Case Nos. A155940 & A156706

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DEWAYNE JOHNSON,

Plaintiff and Appellant,

vs.

MONSANTO COMPANY,

Defendant and Appellant.

APPEAL FROM SAN FRANCISCO SUPERIOR COURT, THE HONORABLE SUZANNE R. BOLANOS, JUDGE, CASE NO. CGC-16-550128.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT MONSANTO COMPANY

FRED J. HIESTAND (SBN 44241)
COUNSELOR AT LAW
fred@fjh-law.com
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100

General Counsel for *Amicus Curiae*
The Civil Justice Association of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes

Articles, Texts and Miscellaneous

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") welcomes the opportunity to address as *amicus curiae*[1] a key issue this case presents—Does the punitive damage verdict for plaintiff comply with defendant's due process rights?

That verdict is for $250 million (remitted to $39 million) along with a compensatory damage award for $39 million ($37 million of which is for "pain and suffering"). What's more, defendant has been saddled with other large punitive damage judgments because it made and marketed the same product – Roundup, a glyphosate-based herbicide made and marketed

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[1] By separate accompanying application, CJAC requests the court accept this brief for filing.

by Monsanto Corporation [Bayer][2] and in wide and approved use in this country and throughout the world for more than 40 years. Though not one national or international regulator that has studied and evaluated Roundup has ever concluded it causes cancer in humans, the jury here, as well as juries in other cases, have found to the contrary based on similar evidence and argument presented to them by plaintiffs. This has resulted in awards for substantial punitive damages in all of the cases. It is the punitive award here, and its relation to other punitive damage awards against Monsanto for its manufacture, marketing and defense of Roundup, that concerns amicus and prompts our brief.

CJAC is a long standing non-profit organization of businesses, professional associations and financial institutions. Many of our members, including Bayer U.S.[3], are frequent defendants in lawsuits seeking redress for injuries allegedly occasioned to others from conduct by defendants or

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[2] Within weeks of the [Bayer-Monsanto] acquisition closing in June 2018, Bayer lost a lawsuit alleging Monsanto's Roundup herbicide causes cancer. Another two defeats followed, landing Bayer with damage payments of more than $190 million. More cases are coming: A total of 18,400 plaintiffs have filed suits." *WALL ST. J.*, Business Section, August 28, 2019.

[3] While Bayer U.S. is a member of CJAC, no representative or agent of that company participated in the decision by CJAC's amicus committee on whether to participate in this appeal. This brief was written solely by CJAC's General Counsel and funded completely by CJAC.

the use of their products, and these claims often seek punitive damages. Once rare, punitive damage claims have become commonplace. As Justice O'Connor stated in *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443:

> As little as 30 years ago, punitive damage awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards has been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated.

Id. at 500. (O'Connor, J., dissenting; internal citations omitted.)

Punitive damage awards have continued to rise in frequency and severity since Justice O'Connor's observation. See, *e.g.*, W. Kip Viscusi, *The Future of Tort Reform: Reforming the Remedy, Re-Balancing the Scales* (2004) 53 *EMORY L.J.* 1405, 1413 ("The general sense that extremely large punitive damages awards are increasing in frequency and increasing in total value is certainly borne out by the evidence."); Skyler M. Sanders (Comment), *Uncle Sam and Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax* (2013) 40 *PEPP. L. REV.* 785, 794 ("[After 1989], the expansion of punitive damages 'continued and accelerated,' thanks in part to the rise of mass tort litigation, and the ensuing two decades saw punitive damage awards continue to escalate.") (footnotes omitted); Andrew W. Marero, *Punitive Damages:*

Why the Monster Grows (2017) 105 *GEO. L.J.* 767, 776 ("Empirical and anecdotal reports suggest that the Supreme Court's numerous interventions to curtail the incidence of grossly excessive punitive awards by defining the constitutional contours of the common law doctrine have not achieved the intended results.") (footnotes omitted).

