. KILARU:** The first sentence says that Mr. Hardeman

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1 must prove his eligibility for punitive damages by clear and
2 convincing evidence, and our worry about that is just the clear
3 and convincing evidence is actually too limited to certain
4 considerations when, in fact, sort of all of the elements
5 they're going to hear about on the next page about malice and
6 oppression and fraud and managing agent liability, corporate
7 liability --

8 **THE COURT:** So you want it to say "He must prove
9 punitive damages by clear and convincing evidence"?

10 **MR. KILARU:** I think that would be more appropriate.

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

12 **THE COURT:** Okay. And nothing else on 16?

13 **MS. MOORE:** Not from us, Your Honor.

14 **THE COURT:** All right. 17?

15 **MR. KILARU:** We had a couple things, Your Honor. We
16 can start with the fraud issue that you had raised.

17 **MS. MOORE:** Your Honor, we're fine with not including
18 fraud.

19 **THE COURT:** Okay.

20 **MR. KILARU:** Okay.

21 **THE COURT:** That was easy.

22 **MR. KILARU:** If there's no fraud claim, so just to
23 take our things in order, I think number A5 should be pulled
24 out, the trickery or deceit, which I think is relevant to a
25 fraud claim but not to sort of a malice or oppression claim.

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1 **MS. MOORE:** I'm not aware of the case law on that,
2 Your Honor. I will note that in the *Johnson* case they did not
3 have the fraud either and they did include the trickery or
4 deceit factor as well.

5 **THE COURT:** Let me just ask. Are you planning on
6 arguing that Monsanto acted with trickery or deceit?

7 **MS. MOORE:** I think they acted with deceit, I do.

8 **THE COURT:** Okay.

9 **MS. MOORE:** I think we have evidence in with the
10 Williams ghostwritten article and that's deceitful. I think
11 that evidence has been presented.

12 **THE COURT:** All right. I think it's appropriate to
13 leave that in.

14 **MR. KILARU:** Okay.

15 **THE COURT:** What else?

16 **MR. KILARU:** On the next page, Your Honor -- oh,
17 actually, let me start with -- this is not an objection. This
18 is just to tee up an issue on the next page.

19 So in 5 -- sorry -- in A -- in B Your Honor used the
20 phrase "is there a reasonable relationship between the amount
21 of punitive damages and Mr. Hardeman's harm or between the
22 amount of punitive damages," so on and so forth, "that Monsanto
23 knew was" -- "potential harm that Monsanto knew was likely to
24 occur." And we think for the "potential harm" piece that is
25 the appropriate standard, that it has to be potential harm that

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1 Monsanto knew was likely to occur.

2 But then on the next page when you started -- the next
3 sentence starts, "A punitive damages award may punish the
4 defendant only for conduct that harmed or potentially could
5 have harmed the plaintiff," I think it would be more
6 appropriate to add in something about the likely to -- the
7 likely harm as opposed to just potential harm.

8 Does that make sense? So it would read something like "A
9 punitive damages award may punish the defendant only for
10 conduct that harmed the plaintiff or potential harm that was
11 likely to have occurred because of Monsanto's conduct."

12 **THE COURT:** "That harmed the plaintiff"?

13 **MR. KILARU:** Right, or "potential harm to the
14 plaintiff that would likely to have occurred because of
15 Monsanto's conduct."

16 It just kind of mirrors the language somewhat from the
17 previous page. And we think the law is a case called *Simon* --
18 it's 113 P.3d 63 -- actually requires for potential harm it
19 would be likely as opposed to just potential in the abstract.

20 **THE COURT:** Any objection to that change?

21 **MS. MOORE:** I think it just becomes confusing,
22 Your Honor. I think the way it was written was fine.

23 **THE COURT:** So what he's proposed is "A punitive
24 damages award may punish the defendant only for conduct that
25 harmed the plaintiff or for potential harm that was likely to

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1 have occurred"? Is that what you proposed?

