

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.)	
_____)	
)	
IN RE: ROUNDUP PRODUCTS)	
LIABILITY LITIGATION)	
)	NO. 16-md-02741 VC
_____)	

San Francisco, California
Tuesday, July 2, 2019

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

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1 Tuesday - July 2, 2019

2:38 p.m.

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

3 ---000---

4 **THE CLERK:** Calling Case Number 16-cv-00525, Hardeman
5 versus Monsanto Company, et al., and 16-md-2741, In Re Roundup
6 Products Liability Litigation.

7 Counsel, please step forward and state your appearances
8 for the record.

9 **MS. WAGSTAFF:** Good afternoon, Your Honor. Aimee
10 Wagstaff on behalf of plaintiffs, and with me is attorney
11 David Wool and Jennifer Moore.

12 **MS. MOORE:** Good afternoon, Your Honor.

13 **THE COURT:** Hello.

14 **MR. STEKLOFF:** Good afternoon, Your Honor. Brian
15 Stekloff, Tamarra Matthews Johnson, Rakesh Kilaru, and Julie
16 Rubenstein on behalf of Monsanto.

17 **THE COURT:** Okay. There's one quick thing I want to
18 get out of the way on Juror Number 4 before we talk about
19 damages.

20 **MS. WAGSTAFF:** Do you mind if I just scoot this over a
21 little so I can see you?

22 **THE COURT:** Yes. Whatever you want.

23 With respect to Juror Number 4, there was one thing that I
24 forgot to put on the record at trial about our contact with
25 her, and I wanted to do that now so as to give you an

1 opportunity to respond to it if you wanted to.

2 As you know, Kristen excused her after the discussion we
3 had about Juror Number 4; and either that day or the day after,
4 there was a message for me from Juror Number 4 and she was
5 calling to ask why she was excused, and so I wanted to do her
6 the courtesy of calling her back.

7 So I called her back and I said, "The reason you were
8 excused is because it was reported by multiple people on the
9 jury that you had announced that you had already decided how
10 the case -- how you were going to vote and that nothing was
11 going to change your mind, and you also expressed some views
12 about the lawyers."

13 And she said, "Oh. Okay. Thank you." And she sounded
14 relieved actually. She didn't deny that she said any of those
15 things. And to me, I mean, this is just my perception from her
16 reaction, but to me she sounded relieved that she hadn't been
17 caught doing something else and that she was worried about
18 being caught doing something else. I mean, again, that was
19 just my perception so you have to take that with a grain of
20 salt.

21 But what is clear is that she did not deny that she had
22 said that to the jurors. So I wanted to tell you that. I
23 mean, I'm not sure -- you know, obviously I made the decision
24 before that time to excuse her, and I think I had sufficient
25 information that justified the decision to excuse her. I also

1 think you probably waived any objection to that.

2 But I did at least want to relay that to you, because I
3 realize that I forgot to do so during trial, and give you an
4 opportunity to respond to it in any way that you like, either
5 at the moment or at the tail end of the hearing when we're done
6 discussing damages.

7 **MR. STEKLOFF:** I don't think, Your Honor, that it
8 changes our argument understanding that you're not going to
9 grant a new trial on that basis. I think that we still believe
10 that there should have been a colloquy at the time and that it
11 could have been more fulsome than what was just described; but
12 beyond that, I think we would preserve the issue understanding
13 that the record -- understanding that this has now been added
14 on the record.

15 **THE COURT:** Okay. And then -- so I think that pretty
16 much leaves us talking about the damages issues. I think
17 that's really the only -- that's probably the only thing we
18 need to discuss.

19 I did ask you one follow-up question on preemption. Let's
20 see how much time we have to get to it. I'm not sure it's
21 necessary.

22 So on the damages, you know, I just have to say that I
23 think that there is an unfortunate aspect to the law on
24 punitive damages and that is, you know, we have to tell -- we
25 have to ask the jury to find the appropriate amount of punitive

1 damages; and, generally speaking, we're not supposed to tell
2 them that under the due process clause, you know, it can almost
3 never be more than nine times the amount of the compensatory
4 damages and that district judges are required after the trial,
5 if the punitive damages award is higher than that, district
6 judges are required after the trial in almost every instance to
7 reduce the punitive damages award.

8 I think that's an unfortunate thing from the standpoint of
9 juror service, you know, and it's unfortunate that we, you
10 know, in most circumstances have to keep the jury in the dark
11 about that.

12 You know, I understand why. I think that if -- I think
13 the problem is that if -- you know, if you inform the jury
14 upfront that punitive damages are capped in a way that's tied
15 to compensatory damages, then you run the risk that the
16 Supreme Court is concerned about of, you know, passions driving
17 the compensatory damages award as well as the punitive damages
18 award; right?

19 So I get the -- I understand it, but I find it very
20 uncomfortable. I don't like it. I don't like bringing, you
21 know, members of the community into the courtroom and having
22 them preside over a trial and kind of keeping them in the dark
23 about this constitutional limitation on, you know, the amount
24 of punitive damages that they can award.

25 That being said, I think that, you know, it's quite clear

1 that I am required under the Constitution to reduce the
2 punitive damages award and it's just a question of how much,
3 and we can have a discussion about how much; but before we get
4 there, I do want to talk a little bit about the noneconomic
5 damages because I also have a specific concern about
6 noneconomic damages.

7 And the question is this: As I recall the evidence, and
8 you can correct me if I'm misstating it in any way or if I'm
9 missing anything, but as I recall the evidence, Mr. Hardeman
10 was diagnosed with NHL about five years before trial; right?

11 **MS. MOORE:** February 14th, 2015, Your Honor.

12 **THE COURT:** So right about five years before trial;
13 right?

14 **MS. MOORE:** About four. Four years, yeah.

15 **THE COURT:** Is it four?

16 **MS. MOORE:** Yes.

17 **THE COURT:** Okay.

18 **MS. MOORE:** 2015-2019.

19 **THE COURT:** All right. So let's divide the
20 noneconomic damages into past damages and future damages.
21 Okay? The jury awarded about \$3 million in past noneconomic
22 damages; right?

23 **MS. MOORE:** Right.

24 **THE COURT:** And the jury awarded about \$2 million in
25 future economic damages.

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

2 **THE COURT:** So what was the harm that Mr. Hardeman
3 suffered in the past before trial; right? He suffered a great
4 deal of harm. He was diagnosed with non-Hodgkin's lymphoma.
5 He didn't know whether he was going to live or die. He went
6 through this horrible chemotherapy treatment. He had to go
7 back, you know, every year to get checked and didn't really get
8 a clean bill of health from his doctors, as I recall, until
9 just before trial -- right around the time of trial; right? He
10 was deemed in remission right around the time of trial. Okay?

11 So that is a great deal of harm, noneconomic harm, and I
12 don't have any concerns about the jury's conclusion that, you
13 know, Mr. Hardeman should have been compensated around to the
14 tune of roughly \$3 million for that past noneconomic harm.

15 And I understand Monsanto's argument that, well, there
16 were only, like -- what was it? -- \$200,000 of economic
17 damages?

18 **MS. MOORE:** That's correct. That's what we stipulated
19 to, Your Honor.

20 **THE COURT:** But under circumstances like this where,
21 you know, again, you're diagnosed with cancer, you don't know
22 whether you're going to live or die, you have to go through the
23 horrible chemo treatment, I don't -- I think under these --
24 under the circumstances of this case, that is not problematic
25 under California law. It's a very loose standard that is

1 applied under California law.

2 **MS. MOORE:** I would agree with Your Honor, and I would
3 just add I don't think that's a good measure in a cancer case
4 to look at the amount of the medical bills to determine the
5 amount of the past noneconomic damages.

6 And I would just say that, as the Court will recall, the
7 testimony is that when Mr. Hardeman was going through those six
8 rounds of chemotherapy, they actually had to reduce his dosage
9 because Dr. Ye testified he didn't think he was going to make
10 it.

11 So here you have someone who he has to have
12 chemotherapy --

13 **THE COURT:** I don't recall Dr. Ye testifying he didn't
14 think Mr. Hardeman was going to make it. My recollection of
15 the testimony was that he, as often happens during
16 chemotherapy, he had to stop because his levels were down and
17 we needed to wait for his levels to come back up.

18 **MS. MOORE:** It was two different things, Your Honor.
19 His white blood count dropped and so then they had to give him
20 Neupogen shots. The first dosage and the frequency was not
21 sufficient to get his white blood count back up, and so then
22 they had to increase the dosage of the Neupogen shots and to go
23 to seven days --

24 **THE COURT:** Okay. But you said Dr. Ye testified that
25 he didn't think Mr. Hardeman was going to make it.

1 **MS. MOORE:** Right. So what I'm saying, that's two
2 different things. So that was the white blood count; and then
3 the chemotherapy itself, that the dosage they said was too
4 high, he wasn't able to tolerate it and so he was reduced on
5 the dosage of the chemotherapy, which of course he needs the
6 chemotherapy to get rid of the non-Hodgkin's lymphoma. So
7 there was a reduction of that because he didn't think he was
8 going to be able to survive the chemotherapy at the dosage that
9 he was being administered at that time.

10 **THE COURT:** Okay. So, in any event, I don't have --
11 as I said, I don't have any particular concerns about the award
12 of past noneconomic damages.

13 So it was \$3 million for past noneconomic harm and
14 \$2 million for future noneconomic harm. So let's compare the
15 harm that Mr. Hardeman suffered in the five years prior to
16 trial -- or four years prior to trial with the harm that we
17 expect him to suffer in the -- you know, however long he lives.

18 He's in remission. Dr. Nabhan testified, I don't remember
19 the exact words, but it was essentially he's in the clear;
20 right? He doesn't have to worry?

21 **MS. MOORE:** He said it's extremely unlikely that it
22 would reoccur.

23 **MR. STEKLOFF:** And Dr. Ye said the same thing.

24 **THE COURT:** And so I'm not saying that there is no
25 suffering, no emotional distress going forward; but, you know,

1 is it -- what would be the basis for concluding that the future
2 noneconomic harm is almost as great as the past economic harm?

3 I mean, it seems like the only reasonable conclusion is
4 that the past economic harm is much, much, much greater than
5 the future noneconomic harm and, therefore, the fact that --
6 and it does -- I can't think of a rational justification for
7 the two awards being so close to one another given the
8 disparity in the harm.

9 So I wanted to give you an opportunity to explain how you
10 think, you know, we might justify 2 million for the future
11 noneconomic harm.

12 **MS. MOORE:** All right. So on the evidence of
13 noneconomic harm for the future, Your Honor, Dr. Nabhan
14 testified that this is lifelong, that he's going to have to
15 have repeat scans. Dr. Nabhan said that he would do it -- he
16 would see him twice a year. He's been seeing -- he was going
17 to the doctor, he testified, right after the trial to get a
18 repeat scan. He has to get repeat blood work. And this is for
19 the rest of his life. That's the testimony.

