In Re: Roundup Products Liability Litigation, May Term 2022, No. 550

CARL KLINE Plaintiff, v. MONSANTO COMPANY, et al., Defendants.	§ § § § § § § § § §	COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY, CIVIL DIVISION FEBRUARY TERM 2022 NO: 01641 JURY TRIAL DEMANDED

ORDER

AND NOW, this ___ day of _____, 2024, upon consideration of Plaintiff Carl Kline's Motion for Post-Trial Relief, and any responses thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED. A new trial is ORDERED as to Plaintiff's negligence claims against Defendants Monsanto Company and Nouryon Surface Chemistry LLC.

BY THE COURT:

_____
Butchart, J.

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CARL KLINE Plaintiff, v. MONSANTO COMPANY, et al., Defendants.	§ § § § § § § § § §	COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY, CIVIL DIVISION FEBRUARY TERM 2022 NO: 01641 JURY TRIAL DEMANDED

REQUEST FOR TRANSCRIPT OF TRIAL TESTIMONY

Pursuant to Pa.R.Civ.P. 227.3, Plaintiff hereby designates the following for transcription by the official court reporter:

(1) The entire trial in this matter, docketed at February Term 2022, No. 1641, from hearings and trial proceedings that began on February 15, 2024, through the rendering of the verdict on March 5, 2024;

(2) The motion hearing dated January 3, 2024 in the *In Re: Roundup Products Litigation*, docketed at May Term 2022, No. 550; and

(3) The motion hearing dated February 13, 2024 in the *In Re: Roundup Products Litigation*, docketed at May Term 2022, No. 550.

The official court reporter is hereby ordered to produce, certify, and file the entire transcript in conformity with Pa.R.A.P. 1922 and Pa.R.J.A. 4000.1, *et seq*.

Respectfully submitted,

By: /s/ Scott A. Love

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PLAINTIFF'S MOTION FOR POST-TRIAL RELIEF

Plaintiff Carl Kline respectfully files this Motion for post-trial relief and seeks a new trial on his negligence claims against Defendants Monsanto Company ("Monsanto") and Nouryon Surface Chemistry LLC ("Nouryon") (together, "Defendants").[1] Plaintiff avers as follows:

I. Statement of Facts.

1. Plaintiff Carl Kline is a 71-year-old man who lives in Lansdale, Pennsylvania. Ex. A, Carl Kline Test., Feb. 28, 2024, A.M. Tr., at 6:2-5. He developed Non-Hodgkins Lymphoma, a serious and non-curable form of cancer. *Id*. at 36:22 – 37:11. As set forth below, he alleged that his cancer was caused by over 30 years of exposure to Roundup. *Id*. at 10:1 – 13:10, 15:1 – 20:9; *see also* Ex. B, Conry Test., Feb. 27, 2024, A.M. Tr., at 72:25 – 73:8, 90:12 – 94:21.

2. Roundup contains cancer causing agents such as glyphosate, polyethoxylated tallow amine ethylene oxide (POEA), ethyl oxide, and 1,4-dioxane, formaldehyde, arsenic, and N-Nitroglyphosate (NNG). Ex. C, Bonilla Test. by Video, Tr. at 67:19 – 68:23, 72:14-19; Ex. SS, Reeves Test., Feb. 20, 2024, A.M. Tr. at 65:8 – 67:2, 68:3-23, 70:7 – 71:19. Roundup is a pesticide that is designed, manufactured, and sold by Defendant Monsanto. Roundup contains surfactants, including POEAs, developed and manufactured by Defendant Nouryon in conjunction with Monsanto for use in Roundup.

3. Mr. Kline began using Roundup at his home in Lansdale in 1986. Ex. A, Kline Test., at 10:1 – 13:10, 15:1 – 20:9. During the 30-plus years Mr. Kline sprayed Roundup at his home, he primarily used Roundup Weed and Grass Killer Concentrate and Roundup Weed and Grass Killer Concentrate Plus. *Id*. at 10:1 – 13:10. Both products contained Nouryon surfactants. Ex. TT, Pl.'s Trial Ex. 1083, Tabs 36, 81. In any given season, Mr. Kline testified that he usually sprayed Roundup once per month in May and October, and two-to-three times per month from

[1] *See* Ex. RR, Stip. to Discontinue Claims Against Certain Defs., Feb. 20, 2024.

June to September. Ex. A, Kline Test., at 10:1 – 13:10, 15:1 – 20:9. He typically used two to four ounces of the concentrated solution and mixed it with water, in a two-gallon hand-held sprayer. *Id*. He typically sprayed Roundup around his property, spending anywhere from 30 minutes to an hour spraying on each occasion. *Id*.

4. During the 30-plus years of spraying Roundup at his home, Mr. Kline testified that he frequently got Roundup on his bare skin, including while mixing the concentrate solution with water, when the trigger of the sprayer leaked onto his hands, if it was windy outside while he was spraying Roundup, when he was spraying the fences and trees for weeds and poison ivy, when he cleaned his pump sprayer after each use, and when adjusting the nozzle of the sprayer to choose a different size stream. *Id*. at 15:1 – 20:21. Mr. Kline also testified that he usually wore t-shirts and shorts while spraying, which left large portions of his arms and legs exposed to the spray. *Id*.

5. Mr. Kline testified that he periodically read the labels on the Roundup containers he purchased during his 30-plus years of use. *Id*. at 27:8 – 31:23; 77:5 – 78:24. He testified that the product labels did not include any warnings that Roundup could cause cancer, that it was toxic, or advising consumers to wear boots, gloves, and long sleeves. *Id*. Mr. Kline also testified that had the Roundup labels included such warnings, he would have either worn the recommended protective clothing or not used the product at all, to protect his family. *Id*.

6. In 2020, Mr. Kline presented to his orthopedic doctor for acute lower back pain he experienced while doing light yard work. *Id*. at 31:24 – 32:4, 33:2-11. Subsequent imaging of Mr. Kline's back revealed the presence of lymphoma affecting his vertebral bodies, spine, and thoracic and lumbar areas. Ex. B, Conry Test., at 96:1 – 97:9.

7. Prior to receiving an official diagnosis, Mr. Kline underwent extensive diagnostic testing and imaging, including x-ray showing an abnormal left hilar mass and evidence of

prominent lymph nodes, an MRI showing a mass in the lumbar vertebral body at L5 and T11 (causing pain and foot drop), a chest CT scan showing a lymph node near one of the main airways, a PET scan that showed areas suspicious for lymphoma, and a biopsy. Ex. D, Morginstin Test. By Video, Tr. At 28:04 – 30:08, 30:21 – 31:04. In December 2020, oncologist and hematologist Mark Morginstin, DO, diagnosed Mr. Kline with stage III Diffuse Large B-Cell Lymphoma (DLBCL), a very aggressive type of NHL. *Id*. at 30:21 – 31:04, 31:07 – 31:12. Dr. Morginstin also observed and diagnosed underlying follicular lymphoma, which he opined likely transformed into the aggressive DLBCL. *Id*. at 33:14 – 36:10.

8. Mr. Kline's cancer treatment consisted of 10 fractions of palliative radiation therapy followed by 6 rounds of chemotherapy. *Id*.; *see also* Ex. B, Conry Test., at 99:12 – 102:8. Although Mr. Kline tolerated the radiation treatment fairly well, he experienced life-threatening complications after his second cycle of chemotherapy. After the second round of chemotherapy, he had to be hospitalized "because he was severely anemic, meaning a really low red blood cell count, low enough he had to get three units of transfused blood." *Id*. at 102:8 – 103:14. He developed a severe infection of his colon called clostridiales difficile colitis and was "admitted into the intensive care unit because he was so sick." *Id*. He required blood transfusions, IV antibiotics, and extensive supportive care. *Id*. Although Mr. Kline recovered from the life-threatening infection after a 5-day stay in the ICU, Dr. Morginstin decided he could only handle half dosing of the two most important chemotherapy drugs, because "full dosing of the drugs would potentially be fatal." *Id*. Accordingly, Mr. Kline received half the normal dose of those drugs for the last four cycles of his treatment. *Id*.