The central purpose of amicus is to help make our laws more "fair, economical and certain" when it comes to determining who gets paid, how much and by whom when the conduct of some is charged with occasioning harm to others. Toward this end, CJAC participates in petitioning the government for redress of grievances when it comes to various civil liability issues.

Punitive damages implicates our existential purpose, as shown by CJAC's sponsorship of SB 1989 in 1980, which significantly amended punitive damage law (Civ. Code § 3294), our participation in the 1987 amendments to this same statute[4], and our filing of amicus briefs in court cases concerning punitive damages. See, *e.g.*, *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704; *Adams v. Murakami* (1991) 54 Cal.3d 105.

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[4] See *American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 485, 487-488.

SUMMARY OF ARGUMENT

This case lacks the essential elements for the finding of liability and the imposition of punitive damages. There is insufficient evidence of causation because it is undisputed that 80% of the causes for plaintiff's type of cancer – non-Hodgkin's lymphoma (NHL) – he claims exposure to defendant's product occasioned him to contract, are unknown, what medicine terms "idiopathic." A "reasonable medical probability" for causation requires more than a 50% probability, which cannot be arithmetically arrived at from the remaining 20% of probable causes of NHL even if plaintiff's medical expert arbitrarily shoehorns defendant's product into that 20% category.

There is also insufficient evidence of "malice" by defendant to warrant an award of punitive damages. Proof of "malice" is required for a punitive damages award, but the most the evidence shows here is that defendant relied on the findings and conclusions of the federal EPA and the regulatory bodies of countries where its Roundup product is used that it is not a human carcinogen. That plaintiff proffered contrary studies attests to a difference of scientific opinion, but this militates against a finding of malice, not a capitulation to the minority view.

In addition, the punitive damage award as remitted by the court is excessive as it is based on a gargantuan "pain and suffering award" that contains a punitive element, making for an essentially double recovery based on a 1:1 ratio

of compensatory to punitive damages.

Finally, the punitive damage award is excessive and in violation of due process because it should be considered in combination with other punitive damage awards rendered against defendant by different courts for the exact same course of conduct – the manufacture, marketing and sales of its weed killer Roundup.

ANALYSIS

I. PUNITIVE DAMAGES ARE NOT WARRANTED WHEN THE EVIDENCE OF "MALICE" BY DEFENDANT IS INSUFFICIENT AND CAUSATION OF HARM TO PLAINTIFF BY DEFENDANT'S PRODUCT CANNOT BE SHOWN.

Any award for punitive damages must be based on "clear and convincing evidence of oppression, fraud or malice"; and *malice* means "despicable conduct" done "with a willful and conscious disregard of the rights or safety of others." Civ. Code § 3294(a); *College Hospital*, *supra*, 3 Cal.4th at 928-29.

A. When, as here, the Proper Federal Regulatory Agency Determines that a Defendant's Product is not a Human Carcinogen, it is not Malicious for the Defendant to Manufacture, Sell and Defend its Product Against Studies Claiming the Contrary.

Here, defendant's purported "malice" is that it "knew" or "should have known" that Roundup was a human carcinogen and either labeled it as such or stopped manufacturing and

selling it for use by and exposure to humans. But "knowledge" for the purpose of assessing punitive damages means "*actual* knowledge of the risk of harm [defendant] is creating and, in the face of that knowledge, fail[ing] to take steps it knows will reduce or eliminate the risk of harm." *Pacific Gas & Electric Co. v. Superior Court* (2018) 24 Cal.App.5th 1150, 1159 (italics added). Constructive knowledge will not wash because it does not rise to the requisite level of "willful or malicious conduct. "[C]onstructive knowledge . . . cannot support punitive damages." *Splunge v. Shoney's, Inc.* (11th Cir. 1996) 97 F.3d 488, 491; *Laney v. Coleman Co., Inc*. (8th Cir. 1985) 758 F.2d 1299, 1305 ("[R]ecovery of punitive damages in a products liability case is not permitted upon a theory of constructive knowledge of product defect.").