20 **THE COURT:** Right. And, by the way, I want to make
21 very clear, I'm not saying that's a walk in the park.

22 **MS. MOORE:** Right.

23 **THE COURT:** I mean, I understand that that is harm.
24 That is very real harm that can be compensated. I'm only
25 questioning whether it comes close to the kind of noneconomic

1 harm that Mr. Hardeman had already experienced when he thought
2 he was going to die; right?

3 **MS. MOORE:** I understand. And that's why I asked him
4 when he was on the stand: "What does remission mean to you?
5 You heard Dr. Nabhan testify you were in remission. What does
6 it mean to you?"

7 And he said to him it means he's in a temporary place and
8 when he gets closer to those repeat scans, that that all goes
9 away and that anxiety comes back and he thinks "Is this the
10 time? Do I have swollen lymph nodes again? Is it coming back?
11 Do I have cancer again?"

12 So you can tell someone that has cancer or had cancer and
13 is in remission, "You're fine." It doesn't mean that's going
14 to -- you know, can go to them and they're going to realize it.
15 I mean, that's what he testified to.

16 **THE COURT:** So I agree and I get all that, but it
17 doesn't fully answer the question that I'm asking you, which
18 is -- so far what you've described doesn't seem to come
19 close -- it is real harm but it doesn't seem to come close to
20 the kind of suffering he experienced in the past.

21 **MS. MOORE:** So there's additional testimony and
22 evidence in the case too. So Dr. Nabhan testified that because
23 of the side effects of the chemotherapy -- remember, it was the
24 R-CHOP, the five different drugs that he was administered six
25 times -- that he has DNA damage not only to the lymphoma cells

1 but to the non-lymphoma cells and that because of that, he's at
2 an increased risk of developing other types of cancer.

3 And so, you know, as the Court is aware, under the jury
4 instructions --

5 **THE COURT:** Was that risk quantified? I don't recall
6 if that was quantified in any way at trial. Was it a slight
7 increased risk, a significant risk, anything like that?

8 **MS. MOORE:** He said "increased risk" and that was
9 undisputed. As the Court is aware, Monsanto did not challenge
10 any of the noneconomic damages in this case. They did not call
11 an expert to challenge the noneconomic damages. They did not
12 refute any of the testimony of Dr. Nabhan. They didn't
13 cross-examine Dr. Nabhan. They didn't cross-examine
14 Mr. Hardeman regarding his noneconomic damages and they didn't
15 cross-examine Ms. Hardeman at all.

16 **THE COURT:** But they're not required to. I mean, the
17 test at this stage is, you know, did the evidence justify a
18 conclusion that he suffered almost as much -- he is going to
19 suffer almost as much noneconomic harm in the future as he
20 suffered in the past; right?

21 **MS. MOORE:** Well, if you look at the time period,
22 though, it's not the same because if you have four years of
23 past noneconomic harm and the 3,666,000, you know, and change,
24 versus, you know, he might live another, and as I argued in
25 closing, 15, 20 years -- he's 73. I know we'll probably get to

1 that --

2 **THE COURT:** Actually, I don't think you did argue that
3 in closing. I think you just said, you know, give him -- what
4 did you say? Give him a million bucks a year for 15 years?

5 **MS. MOORE:** I thought -- I'll go back and check, but I
6 thought I said that he could live another 15, 20 years and that
7 I would suggest that you award him \$1 million per year. So
8 four years for past noneconomic and a million dollars -- I'm
9 sorry -- a million dollars for the past four years and a
10 million dollars for 15 years going forward. They didn't agree
11 with me. They awarded much less than that, dramatically less
12 than what I asked for.

13 And in closing defense argued, and this is on page 2786 of
14 the transcript (reading):

15 "I told you in opening for Phase II we weren't going
16 to challenge how difficult and unfortunate it was that
17 Mr. Hardeman suffered from NHL and what he went through.
18 I'm not standing here challenging that this morning."

19 I mean --

20 **THE COURT:** But that's not relevant to the question
21 I'm asking you. I'm not talking about what he went through.
22 I'm talking about compensation for what he's likely to go
23 through.

24 **MS. MOORE:** Right. And so if you do the math, over 15
25 years \$2 million is \$133,000 a year. I don't think anyone

1 would say "Okay. You can pay me \$133,000 a year for the next
2 15 years" knowing that I could get cancer again and die.

3 I mean, it's absolutely -- there's -- first of all --

4 **THE COURT:** But, again, that begs the question to what
5 extent was the risk quantified; right? I mean --

6 **MS. MOORE:** I don't think the risk had to be
7 quantified.

8 **THE COURT:** -- if there's a slightly increased risk
9 that he could get some other cancer in the future, I don't
10 know. I mean, everybody has a risk of getting cancer in the
11 future; right? So, you know, the baseline is not zero risk.

12 **MS. MOORE:** But he has an increased risk.

13 **THE COURT:** Right.

14 **MS. MOORE:** He has an increased risk, I mean, compared
15 to me or you because he had gone through chemotherapy, and
16 that's what Dr. Nabhan testified to and that was --

17 **THE COURT:** That wasn't quantified in any way?

18 **MS. MOORE:** It was -- the testimony was that it was
19 increased risk. I don't think it had to be quantified more
20 than that.

21 But regardless of that, Your Honor, Mr. Hardeman
22 testified, when I asked him what does it mean going forward to
23 him, he said (reading):

24 "I think it's always going to be there. It could come
25 back and you're always -- you're thinking about it.

1 There's always that fear that it can come back. There's
2 no guarantee that it won't come back."

3 And I put together in response to the Court's --

4 **THE COURT:** Let me just ask you, I want to try one
5 more time -- okay? -- and let me ask it to you directly. Do
6 you think that the harm Mr. Hardeman is going to suffer in the
7 future is anything close to the harm he has suffered in the
8 past?

9 **MS. MOORE:** From his perspective, no, I don't, because
10 he thinks that the cancer could come back and that he could
11 die.

12 **THE COURT:** Did you mean to say "yes" in response to
13 that question?

14 **MS. MOORE:** Yes, I did. Sorry. Thank you,
15 Your Honor.

16 **THE COURT:** So from Mr. Hardeman's perspective, even
17 though he previously thought he had a good chance of dying and
18 went through this horrible chemotherapy, that the harm he
19 suffered in the past is roughly comparable to the harm he's
20 suffering going forward, even though he's been told that he's
21 in remission and that he's essentially in the clear with
22 respect to non-Hodgkin's lymphoma?

23 **MS. MOORE:** Well, he hasn't been told he's in the
24 clear. I mean, one thing Dr. Nabhan testified --

25 **THE COURT:** That's pretty close to what Dr. Nabhan

1 said.

2 **MS. MOORE:** He said it's extremely unlikely and, you
3 know, when you hit the five-year mark, that's a good mark for
4 cancer survivors.

5 But the testimony in front of the jury was: What does
6 remission mean to Mr. Hardeman? And the damages under the
7 instructions is to compensate Mr. Hardeman for that mental
8 anguish, the suffering, and the anxiety, and all of that is
9 spelled out under the California jury instructions. It's not
10 just pain and suffering.

11 **THE COURT:** I just wish there was something else you
12 could say to support the idea that the harm he is suffering in
13 the future is remotely comparable to the harm he's already
14 suffered because, again, I'm not disputing that he's going to
15 suffer harm in the future. I'm not saying that the jury's
16 conclusion that he is going to suffer harm in the future is
17 illegitimate. I'm just saying that it doesn't seem -- they
18 don't seem close to me. The harm that he's already suffered
19 seems much, much greater and, if so, how can we rationalize a
20 damages award that is roughly similar?

21 **MS. MOORE:** And I think if we were faced with a
22 situation where the jury came back and awarded the exact same
23 amount for past and future, that would be a different
24 situation, but that's not what we have. They awarded less than
25 they did -- for future than they did for the past, and that's

1 them recognizing that, sure, he went through six rounds of
2 chemotherapy and that was horrible; and right now what he's
3 dealing with in the future is the mental anguish, the
4 suffering, and the anxiety that every time for every year of
5 his life, the remainder of his life, he has to go and get a
6 repeat scan and then wait for those results and wonder if he's
7 going to get cancer. And if he gets cancer again, he knows
8 that that is a death sentence.

9 **THE COURT:** Is he getting scanned for NHL or is he
10 getting scanned for any kind of cancer? What did the evidence
11 say about that? Because my recollection, and I could be
12 misremembering, but my recollection is that he gets scanned for
13 NHL every year not that he gets scanned for any kind of cancer?

14 **MS. MOORE:** Well, he would -- the PET scan, it would
15 be a PET scan to show whether he has cancer. I mean, and then
16 you would have to do the pathology to determine, but I don't
17 think the evidence went into that great of detail. I mean,
18 he's getting repeat scans to find out if he has cancer. I
19 don't think it went into detail as far as what type of cancer.

20 **THE COURT:** Okay.

21 **MS. MOORE:** I mean, if you're getting a PET scan and
22 they find something, they're going to call you and tell you you
23 need to come back in and get further testing, you know, whether
24 it's non-Hodgkin's lymphoma or acute leukemia.

25 **THE COURT:** I don't know. I don't know how that works

1 and that sort of depends what the evidence said at trial about
2 that; right?

3 Do you have any other evidence that you want to make sure
4 I focus on that would support a \$2 million award for future
5 noneconomic harm?

6 **MS. MOORE:** I think the fear, the mental anguish, and
7 the worry, the anxiety, which is all compensable under
8 California law, which was what you instructed the jury to
9 consider when they deliberated and made their decision in this
10 case, I think the evidence there, which was unrefuted and
11 undisputed, supports that.

12 And, Your Honor, what I did is I put together cites to the
13 record that talk about the noneconomic damages in response to
14 your question in PTO 152. If I could hand that to you.

15 **THE COURT:** Sure.

16 **MS. MOORE:** And then what we're going to do is we
17 actually --

18 **THE COURT:** I assume you've given that to the other
19 side as well.

20 **MS. MOORE:** Yes. I just handed them a copy of it,
21 Your Honor.

22 And then what we're doing is we're going to file this --
23 it has been filed, Aimee? -- with actual -- the attachments
24 which will show the transcript and it will be highlighted so
25 you'll see all the evidence on noneconomic damages that was

1 presented to the jury.

2 **THE COURT:** Future noneconomic damages?

3 **MS. MOORE:** It's past and future. I did not separate
4 it out. If you want me to, I'm happy to do that, Your Honor.

5 **THE COURT:** Oh, no. That's okay.

6 **MS. MOORE:** But I do think if you look at similar
7 verdicts -- and, of course, we have two similar verdicts, we
8 have the *Johnson* verdict and the *Pilliod* verdict -- in *Pilliod*,
9 Mr. and Mrs. Pilliod, the amounts were much different,
10 Your Honor, but --

11 **THE COURT:** I was wondering if you were regretting
12 that you didn't ask for a billion dollars in this case.

13 **MS. MOORE:** No comment, Your Honor.