2 **MR. KILARU:** Yeah. I'm trying to think of a better
3 way to phrase it than what I just said. I mean, maybe it would
4 be "conduct that harmed or potentially likely could have harmed
5 the plaintiff."

6 **MS. MOORE:** That's just basically the same thing that
7 was already there.

8 **THE COURT:** Well, he's trying to insert the word
9 "likely" in.

10 **MR. KILARU:** Yeah, that's it. I think my first
11 phrasing was a much more inelegant way of doing that, but I
12 think that that is an important aspect of the "potential harm"
13 piece.

14 **THE COURT:** So do you have any objection to the
15 concept of inserting that "likely" into that sentence?

16 **MS. MOORE:** Where would "likely" go?

17 **THE COURT:** I don't know exactly.

18 **MR. KILARU:** I think you could just say "potentially
19 likely could have harmed" or "potentially likely could have
20 harmed the plaintiff," perhaps.

21 **MS. MOORE:** I think "potentially" --

22 **THE COURT:** Why not just say -- well, this
23 instruction...

24 (Pause in proceedings.)

25 **THE COURT:** "Punitive damages and potential harm that

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1 Monsanto knew was likely to occur because of its conduct."

2 **MR. KILARU:** Yeah, I think the first proposal was just
3 to take that phrase kind of wholesale and put it at the end. I
4 recognize that makes it a lot longer, but that might avoid the
5 weirdness of "potentially likely could."

6 **MS. MOORE:** You could say -- you know, I don't think
7 it's necessary, but you could say "or potentially could have
8 likely harmed." I mean, this is ridiculous really.

9 **MR. KILARU:** I don't think it's that ridiculous. I
10 think it's pretty important, but I get the wording could be a
11 little ridiculous.

12 **MS. MOORE:** I agree that jury instructions are
13 important, but I think the way it was written covered the issue
14 that you're raising.

15 **MR. KILARU:** I guess my concern was as it's phrased,
16 is that it takes out the part about how we, Monsanto, had to
17 know that potential harm was likely to occur. That's sort of
18 the nutshell point of it.

19 **THE COURT:** I mean, model instructions are often
20 wrong, especially in California, but what does the model
21 instruction say? 3945, is that what it is?

22 **MR. KILARU:** Yeah, this is 3940. This is not in the
23 model because I think the purpose of this paragraph was
24 something we had proposed inserting to address both the 2012
25 issue and then how you consider post 2012 issues. So it's not

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1 sort of normally -- well, I can tell you what our language was.

2 **MS. MOORE:** Yeah. We had ended it with -- our
3 proposal, Your Honor, was after number (c) -- or subsection
4 (c), that you would just say "Punitive damages may not be used
5 to punish Monsanto for the impact of its alleged misconduct on
6 persons other than Mr. Hardeman." And so we didn't have any of
7 these last three paragraphs in our proposal.

8 **MR. KILARU:** So that actually is one of my next
9 points, which is I think that should be --

10 **THE COURT:** That's not included in there.

11 **MR. KILARU:** I think that should be in there.

12 **THE COURT:** Right.

13 **MR. KILARU:** But I don't think that goes to this point
14 about likely -- about potential harm being likely.

15 **THE COURT:** This was the paragraph -- this was the
16 post-use conduct paragraph.

17 **MR. KILARU:** Yeah.

18 **THE COURT:** Okay. So I think we can simplify this.

19 So what I would propose is simply to cross out --

20 **MS. MOORE:** The first sentence?

21 **THE COURT:** -- the first sentence because --

22 **MR. KILARU:** Oh, I see. Okay.

23 **THE COURT:** And then --

24 **MS. MOORE:** You can just start with "when."

25 **MR. KILARU:** Yeah.

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1 **THE COURT:** Then you say "When deciding whether award
2 punitive damages" -- well, so we need to tweak this based on
3 our discussion earlier.

4 **MR. KILARU:** Right.