9. Mr. Kline completed his last cycle of chemotherapy in May 2021. Ex. D, Morginstin Test., at 95:01 – 96:13. Although the DLBCL was treated and in remission, Mr. Kline

has a high risk of recurrence. *Id*. at 46:13 – 46:24, 95:01 – 96:13. In fact, his risk of recurrence is never zero moving forward, particularly considering the underlying follicular lymphoma, and Mr. Kline will never be fully cured of cancer. *Id*. at 95:01 – 96:13; *see also*, Ex. B, Conry Test., at 111:24 – 112:21.

10. On February 15, 2022, Mr. Kline filed suit in the Philadelphia County Court of Common Pleas against several defendants, including Monsanto and Nouryon. On May 12, 2022, the case was transferred to the mass tort program coordinated by the Philadelphia County Court of Common Pleas and docketed at May Term 2022, No. 00550 (Case No. 220500550).

11. Trial began on February 20, 2024. On March 5, 2024, the jury returned a verdict that found in favor of Monsanto and Nouryon, and against Mr. Kline on the question of negligence. *See* Ex. E, Mar. 5, 2024 Verdict Sheet.

12. Plaintiff timely files the instant motion for post-trial relief under Pa.R.Civ.P. 227.1(c), seeking a new trial on his negligence claims against Defendants.

II. Plaintiff is entitled to a new trial on the basis of the Court's evidentiary errors that prejudiced the outcome of the trial.

A. The Court erred when entering a global order in Roundup litigation permitting evidence regarding EPA registration and associated documents pertaining to Roundup.

13. Rule 402 provides that, generally, "[a]ll relevant evidence is admissible." Pa.R.E. 402. Evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Pa.R.E. 401. Rule 403 allows the Court to exclude even relevant evidence "if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. Under Rule 403, the Court had discretion to exclude evidence that tended "to suggest decision" by

the jury "on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." *Czimmer v. Janssen Pharmaceuticals, Inc*., 122 A.3d 1043, 1058 (Pa. Super. 2015).

14. Relevant evidence introduced by a plaintiff "is meant to prejudice a defendant," and "exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." *Commonwealth v. Serge*, 837 A.2d 1255, 1260-61 (Pa. Super. 2003), *aff'd*, 896 A.2d 1170 (Pa. 2006). "[A] trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events" and are relevant to proving the plaintiff's claims against the defendant. *See id*.; *Commonwealth v. Walter*, 119 A.3d 255, 286 (Pa. 2015).

1. The Court should have precluded EPA evidence in its entirety, pursuant to Pa.R.E. 401 and 403.

15. Here, the issues before the jury were whether Defendants acted negligently when manufacturing and/or selling Roundup, and whether Roundup was defective for strict liability purposes. (Mr. Kline ultimately proceeded only on the basis of negligence). Anticipating Monsanto's defenses and arguments relying on actions by the U.S. Environmental Protection Agency ("EPA"), Roundup plaintiffs moved in individual cases as they were slated for trial to exclude any and all EPA-related evidence. Before trial in *McKivison v. Monsanto Company, et al.*, January Term 2022, No. 337, the plaintiff in that case also moved to exclude EPA evidence in several motions. On January 3, 2024, the Court held oral argument on these motions in limine. Ex. K, *In re Roundup Prods. Liab. Litig.*, Case No. 22050550, Hearing Tr., at 4-148. These motions were decided on January 4, 2024. On January 29, 2024, the Court issued an Order on the global docket by which the *McKivison* motions and related orders were then "deemed filed and decided

in all cases pending within the *In Re: Roundup Products Liability Litigation* mass tort program in the Court of Common Pleas of Philadelphia County." Ex. F, Jan. 29, 2024, Order, entered in *In Re: Roundup Products Liability Litigation*, May Term 2022, No. 550. The motions related to the exclusion of EPA evidence were as follows:

- Plaintiff's Motion *in Limine* No. 1 To Preclude All References to EPA Registration Regarding Glyphosate or Formulated Roundup (Ex. G, Ctrl. No. 23103045);
- Plaintiff's Motion *in Limine* No. 2 Regarding EPA's Glyphosate Cancer Decisions, Findings and Reviews That Have Been Vacated by the Ninth Circuit and Withdrawn by EPA (Ex. H, Ctrl. No. 23103047);
- Plaintiff's Motion in Limine No. 3 Regarding certain EPA documents (Ex. I, Ctrl. No. 23103048); and
- Defendants' Motion *in Limine* No. 5 To Exclude at Trial any Evidence or Argument Concerning the Ninth Circuit's Recent Decision in *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 38 F.4th 34 (9th Cir. 2022) ("*NRDC*") or any Canadian court decisions (Ex. J, Ctrl. No. 23103070).

16. Trial in the *Kline* case began following the entry of the January 29, 2024 deeming order. *See* Ex. F.

17. Pursuant to the Court's global orders on these motions,[2] in *Kline*, the Court permitted Defendants to introduce into evidence various EPA documents related to: (1) the EPA's registration of Roundup, and (2) the EPA conclusions regarding the carcinogenicity of glyphosate. The admitted EPA evidence included the Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, dated December 12, 2017 ("2017 Issue Paper") (Ex. N); the Draft Human Health Risk Assessment in Support of Registration for Glyphosate, December 12, 2017 (Ex. O); and the Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, September 12, 2016 (Ex. P).

[2] Orders on Plaintiff's Motions *in Limine* Nos. 1-3 are attached as Exhibit L; the Order on Defendants Motion *in Limine* No. 5 is attached as Exhibit M.

18. The Court erred by permitting this EPA evidence because it was irrelevant to Mr. Kline's common law negligence claims. *See* Pa.R.E. 401, 402. In a negligence action, the question for the jury is whether Defendants (not the EPA) acted reasonably when marketing and/or selling Roundup. As explained in *Hardeman*, *Pilliod*, and *NRDC*, the EPA documents offered into evidence by Monsanto do not represent an affirmative decision relating to whether Roundup is safe. And the EPA did not address or conclude that Defendants acted with reasonable care in relation to Roundup, given the known and knowable cancer-related safety flags available to Monsanto over its history of selling Roundup. *See Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022); *Pilliod v. Monsanto Co.*, 282 Cal. Rptr. 3d 679 (Cal. App. 1st Dist. 2021), reh'g denied (Aug. 25, 2021), *review denied* (Nov. 17, 2021), *cert. denied*, 142 S. Ct. 2870 (2022); *NRDC*, 38 F.4th at 41-52. These EPA documents also do not represent an affirmative decision on safety or negligence given other evidence in the case illustrating that Monsanto influenced the decision-making of EPA regulators, all culminating in the Ninth Circuit's decision in *NRDC* that the EPA's human health assessments lacked scientific rigor and credibility so as to have violated both EPA internal guidelines and the Administrative Procedure Act. The evidence all should have been precluded on these grounds as ratified in such decisions as *Carlino v. Ethicon, Inc.*, 208 A.3d 92, 110 (Pa. Super. 2019) (trial court acted within its discretion to exclude regulatory evidence where such evidence was not probative of safety).

19. Under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), pesticide manufacturers are only required to "register" a pesticide with EPA before selling that product in the United States, not establish its cancer safety. 7 U.S.C. § 136a(a). Based on information supplied by the manufacturer, EPA registers a pesticide if it determines that, *inter alia*, (1) the product will perform its function when used in accord with common practice without causing "unreasonable

adverse effects on the environment;" and (2) the product label complies with FIFRA including those provisions concerning "misbranding" of a product label. *See* 7 U.S.C. § 136a(c)(5)(B)-(D) (emphasis added). Manufacturers have a pre-registration and ongoing responsibility to update EPA with information related to the health risks posed by a registered pesticide, and EPA reviews pesticide registrations every 15 years. But the EPA does not independently evaluate a pesticide's cancer risk outside of data provided by the pesticide manufacturer. *See* 7 U.S.C. § 136a(g)(1)(A); 7 U.S.C. § 136j(a)(1)(E); 40 C.F.R. 159.158; *see generally Bates v. Dow Agrosciences*, 544 U.S. 431, 437-38 (2005). The EPA's non-involvement in evaluating a pesticide's cancer risk other than reviewing the manufacturer-provided date further supports exclusion of EPA-related evidence.