14 On the Pilliods, both Pilliods are in remission. They're
15 actually older. Mr. Pilliod is older than Mr. Hardeman, and in
16 those cases the compensatory amount was 18 million and
17 37 million. Here we have a \$5 million total compensatory.

18 **THE COURT:** And maybe that will be reduced.

19 **MS. MOORE:** Or maybe not. I mean, again, there's no
20 magic formula on it. This is a jury that sat through a trial
21 for a month, six people devoted a month of their life and
22 listened to the evidence. As the Court knows, they took
23 extensive notes. They deliberated, they took the matter very
24 seriously, and they came back and based on their deliberations,
25 they determined that \$2 million was fair and reasonable to

1 compensate Mr. Hardeman for his damages going forward.

2 And I would just say that when you look at four years,
3 and, yes, that was absolutely horrible what he went through
4 having to go through chemotherapy, but then you look at years
5 going into the future because he does not have a reduced life
6 expectancy, there was no testimony his life expectancy is
7 reduced, you look at years going into the future, spread that
8 out \$2 million, when you look at the *per diem*, it is not that
9 much given the worry and the anguish and anxiety that he's
10 facing.

11 **THE COURT:** Okay. Mr. Stekloff, do you want to
12 address that?

13 **MR. STEKLOFF:** I agree, Your Honor, with the way that
14 you've characterized the evidence. Obviously I haven't been
15 able to review the testimony or the exhibits laid out here, but
16 I think what you have set forth as your recollection of the
17 evidence is consistent with what the evidence, in fact, was.

18 Dr. Nabhan, I will just add, that he did not quantify the
19 risk of any other cancer in any way or present any
20 scientific -- I mean, he said it and he said it was a risk but
21 he didn't present any studies or anything along those lines.

22 **THE COURT:** So what is it that he said? He said that
23 having gone through chemo, Mr. Hardeman's risk of developing
24 other cancers increases? Is that what he said?

25 **MR. STEKLOFF:** I believe that's correct. And I

1 believe that you actually -- there was -- when the life
2 expectancy issue came up, this was part of the basis for them
3 arguing that that evidence should have been admitted to the
4 jury, and you at that time called what Dr. Nabhan said
5 speculative, which I agree with both then and now, and so he
6 didn't quantify it in any way.

7 **THE COURT:** What did I call speculative? I don't
8 remember.

9 **MR. STEKLOFF:** Dr. Nabhan's testimony about the risk
10 of developing a cancer in the future.

11 **THE COURT:** Okay.

12 **MR. STEKLOFF:** We cite that in our reply brief. We
13 cite the trial transcript where there was a discussion about
14 this issue in a different context.

15 **THE COURT:** Okay. And then what about the issue of
16 the annual scans? What do you recall? Was the evidence that
17 he was getting annual scans to test for NHL or for any cancer?
18 What do you remember about that?

19 **MR. STEKLOFF:** I don't believe that it was specified
20 is my recollection sitting here now. I did not go back before
21 the hearing to check. I think the purpose is to see if the NHL
22 returns. I mean, sitting here, from what I know about PET
23 scans, which is just what I know, I don't think it's in the
24 record, is that it might pick up other cancers; but I don't
25 think there was any testimony, which is the question: What is

1 the evidence that the purpose of those other scans was to
2 assess whether he developed any other cancer? The purpose of
3 the scans, I think, the best reading of the evidence to my
4 recollection is to see if the NHL returns.

5 And it's not just Dr. Nabhan who testified about this
6 issue of remission at the five-year point or the future
7 prognosis. It was also Dr. Ye. There was extensive testimony
8 from Dr. Ye on that same issue, which was introduced in front
9 of the jury.

10 The only other point I want to make on this issue is the
11 standard because counsel is talking about this as sort of, you
12 know, an abuse of discretion of the jury's assessment, and
13 that's not the standard under California law. Under California
14 law, here I believe the Court has a duty to independently
15 assess the evidence and then substitute its judgment if it
16 feels -- you know, essentially provide your own judgment about
17 the proper compensatory damages, including the future and
18 noneconomic loss.

19 And so it's not -- you know, it's not just was the jury
20 reasonable, and we can all speculate about what the jury
21 thought about past economic damages -- or noneconomic damages,
22 future noneconomic damages. That's not the standard that is
23 applicable, I think, to the decision you have to make under
24 California law.

25 That's one of the questions I think you asked in your

1 order, which was: Is California law different than federal law
2 and would the outcome be different? I don't know that the
3 outcome would be different, but I certainly think that -- I
4 mean, I would argue under federal law the same thing; but I
5 think under California, it is clear that there isn't sufficient
6 evidence to support a \$2 million future noneconomic loss.

7 **THE COURT:** But it -- I mean, so I understand that
8 whether it's under California law or federal law, it's not a
9 situation where I have to view the evidence in a light most
10 favorable to the plaintiff. I get that.

11 But there is this -- you know, what the California Code of
12 Civil Procedure says about it is that I'm not supposed to
13 reduce the damages award simply if I would have done it
14 differently; right? I mean, what it says is that I have to be
15 convinced from the entire record that the jury clearly should
16 have reached a different verdict or decision; right? That's
17 the standard.

18 So to the extent you're suggesting that I can simply
19 substitute my own judgment for the jury's, I don't think that's
20 correct.

21 **MR. STEKLOFF:** And I'll cite to a case *Ryan vs. Crown*
22 *Castle NG Networks, Incorporated*, 6 Cal.App. 5th 775, and that
23 case says (reading):

24 "For purposes of a motion asserting inadequate or
25 excessive damages, the trial court has not only the power

1 to substitute its judgment for the jury's but the duty to
2 do so."

3 And so --

4 **THE COURT:** But isn't that -- I mean, I don't know
5 what that means in the abstract, but don't we have to consider
6 language like that, you know, in the context of this language
7 from Section 657 of the Code of Civil Procedure?

8 I mean, I think the problem with California law on this
9 issue is that how you characterize the judge's role, I mean, it
10 really depends on what case you look at and sometimes it
11 depends on what paragraph in a particular case you look at;
12 right? California law is a mess on that question. You're
13 nodding your head in agreement.

14 **MR. STEKLOFF:** I think it's a mess on many of the
15 questions that you posed in your pretrial order.

16 **THE COURT:** Yes. But I do think that it would be a
17 mistake to simply say that I can -- you know, if I would
18 disagree with the jury, that if I would have come out
19 differently than the jury on the future noneconomic harm
20 question, then I need to lower the award or give them a choice
21 of accepting a lower award or having a new trial. I mean, I
22 think that, you know, the standard is higher than that.

23 **MR. STEKLOFF:** I don't disagree with that. I don't
24 think it's -- but -- I'm not saying it shouldn't be viewed
25 within the context of what the jury did. I'm just saying that

1 it's --

2 **THE COURT:** There's a degree of deference that I give
3 to the jury in this context, I think, in other words.

4 **MS. MOORE:** There is, Your Honor.

5 **MR. STEKLOFF:** I'm not -- I think that you have to
6 independently assess the evidence. I don't think you need
7 to --

8 **THE COURT:** Only if the jury's verdict was clearly
9 unjustified in light of that evidence do I require that the
10 damages -- that that aspect of the damages award be reduced.

11 **MR. STEKLOFF:** That's where I disagree. I don't
12 think -- that would be giving too much deference under
13 California law. Clearly unjustified I don't think is the
14 correct standard.

15 **THE COURT:** Clearly should have reached a different
16 verdict or decision.

17 **MR. STEKLOFF:** I mean, that's the statute but there's
18 case after case that talks about this concept of 13th juror and
19 the Court serving as a 13th juror, and there are appellate
20 decisions where the California Courts of Appeals say that where
21 the judge doesn't -- where the trial judge doesn't exercise an
22 independent assessment of the evidence and I think make a more
23 independent -- I mean, I don't think it has to be you would
24 have given exactly X. I think it can be considered within the
25 totality of what the jury gave, but I don't think it's that

1 deferential to the jury's verdict. I do not think California
2 law, as it's been laid out in numerous California appellate
3 decisions, is consistent with that level of deference.

4 **THE COURT:** On the relationship between this issue
5 we're discussing and the punitive damages award, which comes
6 first? In other words, do I make a decision about whether the
7 future noneconomic harm number must be reduced first and then
8 set the punitive damages award to that reduced number? Is that
9 how I'm supposed to do it?

10 **MR. STEKLOFF:** I believe so, Your Honor.

11 **THE COURT:** Okay. And do you have cases that
12 exemplify that?

13 **MR. STEKLOFF:** I did not -- off the top of my head --

14 **THE COURT:** Sorry. I didn't give you that question
15 ahead.

16 **MR. STEKLOFF:** Yeah, I realize -- I read so many
17 cases. I can check, but off the top of my head I don't have,
18 you know, the cases that necessarily fit squarely in that; but
19 I think how could you give punitive damages to a number that is
20 determined to be improper -- I'm using the phrase loosely --
21 improper or inadequate or excessive under the law?

22 I mean, if the verdict is excessive, you can't then cue a
23 constitutional determination off of that. It has to be that
24 the constitutional due process procedure applies to what is
25 viewed after a review by the Court as the correct compensatory

1 damages.

2 **THE COURT:** Okay.

3 **MR. STEKLOFF:** It just seems inherent.

4 **THE COURT:** So while we're on the topic -- so moving
5 to the topic of punitive damages, I don't need to hear
6 argument. I believe that the jury's conclusion that Monsanto
7 deserves punitive damages is supportable and I don't need to
8 hear any argument to the contrary.

9 I believe that this is not a case where Monsanto's conduct
10 was so outrageous that the punitive damages award should not be
11 reduced so I don't need to hear argument to that effect either.

12 It's really just a question -- I mean, I think the
13 punitive damages award has to be reduced under the due process
14 clause to, you know, a single-digit ratio and the question is
15 just what single-digit ratio.

16 So give me sort of your best argument that it should be
17 closer to 1-to-1 than 9-to-1.

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

19 So I think it's very important to keep in context 2012,
20 which was the post -- that was the cut-off date that was used
21 in the evidence, and as of 2012, view the scientific and
22 regulatory consensus on glyphosate as of 2012. And I
23 understand now you're saying punitive damages are appropriate.
24 I understand it's clear that the science reached that.

25 **THE COURT:** Well, what's relevant is the degree of

1 reprehensibility of Monsanto's conduct and all that, and that's
2 what you're addressing now.

3 **MR. STEKLOFF:** Correct. And the degree of
4 reprehensibility as of 2012. And I only -- for purposes of
5 punitive damages, to be clear, based on the evidence, I'm going
6 to talk about past 2012, but I just want to start with 2012.

7 As of 2012, no scientific body had said that glyphosate
8 had an association with non -- causes cancer. No regulatory
9 body had said that. And that is the key, is that Monsanto,
10 whether they're going to say they shouldn't have done the magic
11 tumor and they should have --

12 **THE COURT:** Shouldn't have ghostwritten --

13 **MR. STEKLOFF:** -- they didn't respond well to Perry
14 and they shouldn't have ghostwritten Williams in 2000,
15 everything that they did was consistent with the regulatory and
16 the scientific consensus.