The *actual knowledge* Monsanto had (and has) of Roundup, is that since 1974 the federal Environmental Protection Agency (EPA) approved the sale of glyphosate without a cancer warning and has repeatedly determined that "glyphosate does not cause cancer, . . . a view shared by regulators worldwide, including regulators for the European Union, Canada, Australia, New Zealand and Japan." Combined ARB and XRB, 67, citing AOB 20-21, 24-26, 66. As recently as December 2017 the EPA wrote that "glyphosate is not likely to be carcinogenic to humans."[5] In 2017 "[t]he

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[5] *EPA Releases Draft Risk Assessments for Glyphosate*, (continued…)

European Union voted . . . to extend its authorization for the world's best-selling herbicide for . . . five years . . .."[6]

That defendant believed in the safety of its product for human use and exposure and defended its non-cancer causing propensities through its own studies, which it presented to government regulators who were aware of and considered studies to the contrary, including those tendered by plaintiffs here, is poor evidence of and does not evince defendant's "malice." A manufacturer need not "roll over" and label its product a human carcinogen or take it off the market whenever a study is released by some group categorizing that product as cancer causing to humans. The ultimate arbiter of whether a product is dangerous for human use should be the regulatory body that has jurisdiction over it and has specifically reviewed it, not a court relying on a self-appointed "scientific" body that releases a minority study casting doubt on the product's safety.

When, as here, there is a genuine scientific dispute between experts and studies proffered by plaintiffs and defendants on the dangerousness of a product, *malice* cannot be attributed to defendant because it agrees with one side of

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[5](...continued)
EPA (Dec. 18, 2017), https://www.epa.gov/pesticides/epa-releases-draft-risk-assessments-glyphosate.

[6] Danny Hakim, Glyphosate, *Top-Selling Weed Killer, Wins E.U. Approval for Five Years*, *THE NEW YORK TIMES*, Nov. 27, 2017.

the dispute, especially when that side is the one that a majority of the world's government regulators are on. It "remains purely speculative as to whether the [defendant] acted with . . . malice rather than out of a bona fide disagreement over" plaintiff's claims. *Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 959.

Granted California's EPA recently disagreed with the federal EPA and "declared glyphosate a known carcinogen," however, a federal court enjoined the state from requiring defendant to place that warning on Roundup or any of its cognate products. *In re Roundup Products Liability Litigation* (N.D. Cal. 2019) 364 F.Supp.3d 1085. In addition, the EPA in an August 7, 2019, letter stated that "any glyphosate cancer warning constitutes 'a false and misleading statement,' and ordered California, the only U.S. state requiring such a warning, to remove the label." *THE NEW YORK TIMES*, *Explainer: What are the Obstacles to Bayer Settling Roundup Lawsuits?*, Reuters, August 22, 2019. These developments should give legal pause to any finding that defendant acted with "malice" by not placing a warning label on Roundup as to its carcinogenic danger to humans or refusing to take the product off the market.

B. When It is Undisputed that the Vast Majority of Causes of Plaintiff's Type of Cancer are Unknown, Defendant cannot in Fairness and Logic be Found to Have Acted with "Malice" toward Plaintiff.

Plaintiff has a rare form of cancer, NHL or mycosis fungoides, which he claims to have gotten from his occupational exposure to Roundup. But it is medically and scientifically undisputed that 80% of the causes of NHL are presently unknown. That leaves just a possible 20% of probable known causes from which to pick and choose which one or ones caused plaintiff's injury. AOB 60 and citations there to the RT.