20. Under FIFRA, the EPA's registration of a pesticide does not represent a conclusive determination that the label adequately warns about a pesticide's health risks and even the "agency's approval of a label is not determinative of compliance with [FIFRA]" itself. *See Hardeman*, 997 F.3d at 956 n.6. FIFRA instead provides that registration represents only "prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of the subchapter." 7 U.S.C. § 136a(f)(2). EPA also may determine that a pesticide label is "misbranded" if the agency concludes that the label lacks "a warning or caution statement . . . adequate to protect health and the environment," or if the label lacks "directions for use . . . adequate to protect health and safety." 7 U.S.C. § 136(q)(1)(F)-(G); *Bates*, 544 U.S. at 438. FIFRA therefore speaks to regulatory compliance and ultimately not the product's safety. FIFRA further provides that "[i]n no event shall registration of an article be construed as a defense for the commission of any offense under this subchapter." *Id.* It also is not a complete defense to a state law negligence action relating to the adequacy of its warning of known and knowable cancer risks. *See Hardeman*, 997 F.3d at 960 ("Considering the responsibility FIFRA places on manufacturers

to update pesticide labels and that EPA has allowed pesticide manufacturers to add cancer warnings to label through the notification process without prior approval, it is not impossible for Monsanto to add a cancer warning to Roundup's label."). These points further support the exclusion of EPA evidence.

21. In addition, FIFRA gives the states concurrent authority to "regulate the sale or use of any federally registered pesticide." 7 U.S.C. § 136v(a). Unlike the federal statutes governing prescription drugs and medical devices (for example), states may completely *ban* a pesticide's sale if a state finds "that one of the pesticide's label approved uses is unsafe," despite EPA's approval of the label. *See Bates*, 544 U.S. at 446 (citing § 136v(a)). This approach reflects Congress' embrace of a "relatively decentralized scheme that preserves a broad role for state regulation" regarding pesticide regulation *Id*. at 450. Therefore, the responsibility for Roundup rests with Monsanto—not EPA—and the introduction of evidence and argument of EPA's registration of Roundup and related documents was not relevant to show whether Defendants were negligent or could have and should have warned about risks associated with Roundup.

22. Even assuming some marginal relevance with EPA documents, the Court's error when permitting this type of evidence significantly influenced the outcome of the trial. As discussed below, this evidence should have been excluded pursuant to Pa.R.E. 403 because it suggested to the jury that they should come to a decision on an improper basis, and it was significantly conflating the issue of state law negligence with regulatory compliance. *See Carlino*, 208 A.3d at 111. Here, Defendants introduced EPA evidence to establish that they acted reasonably given the EPA's registration of Roundup. This evidence came in through multiple witnesses during trial, including William Reeves, Donna Farmer, Timur Duranni, and Beau Bruce. *See* Ex. Q, Reeves Test., Feb. 21, 2024, P.M. Tr., at 154:6-159:20; Ex. R, Farmer Test., Feb. 22, 2024, P.M.

Tr., at 142:3-16; Ex. S, Durrani Test., Feb. 26, 2024, P.M. Tr., at 60:1-66:20; Ex. T, Bruce Test., Feb. 29, 2024, A.M. Tr., at 28:16-29:21. Defendants made the EPA the centerpiece of their closing arguments:

> You heard from the Court that the claim here is that Monsanto and Nouryon have been negligent. That's the claim. And, you heard basically that comes down to reasonableness. What would a reasonable chemical company do in Monsanto and Nouryon's position. Well, as to the question of labeling, what a reasonable company would do is follow the dictates of the EPA label and follow the science.

Ex. U, Closing Arg., Mar. 5, 2024, A.M. Tr. at 110:17-25 (emphasis added).

23. As a result of the Court's error in admitting EPA evidence into the case, the jury returned a verdict of "no" on negligence in favor of Defendants and against Plaintiff. The Court's error permitted the jury to reach a decision on the basis of this evidence and argument, wrongly diverting the jury's attention from the negligence at issue in the case to the irrelevant and unfairly prejudicial regulatory conclusions instead. It permitted the jury to reach a verdict on an improper basis, prejudicing the plaintiff. *See Czimmer*, 122 A.3d at 1058. A new trial is justified on this basis alone.

2. Alternatively, the Court should have permitted Plaintiff to tell the jury the whole EPA story including the Ninth Circuit's *NRDC* decision and the EPA's withdrawal of its 2020 Interim Review Decision.

24. In the alternative, assuming the Court acted within its discretion to allow any EPA evidence at trial, the Court in turn erred by permitting Monsanto to tell the jury only a misleading half of the story when the Court excluded evidence and testimony about the EPA 2020's Interim Decision (which finalized all of the prior EPA documents the Court admitted) and the Ninth Circuit's opinion in *NRDC* vacating the EPA's human health assessment.

25. By way of background, in October 2015, EPA's Office of Pesticide Programs ("OPP") made a preliminary determination that glyphosate is "not likely" to be carcinogenic. EPA later issued a draft paper entitled "Glyphosate Issue Paper: Evaluation of Carcinogenic Potential." Ex. P (Sept. 12, 2016). One year later, EPA issued a draft human-health risk assessment for glyphosate and an updated final paper that included the EPA's human-health risk assessment, concluding that glyphosate poses no serious human-health risks, and that "glyphosate should be classified as 'not likely to be carcinogenic to humans.'" Ex. O (Dec. 12, 2017); Ex. N (Dec. 12, 2017). These EPA documents were admitted into evidence during the *Kline* trial.

26. In January 2020, the EPA also issued an Interim Registration Review Decision for glyphosate ("Interim Decision"), which announced that the draft human-health risk assessment was now final, with no changes. The Interim Decision cited to and relied on the prior EPA documents the Court allowed into evidence, and advised that the EPA concluded "that there are no risks to human health from the current registered uses of glyphosate and that glyphosate is not likely to be carcinogenic to humans." *Id.* The basis for this evaluation was the EPA's prior assessments, which were specifically referenced in the Interim Decision. *Id*.

27. In March 2020, consistent with federal administrative law and procedure, the Ninth Circuit was petitioned to review EPA's 2020 Interim Decision pursuant to FIFRA. Federal administrative law grants United States courts of appeal authority to provide judicial review regarding cases "of actual controversy as to the validity of any order issued by" EPA. 7 U.S.C. § 136n(b); *NRDC*, 38 F.4th at 44. After reviewing the underlying scientific data and the EPA's findings, the Ninth Circuit determined that EPA's conclusion that glyphosate was not likely to be carcinogenic was "not supported by substantial evidence," vacated the human-health risk assessment, and remanded for further review. *NRDC*, 38 F.4th at 51.

28. Although the Ninth Circuit applied administrative rules, the *NRDC* opinion is binding legal precedent on the EPA, vacating its most recent and comprehensive cancer assessment regarding glyphosate due to the "serious" errors the agency made when "assessing the human-health risks." *Id*. at 52. The U.S. Supreme Court denied the EPA's petition for certiorari. After denial of certiorari in *NRDC*, the reliability of the EPA's cancer assessment related to glyphosate has been called into serious question, because the Ninth Circuit took the unusual step of vacating the human-health portion of the Interim Decision, based upon finding that "EPA's errors in assessing human-health risk are serious." *Id.* at 52 (emphasis added). Because the Ninth Circuit's opinion goes to the very heart of Monsanto's negligence defense—which relies heavily on EPA's evaluation of the carcinogenic potential of glyphosate—it should not have been excluded from this trial, especially because the Court wrongly permitted the very EPA evidence discredited by the *NRDC* decision to be considered by the jury.