17 Now, I understand now the argument is going to be, well,
18 they influenced that, but I don't think that that's consistent
19 with what the evidence showed because we know that the EPA, and
20 here specifically Europe, had all of that evidence and
21 considered all of it and repeatedly told Monsanto that it could
22 both sell and manufacture Roundup and glyphosate and that it
23 didn't require a warning. And that's also where I think for
24 your assessment of punitive damages it doesn't end there
25 because we were allowed, the evidence shows, to argue that that

1 is also true up to today.

2 I mean, there were lots of sort of walls drawn around what
3 we could argue and what we could not, but the evidence was
4 given to the jury based on, for example, what Dr. Portier wrote
5 to EFSA and ECHA and current EPA decisions that even given
6 IARC, even given other science as it developed, that that is
7 the absolute consensus of the world in the regulatory -- you
8 know, I think I was allowed to argue based on the evidence
9 that --

10 **THE COURT:** It's not the absolute consensus of the
11 world. What you're saying is that no regulatory body had
12 concluded -- no regulatory body has yet agreed with the IARC --

13 **MR. STEKLOFF:** Correct.

14 **THE COURT:** -- or acted on the IARC's conclusions to
15 require a warning label or limit use of Roundup.

16 **MR. STEKLOFF:** Correct. And the same with other
17 scientific bodies. We know there are numerous scientific
18 bodies and no other scientific -- no scientific body other than
19 IARC has come out and said -- you know, I'm not saying in a
20 given study that people haven't said there's an association,
21 but sort of as a scientific body making a determination about
22 the carcinogenicity of glyphosate said "We think glyphosate or
23 Roundup is carcinogenic."

24 And so I think that, then, puts in light every action that
25 Monsanto made. I'm not going to -- I can stand here and debate

1 every piece of evidence about the magic tumor or Perry or the
2 Williams article, but I think that that overall threshold
3 requires a very low, I mean, we would argue 1-to-1, but very
4 low ratio and I think that that's the strongest evidence there
5 is.

6 I also think the evidence that we saw from, you know, all
7 of these employees, that they used the product. Now, again, we
8 can question things that they wrote in individual e-mails or
9 phrases that they used; but, again, we're talking about people
10 who use the product, who stand by its safety, and it's very
11 different than other cases.

12 **THE COURT:** But here's -- I mean, here's the problem I
13 have with that. I think there was a fair amount of evidence of
14 Monsanto being pretty crass about this issue. There was a fair
15 amount of evidence of Monsanto not really caring whether its
16 product caused cancer or not, and a fair amount of evidence
17 that the only thing that Monsanto cared about was undermining
18 the people who were raising concerns about whether Roundup
19 caused cancer.

20 Monsanto didn't seem concerned at all with getting at the
21 truth of whether Roundup caused cancer. And, you know, I might
22 have expected you to put in -- I mean, if there was evidence of
23 Monsanto being conscientious about this issue, if there was
24 evidence about Monsanto being objective about the question, I
25 expect there would have been tons of e-mails reflecting that.

1 E-mails like, "Oh, you know, there's this study coming out that
2 concludes that glyphosate might cause cancer. Do we need to
3 take another look at this?" Something like that. But there
4 was, at least at trial, there was nothing suggesting that
5 anybody at Monsanto viewed this issue objectively or with any
6 amount of caring for human beings.

7 And so, you know, you say that people came up and intoned
8 that they -- people testified that they used the product, but
9 where was the evidence that Monsanto actually cared about
10 getting to the truth of any of this and actually sort of cared
11 about whether, in fact, these concerns being raised about its
12 product might have some validity that needs -- that might have
13 some -- raise some questions that need to be investigated?

14 **MR. STEKLOFF:** I think there was substantial evidence
15 that Monsanto cared about the issue and --

16 **THE COURT:** Where? What was it?

17 **MR. STEKLOFF:** Donna Farmer's testimony about the
18 extensive testing that had occurred on the product.

19 **THE COURT:** What about contemporaneous evidence, like
20 e-mails? You know, they put in all these bad e-mails --
21 right? -- showing Monsanto executives being, you know, kind of
22 crass about this and not seeming to care about doing anything
23 other than undermining the people who were raising concerns
24 about this. Where were the e-mails that suggested
25 contemporaneously that Monsanto people wanted to look at the

1 issue objectively?

2 **MR. STEKLOFF:** Well, we had the testimony of people
3 that said that.

4 **THE COURT:** That wasn't contemporaneous evidence.
5 That was people testifying --

6 **MS. MOORE:** That was after the fact.

7 **THE COURT:** -- testifying that --

8 **MS. MOORE:** Sorry.

9 **MR. STEKLOFF:** But I understand that -- I mean,
10 whether -- how the evidence was put into the record through
11 deposition testimony, I think the evidence --

12 **THE COURT:** Yes, but the jury had the right to not
13 believe Monsanto's people -- right? -- when they said that they
14 believed that this was safe?

15 **MR. STEKLOFF:** Well, off the -- you know, Donna Farmer
16 testified, we had to show this testimony, for example, about
17 being careful about what language to use, about whether it was
18 just glyphosate or whether you could say that Roundup was
19 carcinogenic; and then we introduced evidence of her talking
20 about the stewardship of the product and --

21 **THE COURT:** Yeah, but that careful about what language
22 to use, wasn't that their evidence? I mean, they put that in
23 to show that Monsanto was being crass about all this. At least
24 that's my recollection.

25 **MR. STEKLOFF:** They put that evidence in. Then they

1 didn't play her testimony about it. We played the testimony
2 about it from her, but I don't think that -- I mean, we can --
3 it was lawyer argument about whether she was being crass or
4 not. I think maybe the jury didn't agree with me, but being
5 careful about what language to use based on the extensive
6 testing to be done.

7 I mean, also there was evidence -- what we know is that
8 the EPA and all of these regulatory bodies around the world
9 require extensive testing before they both approve a product
10 and continually reevaluate a product. And it's not just
11 Monsanto's testing, but there was evidence of the fact that
12 other glyphosate-based herbicides manufactured by other
13 manufacturers, that evidence is also submitted to the EPA and
14 to the regulatory bodies.

15 So these regulatory bodies are considering all of that
16 evidence. That is contemporaneous evidence that the company
17 was meeting its regulatory obligations, which is taking the
18 question of its safety and carcinogenicity seriously, both
19 doing the animal studies that are required and doing the cell
20 studies that are required, doing them over decades, doing them
21 up into the 2000s, which was presented through Donna Farmer,
22 and testing every formulation, getting regulatory approval
23 every single time, and going above and beyond their regulatory
24 requirements.

25 I mean, that testing evidence is contemporaneous evidence.

1 It's not a discussion between two Monsanto employees about a
2 particular study, but I think that it all ties back -- and I
3 understand the jury, they weren't supposed to substitute their
4 judgment for the regulatory bodies; but at the end of the day,
5 the fact that every regulatory body, with all of the Monsanto
6 papers and all of these allegations being out there and IARC
7 decisions coming out post-IARC have repeatedly assessed all of
8 the evidence, all of the allegations. It is all public and
9 it's not just the EPA. It is every regulatory body that has
10 assessed the issue, whether it's Europe, Health Canada, the
11 letter to Australia from the EPA that was introduced, whether
12 it's considering Dr. Portier's specific, you know, litigation,
13 the same arguments he makes in the courtroom, they are
14 considering those and saying, "No, based on the science,
15 glyphosate is not carcinogenic, that is what the evidence
16 shows," that goes to contemporaneous evidence of what the
17 company did for 40 years to establish that scientific record.

18 And so, you know, I don't think all of a sudden this
19 should be, well, they liked their six e-mails and their ten
20 e-mails and that's all the Court can consider in punitive
21 damages. I think that this is a unique case in which the
22 regulatory consensus is so different than the basis for this
23 litigation, which is the IARC decision.

24 **THE COURT:** You know, I certainly agree that's
25 relevant. I mean, your points are relevant. It's just a

1 question of how important they are in the overall mix I think.

2 Let me just ask you a couple other quick questions on the
3 damages stuff. So is it -- so let's say I conclude that --
4 well, we know that with respect to compensatory damages, if I
5 conclude that the noneconomic future damages award is not
6 supportable, to use a colloquial phrase, I would need to give
7 them the choice of accepting a reduction or having a new trial;
8 correct?

9 **MR. STEKLOFF:** I agree with that, Your Honor.

10 **THE COURT:** And then so if I believed that that aspect
11 of the award needed to be reduced and then I believed that to
12 comport with the Constitution the punitive damages award needed
13 to be reduced, do I then sort of give them that full figure
14 and -- you know, that final figure and say "You need to either
15 accept this or have a new trial"? Or do I -- is that the most
16 advisable way to handle this?

17 **MR. STEKLOFF:** So -- well, so let me break it down a
18 little bit. I don't think on the punitive damages question
19 alone you have to offer a new trial. I think it's a question
20 of federal law and there's case law -- I can cite it if you'd
21 like -- that allows you to just issue a judgment with the ratio
22 and the final number that you determine is correct.

23 **THE COURT:** Go ahead. Cite that.

24 **MR. STEKLOFF:** So I would cite *Morgan v. Woessner*,
25 W-O-E-S-S-N-E-R, 997 F.2d 1244. It's a 1993 Ninth Circuit

1 case.

2 And there's one other case, *Southern Union Company v.*
3 *Irvin*, 563 F.3d 788, 790.

4 I also think actually that's true under California law as
5 well, but I think this is a federal question. The California
6 case is the *Simon* case that I believe was cited in our brief,
7 Your Honor.

8 Then you asked what's advisable, which I think is a
9 different question. I think if you --

10 **THE COURT:** Well, let me -- so part of it involves
11 what's advisable and part of it involves do I have the
12 discretion to do it either way.

13 **MR. STEKLOFF:** Well, I think what you have the
14 discretion to do is to offer a new trial only on the
15 noneconomic compensatory damages if you choose and then set the
16 ratio off of that. I think that you have the option to
17 offer -- to give them the choice on the entire thing.

18 I don't think you're required to just issue the judgment.
19 I think either --

20 **THE COURT:** But I have the discretion to -- the
21 question I'm asking -- I want to make sure we're on the same
22 page, we're communicating -- do I have the discretion to say,
23 "All right. You know, future noneconomic damages, you know,
24 must be reduced by X and, you know, the punitive damages award
25 must be no greater than X times the adjusted compensatory

1 damages award"?

2 And I'm putting the question to the plaintiffs: You know,
3 do you want to take that final number or do you want a new
4 trial? Do I have the discretion to do it that way as opposed
5 to saying -- I mean, maybe as a practical matter there's no
6 difference, but do I have the discretion to do that as opposed
7 to saying "You can have a new trial on the noneconomic damages
8 question only"?