When it comes to medical causation for an injury, however, the standard is "reasonable medical probability." *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696. A "20 percent probability of detecting the risk of Down's Syndrome [had the physician provided the expectant mother with a certain genetic test] falls far short of the requisite reasonable medical probability standard of causation." *Id.* at 699. The "reasonable medical probability" standard for causation means a greater than 50% probability that, for example, a defendant's drug contributed to the development of the plaintiff's cancer. *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 401-04. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." *Id.* at 403. Since it is

undisputed that 80% of the causes of plaintiff's type of cancer are not known and thus presently unknowable, it can hardly be said that Monsanto's persistent defense of Roundup as a non-cause of plaintiff's injury constitutes evidence of its malice.

Further, plaintiff's and the trial court's allusions to plaintiff's expert Dr. Nabahan having conducted "a differential etiology" is beside the point. As Monsanto points out, "differential etiologies are . . . only valid if . . . a substantial proportion of competing causes are known. . . Thus, for diseases for which the causes are largely unknown . . . a differential etiology is of little benefit." AOB 58, citing and quoting from Federal Jud. Center, Reference Manual on Scientific Evidence (3d ed. 2011), pp. 617-618.

II. THE PUNITIVE DAMAGE AWARD VIOLATES DUE PROCESS BECAUSE IT IS EXCESSIVE GIVEN SUBSTANTIAL ACCOMPANYING COMPENSATORY DAMAGES WITH A LARGE NON-ECONOMIC COMPONENT AND THE DEFENDANT'S ASSESSMENT OF PUNITIVE DAMAGES BY OTHER COURTS FOR THE SAME CONDUCT.

A. When Pain and Suffering Damages are a Significant Component of a Compensatory Award, Punitive Damages should be Denied or Reduced Because there is an Overlap Between Both Species of Non-economic Damages.

Plaintiff obtained a compensatory damage award for $39 million of which $37 million was for pain and suffering; and on top of that an award of $250 million for punitive damages.

The court remitted the punitive damages to equal the compensatory award, presumably to satisfy the Court's observation that "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1," suggesting that "in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter." *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 498-99. See also *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 ("[F]ew [punitive damage] awards exceeding a single-digit ratio between punitive and compensatory damages . . . satisfy due process.").

Plaintiff asks this court to reinstate the $250 million punitive award and defendant seeks to strike it in its entirety. Amicus contends that where, as here, a compensatory non-economic damage award "exceeds the range established by comparable cases, the court should exercise *de novo* review of the verdict for excessiveness" in the same way it does for punitive damages under due process constraints. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages* (2003) 27 *HARV. J.L. & PUB. POL'Y* 231, 295. A reduction of the compensatory non-economic damage award should then reduce or eliminate the need for punitive damages, especially when the non-economic compensatory award contains a punitive element, which the trial court expressly recognized: "[T]here is a punitive element

to the compensatory damages award." Combined ARB and XRB, 99.

Here the non-economic damage component of the compensatory award was 18.5 times greater than the economic damage portion. Moreover, that $37 million in non-economic damages far outpaces the amounts courts have imposed in comparable cases. Monsanto's brief references a "search of a published appellate decisions since 2000 in mesothelioma cases filed in San Francisco Superior Court." AOB 91. These cases show that "plaintiff's award of future non-economic damages is more than eight times higher than the next highest award of total non-economic damages ($4 million) and more than 16 times higher than the average of these awards ($2,006,667)." *Id.* at 92.

It is unsurprising that damages for a plaintiff's "pain and suffering" often contain a punitive component. After all, pain and suffering damages were originally awarded largely to satisfy the vindicatory feelings of the plaintiff and his or her family:

> [T]he development of damages for pain and suffering calls to mind that the origins of damages at common law for personal injury stem not so much from an interest in compensating injured persons for actual loss as buying off the *anger* of the victim's family and *forestalling vengeful retaliation.* Even the early cases of trespass to land, for example, reflect not so much economic loss as a *redress of the indignity* of having one's

> land invaded. As a corollary, early common law damages for personal injury were based not so much on economic loss as on the nature and the egregiousness of the defendant's conduct and the type of injury, such as scarring, peculiarly likely to lead to *resentment*.