29. If EPA evidence should have been in the case at all, the Court's decision to exclude evidence concerning the *NRDC* decision nevertheless was error because it withheld from the jury the shortcomings of EPA's regulatory analysis and it painted a picture that did not accurately inform the jury about the state of the EPA's analysis and was simply not true. The jury was entitled to know that the EPA's most recent assessment of glyphosate's carcinogenic potential was found to be (1) flawed in a Court of law, (2) contrary to the agency's own Cancer Guidelines,[3] (3)

[3] The Ninth Circuit explained that "[d]espite EPA's repeated invocation of its Cancer Guidelines, the Interim Decision fails to abide by those guidelines" by reaching irreconcilable conclusions based upon the human "epidemiological studies showing increased NHL risk," and ignoring the tumor evidence from rodent studies. *NRDC*, 38 F.4th at 46–51. Specifically, the Ninth Circuit found that EPA improperly disregarded tumor evidence "so often throughout the Cancer Paper that it is impossible to know what conclusion EPA would have reached" if the agency considered the evidence appropriately. *Id.* at 47 n.7.

inconsistent with findings of its own scientist,[4] and (4) in conflict with numerous scientific studies (human and animal) showing glyphosate does pose a carcinogenic risk.[5] It was entitled to weigh whether Monsanto's reliance on the EPA as a basis for ignoring red flags concerning Roundup's carcinogenicity was reasonable, given the patent lack of reliability of EPA's conclusions, as explained in *NRDC*. Allowing Monsanto to hide behind the EPA's regulatory process, when that process was minimally relevant to Roundup's safety and deeply flawed, was an error and/or abuse of discretion that changed the balance of evidence in the case, affecting the outcome of trial. *See Risperdal Litig. W.C. v. Janssen Pharms., Inc.*, 174 A.3d 1110, 1122 (Pa. Super. 2017).

30. The Court moreover incorrectly precluded Mr. Kline from introducing evidence that, following the *NRDC* decision, the EPA withdrew its 2020 Interim Review Decision on Human Health and Carcinogenicity of glyphosate and has yet to re-register Roundup. *See* Ex. V, Sept. 21, 2022, EPA Press Release. As with the *NRDC* opinion, the EPA's withdrawal also is relevant to rebut Monsanto's reliance on the EPA in defense of its negligent conduct.

31. In sum, the Court erred in permitting EPA evidence at trial at all. Even if allowing such evidence was within the scope of the Court's discretion, the Court was obliged also to allow Plaintiff's evidence relating to the *NRDC* and the EPA's withdrawal of its 2020 Interim Review

[4] The Ninth Circuit added that EPA's Interim Decision finding that glyphosate is "not likely" to be carcinogenic to humans "conflicts with a[n earlier] determination" in EPA's Cancer Paper that glyphosate's carcinogenicity "cannot be determined based on the available evidence." *Id.* at 46.

[5] The *NRDC* Court emphasized that EPA's Cancer Paper on glyphosate "discussed human epidemiological studies showing what could be considered suggestive evidence that glyphosate exposure causes NHL." *Id*.. Indeed, the Ninth Circuit observed, "most studies EPA examined indicated that human exposure to glyphosate is associated with an at least somewhat increased risk of developing NHL." *Id*. (emphasis added). "The Cancer Paper also acknowledged that some epidemiological studies provide evidence of an exposure-response relationship between glyphosate and NHL. One study, for instance, indicated that there was an increased risk of NHL for those with more than ten years of glyphosate exposure. In addition, that same study as well as another indicated that those who are exposed to relatively more glyphosate in a year face a higher risk of NHL." *Id*. (emphasis added).

Decision on Human Health and Carcinogenicity of glyphosate. This would have permitted the jury to understand the whole truth of Roundup and the EPA and weigh the evidence in its entirety.

32. During the course of trial, Counsel held a sidebar on this topic and raised the issue with the Court. Counsel was clear that they "want to tell the truth and the whole truth without bringing up any opinions or Court orders or anything like that" concerning the fact that the EPA's "finding that [glyphosate is] not likely a carcinogen currently today has been withdrawn by the EPA." *See* Ex. W, Feb. 21, 2024, A.M. Tr. at 4:4-7:6. Over Counsel's objection, the Court ordered that there be "no mention" of "where the 2020 IRD is" despite this evidence being explicitly allowed in the Philadelphia Court of Common Pleas just the month before Plaintiff's trial. *See id*. at 6:5-15; *see also* Ex. X, *McKivison* Trial, Jan. 24, 2024, P.M. Tr., at 26:13-18 (Dr. Connie Welch Du Jardin testifying that she knew before she testified that day "that on September 23, 2022… the EPA announced its withdrawal of all remaining portions of the interim registration review decision for glyphosate").

33. Because of the Court's error in excluding the *NRDC* decision and the EPA's withdrawal of the Interim Decision, the jury was left with a misleading presentation of the current state of the EPA's findings on glyphosate and prevented from considering evidence that fairly rebutted Monsanto's own reliance on EPA's regulatory decisions concerning Roundup and glyphosate. The jury was not permitted to understand the entire regulatory story of Roundup and weigh it in reaching its decision on negligence. This prejudiced the outcome of trial against Plaintiff and is properly the basis for a new trial.

B. The Court erred and/or abused its discretion when preventing Plaintiff from presenting a full record regarding IARC evidence.

1. The Court erred and/or abused its discretion when amending the January 4, 2024 Order.

34. The Court wrongly precluded Plaintiff from introducing evidence regarding the International Agency for Research on Cancer ("IARC") at trial. The preclusion of this evidence was the result of several trial court decisions that were in error, and which individually and cumulatively caused prejudice, justifying a new trial.

35. IARC is a non-governmental "agency" organized within the umbrella of the United Nations' World Health Organization. IARC generally is composed as an independent body of scientists. In 2015, 17 independent international scientists with expertise and interest in the carcinogenicity of pesticides, the majority of whom live and work in the United States, gathered to review the carcinogenic potential of glyphosate. Their review included exposure data, cancer bioassays in animals, mechanistic and toxicological data, and published (or accepted for publication) epidemiology studies of cancer in humans. This data also was available to the EPA when it made its various registration decisions on Roundup. Based on this data, IARC concluded that "glyphosate is *probably carcinogenic to humans (Group 2A).*" Evidence that independent scientists gathered at IARC in 2015 to review the carcinogenic potential of glyphosate, their backgrounds, processes, evaluations, and ultimate classification of glyphosate as a probable human carcinogen in the IARC Monographs, along with evidence of IARC's history and the importance of its determinations has been admitted in every Roundup trial in the nationwide history of this litigation (approximately 20 trials to date), including all three prior Roundup trials in Philadelphia. The findings of these scientists operating under the IARC umbrella have been present in every one of the Roundup trials except this one. These findings were important not only in themselves, and

also because they were made under the IARC umbrella given its reputation and independence from governmental regulatory bodies in the United States and elsewhere. *See*, *e.g.*, Ex. Y, *Caranci v. Monsanto Co*., Oct. 12, 2023, P.M. Tr., at 55:3-58:24; Ex. Z, *Martel v. Monsanto Co., et al.*, Nov. 7, 2023, A.M. Tr., at 38:21-42:12; Ex. AA, *McKivison v. Monsanto Co., et al.*, Jan. 11, 2024, P.M. Tr. at 56:6-61:17; Ex. UU, *McKivison*, Jan. 18, 2024, A.M. Tr. at 21:11 – 29:23, 31:16 – 33:20, 36:4 – 40:4, 120:13 – 123:3. During those trials, plaintiff and defense fact witnesses and expert witnesses discussed IARC and its glyphosate findings extensively as they relate to Monsanto's negligence. *Id*.