5 **THE COURT:** So there are a couple things flying around
6 in the air right now. One is you want to include an
7 instruction that the jury can't punish Monsanto for harm caused
8 to others --

9 **MR. KILARU:** Yes.

10 **THE COURT:** -- only to Mr. Hardeman. That seems
11 appropriate. It was included in the plaintiff's original
12 proposed instructions. I believe it's in the model. I know
13 it's in the Ninth Circuit model. That seems appropriate.

14 And so we have to work to figure out how to incorporate
15 that, and then tweak this language about 2012 to account for
16 the discussion -- kind of the meeting of the minds that I
17 believe we reached earlier today, which is that in deciding
18 whether the conduct was, you know, sufficiently reprehensible
19 to warrant punitive damages, only the conduct pre-summer 2012
20 can be considered.

21 When you're considering the amount, you know, you can
22 consider -- I think we might just be able to say "You can
23 consider post-summer 2012 conduct" because we've already sort
24 of very carefully limited what evidence came in of post-2012
25 conduct.

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1 **MR. KILARU:** Right.

2 **THE COURT:** So now that we've limited what evidence
3 has come in on post-2012 conduct, I think we can just say that
4 "you can consider post-2012 conduct in determining the amount."
5 And what that allows you to do is argue --

6 **MS. MOORE:** Right.

7 **THE COURT:** -- that -- you know, you can make your EPA
8 argument --

9 **MS. MOORE:** IARC.

10 **THE COURT:** -- you can make your IARC, and they still
11 haven't done a study.

12 **MS. MOORE:** Or Zhang, or whatever has come out
13 afterwards, and said, "Look, all the stuff keeps coming and
14 they still don't change their behavior."

15 **MR. KILARU:** I think a way -- I'm sorry. Go ahead.

16 **MS. MOORE:** I was going to say, the only thing is that
17 where we say "You should only consider Monsanto's conduct up
18 until summer," I think it should be "through the summer"
19 because he did testify that he went through the summer of 2012.
20 So --

21 **THE COURT:** Okay.

22 **MS. MOORE:** -- just to change that "up until."

23 **MR. KILARU:** So, Your Honor, just to put all these
24 threads together, I think this is off the top of my head, but
25 one potential idea would be, "When deciding whether to award

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1 punitive damages -- because that's the eligibility point --
2 "you should only consider Monsanto's conduct through summer
3 2012, which is when Mr. Hardeman stopped using Roundup. Any
4 evidence you may have heard concerning" -- I guess you could
5 just say "conduct post-summer 2012" because I think the EPA
6 pieces may fold into here as well, "can only be considered in
7 determining the amount of punitive damages.

8 **THE COURT:** Okay. So say that again.

9 **MR. KILARU:** Sure.

10 **THE COURT:** "Any evidence you may have heard regarding
11 conduct"?

12 **MR. KILARU:** Yes, "conduct post-summer 2012 can only
13 be considered in determining the amount of punitive damages."

14 **THE COURT:** And then you might say "In addition,
15 punitive damages" -- "In addition," and then the sentence --

16 **MR. KILARU:** Yeah. So it's -- actually I looked just
17 now, it's the same in ours and theirs, so I think from either
18 side you could take it, but I believe it's -- I'll just use
19 this --

20 **MS. MOORE:** I would add it at the end of the next
21 paragraph, though. I think that flows a little bit more.

22 **THE COURT:** Okay.

23 **MR. KILARU:** That's fine. Yeah. I think, yeah, both
24 sides I believe had the same language, which is --

25 **MS. MOORE:** It's straight from the model.

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1 **MR. KILARU:** Yeah. "Punitive damages may not be used
2 to punish Monsanto for the impact of its alleged misconduct on
3 persons other than Mr. Hardeman."

4 **THE COURT:** Okay.

5 **MS. MOORE:** Yeah. And I'm fine if he just wants to
6 stick that at the end of that next paragraph, Your Honor.