Jeffrey O'Connell & Rita James Simon, *PAYMENT FOR PAIN AND SUFFERING: WHO WANTS WHAT, WHEN AND WHY?* (1972), p. 108 (italics added).

Hence there is considerable redundancy of objectives shared by damages awarded for plaintiffs' pain and suffering and damages awarded to punish and deter defendants. That duplication continues to this day and has been recognized as a reason to cabin the punitive amount when an award also provides for the plaintiff's pain and suffering.

In *State Farm,* for example, the majority justified its invalidation of a punitive damages award that exceeded the compensatory damages award by 145-to-1, emphasizing that compensatory damages in the case were "substantial" ($1 million). *State Farm, supra,* 538 U.S. at 426. The Court believed there was "likely" an overlap between the punitive damages award and the compensatory damages award because much of the compensatory award compensated for emotional distress caused by the outrage and humiliation the plaintiffs suffered. *Id. State Farm* went on to cite authority arguing that compensatory damages of this type already contain a punitive element, and stated that there is "no clear

line of demarcation between punishment and compensation" in a case of this kind. *Id.*

The duplicative nature of pain and suffering and punitive damages as a reason for reducing the punitive award is recognized in *Casumpang v. International Longshore & Warehouse Union, Local 142* (D. Hawaii 2005) 411 F. Supp. 2d 1201, a retaliatory discharge case. The jury awarded $1 million in punitive damages and $240,000 in compensatory damages ($90,000 for injury to reputation and $150,000 for emotional distress). The court reduced the punitive award to $240,000, explaining that, although the ratio of punitive to compensatory damages was "approximately 4:1," the amount of punitive damages was nevertheless too high: "Where a compensatory damages award is based on emotional distress damages caused by humiliation and outrage, it likely contains a punitive element of punishment in addition to an element of compensation . . . In light of the substantial compensatory damages awarded and the duplicative considerations in the compensatory and punitive awards, the Court finds that the punitive damages award of one million dollars is excessive." *Id.* at 1220; citing *State Farm, supra,* 538 U.S. at 426.

In *Graselli v. Barr* (2006) 142 Cal.App.4th 1260, a civil rights action against police and Highway Patrol officers for violating the plaintiff motorist's First Amendment rights, the appellate court reversed as "excessive" a punitive damage award that was eight times greater than the compensatory award of $500,000 ($290,000 of which was for non-economic

damages), citing the redundancy between the pain and suffering or emotional distress damages and punitive damages:

> The high court [in *State Farm]* has recognized that when the compensatory damages award includes a substantial amount of emotional distress damages, there is a danger that this compensation will be duplicated in a punitive damages award, thus calling for a smaller ratio.[7]

B. Punitive Damages Should Be Reduced or Curtailed When, as Here, the Defendant Has Already Been Assessed Multiple Punitive Awards by Other Courts for the Same Conduct Complained of in this Case.

Defendant has been a frequent target of product liability lawsuits in California and elsewhere because of its manufacture, marketing and sales of Roundup and related products containing glyphosate. These actions have resulted in substantial punitive damage awards. See RB and XARB, 56. And the litigation continues at a quickening pace.

> The number of lawsuits alleging a link between Bayer's Roundup pesticide and

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[7] 142 Cal.App.4th at 1290, citing and quoting from *Rest.2d Torts* § 908, com. c, p. 466: "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."

> cancer has jumped from 13,400 to 18,400 in the space of just three months, underlining the growing legal risk faced by the German pharmaceuticals and chemicals group. Bayer's shares have fallen sharply over the past year, in response to a string of jury verdicts in California that found Roundup was responsible for the plaintiffs' cancer.

ICIS Chem. Bus., August 2, 2019, 2019 WLNR 23674184.