36. IARC's classification of glyphosate as a probable human carcinogen in 2015 further informed Defendants of about the risks associated with Roundup. Rather than use IARC's assessment as a spur to warning end users about Roundup's risk profile, Monsanto first to alter or prevent IARC from issuing its report and then to minimize and marginalize IARC's conclusions. Monsanto also lobbied Congress to defund IARC. *See, e.g.* Ex. VV, *Caranci*, Farmer Test., Oct. 16, 2023, A.M. Tr. at 102:21 – 103:8, 114:10 – 115:13, 125:6 – 127:3, and P.M. Tr. at 4:22 – 6:4, 7:10 – 8:5, 22:14 – 24:11, 37:5-7, 39:19 – 44:14; *see also*, Ex. UU, *McKivison*, Jan. 18, 2024, A.M. Tr., Farmer Test., at 21:11 – 29:23, 31:16 – 33:20, 36:4 – 40:4. Monsanto's aggressive effort to product its profits and set aside a serious warning about human safety was informed by the fact that a major world health organization such as IARC issued that conclusion. *See*, *e.g.*, Exs. UU and VV.

37. Prior to the *Kline* trial, three Roundup trials took place in the Philadelphia County Court of Common Pleas: *Caranci v. Monsanto Co.*, June Term, 2021, No. 2213; *Martel v. Monsanto Co., et al.*, September Term, 2021, No. 84; and *McKivison v. Monsanto Company, et al.*, January Term 2022, No. 337. Evidence about IARC proffered by Plaintiff in *Kline* was

permitted in all of these cases. As in Roundup cases nationwide, evidence of IARC's safety signal was presented to the jury and weighed as a basis for finding Defendants negligent. The Courts in *Caranci*, *Martel* and *McKivison* properly allowed that evidence. The Cort erred and/or abused its discretion by excluding this evidence here.

38. In anticipation of trial in *McKivison*, the plaintiff moved to exclude foreign regulatory registrations and/or approvals of glyphosate, GBHs, and/or Roundup. Ex. BB (Ctrl. No. 23103051). Plaintiff's motion pertained to different evidence, and not any evidence relating to IARC. *Id*. Again, IARC is a non-governmental entity that has no authority to register or approve pesticides for market. *See, e.g*, Exs. Y-AA. IARC also was composed of independent scientists, most of whom live and work in the United States. *See id*. On January 4, 2024, the Court granted Plaintiff's motion to exclude foreign regulatory registrations and/or approvals "without prejudice to a party's introduction of foreign scientific evidence including, but not limited to, evidence from the International Agency for Research on Cancer (IARC), provided that such introduction does not refer to foreign regulatory agencies." Ex. CC, Jan. 4, 2024 Order on Pl.'s MIL No. 5 (Control No. 23103051). On January 29, 2024, the Court deemed this motion and the January 4 Order "filed and decided in all cases pending within the *In Re: Roundup Products Liability Litigation* mass tort program" Ex. F, Jan. 29, 2024 Deeming Order. This included *Kline*.[6]

[6] The Court has entered orders on the global docket on the basis that the parties – including plaintiffs via liaison counsel, agreed to the Court deciding motions in limine on a global basis. This includes the Orders dated January 4, 2024, January 29, 2024, and February 14, 2024. Each of these Orders states that motions in limine filed in the *McKivison* case were deemed filed and decided in all cases on the Roundup global docket "upon agreement of liaison counsel." *See* Ex. F, CC, GG. These Orders inaccurately represent the existence of such an agreement certainly as relates to the issues presented in this post-trial motion. In particular, to the degree that the Court's orders suggested the concurrence of Plaintiff's counsel as to the issues presented here, the orders improperly encouraged and prompted the Court to decide the IARC issues in the *Kline* case on the basis of the January 4 and February 14 Orders rather than the arguments Plaintiffs actually made in the *Kline* trial. The Court erred to the extend it suggested and suggests that Plaintiff have concurred with and thereby waived any right to challenge the orders and rulings at issue in this post-trial motion.

39. On February 2, 2024, Defendants moved to "clarify" the January 4 Order, and the Court heard oral argument on February 13, 2024, just two days before the trial in this matter was scheduled to begin. *See* Ex. DD, *McKivison*, Feb. 2, 2024, Defs.' Mot. To Clarify; Ex. EE, *In re Roundup Prods. Liab. Litig.*, Case No. 22050550, Hearing, Feb. 13, 2024 Tr., at 3-81. Defendants' argument centered entirely upon a complaint that the *McKivison* trial court precluded the introduction of "foreign scientific evidence, if the foreign scientists happened to work for a foreign government or foreign regulatory agency." *See* Ex. DD. In essence, Defendants argued that the January 4 Order permitted introduction of evidence from foreign regulatory agencies that glyphosate is not carcinogenic, so long as the evidence was couched as the analysis and conclusions of "foreign scientists," rather than from any particular foreign regulatory agency. *See, generally, id.; see also,* Ex. EE. During the hearing, Defendants' sole argument was that the Court should reconsider its January 4 Order to permit Monsanto introducing evidence that glyphosate is registered or approved for sale in other countries to support its defense that Roundup is not carcinogenic. Ex. EE. In particular, Defendants wanted to show the jury a map of countries that permit the sale of Roundup. *Id*. They argued for this evidence to be allowed, couched as the analysis and conclusions of "foreign scientists," rather than from any particular foreign regulatory agency. *See generally*, Exs. DD, EE.

40. Monsanto's motion for clarification touched on IARC to suggest that permitting this evidence was in rebuttal of Plaintiff's IARC evidence. The motion referenced IARC evidence as a benchmark for seeking more latitude to introduce foreign regulatory evidence before the jury. Monsanto's motion for clarification and therefore Plaintiff's response did not raise any issue relating to the admissibility or nonadmissibility of IARC evidence itself, or of the evidentiary concerns raised by identifying IARC to the jury. Ex. EE, at 53:1-24; 54:8-21; 56:4-14; 57:6-60:8;

Ex. FF, Feb 12, 2024 Pl.'s Opp. to Defs.' Mot. to Clarify (Control No. 24020394). During the hearing, Monsanto also made no oral motion to preclude IARC evidence. *See, generally*, Ex. EE. The Court did not raise that issue during argument either. *Id*.

41. On February 14, the Court entered the following order:

> **AND NOW**, this 4th day of January 2024, upon consideration of plaintiff's motion *in limine* no. 5 to exclude foreign regulatory registrations and/or approvals of glyphosate, GBH's, and/or Roundup, any response thereto, the supplements of the parties, and oral argument, it is **ORDERED** that the motion is **GRANTED** without prejudice to a party's introduction of foreign scientific evidence, provided that the evidence is introduced through an expert witness who has been qualified pursuant to Pa.R.E. 702.

See Ex. GG. Pursuant to the Court's deeming order, the January 4 Order, as amended on February 14 (here, the "February 14 Amended Order"), was made applicable in the *Kline* trial. *See* Ex. F.

42. The Court erred and/or abused its discretion when *sua sponte* amending the January 4 Order on February 14 to remove the language pertaining to IARC on the basis of Monsanto's Motion for clarification. Specifically, Monsanto's motion did not place Plaintiff on notice that the Court's order pertaining to the admissibility of any IARC evidence was at issue in the motion or argument occurring on February 13. The Court also never suggested that the admissibility of any IARC evidence or the decision to bar references to IARC at trial was on the table. To the extent the Court's February 14 amendment of the January 4 Order precludes reference to IARC or any IARC-related evidence, the Court abused its discretion to decide that issue without notice to Plaintiff or the opportunity to be heard on that issue. IARC evidence is relevant to Monsanto's negligence, in addition to causation and punitive damages. The Court had no basis on which to preclude the evidence, especially where no Monsanto motion or objection even was pending.

43. The Court's February 14 Amended Order affected the balance of evidence at trial relevant to Monsanto's negligence. It precluded Plaintiff from publishing exhibits and examining

witnesses about whether they reasonably (and credibly) acted to ignore the red safety flag of Roundup's carcinogenicity. This error independently and cumulatively justifies a new trial. *See W.C.*, 174 A.3d at 1122.

2. Alternatively, the Court erred and/or abused its discretion by precluding Plaintiff from introducing evidence that IARC had concluded that Roundup is a probable human carcinogen.