9 **MR. STEKLOFF:** I think you could offer them -- I think
10 you have the discretion to do both, either one. I think you
11 could say "I'm going -- this is what I think are the
12 appropriate noneconomic damages and the appropriate ratio, and
13 you can either have a new trial on both or either and then --
14 or you can accept my number." I think you also could say "This
15 is what I think the ratio is. That's not going to change. You
16 can have a new trial on noneconomic damages or accept my
17 number."

18 **THE COURT:** And what do you think the most advisable
19 course is?

20 **MR. STEKLOFF:** I think the most advisable course is
21 for them to accept your number because I think there is case
22 law that suggests that --

23 **THE COURT:** But that's not quite what I asked.

24 **MR. STEKLOFF:** I mean, there's case law that suggests
25 they can't do better than what you say. So they can only do

1 worse. So I'm not sure why they wouldn't accept the number
2 that you're giving even though they may not agree with it and
3 they may appeal that, but I'm not sure what a new trial would
4 accomplish for any of us on that.

5 But I think I would offer a -- I think the more certainty,
6 the better. So I think that if you think the ratio is set,
7 sort of not giving them a choice because it's a maximum
8 constitutionally allowed number is easier. And so if we need
9 to have a new trial about noneconomic damages, which would be
10 capped at the \$2 million, I guess we could come in and do that,
11 but I don't think that that's advisable --

12 **THE COURT:** So it would be --

13 **MR. STEKLOFF:** Or, no. Sorry. Capped at whatever
14 number you set.

15 **THE COURT:** Okay. So that's -- and that's the part I
16 didn't -- I guess maybe we learned about this in law school,
17 but I've never had this issue before. So it would be capped at
18 the number that I concluded is sort of the maximum number
19 that's supportable by the evidence?

20 **MR. STEKLOFF:** I believe so, Your Honor.

21 **THE COURT:** In the previous trial?

22 **MR. STEKLOFF:** I believe so. Well, the case,
23 Your Honor, is *Simon v. San Paolo U.S. Holding Company*,
24 35 Cal.4th 1159. It's a 1995 case. This is punitive damages
25 and constitutional excessiveness there. So, you know, the

1 noneconomic damages is a different question about exactly how a
2 new trial would play out.

3 **MS. MOORE:** Your Honor, if I could address that point.

4 **THE COURT:** Sure.

5 **MS. MOORE:** On compensatory damages on the noneconomic
6 future, if the Court were to reduce that -- and I do want to go
7 back to that, I know we went to punitives --

8 **THE COURT:** Before we turn back to you, just bookmark
9 that.

10 **MS. MOORE:** Sure.

11 **THE COURT:** I have one more question for them --

12 **MS. MOORE:** Okay.

13 **THE COURT:** -- and then I was going to turn to you.

14 The last question I have for you is -- I couldn't quite
15 tell -- do you have any separate argument that even within --
16 you believe that -- first of all, you believe that the punitive
17 damages verdict should be overturned entirely. I have said
18 that I disagree with you about that.

19 And then you seem to have an argument that, in any event,
20 you know, it should be no more than 1-to-1 or, in other words,
21 you know, no greater than -- the punitive damages award should
22 be no greater than the compensatory damages award.

23 And is it your argument that the Constitution requires
24 that as opposed to, you know, that being required as an
25 evidentiary matter or a discretionary matter on my part?

1 **MR. STEKLOFF:** I think that was one of the questions
2 you asked, which was this difference between the constitutional
3 argument and the other argument.

4 **THE COURT:** Yes.

5 **MR. STEKLOFF:** I think we're arguing under both
6 grounds but in another area where the cases are not entirely
7 clear. It seems like that second argument, which is that this
8 is grossly excessive under California law, is often subsumed by
9 the constitutional analysis, which I think requires three
10 questions which we laid out in our brief. It's not just
11 reprehensibility.

12 **THE COURT:** Right.

13 **MR. STEKLOFF:** I mean, it also goes to the FIFRA fine
14 that's available and other awards, and so I think that we've
15 laid out that analysis under *State Farm*. So I just want to put
16 a bookmark there that it's not just the question of
17 reprehensibility, but --

18 **THE COURT:** But that is the most important question;
19 right?

20 **MR. STEKLOFF:** Yeah. I mean, it's the primary
21 question in *State Farm*.

22 **THE COURT:** Courts have stated that.

23 **MR. STEKLOFF:** I think it's where the courts focus
24 their attention, but the Supreme Court in *State Farm* made clear
25 that the other factors, which we've laid out in our brief, also

1 must be considered by the Court, and I don't think -- you know,
2 we've addressed the other two factors. One wasn't responded to
3 at all in the plaintiffs' opposition, which is the FIFRA fine.
4 The other one I think they tried to argue that you can't
5 consider, you know, the concern that Monsanto could be punished
6 through other punitive damages for the same conduct in other
7 cases, but their case we distinguished in our reply brief. So
8 I just want to make sure we address those other factors.

9 **THE COURT:** Understood.

10 **MR. STEKLOFF:** But I think that we are arguing both,
11 that it's grossly excessive as a common law issue under
12 California state law and also the due process constitutional
13 issues. I think the due process constitutional issues is
14 really where, you know, it subsumes -- in the cases I've seen,
15 it subsumes the other analysis.

16 **THE COURT:** Okay. Go ahead.

17 **MS. MOORE:** Your Honor, if I can go back to the
18 compensatory and then we can go to punitive.

19 So on the compensatory issue, and I want to pick up at the
20 very end where you were asking defense counsel about if you
21 order a new trial, and I just want to be really clear on that.
22 That would be a trial that would be limited to noneconomic
23 damages. Phase I verdict would stand. Phase II we would just
24 be coming back to present to the jury evidence regarding
25 noneconomic damages.

1 **THE COURT:** And possibly punitive damages.

2 **MS. MOORE:** That's fine. Okay.

3 And then with respect to your question --

4 **THE COURT:** I mean, I assume that's right. I mean, I
5 haven't actually examined that question, but that's the
6 assumption I was operating on.

7 **MS. MOORE:** Right. And then --

8 **THE COURT:** And it sounds like everybody agrees on
9 that.

10 **MS. MOORE:** Right. I think so. That was my
11 understanding.

12 And then with respect to --

13 **THE COURT:** Mr. Stekloff is nodding his head.

14 **MR. STEKLOFF:** I wasn't fully listening to Ms. Moore's
15 argument so I'm sort of --

16 **THE COURT:** Well, let me just repeat it. So the point
17 is that under any scenario, there wouldn't be a new trial on
18 Phase I. There wouldn't be a new trial on past economic
19 damages or noneconomic damages. It would just be a new trial
20 on future noneconomic damages and potentially punitive damages.

21 **MR. STEKLOFF:** I would love a new trial on Phase I,
22 but I don't think I have any case law to support that argument,
23 Your Honor.

24 **THE COURT:** I'm sure you will get an opportunity in
25 another case.

1 Go ahead.

2 **MS. MOORE:** So that was one point.

3 And then he raised an issue about it would be capped at
4 whatever -- if the Court did reduce, and I want to address
5 that, but if the Court did reduce the future noneconomic, it
6 would be capped at that amount. I don't think that's correct,
7 Your Honor.

8 If we have a new trial on noneconomic damages, then we
9 have the opportunity to present evidence to the jury. The jury
10 then would consider that evidence and the constitutionality of
11 the due process arguments do not apply for compensatory
12 damages. So --

13 **THE COURT:** I mean, that's usually what happens when
14 you have a new trial; right? You have a new trial and you
15 present the evidence again, and the jury renders a verdict
16 based on that new evidence; but maybe in the remittitur
17 context, you know, you're stuck with -- I don't -- why would
18 anybody ever opt for a new trial?

19 The concept is --

20 **MS. MOORE:** It doesn't make any sense, yeah.

21 **THE COURT:** -- you're giving people the choice of a
22 new trial or accept the number; and if you're capping people at
23 the number, why would anybody ever take a new trial?

24 **MR. STEKLOFF:** I think you're capping them at the
25 2 million. So I don't think -- so -- because you're saying,

1 I'm making up a number, you say it's -- I'll pick a really low
2 number, 200,000. I don't think, then, they can argue for
3 6 million because there's a Seventh Amendment jury problem
4 there. They are, then, if they select a new trial, I think
5 given the opportunity to try to justify the larger amount; but
6 where we have a jury decision of \$2 million, they don't get to
7 relitigate that and argue for more.

8 **THE COURT:** I see.

9 **MR. STEKLOFF:** That's different than punitive damages.
10 Where punitive damages you're saying this is the constitutional
11 maximum, then I think the analysis changes.

12 **THE COURT:** And so in that scenario, on the punitive
13 damages scenario, again, I mean, there's no reason for a
14 remittitur it seems to me. I mean, if you're saying that under
15 California law the punitive damages award was excessive, not in
16 a constitutional way but under California law, then maybe it
17 makes sense to say, "You know, either you take this number or
18 you have a new trial where you try to go for the number -- you
19 know, you try to better justify the number that the jury
20 reached in your previous trial."

21 But if you're ruling on a constitutional basis, I mean, it
22 sounds to me like if you're saying, well, this is the
23 constitutional ceiling, why would anybody go have a new trial
24 then; right?

25 **MR. STEKLOFF:** I agree. I don't think in that -- I

1 think in that context it's why there are courts that say
2 there's no need to go through the exercise of ordering --
3 giving the plaintiff the option of a new trial and you can just
4 put the judgment in because I agree with you.

5 **THE COURT:** Okay.

6 **MS. MOORE:** And so that was my point on the
7 compensatory, is that --

8 **THE COURT:** And, by the way, do you agree with that,
9 that on the compensatory side of things, if I -- the number he
10 used was \$200,000 -- if I said it has to be reduced to \$200,000
11 based on the evidence that came in at the last trial, then your
12 choice is to take that number or go for a new trial but at the
13 new trial you wouldn't be able to argue for more than
14 2 million?

15 **MS. MOORE:** I disagree with that, Your Honor --

16 **THE COURT:** Okay.

17 **MS. MOORE:** -- because --

18 **THE COURT:** Where's your case law? Do you have case
19 law to support that?

20 **MS. MOORE:** I don't but I'm happy to provide that,
21 Your Honor, because when you start a new trial, then that jury
22 is presented with the evidence. We're not limited as to what
23 evidence we can present on noneconomic future damages at that
24 point, and then the jury deliberates based on the evidence
25 presented at that trial. I mean, there's no constitutional

1 argument that says, well, then you're capped at whatever
2 another jury had determined on evidence in that particular
3 case. I mean, that doesn't make any sense to me on that issue.

4 But regardless of that, we don't think that the future
5 noneconomic damages should be reduced at all. If you go back
6 to the standard that, Your Honor, you were referencing, which
7 is the 657, it's very clear in 657 that a new trial shall not
8 be granted upon the ground of excessive damages unless after
9 weighing the evidence the Court is convinced from the entire
10 record, including reasonable inferences therefrom, that the
11 jury clearly should have reached a different verdict or
12 decision.