The Supreme Court recognizes the due process concerns created by multiple awards from different courts in favor of different plaintiffs against the same defendant for engaging in the same, or similar course, of conduct; but has never directly come to grips with these concerns. See, *e.g.*, *State Farm, supra*, 538 U.S. at 423 (explaining that punishment based on "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised . . . creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains"); *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 593: "Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover." (Breyer, J., concurring.)

Lower courts rhythmically call attention to this problem, yet have not agreed upon any solution or answer to it. See, *e.g.*, *Roginsky v. Richardson-Merrell, Inc.* (2d Cir. 1967) 378

F.2d 832, 838-41 (expressing concern about the problem of "claims for punitive damages on the part of hundreds of plaintiffs"); and Judge Richard Posner's comment in *In re Brand Name Prescription Drugs Antitrust Litig.* (7th Cir. 1997) 123 F.3d 599, 609 ("[I]t could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act.").

Legal scholars have joined the chorus in underscoring the serious due process implications of multiple punitive damage awards against the same defendant for the same course of conduct. See, *e.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs* (2003) 87 *MINN. L. REV.* 583, 587 ("This practice of punishing the defendant . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment."); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry* (2005) 99 *NW. U.* L REV. 1613, 1618-44 (giving an exhaustive review of both scholarly and judicial discussion of the multiple punitive issue); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform* (1994) 39 *VILL.* L. REV. 363, 406 ("Surely the most momentous question as yet unresolved by the Court is whether the Constitution imposes any restraints on the

repetitive imposition of punitive damages in mass disaster litigation, such as the litigation that has confronted the asbestos industry for many years."); and Semra Mesulam (Note), *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class* (2004) 104 *COLUM. L. REV.* 1114, 1132 ("The Court's punitive damages [jurisprudence] is dependent on claim aggregation because multiple suits . . . entail multiplying potential and non-economic harm factors, which could . . . result in over-deterrence and undermine . . . efforts to protect defendants' due process rights.").

The American Law Institute recognizes the importance of the multiple redundant punishment danger by offering the following illustration:

> Problems arise especially in the context of product litigation alleging defective designs or warnings . . . If a defectively designed product is unduly hazardous, it may injure hundreds or even thousands of purchasers and users. If liability for punitive damages can be established for *any* of the resulting tort claims, then such an award should be available for *all* the claims arising out of the single corporate misdeed. Yet the consequence is that beyond compensatory damages it must pay for the actual losses of its victims, the firm will be penalized again and again for a single wrongful judgment or action, a sanction that is antithetical to the protection against double jeopardy that characterizes overtly penal regimes. In addition, substantial payments for the earlier punitive damage awards may strip

> the firm of its insurance coverage and assets, thus endangering the ability of later claimants to realize their fundamental tort right to compensatory redress.

2 Am. Law Inst., *REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* (1991) 260-61, n.5 (italics original).

Finally, the Court's recent opinion holding the Eighth Amendment's excessive fines clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's due process clause, indicates a potential new remedy for multiple punitive damage awards against the same defendant for the same conduct when those aggregate damages are "excessive." *Timbs v. Indiana* (2019) 139 S.Ct. 682. *Timbs* found that Indiana's civil in rem forfeiture statute was subject to the "excessive fines" clause because it was "at least partially punitive." *Id.* at 690. Punitive damages, of course, are "wholly punitive" and thus subject under the reasoning of *Timbs* to the restraining effect of the excessive fines clause. Justices Thomas and Gorsuch concurred in Justice Ginsberg's majority opinion, but suggested the Fourteenth Amendment's "privileges and immunities" clause may be the "more appropriate" vehicle for incorporation and application to the states of the "excessive fines" clause.