7 **THE COURT:** All right. So the idea -- so let's -- so
8 we go through these various elements A, B, C; and then after
9 that, you have a paragraph that says (reading):

10 "When deciding whether to award punitive damages, you
11 should only consider Monsanto's conduct through summer
12 2012, which is when Hardeman stopped using Roundup. Any
13 evidence you may have heard regarding conduct post-summer
14 2012, can only be considered in determining the amount of
15 punitive damages."

16 And then you go --

17 **MS. MOORE:** Can you --

18 **THE COURT:** Sorry?

19 **MS. MOORE:** I was just going to say, can you add
20 "Monsanto's" in front of "conduct"?

21 **THE COURT:** Oh, no. The idea would be to --

22 **MS. MOORE:** Oh, any conduct. Okay.

23 **THE COURT:** -- take that out because it could be EPA
24 conduct, it could be --

25 **MS. MOORE:** Okay. That's fine.

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1 **THE COURT:** And then -- so the next paragraph, the one
2 that starts "Punitive damages are not intended to compensate
3 Mr. Hardeman," at the end of that paragraph add the sentence
4 about punitive damages only being -- you can't award punitive
5 damages for harm done to other people.

6 **MS. MOORE:** Right. That's fine.

7 **THE COURT:** Is that correct?

8 **MR. KILARU:** Yep.

9 **MS. MOORE:** Yes.

10 **THE COURT:** Should that be a separate paragraph or
11 should it be --

12 **MS. MOORE:** I think it can go in that one, Your Honor.

13 **MR. KILARU:** I think it's fine either way.

14 **THE COURT:** Okay. Anything else on the punitive
15 damages instruction?

16 **MS. MOORE:** Your Honor, we would just object to that
17 last paragraph. We don't think that that's necessary.

18 **THE COURT:** The one about mitigating evidence?

19 **MS. MOORE:** Yes.

20 **THE COURT:** Okay. And I think based on the discussion
21 we had, that it is appropriate, and so that will stay in.

22 **MR. KILARU:** I think that was the last thing we had on
23 the instructions, Your Honor.

24 **THE COURT:** All right. Anything else from the
25 plaintiff on the instructions?

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1 **MS. MOORE:** No, Your Honor.

2 **THE COURT:** Okay. Verdict form?

3 **MS. MOORE:** Your Honor, we do not have any changes to
4 the verdict form.

5 **THE COURT:** Okay.

6 **MR. KILARU:** So we have --

7 **THE COURT:** I want to make a note to ourselves to make
8 sure the numbering stays the same. I think the numbering is
9 going to stay the same, but in terms of cross-referencing the
10 instruction numbers.

11 **MS. MOORE:** Right.

12 **THE COURT:** And then you wanted -- in light of the way
13 we've changed the instructions, are you okay with keeping the
14 number in on past economic loss?

15 **MR. KILARU:** I actually think part of my proposal to
16 put it in the instructions was to take it out of here for the
17 reasons of suggestiveness. I mean, I think they will use these
18 things side by side. So if they get to this question on the
19 form, they can go to the instruction; but I think having it on
20 the form we think is a little suggestive that they should get
21 there.

22 **THE COURT:** What happens if they award \$1 million in
23 economic damages?

24 **MR. KILARU:** I think we stipulated to the amount of
25 economic damages, so it would get reduced to 200,000, whatever

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1 the number is.

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

3 Any objection?

4 **MS. MOORE:** No, Your Honor.

5 **THE COURT:** Okay.

6 All right. So you're okay with the verdict form?

7 **MR. KILARU:** Two things.

8 **THE COURT:** Okay.

9 **MR. KILARU:** So, first, I sort of gather that
10 Your Honor has ruled on this, but we have proposed something
11 more akin to a special verdict form as opposed to a general
12 verdict form.