13 In California law, the cases have said -- I would
14 reference *Bigboy vs. County of San Diego*, Your Honor. This is
15 154 Cal.App.3d 397. It's a 1984 case, and the quote from the
16 case is (reading):

17 "Judge is not permitted to substitute his judgment for
18 that of the jury on the question of damages unless it
19 appears from the record that the jury verdict was
20 improper."

21 So simply if you disagree with the number of 2 million,
22 you would have -- you know, if you were sitting on the jury,
23 you would have voted for a different number, that's not the
24 same thing.

25 **THE COURT:** No, I agree with you.

1 **MS. MOORE:** Okay.

2 **THE COURT:** You don't need to --

3 **MS. MOORE:** So from that perspective, our position is
4 there's no basis to reduce the future noneconomic damages.

5 I went back and I pulled Dr. Nabhan's testimony,
6 Your Honor, and this is on page 2370 of the transcript, and
7 it's lines 8 going down to 25 really. I won't read the whole
8 thing, Your Honor, but I wanted to address the issue about the
9 repeat scans.

10 **THE COURT:** Could you give me the citation to it one
11 more time?

12 **MS. MOORE:** Sure. 2370 --

13 **THE COURT:** Okay.

14 **MS. MOORE:** -- and then lines 8 through 25.

15 **THE COURT:** Okay.

16 **MS. MOORE:** And he starts off and he says (reading):

17 "I do believe that it is very important that
18 Mr. Hardeman is watched and monitored and followed up
19 because there are certain toxicities that occur from the
20 chemotherapy that he received that are important to
21 recognize and identify by his oncologist, and he is at an
22 increased risk of other types of lymphomas."

23 And then he goes on to explain what those are. He talks
24 about the increased risk some more and he explains how it had
25 affected his DNA.

1 **THE COURT:** So other types of lymphomas. Okay.

2 **MS. MOORE:** Yes. And then he specifies such as acute
3 leukemia and then myelodysplasia. I don't know if I'm
4 pronouncing that correctly.

5 But the monitoring, the repeat monitoring, is to pick up
6 those increased risks of other cancer so I wanted to address
7 the Court's question on that.

8 So when you look at that and you see that the future
9 noneconomic is based on the mental anguish, the worry, the
10 anxiety because he's going to have these repeat scans and
11 Mr. Hardeman testified that he knows there's no guarantee, he
12 knows it's going to come back, and then when you look at the
13 metric that I asked the jury to consider when determining the
14 amount of future and past noneconomic damages, that was based
15 on a per year *per diem*.

16 And if you look at that, the past noneconomic is roughly
17 \$750,000 per year. The future is \$133,000. So -- and that's
18 rough numbers, Your Honor. But that is substantially different
19 and it's going over several years. So I don't think there's
20 any basis that the jury was clearly wrong.

21 And when you look at the *California Judges Benchbook*,
22 which, I mean, really in this light for compensatory damages,
23 you've got to -- you may not want to do this -- step in the
24 shoes of a California state court judge, the *Judges Benchbook*
25 says that -- let me just read that section to you really

1 quickly, Your Honor (reading):

2 "A judge should not substitute his or her evaluation
3 of the evidence for that of the jury even if the judge
4 would have reached a different conclusion based on an
5 independent evaluation of the evidence. As long as the
6 verdict is based on a reasonable interpretation of the
7 evidence and it appears the jury understood" --

8 **THE COURT:** But I keep saying that I agree with you
9 that that's the standard. So you're arguing against something
10 that you don't need to be arguing.

11 **MS. MOORE:** Okay. All right. I'll move on from that,
12 Your Honor.

13 We would just ask that the Court not reduce the future
14 noneconomic and let the jury's decision on its award stand
15 because we do think that they considered the difference between
16 the past damage and the future damage, especially when you look
17 at that metric when you break it down per year.

18 **THE COURT:** Okay. That's a fair point.

19 So punitive damages, do you want to sort of wrap up on
20 that topic?

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

22 So on punitive damages, on the ratio issue, I mean, we
23 would disagree, Your Honor, that a 15-to-1 ratio like we have
24 in this case is not constitutionally permissible.

25 **THE COURT:** Okay. I don't need to hear argument on

1 that.

2 **MS. MOORE:** I understand. I would just refer the
3 Court to the *Bullock* decision which we cited in our brief,
4 which was 16-to-1.

5 On the analysis on the evidence of reprehensibility, that
6 what they're referencing is, remember, they knew that
7 glyphosate and Roundup are two different things. They're not
8 the same thing, and the regulatory bodies only consider
9 glyphosate, not Roundup.

10 **THE COURT:** That's your argument for punitive
11 damages --

12 **MS. MOORE:** No, no, no, no.

13 **THE COURT:** -- for reprehensibility?

14 **MS. MOORE:** No, no, no.

15 **THE COURT:** Because the evidence was exceedingly thin
16 on that issue.

17 **MS. MOORE:** No. The evidence was there, but that's
18 not the main thing on that. I mean, if you look at
19 decades-long evidence on what Monsanto knew, what they did,
20 what they didn't do, you go back to the Perry report, for
21 example, they hired Dr. Perry as an independent toxicologist to
22 look at whether Roundup was genotoxic based on the four studies
23 from the 1990s.

24 **THE COURT:** So I will just -- I'm interrupting you
25 because I remember all that evidence well --

1 **MS. MOORE:** I understand. I don't want to --

2 **THE COURT:** -- and it supports the conclusion that I
3 think I articulated to Mr. Stekloff, which is that, you know,
4 it didn't seem like Monsanto cared about anything other than
5 tamping down any concerns that its product might cause cancer;
6 right?

7 But, on the other hand, you know, your argument and your
8 presentation seems to assume that Monsanto controls the EPA and
9 controls the European regulators, and I don't think the
10 evidence suggested that either and I don't think that's true.

11 And, you know, it may be that Monsanto's machinations had
12 some influence on, you know, the conclusions ultimately reached
13 by the regulators, but I also think that the regulators
14 conducted, you know, their own analysis and reached their own
15 conclusions and essentially said, "You know, you can sell this
16 product."

17 And I feel like that, you know, that is a relevant and
18 maybe a highly relevant consideration on what is the
19 constitutional limit of punitive damages in this case. You
20 know, it can't simply be thrown aside.

21 And as Mr. Stekloff points out, even after the IARC
22 reached the conclusion that it did, the EPA, you know,
23 continues to take the position that it does and the jury
24 learned that; and, you know, I think that has to be a major
25 factor in the analysis.

1 **MS. MOORE:** I think the major factor, Your Honor, is
2 what Monsanto knew and what they did over decades of this
3 product being on the market. And if you look at that -- so
4 look at the --

5 **THE COURT:** And, as I said, I agree with you that it's
6 highly relevant. I'm just saying that it's also highly
7 relevant that the regulators said, "You have permission to sell
8 this product." I mean, how can that not be highly relevant to
9 the degree of reprehensibility?

10 **MS. MOORE:** Well, it's a matter of what the other
11 evidence shows too. I mean, the other evidence shows that
12 Monsanto refused to test its product. I mean, when Dr. Perry
13 came back and said, "This is possible genotoxic," the e-mails,
14 which they did not dispute clearly show that Monsanto refused
15 to test the product, they refused to conduct the tests that
16 Dr. Perry recommended, and they never told the EPA about any of
17 that. Instead, they went along and they continued to market
18 this product as safe to consumers. They never warned it caused
19 cancer and they knew that it was genotoxic.

20 I mean, the studies showed that Roundup is 100 times more
21 potent or 10 times more potent, depending on the study you look
22 at, than glyphosate alone, and Monsanto knew that and they
23 didn't tell the consumer that.

24 I think the evidence was overwhelming on what they knew,
25 when they knew it. And you look at other cancer cases,

1 Your Honor, the *Actos* case, which I'm sure you're familiar
2 with, the *Actos* MDL out of Louisiana --

3 **THE COURT:** I can't keep track of all the MDLs.

4 **MS. MOORE:** I know. I cannot either, Your Honor.

5 I actually had -- if it's okay, I can pass this decision
6 up to you.

7 **THE COURT:** Sure.

8 **MS. MOORE:** This is the *Actos* decision.

9 **THE COURT:** It's heavy.

10 **MS. MOORE:** It is heavy, Your Honor.

11 This is relevant to this discussion, Your Honor, because
12 in *Actos* -- this was the \$9 billion verdict. It was an
13 individual plaintiff. It's a federal district court case
14 coming out of an MDL. It's a personal injury claim involving
15 cancer. And in that case the court does a very thorough and
16 detailed analysis of Supreme Court and federal law on the issue
17 of what is constitutionally permissible under the due process
18 clause of the Fourteenth Amendment. So I think it's very
19 helpful for our analysis.

20 And in that case the court held that a ratio of 25-to-1
21 was constitutionally permissible given the evidence that Takeda
22 and Lilly, so pharmaceutical companies, were aware of the
23 possibility that *Actos* posed an increase risk of bladder
24 cancer, that Takeda and Lilly chose to move forward and acted
25 to avoid full disclosure of that and other relevant information

1 to the FDA, to refuse to include adequate warnings on the
2 label --

3 **THE COURT:** But I think you've already distinguished
4 that case from this one; right? Because in contrast to
5 apparently that case and in contrast to the tobacco cases, for
6 example, there was no evidence presented to the jury that
7 Monsanto actually had knowledge of the dangers of Roundup that
8 it concealed from anybody.

9 Rather, I mean, it was -- I believe that the way Monsanto
10 conducted itself was reprehensible but, you know, less
11 reprehensible than the tobacco companies if only because we
12 didn't see any evidence that Monsanto actually knew of a danger
13 and concealed that danger from regulators or from the public.
14 Rather, it was Monsanto -- you know, the evidence, as I've said
15 a number of times, I think is very equivocal on whether Roundup
16 actually does cause cancer, and the problem with Monsanto's
17 conduct is that Monsanto didn't seem to really care what the
18 answer was.

19 But it didn't -- there was -- or at least we didn't
20 receive any evidence at trial and we haven't received any
21 evidence in this litigation that Monsanto actively concealed
22 anything from anybody in the way that the tobacco companies
23 did.

24 **MS. MOORE:** Well, what they did do was they made a
25 choice not to conduct carcinogenicity tests because they didn't

1 want to know.

2 **THE COURT:** They were perhaps, you know, grossly
3 reckless but, you know, what the tobacco companies did was
4 criminal. And, you know, it sounds like from your brief -- I
5 haven't read this case, but it sounds like what the company did
6 in that case was much closer to criminal than in this case.
7 I'm not saying Monsanto's conduct was not reprehensible but
8 it's different.

9 And then, you know -- and so it's not a case where the
10 regulators only approved the product because they were in the
11 pocket of the company and the company, you know, concealed from
12 the regulators information that, you know, the regulators
13 should have seen. You know, we didn't see evidence at trial of
14 that happening here.