The majority opinion in *Timbs* forcefully stated that "[p]rotection against excessive *punitive economic sanctions* secured by the Clause is, to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" 139 S.Ct. at 689 (citation omitted;

italics added). *Timbs*' reasoning arguably upends the Court's opinion in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 268 that the excessive fines clause does not apply to punitive damage awards. Since some scholars have suggested the excessive fines clause is a superior mechanism to regulate punitive damages (*e.g.*, Erwin Chemerinsky, *The Constitution and Punishment* (2004) 56 *STAN. L. REV.* 1049, 1063, 1076-78) than the Court's punitive damages jurisprudence, *Timbs* points a way for this court in its independent review of the record to reduce or repeal the trial court's punitive damage award.

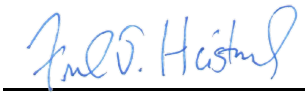
CONCLUSION

This case lacks sufficient evidence of malice and a reasonable medical probability of causation. It also imposes an excessive punitive damage award by unreasonably boosting the compensatory award for "pain and suffering" to punish defendant and then exacerbating that punishment with a separate punitive damage award equal to the compensatory award.

When, as here, a defendant has already been made to pay enormous compensatory and punitive damage awards for the sale and marketing of its product, fairness requires that punitive damage awards be kept within reasonable aggregate limits. After all, the objective of all punitive damage awards is "to assure that the award punishes but does not cripple or bankrupt the defendant." *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57.

For these reasons and others aforementioned, the court should reverse the judgment and enter judgment for defendant, or reverse and remand for a new trial on excessiveness grounds.

Dated: September 3, 2019



Fred J. Hiestand
CJAC General Counsel

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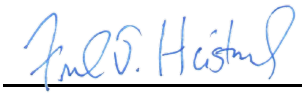
Dated: September 3, 2019



Fred J. Hiestand
CJAC General Counsel

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On September 3, 2019, I served the foregoing document(s) described as: AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT in *Johnson v. Monsanto Company*, A155940 & A156706 on all interested parties in this action by placing a true copy thereof electronically or in the U.S. Mail (where indicated) addressed as follows:

Michael J. Miller
Curtis G. Hoke
Jeffrey A. Travers
The Miller Firm, LLC
108 Railroad Ave.
Orange, VA 22960
mmiller@millerfirmllc.com
choke@millerfirmllc.com
jtravers@millerfirmllc.com
Attorneys for Plaintiff and Appellant (Electronic Copy)

R. Brent Wisner
Pedram Esfandiary
Baum, Hedlund, Aristei & Goldman, PC
10940 Wilshire Blvd., 17th Floor
Los Angeles, CA 90025
rbwisner@baumhedlundlaw.com
pesfandiary@baumhedlundlaw.com
Attorneys for Plaintiff and Appellant (Electronic Copy)

Mark Burton
Audet & Partners, LLP
711 Van Ness Avenue, Suite 500
San Francisco, CA 94102
mburton@audetlaw.com
Attorneys for Plaintiff and Appellant (Electronic Copy)

David M. Axelrad
Jason R. Litt
Dean A. Bochner
Horvitz & Levy LLP
3601 West Olive Ave., 8th Floor
Burbank, CA 91505
daxelrad@horvitzlevy.com
jlitt@horvitzlevy.com
dbochner@horvitzlevy.com
Attorneys for Defendant and Appellant (Electronic Copy)

K. Lee Marshall
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Fl.
San Francisco, CA 94111
klmarshall@bclplaw.com
Attorneys for Defendant and Appellant (Electronic Copy)

Sandra A. Edwards
Joshua W. Malone
Farella Braun & Martel
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
sedwards@fbm.com
jmalone@fbm.com
Attorneys for Defendant and Appellant (Electronic Copy)

Hon. Suzanne R. Bolanos
Civic Center Courthouse
400 McAllister St, Department 504
San Francisco, CA 94102
(Trial Court via U.S. Mail)

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
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[X](VIA E-SERVICE) I electronically served the foregoing documents via the TrueFiling website.

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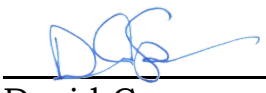
Executed this 3rd day of September 2019 at Sacramento, California.



David Cooper