44. Against the backdrop of the February 14 amendment to the January 4 Order, in opening statement, Plaintiff provided the jury with a summary of the trial evidence, including a reference to IARC and its conclusions. After an objection by Defendants, the Court interrupted Plaintiff's opening and instructed the jury to disregard any reference to IARC. Ex. HH, Feb. 20, 2024, A.M. Tr., at 37:3-14.

45. Given that IARC's classification of glyphosate as a probable human carcinogen is weighty evidence of Defendants' negligence in continuing to manufacture and sell glyphosate-based Roundup formulations to consumers, and/or in failing to warn consumers of the carcinogenic risk of using Roundup, Plaintiff briefed and requested an opportunity to be heard as to the trial court's position regarding IARC. Ex. II, Feb. 20, 2024, P.M. Tr., at 172:17-178:15; Ex. JJ, Feb. 20, 2024, Pl.'s Trial Br. re: IARC Admissibility. In response, Defendants argued that the February 14 Amended Order on foreign regulatory registrations and approvals of glyphosate and Roundup precluded any reference to IARC in the *Kline* trial. Ex. II, at 176:14-21.

46. On February 22, the Court ruled that: (1) Plaintiff could introduce evidence pertaining to the fact that 17 independent scientists concluded that glyphosate is a probable human carcinogen, but that (2) Plaintiff was not permitted to identify IARC by name, describe IARC's affiliation with the World Health Organization, its 50-year history, its singular role worldwide in assessing cancer risks, or its relationship with regulatory entities in the U.S. such as the

Occupational Safety and Health Administration and OSHA's reliance upon IARC. In sum, the Court prohibited Plaintiff from establishing that IARC's conclusion that Roundup is a probable human carcinogen carries indicia of credibility, at least as a red flag to Monsanto to investigate and warn consumers about Roundup's cancer risk, such that Monsanto's failure to do so established negligence. Ex. KK, Feb. 22, 2024, A.M. Tr., at 4:3-34:9; Ex. LL, Feb. 22, 2024, P.M. Tr., at 4:1-16.

47. The Court abused its discretion for two reasons. First, the Court wrongly applied the February 14 Amended Order to preclude Plaintiff's references to IARC. The February 14 Amended Order pertained to foreign regulatory bodies and not IARC. IARC is a non-governmental entity and not a foreign governmental and regulatory entity. The Court misunderstood the meaning of the February 14 Amended Order by reading preclusion of IARC where it did not exist. Monsanto invited error by arguing the second paragraph of the February 14 Amended Order excluded reference to IARC, which was an unnatural reading of that order. *See* Ex. GG; Ex. KK, at 26:13-17. The second paragraph of the amended order simply iterated the Court's intention of removing specific reference to IARC from the January 4 Order—not that the Court was intending to preclude IARC from being introduced at trial. *See id.* Indeed, in reading fully the February 14 Amended Order, it is clear that it cannot be read in the manner that Defendants represented to the Court and to which the Court agreed.

48. Second, even if the trial court were to understand IARC as a "foreign agency" within the meaning of the February 14 Amended Order (it is not), the Order simply states that such evidence may not be introduced where it "may result in a mini-trial regarding the protocols, rules, and/or decision making processes of the foreign agency and/or foreign regulatory agency." Ex.

GG at No. 3. Evidence regarding IARC has not resulted in a mini-trial in any Roundup trial to date, and it likewise would not have in this case. *See, generally*, Exs. Y, Z, AA, UU, VV.

49. The trial court's ruling was an abuse of discretion, as IARC is admissible under the February 14 Amended Order regarding foreign regulatory registrations or approvals of glyphosate or Roundup, highly relevant and probative of Monsanto's negligence, and not substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. *See Commonwealth v. Flamer*, 53 A.3d 82, 86 (Pa. Super. 2012) ("An abuse of discretion is not merely an error in judgment, but an 'overriding misapplication of the law, or the exercise of judgment that is manifestly unreasonable . . .'"); Pa.R.E. 401, 403.

50. The Court's decision affected the balance of evidence at trial pertaining to Defendants' negligence. It precluded Plaintiff from publishing exhibits and examining witnesses about whether they reasonably (and credibly) acted to ignore the red safety flag of Roundup's carcinogenicity. This error independently (and cumulatively) justifies a new trial. *See*, *e.g.*, Ex. MM, Pl.'s Trial Ex. 36 (Media training in response to IARC); Ex. NN, Pl.'s Trial Ex. 563 ("Post-IARC Activities to Support Glyphosate" email chain showing Monsanto's intent to ghostwrite an article rebutting IARC's analysis of glyphosate's carcinogenicity demonstrated in animal studies); Ex. OO, Pl.'s Trial Ex. 564 (Monsanto PowerPoint presentation showing intent to ghostwrite science in response to IARC, and for "Litigation support"); Ex. PP, Pl.'s Trial Ex. 589 (Email acknowledging Monsanto's vulnerability in "areas that IARC will consider, namely, exposure, genetox, and mode of action . . ."); Ex. QQ, Pl.'s Trial Ex. 618 ("Glyphosate IARC Question" email chain recounting conversation whereby an EPA employee informed a Monsanto employee that he "should get a medal" if able to "kill" another agency's review of glyphosate following IARC's classification).

51. The Court's errors independently and cumulatively prejudiced the jury's decision on Defendants' negligence. Due to the Court's erroneous ruling or rulings, Plaintiff was unable to demonstrate that Monsanto was aware of the importance of IARC's scientific review and classification of glyphosate as a probable human carcinogen, and Monsanto's efforts to deliberately combat this classification. This evidence is relevant to establishing Defendants' negligence in failing to act as a reasonably careful company would have. Moreover, the evidence was not properly excluded under Pa.R.E. 403 on the basis of that it gave rise to a trial within a trial. Identifying IARC was part of the natural unfolding of the Roundup story that properly should have informed the jury's decision. In sum, the improper exclusion of evidence and testimony related to IARC's classification of glyphosate as a probable human carcinogen was an abuse of discretion that prejudiced the outcome of the case. A new trial is justified on this basis as well. *See W.C.*, 174 A.3d at 1122.

C. The Court improperly admitted testimony regarding regulatory findings by foreign regulatory agencies under the guise that these were studies by independent foreign scientists.

52. Finally, the Court erred and/or abused its discretion when permitting Defendants to introduce into evidence expert testimony regarding foreign regulatory registrations and approvals of glyphosate, on the basis they were "scientific report(s) on glyphosate" by "other international scientists." Ex. T, Bruce Test., at 31:22 – 39:14.

53. During the direct examination of Defendants' epidemiology expert, Dr. Beau Bruce, the Court permitted defense counsel to question Dr. Bruce at length on his reliance on foreign regulatory registrations and approvals of glyphosate, on the types of materials those regulatory agencies analyzed in issuing their regulatory reports, and on the "findings" of these

regulatory bodies. Specifically, the Court permitted the following testimony, over Plaintiff's objection:

> Q. Okay. Since that meeting in March of 2015, have there been other **international scientists** who have reviewed the data and commented on this question?
> A. Yes.

Id. at 31:22 – 32:1 (emphasis added).

> Q. Doctor, do you have the binder in front of you?
> A. Yes, I do.
> Q. If you turn to Defense **Exhibit-610** --
> A. Yes.
> Q. -- is that a report on -- **scientific report** on glyphosate from 2023 that you reviewed?
> A. Yes.
> Q. Did the **scientist** who prepared that **report analyze scientific evidence including epidemiology**?
> A. Yes.
> Q. Was it important to you in your review and arriving at your opinions to consider reports such as Exhibit-610?
> A. Yes.
> Q. I can't remember if I identified. Was this from a **group of scientists in Europe**?
> A. Yes, it was.
> Q. What **conclusion did they reach** on the carcinogenicity of glyphosate?
> A. That it is not.
> Q. Did you find support from that in your work preparing for your opinions?
> A. Yes.
> Q. If you could, turn to Exhibit-369.
> A. Okay.
> Q. Actually, if you turn to **Exhibit-420**.
> A. 420, okay.
> Q. Is this a **scientific report on glyphosate** that was prepared by a **group in Canada** in 2017?
> A. Yes.
> Q. Did they consider **the scientific evidence including human epidemiology**?
> A. Yes, they did.
> Q. Did you review and rely upon this information when forming your opinions in this case?
> A. Yes, I did.
> Q. What conclusions did those -- **that group in Canada** reach?
> A. That, likewise, that Roundup is not a carcinogen.