15 **MS. MOORE:** But what we did see evidence was the
16 company saying one thing internally and another thing
17 externally. So when you go back to the Dr. Farmer e-mails, the
18 2003, 2009 e-mail that's in evidence, Your Honor, she says in
19 there (reading):

20 "We cannot say Roundup is not a carcinogen. We have
21 not done the necessary testing."

22 And then right below that she says -- in response to how
23 you deal with the media, she says (reading):

24 "Say Roundup, based on our long-term and short-term
25 testing, poses no danger to you and your family."

1 They say one thing internally and they say another thing
2 externally. That is concealing the facts from the public, and
3 that is reprehensible and it does warrant a more significant --

4 **THE COURT:** A punitive damages award, I agree with you
5 there.

6 **MS. MOORE:** Punitive damages, yes. But under
7 California, and I understand, you know, on the binding
8 precedent, but under California, when you look at that,
9 California law has said that a ratio of 9- or 10-to-1 --

10 **THE COURT:** Well, wait a minute. We're talking about
11 the United States Constitution here.

12 **MS. MOORE:** I understand, Your Honor. I understand.
13 I think this is instructive. I understand it's not binding on
14 you.

15 But under that is that --

16 **THE COURT:** It's not only not binding, I'm not sure
17 how much it matters in the -- what California law requires, I'm
18 not sure how much it matters on the question of what the U.S.
19 Constitution requires.

20 **MS. MOORE:** Well, it's looking at *BMW* and *State Farm*
21 *vs. Campbell*. So in that context they said when you look at
22 that -- it's the *Simon* case that he was referencing -- when you
23 look at that, if it's significantly greater than 9- or 10-to-1,
24 it's suspect. This is not significantly greater than 9- or
25 10-to-1. We're looking at a 15-to-1 ratio. And, you know,

1 tobacco --

2 **THE COURT:** I think the Supreme Court has language
3 that if it's greater than, like, 4-to-1, it's suspect; right?
4 Isn't that what *State Farm* says?

5 **MS. MOORE:** But not in a personal injury context,
6 Your Honor.

7 **MR. STEKLOFF:** 3- or 4-to-1, Your Honor.

8 **MS. MOORE:** I mean -- I think it's 4-to-1, Your Honor,
9 but it's not in a personal injury context. That's why I think
10 the *Actos* case is so illustrative because it's a personal
11 injury case; it's also a cancer case.

12 And when you are disguising from the public cancer, the
13 risk of cancer --

14 **THE COURT:** But, I mean, the Supreme Court didn't say
15 in noncancer cases, it's constitutionally suspect if it's more
16 than 4-to-1. The court said -- there were specific facts in
17 *State Farm*, but the court in generally describing the
18 constitutional rule for punitive damages said that it's, as I
19 recall -- I mean, I don't recall the exact language, but I
20 think it said that, you know, a punitive damages award of more
21 than 4-to-1 is going to require some pretty serious scrutiny.

22 **MS. MOORE:** Well, and you can have the scrutiny,
23 Your Honor, but we believe the evidence shows that when you're
24 dealing with hiding the risk of cancer from your consumer in
25 lieu of making profits -- and, remember, this is a

1 billion-dollar company, the jury heard the evidence on that,
2 \$63 billion acquisition, the 7.8 billion net worth. I mean,
3 the punitive damage award is .001 percent of the stipulated net
4 worth amount that was presented to the jury. I mean, this is
5 not grossly excessive by any stretch of the imagination when
6 you're looking at .001 percent of the stipulated net worth.

7 **THE COURT:** Okay. Anything else on punitive damages?

8 **MS. MOORE:** Your Honor, we would just ask that you
9 look at the *Actos* case and we would ask that you look at the
10 *Bullock vs. Philip Morris* case. The *BMW* case which is, you
11 know, the property damage issue is a much different situation
12 than you have here when you have cancer as the harm.

13 The U.S. Supreme Court has been very clear there's no
14 mathematical bright line between what is constitutionally
15 acceptable and what is not. There's no rigid benchmarks that a
16 punitive damages award may not surpass.

17 And so that we believe that, you know, when you're looking
18 at 15-to-1 compared to 25-to-1 ratio in *Actos*, this is
19 constitutionally -- passes constitutional muster and you have
20 to consider the net worth of a company, that's another factor,
21 in this analysis; and given that it's .001 percent of the net
22 worth of Monsanto, we believe that it should stand.

23 And when you look at the --

24 **THE COURT:** I assume the net worth of the company has
25 gone down a fair bit in the last few months.

1 **MS. MOORE:** It actually just had some stock -- the
2 shares went up about a week or so ago.

3 **THE COURT:** You said you have stock.

4 **MS. MOORE:** No. Oh, no, no, no, Your Honor. No. I
5 said the stock went up a couple weeks ago. No, I do not have
6 stock in Monsanto, Your Honor.

7 But when you look at it from that standpoint and you look
8 at the *Pilliod*, you know, verdict, Your Honor, which was the
9 ratio was much higher, you know --

10 **THE COURT:** I really don't think it's appropriate for
11 me to consider the *Pilliod* verdict where the judge hasn't even
12 ruled on posttrial motions yet.

13 **MS. MOORE:** Well, and I understand that, Your Honor.
14 I would just say that it's --

15 **THE COURT:** We all know the \$2 billion verdict is
16 going to be reduced substantially; right? I mean, nobody
17 thinks that's going to stand.

18 **MS. MOORE:** Well, and this is -- I think when you look
19 at what this jury did for a month and these six people who sat
20 in this courtroom -- or in the courtroom down the hall,
21 Your Honor, who deliberated and took extensive notes and took
22 this matter very seriously and gave up a month of their life,
23 when they came back with a \$75 million punitive damage, they
24 thought that would send a message to this company because the
25 goals of punitive damage, the purpose of it is to punish the

1 harmful --

2 **THE COURT:** I don't think you need to go over those
3 basics with me.

4 **MS. MOORE:** And I'm not trying to be -- I mean, I
5 just -- Your Honor, I think right after this verdict, Monsanto
6 came out with a press release and said it has no impact, and
7 the purpose of punitive damages is to --

8 **THE COURT:** But I'm not supposed to consider that in
9 deciding whether to reduce the award.

10 **MS. MOORE:** Well, the purpose of punitive damages is
11 deter wrongful conduct and to punish the wrongdoer.

12 **THE COURT:** I understand your arguments. Is there any
13 final point you want to make before we wrap up?

14 **MR. STEKLOFF:** I think this is obvious, but in
15 *State Farm* the Supreme Court made clear the wealth of a
16 defendant cannot justify an otherwise unconstitutional punitive
17 damages award at page 427.

18 I actually just wanted to seize on one thing that
19 Your Honor mentioned as another reason why I think the punitive
20 damages should be 1-to-1 or much closer to 1-to-1, which is the
21 ambiguity over the science because taking even -- I was not
22 involved in *Actos* and don't have that large opinion in front of
23 me but, I mean, where there is I think recognized ambiguity of
24 the science that this Court in this case has recognized in both
25 *Daubert* opinions and at various times throughout the trial,

1 that also goes to the question of punitive damages and the
2 conduct of the company.

3 In other words, just I don't even think it's appropriate
4 to be comparing this to tobacco, but there is no -- you know,
5 there's not the ambiguity of science there. And so I think
6 that that is another factor that Your Honor can consider when
7 assessing the reprehensibility, and so I just wanted to make
8 that point.

9 I don't know if you need me to try to distinguish *Actos*
10 based on my limited knowledge. I think Your Honor started to.
11 I think there were also spoliation allegations there.

12 **THE COURT:** No, I don't need that.

13 **MR. STEKLOFF:** I think there was so much else there
14 that it's not an appropriate comparison.

15 **THE COURT:** Okay. Well, I'll give this a little more
16 thought and then issue a ruling probably on all the issues
17 probably next week.

18 And I guess one last question for you on the preemption
19 issue. So I think I understand your argument to be, and I
20 want --

21 **MR. STEKLOFF:** Is this on the final question?

22 **THE COURT:** Yes.

23 **MR. STEKLOFF:** Mr. Kilaru is going to handle this so
24 I'm just going to switch.

25 **THE COURT:** All right. And actually if we could just

1 take a two-minute break --

2 **MR. STEKLOFF:** Sure.

3 **THE COURT:** -- and then come back and talk about that
4 and there may be a couple other questions. Why don't we just
5 take a two-minute break.

6 **MR. STEKLOFF:** And Ms. Wagstaff and I had just some
7 general coordination stuff to raise.

8 **THE COURT:** Great.

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

10 (Recess taken at 3:59 p.m.)

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

12 **THE COURT:** Okay. I would like -- you know, we were
13 having this discussion about, you know, what a new trial would
14 be capped at, and I would like letter briefs from both sides on
15 this issue by tomorrow close of business, tomorrow 5:00 p.m.
16 Sorry about that.

17 So I want to try to articulate the issue that I want you
18 to address in these letter briefs, and feel free to ask me any
19 questions if you have them.

20 Okay. So let's just say hypothetically, and these
21 numbers -- these are not numbers that I'm particularly leaning
22 towards or anything like that, but just hypothetically let's
23 say that I conclude that, you know, the highest appropriate
24 number for future noneconomic damages would have been \$500,000,
25 and let's just say that I conclude that the highest

1 constitutional ratio for punitive damages is 5-to-1. I want to
2 emphasize that that is not a reflection of where I'm leaning.
3 It's just a hypothetical number that I've sort of pulled out of
4 the air.

5 And let's say that I give the plaintiffs an option of
6 accepting that or having a new trial. What does the new trial
7 look like? To what extent are the plaintiffs' requests for
8 future noneconomic damages and punitive damages capped at the
9 new trial?

10 Does that question make sense?

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

12 **MR. STEKLOFF:** And I assume it's how is each one
13 standing on its own capped.

14 **THE COURT:** Each one standing on its own and how might
15 they relate to one another.

16 **MR. STEKLOFF:** Okay.

17 **MS. MOORE:** Okay.

18 **THE COURT:** Does that make sense?

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

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

21 **THE COURT:** And if you think I asked the question
22 imprecisely, you can tell me that in the letter brief tomorrow.

23 And then you guys said you had some housekeeping matters,
24 but first, Mr. Kilaru, do you want to talk briefly about the
25 FIFRA issue?

1 **MR. KILARU:** Sure.

2 **THE COURT:** Really I think I just have one question
3 about it. You keep making this argument and you keep trying to
4 pull this language from one part of FIFRA and apply it to the
5 other part of FIFRA, and I think your argument stands for the
6 following proposition, and I want you to tell me if I'm correct
7 about that.

8 I think your argument is if the product would not harm
9 people in its widespread use, then even if the product would
10 harm people in some different and foreseeable use, there is no
11 duty to warn under FIFRA. Is that your argument?