13 **THE COURT:** My general philosophy is unless there's a
14 really strong reason to do special verdicts, I think it's
15 generally preferable to do a general one. So --

16 **MR. KILARU:** The only thing -- understanding that,
17 Your Honor, I think -- I just note that we would prefer the
18 special for record purposes; but the one thing I propose is
19 instead of Question 1, there's a sentence and then it says "See
20 Instruction Number 11," that it would be more appropriate to
21 say something like "by establishing the elements in Instruction
22 Number 11" because in order to get the verdict, they need to go
23 through the elements on 11. It's not just sort of look back at
24 them and determine.

25 **THE COURT:** I mean, we're saying "See Instruction 11"

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1 and it tells them in Instruction 11 that he has the burden of
2 proving these elements.

3 **MR. KILARU:** Right. I just -- given that we're not
4 doing a special verdict form, I think it would be appropriate
5 to tell them that they should find the elements in that
6 instruction as opposed to sort of a general reference to the
7 instruction.

8 **THE COURT:** Okay. I mean --

9 **MS. MOORE:** I think that's redundant.

10 **THE COURT:** I suppose that argument can be made in
11 every case, but I do think it's nice to refer them to the
12 instruction, which is helpful because it will remind them of
13 the burden and all that; but I think that makes the sentences a
14 little too complicated to -- a little too long and a little too
15 complicated. So I think it's better to leave it the way it is.

16 **MR. KILARU:** Okay.

17 Second, and my colleague has flagged this for me, but I
18 think in both 2 and 3, just to track the decisions that we made
19 earlier, instead of "potential risks" in 2 and "cancer risk" in
20 3, it should be "the risk of NHL."

21 **THE COURT:** "Lacks sufficient warnings of the risk of
22 NHL"?

23 **MR. KILARU:** Yes.

24 **THE COURT:** "The risk of NHL."

25 **MR. KILARU:** And then in 3, instead of "cancer risk",

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1 Roundup's NHL" --

2 **THE COURT:** "NHL risk"?

3 **MR. KILARU:** Yes.

4 **MS. MOORE:** And, Your Honor, I just want to make sure
5 because the testimony and then their request for admission is
6 warning of cancer, and I don't think they would do this, but I
7 just want to put it out there, that they're not going to stand
8 up and say, "Well, you know, they didn't ask about whether if
9 it had said NHL..." I mean, NHL is a form of cancer. We're
10 narrowing it much more than I'd anticipated.

11 **THE COURT:** I don't understand what they would --

12 **MS. MOORE:** I mean, I thought we would --

13 **THE COURT:** What is it you're worried they're going to
14 argue? Are you worried they're going to get up there and say,
15 "Hey, they never said we had to have an NHL warning, they just
16 said we had to have a cancer warning"?

17 **MS. MOORE:** Right.

18 **THE COURT:** That would shoot the punitive damages
19 verdict up higher than the *Johnson* verdict.

20 **MR. KILARU:** We will not be making that argument to
21 the jury. I note as an aside, that we have an argument that
22 there's insufficient evidence of what the warning should have
23 been, but that's sort of a legal argument and separate than I
24 think we would argue to the jury.

25 **THE COURT:** Okay. Anything else on the verdict form?

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1 **MR. KILARU:** Just one other thing, Your Honor. On
2 Question 5, this alludes to again what we were just talking
3 about.

4 **THE COURT:** Yes.

5 **MR. KILARU:** It says "entitled to punitive damages
6 based on Monsanto's conduct during the time."

7 **THE COURT:** Yes.

8 **MR. KILARU:** We think that needs to be limited to
9 Mr. Hardeman because it's not sort of general conduct. It goes
10 to the question of, you know, it has to be tied to conduct that
11 either -- and I don't want to get into the sort of long phrase
12 we had, but it's the conduct that either harmed Mr. Hardeman or
13 is likely to harm Mr. Hardeman, not just conduct generally.

14 **THE COURT:** Yes. I'm wondering if we should just say
15 "Did Mr. Hardeman prove by clear and convincing evidence" --

16 **MR. KILARU:** Oh, I see.