Q. Could you turn to **Exhibit-594**. Is that a **scientific report from a group in Australia**?
A. Yes, it is.
Q. Did it look at the question of whether Roundup causes cancer?
A. Yes, it did.
Q. Did you review and rely upon this report in forming your opinions?
A. Yes.
Q. What **conclusions did that group reach**?
A. That Roundup was not carcinogenic.
Q. Lastly, **Exhibit-490**, is that **a report from New Zealand**?
A. Yes, it is.
Q. Did you review and rely on this report in forming your opinions?
A. Yes.
Q. Did it look at the question of whether products like Roundup can cause cancer?
A. Yes.
Q. What **conclusions did the group in New Zealand issue**?
A. Roundup does not cause cancer.

Id. at 37:1 – 39:14.

54. Defense Exhibits 610, 420, 594, and 490 are approvals and/or reviews of glyphosate issued by foreign regulatory agencies in their governmental capacity, not "scientific reports" by "international scientists":

- Def. Ex. 610 is the European Food Safety Authority (EFSA)'s 2023 Peer review of the pesticide risk assessment of the active substance glyphosate;
- Def. Ex. 420 is Health Canada Pest Management Regulatory Agency's 2017 Re-evaluation Decision for Glyphosate;
- Def. Ex. 594 is the Australian Pesticides and Veterinary Medicines Authority (APVMA), Regulatory Position: Consideration of the Evidence for a Formal Reconsideration of Glyphosate;
- Def. Ex. 490 is the New Zealand Environmental Protection Authority Review of the Evidence Relating to Glyphosate and Carcinogenicity.

See Def. 2d Am. Ex. List (Feb. 19, 2024).

55. I exhibits referenced are regulatory decisions issued by foreign governmental entities, *i.e.*, the precise type of evidence and testimony precluded by the Court's January 4 Order

and February 14 Amended Order. For example, EFSA is "an agency of the European Union" that provides "the scientific basis for laws and regulations to protect European consumers from food-related risks." Ex. JJ, Pl. Trial Br. Feb. 20, 2024, Ex. 14. EFSA's first risk assessment of glyphosate was done at the request of the European Commission, the EU's executive body, following a "mandate from the European Commission" to consider the potential carcinogenicity of glyphosate, in the context of classification "according to Regulation (EC) No. 1272/2008." *Id*. at Ex. 15. EFSA's 2023 assessment (Def. Ex. 610) was also done at the request of the European Commission, pursuant to processes dictated by EU regulations, in response to an application for renewal of the approval of glyphosate filed by a consortium of eight companies, including Monsanto/Bayer.

56. Health Canada's Pest Management Regulatory Agency (PMRA) regulates pesticides before they can be sold or used in Canada. Def. Ex. 420, at 1. Health Canada's PMRA review is done "under the authority of the *Pest Control Products Act* and Regulations." *Id*. at 2. Health Canada's PMRA doesn't just consider the potential risks of pesticides like glyphosate, but also their value, which is defined *statutorily* by the Pest Control Products Act as "…the product's actual or potential contribution to pest management, taking into account its conditions or proposed conditions of registration … ." *Id.* at n.4.

57. Likewise, the Australian Pesticides and Veterinary Medicines Authority (APVMA) is a "statutory authority with responsibility for the regulation of agricultural and veterinary chemicals in Australia. Its statutory powers are provided in the Agvet Codes scheduled to the Agricultural and Veterinary Chemicals Code Act 1994." Def. Ex. 594, at 5. "The APVMA has legislated powers to reconsider the approval of an active constituent, registration of a chemical product or approval of a label at any time after it has been registered." *Id*. (emphasis added). The

APVMA's review of glyphosate is on its face a "Regulatory Position" "for a formal consideration of glyphosate." *Id*. at 1.

45. The Court's admission of Dr. Bruce's testimony on foreign regulatory decisions was contrary to the January 4 Order and February 14 Amended Order excluding any such testimony or evidence. The January 4 Order granted Plaintiff's motion *in limine* to "exclude foreign regulatory registrations and/or approvals of glyphosate, GBHs, and/or Roundup … without prejudice to a party's introduction of foreign scientific evidence … provided that such introduction does not refer to foreign regulatory agencies." Ex. CC. In the February 14 Amended Order on Defendants' motion to "clarify", the Court again made it clear that Plaintiff's motion *in limine* to exclude foreign regulatory registrations and/or approvals of glyphosate was granted, "without prejudice to a party's introduction of foreign scientific evidence" and that "no party may introduce any testimony or evidence regarding a foreign agency and/or foreign regulatory agency which may result in a mini-trial regarding the protocols, rules, and/or decision making process of the foreign agency and/or foreign regulatory agency." Ex. GG.

46. The Court erred and/or abused its discretion in permitting Defendants to offer into evidence this testimony and exhibits as the work product of "foreign scientists" rather than precluding the evidence pursuant to the January 4 Order, as amended on February 14, as foreign regulatory decisions for reasons explained in Plaintiff's Opposition to Defendants' Motion for Clarification. Ex. FF. The evidence referenced reviews and assessments by foreign government employees, constrained by statutory and regulatory mandates, influenced by industry, and initiated (in large part) by industry applications for registration of glyphosate filed with those same foreign regulatory agencies. *Id.* On the basis of its decision to permit Defendants to refer to foreign regulatory decisions as foreign science, the Court relatedly prohibited Plaintiff from cross-

examining Dr. Bruce on anything related to those agencies, in such a way that Plaintiff would have disclosed their regulatory function. Plaintiff therefore was prevented from telling the jury of the foreign regulators' methodology, their findings, their biases and limitations, and Monsanto's influence on their decision-making processes.

47. In a sidebar discussion, Plaintiff's counsel objected to this line of questioning and specifically identified the unfair prejudice the testimony would create:

> MR. PEAVY: Your Honor, it's visibly apparent that we're about to get into foreign regulatory. I don't know if we need a hearing outside of the jury.
>
> This is about to delve into a significant mini-trial if allowed to proceed beyond just asking general questions about foreign scientists disagreeing.
>
> He's going over ECHA, a regulatory body. We can establish that by the evidence. He's going to talk about the EPA, he already has, an Australian regulatory authority BFR, EFSA, ECHA, foreign regulatory agencies.
>
> And if he's allowed to elicit testimony without a lack of foundation, I can't adequately cross him. I can ask him who are the scientists, do they have ties to regulatory bodies, all of which is true. In some instances, Monsanto was the drafter of the document.
>
> I have to get into all those issues on cross-examination, and that is exactly what Judge Roberts said we don't want, to delve into mini-trials. I have not objected to him criticizing IARC, which I know we can't say. I let that go.
>
> Once this happens, I have no choice but to start pulling out all these regulatory documents and showing ties to Monsanto. It's different standards, not independent scientists. They're paid by the regulatory bodies in other countries. That's precluded by Judge Roberts.

Ex. T, Bruce Test., at 32:9 – 33:16.

> MR. PEAVY: I am completely incapable of crossing him on the inadequacies of these evaluations without showing documents explaining Monsanto's ties, identifying these are regulatory bodies making these assessments. These are not independent scientists. IARC is different. They have no ties to Monsanto. They have no ties to regulatory bodies. All they're doing is redacted from a regulator document and trying to suggest that independent scientists made these evaluations without their involvement. We are significantly prejudiced by the introduction of this evidence and my inability to cure it with cross-examination.