12 So, in other words, the company knows, okay, the
13 widespread use of this product is X and if people use it in
14 that way, it's not going to hurt them; but there's this other
15 foreseeable way in which people sometimes use the product and
16 when people use the product that way, it's going to kill them,
17 but under that scenario, there is no duty to warn people under
18 FIFRA. The company can just sell the product.

19 **MR. KILARU:** I think --

20 **THE COURT:** Is that your argument?

21 **MR. KILARU:** More or less. I mean, I think what we
22 would say is that FIFRA sets forth the standards for what a
23 warning is supposed to contain.

24 **THE COURT:** More or less. What aspect of it is less
25 than that?

1 **MR. KILARU:** I think that's right. I think I would
2 just phrase it from the FIFRA perspective, which I think is the
3 right lens as opposed to from the state law perspective.

4 FIFRA says -- it has a misbranding provision and it
5 involves a -- it requires that a label have directions for use
6 which are necessary for affecting the purpose for which the
7 product is intended, and then it incorporates this misbranding
8 provision that talks about use in accordance with a widespread
9 and commonly recognized practice.

10 And the Supreme Court said in *Bates* that you can't go
11 beyond those requirements and we think that the California law
12 does with the language Your Honor has mentioned about a
13 non -- a reasonably foreseeable misuse.

14 **THE COURT:** Okay. And the consequence of that is that
15 if the company -- if a use of its product -- if it's reasonably
16 foreseeable that people will use its product in the way that
17 will kill them, the company does not have a duty under FIFRA to
18 warn about that --

19 **MR. KILARU:** If --

20 **THE COURT:** -- because it's not a widespread use.

21 **MR. KILARU:** If there's a reasonable foreseeable
22 misuse, yes, because that is a requirement that is in addition
23 to and different from FIFRA's requirement.

24 **THE COURT:** Okay. All right.

25 What else? The severance order? Does anybody have

1 anything they want to say about the severance order?

2 **MR. KILARU:** We did not have any objections to the
3 severance order.

4 **MS. WAGSTAFF:** I haven't had a chance to really look
5 at it and digest it with my team yet, but I can't imagine we'd
6 have a problem.

7 **THE COURT:** Okay. What else do you-all want to talk
8 about?

9 **MS. WAGSTAFF:** So Pretrial Order 150, the wave orders.

10 **THE COURT:** I'm sorry, the what?

11 **MS. WAGSTAFF:** The wave order, where you entered a
12 Wave I and Wave II.

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

14 **MS. WAGSTAFF:** You put them on the discovery track.

15 **THE COURT:** Yes.

16 **MS. WAGSTAFF:** There was one case, Goldie Perkins. It
17 was filed by my law firm on July 29th, 2016.

18 **THE COURT:** Is that the husband and wife, the Stevick
19 comparison, or am I missing --

20 **MS. WAGSTAFF:** No.

21 **THE COURT:** Okay. Sorry about that.

22 **MS. WAGSTAFF:** This is Case Number 3:16-cv-06025.

23 **THE COURT:** Can you say that one more time?

24 **MS. WAGSTAFF:** 3:16-cv-06025.

25 **THE COURT:** Okay.

1 **MS. WAGSTAFF:** We believe that was inadvertently left
2 off the Wave I, and we've conferred with Monsanto and they
3 agree.

4 **THE COURT:** Okay.

5 **MS. WAGSTAFF:** Another case that we believe -- if you
6 want to -- there's a case that's actually a class action that
7 we believe should be put on the side and taken out of Wave I.

8 **MR. STEKLOFF:** That's correct, Your Honor. I don't
9 have the case number in front of me and I'm happy to find it
10 for Ms. Melen. The plaintiff's name is Robert Ramirez and that
11 case -- ah, thank you.

12 This is 3:19-cv-02224. And we've conferred -- and
13 Ms. Wagstaff can verify this -- with Mr. Ramirez and class'
14 counsel and they agree that it should be removed from the wave
15 because it's sort of a unique case.

16 **THE COURT:** Well, I'm not sure I would necessarily
17 disagree with removing it from the wave; but, I mean, it's
18 obvious that class certification is going to need to be denied
19 for that case so why not just keep it in Wave I and deny class
20 certification and keep it in there?

21 **MR. STEKLOFF:** I think you'd have to ask plaintiff. I
22 agree class certification needs to be denied so I think you'd
23 have to ask plaintiffs' counsel if they just accept that
24 outcome.

25 **THE COURT:** Both of you believe that that should be

1 taken out of Phase I -- I mean, Wave I?

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

3 **THE COURT:** Okay.

4 **MS. WAGSTAFF:** It was Monsanto's request to plaintiffs
5 to take it out of Wave I.

6 **THE COURT:** Okay.

7 **MS. WAGSTAFF:** Secondly, prior to serving expert
8 reports, we need to depose the plaintiffs' treating physicians
9 so their experts can read those depositions. We've been having
10 a very difficult time getting medical records and getting those
11 set so we were wondering if the Court would be amenable to
12 moving the Phase I deadlines 30 days. We have conferred with
13 Monsanto. They're agreeable to it.

14 We have a tentative schedule that we would propose to you.
15 We would want Mr. Giglio to --

16 **THE COURT:** I don't have the schedule in front of me
17 right now. And, I mean, the question is -- okay. Go ahead.

18 **MR. STEKLOFF:** I think our thought, Your Honor, was
19 that we could submit -- you know, obviously subject to your
20 approval -- a joint proposed calendar both for Phase I and --
21 or Wave I and Wave II. It essentially moves the expert
22 deadlines back and then the hearings associated with those, the
23 briefing, 30 days in each wave. And fact discovery we've
24 agreed to move the deadlines back two weeks just because
25 there's a lot of movement right now in trying to schedule all

1 of these depositions.

2 So what I would propose is that we -- I mean, we can do it
3 now, but submit -- we could submit it by tomorrow, I think, an
4 order.

5 **THE COURT:** Yeah. Why don't you submit a stipulated
6 request and make sure to justify it because I'm -- you know,
7 give a proper explanation of why this stuff can't be done in
8 the time -- within the deadlines that we previously set because
9 I'm not going to be quick to push back deadlines on these that
10 we just set. You know, we just set these schedules not so long
11 ago and it's important to move these cases along, and
12 especially Wave I where we have somebody who I don't know what
13 their current condition is but the allegation previously was
14 that they were dying and they needed a trial quickly.

15 **MS. WAGSTAFF:** And so, Your Honor, that was what I was
16 saying a moment ago, is we would want to exclude Mr. Giglio
17 from that.

18 **THE COURT:** Okay.

19 **MS. WAGSTAFF:** He actually has -- we have deposed --
20 he's been deposed. We've deposed two of his three treating
21 physicians. We deposed his PCP, we deposed his oncologist, and
22 his last doctor that we've noticed, and Monsanto hasn't noticed
23 anyone, is set for July 11th. So presumably we will have no
24 problem meeting our deadline, which is August 16th -- or 20th,
25 to get expert reports.

1 So we would ask that Mr. Giglio be carved out and continue
2 with the current Wave I deadlines and that everyone else get
3 pushed 30 days, and we'll put that in our proposal tomorrow.

4 **THE COURT:** Okay.

5 **MR. STEKLOFF:** We were going to oppose that. I mean,
6 part of the problem I think is that --

7 **THE COURT:** You're going to oppose it as to Giglio?

8 **MR. STEKLOFF:** Yeah, and not -- and I understand. I'm
9 not in any way questioning the issues with Mr. Giglio, but we
10 have a hearing set for the *Daubert* issues and the summary
11 judgment issues. I don't know specifically which experts they
12 will submit as part of that process or what the challenges to
13 those experts might be, but I think it's odd to have one case
14 on a different track as to all the other cases when it's all
15 sort of part of one -- I mean, I know that that hearing is a
16 potential hearing but as part of that process. So I agree we
17 could finish the expert process.

18 **THE COURT:** You can go ahead and submit your, you
19 know, joint request and in that joint request you can identify
20 where you disagree and explain why, but submit that also by
21 tomorrow. It doesn't have to be by 5:00 o'clock. You can
22 concentrate on your brief if you want, which is more important,
23 but tomorrow submit the stipulation.

24 **MR. STEKLOFF:** The only other request I'll just flag
25 for Your Honor that we're going to put in it is that where --

1 and Ms. Wagstaff and I have discussed this -- where treater
2 depositions are being set, we're going to ask for you to
3 order -- I don't know the exact language, but for the
4 plaintiffs' counsel to engage in a good faith effort to obtain
5 the medical records from that provider.

6 We have authorizations from all the plaintiffs' counsel in
7 the Wave I cases, but that process can take weeks and some of
8 the depositions are coming up within the next few weeks, and so
9 just to try to -- you know, a plaintiff can go to his or her
10 provider and probably obtain the records more easily. So we'll
11 probably propose something along those lines. I don't even
12 know that it will be disputed, but I just want to flag that for
13 Your Honor.

14 **MS. WAGSTAFF:** Well, I would say, you know, some of
15 these plaintiffs have cancer, some of them are very sick. If
16 there's a court order requiring them to go to their doctor to
17 get their records, I don't know if that's --

18 **THE COURT:** I mean, usually you don't have to
19 physically go to your doctor to get records.

20 **MS. WAGSTAFF:** Right. There's already an order in the
21 PFS I believe that says we have to give the records to
22 Monsanto. And as Mr. Stekloff and I were talking before this
23 hearing, we want the records just as much as they want the
24 records, sometimes even more. We don't want to go into a
25 deposition without the records. So we are working together on

1 that, and I advised him that if he had a problem with a
2 particular plaintiff's counsel, to bring it to leadership and
3 that we would talk to that plaintiff's counsel before taking it
4 to the Court, but I don't think that the measure of a court
5 order requiring the plaintiffs to go get them from the doctor
6 is necessary at this point.

7 **THE COURT:** Okay. If you want to propose something,
8 I'll consider it.

9 Anything else?

10 **MS. WAGSTAFF:** I don't think so.

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

12 **THE COURT:** Okay. One last thing that I wanted to ask
13 is that, you know, as you know, I appointed Mr. Feinberg to be
14 the mediator. He reported back to me that both sides -- he
15 reported back to me that after speaking with both sides, he was
16 comfortable being the mediator. I don't think there has been a
17 formal order appointing him as the mediator, but he's hereby
18 appointed as the mediator.

19 And I also understand from Mr. Feinberg that both sides
20 have given him permission to communicate with me about the
21 mediation process, but I just wanted to get confirmation from
22 each of you on the record about that.

23 **MR. STEKLOFF:** That's correct on behalf of Monsanto,
24 Your Honor.

25 **MS. WAGSTAFF:** That's correct. Yes, on behalf of

1 plaintiffs.

2 **THE COURT:** All right. Very good. Thank you.

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

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

5 (Proceedings adjourned at 4:23 p.m.)

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9 **CERTIFICATE OF REPORTER**

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

12
13 DATE: Wednesday, July 3, 2019

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18 _____
19 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
20 U.S. Court Reporter
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