17 **THE COURT:** What?

18 **MR. KILARU:** I'm sorry. I think I envisioned where
19 you were going, but I shouldn't have cut you off.

20 **THE COURT:** Did he prove by clear and convincing
21 evidence that he was entitled to punitive damages?

22 **MR. KILARU:** Yes. That makes sense.

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

24 **MR. KILARU:** That's all.

25 **THE COURT:** And anything else on this verdict form.

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1 **MR. KILARU:** That was all from us, Your Honor.

2 **MS. MOORE:** No, Your Honor.

3 **THE COURT:** Okay. Anything else to discuss?

4 **MS. MOORE:** Your Honor, the only thing is I would ask
5 how much time we have and if I could have an hour for closing.

6 **THE COURT:** You can have an hour for closing.

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

8 **THE COURT:** So is that to say an hour -- are you
9 asking for an hour total?

10 **MS. MOORE:** I'd like an hour to close and then 15
11 minutes for rebuttal.

12 **THE COURT:** That's fine.

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

14 **THE COURT:** And I'll inform the jury that that's how
15 much -- how long you're anticipated to take in advance.

16 **MS. MOORE:** I will be cognizant of that.

17 **THE COURT:** Oh, yes, slides, closing argument slides.
18 When am I getting those?

19 **MR. KILARU:** We could -- I think was it 7:00 a.m. last
20 time, Your Honor, the morning of? We could do that again or --
21 I guess are we starting earlier than 7:00? No. I think --

22 **MS. MOORE:** What time do you want us here tomorrow?

23 **THE COURT:** We're starting at 8:30, and I guess I
24 should receive the closing argument slides by 7:30.

25 **MS. MOORE:** Okay. That's fine, Your Honor. Thank

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1 you.

2 **THE COURT:** And that way I can review them and
3 hopefully we won't have anything to argue about this time, but
4 that will give you a little time to tweak it.

5 **MS. MOORE:** Okay. Sounds good. Thank you,
6 Your Honor.

7 **THE COURT:** All right.

8 **MR. KILARU:** Your Honor, I just got a message on one
9 factual point that goes, I think, two hours ago at this point;
10 but you had asked about the theory of design defect in *Johnson*,
11 and I don't believe, based on what my colleagues are telling
12 me, that in *Johnson* it was argued that Roundup shouldn't be
13 sold to residential users.

14 There was some evidence, we would argue insufficient
15 evidence in that proceeding, but the evidence from Dr. Sawyer
16 that the combination of the particular surfactants used made
17 Roundup more defective than some other version of the product,
18 but I don't believe the sort of "ban the product" argument was
19 made there.

20 **THE COURT:** Yeah. I mean, my recollection of -- I
21 remember flipping through it like last week or something and
22 seeing that they argued to the jury in *Johnson* that the reason
23 it was defective is it didn't have a warning. That's my
24 recollection, but it sounds like -- I mean, I still don't fully
25 understand what they're arguing, but it sounds like they're not

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1 arguing that this time. They're arguing that it was just
2 simply dangerous.

3 **MS. MOORE:** Are we going back to that?

4 It's defective in the sense that it's not something that
5 an ordinary consumer would expect to get cancer from.

6 **THE COURT:** Okay. All right.

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

8 **MR. KILARU:** Thank you, Your Honor.

9 **MS. MOORE:** We'll see you in the morning.

10 **MS. MATTHEWS JOHNSON:** Thank you, Your Honor.

11 **MS. MOORE:** What time do you want us here? 8:00?

12 **THE COURT:** I want you here by quarter to 8:00.

13 **MR. KILARU:** And did you want the slides by 7:00,
14 Your Honor?

15 **THE COURT:** Slides by 7:30.

16 **MR. KILARU:** Oh, okay. I was just going to say...

17 (Proceedings adjourned at 5:12 p.m.)

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CERTIFICATE OF REPORTERS

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

DATE: Monday, March 25, 2019



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter



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