> MS. PINTO: One last point on that. Every one of these regulatory reports is based on extensive regulatory guidelines which necessarily would have to be part -- a huge part of a fair cross-examination.

Id. at 34:16 – 35:9.

> THE COURT: […] We're going to the limited testimony from an expert as outlined in Judge Roberts' orders. There will be no reference to the name of the agency, any cross-examination will, as always, be limited to what was brought out on direct.
>
> MR. PEAVY: May I have a continuing objection? I don't want to stand up and object to this.
>
> […]
>
> THE COURT: Sure.

Id. at 36:4-19.

48. During cross-examination, Plaintiff's counsel was not permitted to ask any questions about whether these "international" scientists are in fact regulatory bodies, was not permitted to show their findings, and was not permitted to discuss whether their review processes were initiated by Monsanto/Bayer submitting reports for registration of glyphosate to those foreign regulatory agencies:

> MS. PINTO: We would like to ask one question regarding the European foreign scientists that Dr. Bruce testified to. […]
>
> MS. PINTO: We would like to ask one question about whether he was aware that the two European groups he testified about, EFSA and ECHA, that they actually started their evaluation with a report submitted by Bayer?
>
> MR. ISMAIL: Your Honor, I think if they ask the question do you know how they started the report to establish some sort of foundation and the witness says yes or no that he knows that process, that the next question -- at this point, it assumes facts not in evidence. I don't think counsel have been fairly characterizing the start of the regulatory review process.
>
> I understand Monsanto did submit information to those agencies, as it does many agencies. I think a proper foundation question and then Your Honor can see how much leeway to go after that.

> MS. PINTO: Your Honor, I have a document submitted by Bayer to these groups. It says that their application will be used as the basis of the evaluation. It's so unfair if we can't, at least, establish that this expert doesn't even know this, and it's cross-examination. All we want to know is did he know that they're looking at the Bayer report.
>
> THE COURT: I'll permit one or two foundation questions to be asked. We'll see where you go from there.
>
> MR. PEAVY: I know I can't show the documents because they're regulatory, but can I ask him if he's aware that the countries he talked about that those findings were related to a regulatory body?
>
> THE COURT: No.
>
> MR. PEAVY: But they are.
>
> THE COURT: In my opinion that's beyond what --
>
> MR. PEAVY: What I'm allowed to do?
>
> THE COURT: Yes. I'll permit one or two foundational questions, and we'll see how it goes.

Id. at 86:20 – 88:22. Without the ability to meaningfully cross-examine Dr. Bruce on the processes of the foreign regulatory agencies or their findings, any foundation questions would have been futile.

49. As a result, Plaintiffs were obliged to proceed on the basis of a false equivalence between foreign regulatory findings and the findings of IARC, an independent, non-governmental entity. The Court's decision precluded the jury from understanding the nature and purpose of the foreign regulatory findings and decision. The decision suggested a story of half-truths about foreign regulatory findings and IARC having equal weight, where Plaintiffs were precluded from surfacing for the jury the credibility of foreign regulatory evidence through cross-examination.

50. A trial judge has considerable latitude in determining the scope of cross-examination and his determination will not be reversed in the absence of an abuse of discretion

that may affect the outcome of trial. *Steinhouse v. Herman Miller, Inc.*, 661 A.2d 1379, 1384 (Pa. Super. 1995). Nevertheless, "cross-examination is a vital and fundamental part of a fair trial." *Commonwealth v. Lopinson*, 427 Pa. 284, 300, 234 A.2d 552, 562 (1967), *vacated on other grounds sub nom. Lopinson v. Pennsylvania*, 392 U.S. 647 (1968). "Full cross-examination of a witness upon the substance of his direct testimony is an absolute right, the denial of which is error of constitutional dimensions." *Id*. Moreover, the right of cross-examination extends beyond the subjects testified to in direct testimony and includes the right to examine on any facts tending to refute "inferences or deductions" arising from matters testified to on direct. *Id*. "Indeed, the very purpose of cross-examination is to elicit testimony tending to refute all inferences and deductions raised by direct examination." *Steinhouse v. Herman Miller, Inc.*, 443 Pa. Super. at 407 (citing *Rafter v. Raymark Industries, Inc.*, 429 Pa. Super. 360, 632 A.2d 897 (1993)).

51. A litigant opens the door to inadmissible or prejudicial evidence by presenting proof that creates a false impression refuted by the otherwise prohibited evidence. *Commonwealth v. Powell*, 171 A.3d 294, 299 (Pa. Super. 2017). For example, in a products liability lawsuit brought against a chair manufacturer and hospital by a doctor allegedly injured when the chair collapsed at the hospital, the hospital was properly permitted to cross-examine the manufacturer's expert witness, where door had been opened as to suitability by the manufacturer and doctor, and where the manufacturer and doctor raised inference that the hospital was negligent in choosing the chair in question. *Steinhouse*, 443 Pa. Super. at 407-08.

52. Likewise, cross-examination of Dr. Bruce's reliance on foreign regulatory findings was not only proper, but necessary. Dr. Burce's testimony during direct examination created a false impression that could have been refuted only by cross examination on the limitations and biases of the foreign regulatory agencies on which he relied. Instead, Plaintiff's counsel was not

even permitted to refer to these "groups" as foreign regulators. The prejudice to Plaintiff was substantial. The jury heard that "scientific groups" of "international scientists" found that glyphosate was not a carcinogen but did not hear that these groups are government regulators, whose review of glyphosate is initiated by industry filings, pursuant to statutes, rules, and regulations of foreign governments. By permitting Dr. Bruce's testimony and prohibiting a meaningful cross-examination, the Court gave these regulatory findings the imprimatur of scientific rigor reserved for peer-reviewed studies by independent scientists. In essence, Defendants were allowed to parade the regulatory decisions in front of the jury without having to answer for their biases and limitations.

53. In determining whether a court's error in prohibiting cross-examination was outcome-determinative, Pennsylvania courts consider the importance of the witness's testimony in the offering party's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the offering party's case. *Com. v. Mullins*, 445 Pa. Super. 583, 592, 665 A.2d 1275, 1279 (1995). When there is a reasonable possibility that an error might have contributed to the verdict, the error is not harmless. *Id*.

54. The Court wrongly admitted Dr. Bruce's testimony on foreign regulatory registrations of glyphosate. Further, the Court abused its direction in prohibiting Plaintiff from meaningfully cross-examining him on those papers, which resulted in substantial unfair prejudice to Plaintiff's ability to refute Dr. Bruce's testimony. This also prejudiced the jury, who was unable to meaningfully assess the credibility and weight of the so-called scientists.

55. The Court's errors changed the outcome of the case. Dr. Bruce's testimony on the findings of foreign regulatory bodies was crucial to Defendants' case and their defense that Roundup does not cause cancer because "scientific groups" have found it to not be carcinogenic. Dr. Bruce was the only witness permitted to testify on these issues. Evidence contradicting the false impression created by Dr. Bruce's testimony was readily available, but Plaintiff was unable to surface that evidence at trial due to the Court's errors. Plaintiff's ability to otherwise cross-examine Dr. Bruce on these regulatory findings was unduly limited by the Court, leaving the jury with a false understanding of the Roundup story. The Court's evidentiary rulings contributed to the jury's verdict that Defendants were not negligent. As such, the Court's errors justify a new trial. *See W.C.*, 174 A.3d at 1122.

III. Relief Requested

56. Plaintiff seeks a new trial on all issues of liability, causation, and damages as to Defendants Monsanto Company and Nouryon Surface Chemistry LLC.

WHEREFORE, Plaintiff respectfully requests that the Court grant his Post-Trial Motion, order further briefing, and enter the attached form of Order.

Respectfully submitted,

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Dated: March 15, 2024

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rosemary Pinto, hereby certify that a true and correct copy of Plaintiff Carl Kline's Motion for Post-Trial Relief was electronically filed with the notary using The Philadelphia Courts Electronic Filing System and served via The First Judicial District Electronic Filing System (EFS) upon the Court and all counsel of record:

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