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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT KANSAS CITY

ALLAN SHELTON, et al.,                    )  
  )  
  ) Plaintiff,                                    )  
  )  
-vs-    ) Case No. 1816-CV17026  
  )  
MONSANTO, et al.,                         )  
  )  
  ) Defendant.                                 )

TRANSCRIPT OF PROCEEDINGS

On Friday, April 8, 2022, the above cause came on for hearing before the Honorable Charles H. McKenzie, Judge of Division 13 of the 16th Judicial Circuit, Jackson County Court, at Kansas City, Missouri:

APPEARANCES:

For the Plaintiffs:

FRAZER, PLC  
By: Mr. Roe Frazer, Mr. Trey Frazer and  
Mr. Patrick McMurtray  
Burton Hills II  
30 Burton Hills Boulevard, Suite 450  
Nashville, Tennessee 37215

ONDER LAW  
By: Mr. Wylie Blair  
110 East Lockwood Avenue  
St. Louis, Missouri 63119

ANDRUS WAGSTAFF  
By: Mr. David J. Wool  
7171 West Alaska Drive  
Lakewood, Colorado 80226

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A P P E A R A N C E S  
(Continued)

For the Plaintiffs:

PRUESS FOSTER LAW  
By: Mr. Shawn Foster  
10601 Mission Road, Suite 250  
Leawood, Kansas 66206

For the Defendants:

SHOOK HARDY & BACON, LLC  
By: Mr. Robert T. Adams, Mr. Jason Zager and  
Ms. Hildy Sastre  
2555 Grand Boulevard  
Kansas City, Missouri 64108

BRYAN CAVE LEIGHTON PAISNER  
By: Mr. Timothy J. Hasken  
One Metropolitan Square  
211 North Broadway, Suite 3600  
St. Louis, Missouri 63102

AMY LYNN MCCOMBS, CCR #1140  
16th Judicial Circuit at Kansas City, Missouri

1                   THE COURT: The Court will call the case  
2 of Allan Shelton and the Monsanto Company,  
3 1816-CV17026. For those attorneys that are going  
4 to be addressing the Court this morning, I'd ask  
5 you to identify yourself, and if you'd please, if  
6 you're not an attorney who has previously been  
7 with us, if you'd spell your full name.  
8 Otherwise, I suspect we've got all the spellings.  
9 Start with plaintiffs.

10                   MR. BLAIR: Wylie Blair for the  
11 plaintiffs.

12                   MR. ROE FRAZER: Your Honor, Roe Frazer  
13 for the plaintiffs.

14                   MR. WOOL: David Wool on behalf of the  
15 plaintiffs.

16                   MR. MCMURTRAY: Patrick McMurtray on  
17 behalf of the plaintiffs.

18                   THE COURT: Defense, please.

19                   MS. SASTRE: Yes. Good morning, Your  
20 Honor. Hildy Sastre for Monsanto.

21                   MR. ADAMS: Judge, Robert Adams for  
22 Monsanto.

23                   MR. ZAGER: Your Honor, Jason Zager on  
24 behalf of Monsanto.

25                   MR. HASKEN: Your Honor, Tim Hasken on

1           behalf of Monsanto.

2                       THE COURT:   Okay.   And what I wanted to  
3           do is to give you an update on the schedule and  
4           then, perhaps for this morning, address the  
5           schedule that I want to attend to before we  
6           conclude the day and then determine other issues  
7           that we should address as you see fit.   The first  
8           for our schedule.   I am available until 11:00 this  
9           morning, then I'll have a brief interlude.   I do  
10          have a sentencing hearing that is getting  
11          continued.   I can go until noon with all of you  
12          with that ten-minute time.   You don't have to  
13          leave, I would just need to attend to a different  
14          case.   And then we'll see what other time we have  
15          available in the coming days prior to April 27th.

16                       I have consulted with Judge Youngs.   I  
17          have been given permission to allow for jury  
18          selection in what we call Division 1.   Those who  
19          have been in Jackson County are aware that's the  
20          former courtroom for Sandy Midkiff.   It is our  
21          largest courtroom.   It has been fully  
22          rehabilitated after our flood and is the finest  
23          courtroom I think we have in the place.   And will  
24          allow us to conduct voir dire beginning on Monday,  
25          May 2nd, and so we will be moving the schedule up

1           some.

2                       The issues, then, for us to consider  
3           today, I want to address the Motion in Limine No.  
4           6 as filed by the plaintiff. I did read the Merck  
5           case, I want to take that up. And then I believe  
6           we'll begin with the motions in limine for  
7           defendants at No. 15, my notes indicate that's  
8           where that would be the next one we were to  
9           address. Then I want to address the motion that  
10          has been filed by the plaintiffs to identify all  
11          local contractors and then we'll segue into a  
12          discussion on the questionnaire. I think that is  
13          an important issue that we address today, if not  
14          in its entirety, certainly preliminarily, so we  
15          can get some direction there.

16                      And then I know there's other motions  
17          that have been filed, I'm aware of a motion for  
18          protective order. I have attempted to address all  
19          of the motions as I could by prioritizing them to  
20          the degree that I needed to to allow your case to  
21          move forward within the confines of the other  
22          conflicts on my schedule and other obligations  
23          that I have.

24                      So with that in mind, I am willing to  
25          open the floor to any additional dialogue on how

1 we ought to handle this morning and determine if  
2 there's other issues we need to address. Let's  
3 start with the plaintiffs. Anything that we need  
4 to discuss urgently or that is problematic or  
5 would change that schedule?

6 MR. BLAIR: No, Judge, I don't think  
7 that there's anything urgent.

8 THE COURT: Okay. Defense's side of  
9 things?

10 MR. ZAGER: Your Honor, Jason Zager for  
11 Monsanto. We do have several logistical issues  
12 that we would like to cover with the Court today.  
13 However, I think based on what you just outlined,  
14 we probably can take those up at the end of the  
15 hearing, would be, I think, probably the most  
16 reasonable.

17 THE COURT: Sure. Let's go for about an  
18 hour, then we'll take a break and we'll come back  
19 for more. All right. So let's talk about Motion  
20 in Limine No. 6 again. I have referenced, as I  
21 indicated, I have read the Merck case, I have --  
22 and I'm prepared to hear any additional argument  
23 you want to make on six, plaintiff's six, and I  
24 may ask some questions.

25 MR. WOOL: Sure, Your Honor. So on six,

1 and I don't want to, you know, retread all the  
2 ground that we went over last week. But in  
3 addition to the point that what EPA might have  
4 done had Monsanto proposed an adequate label being  
5 a question for the Court and not the jury, you  
6 know, I think that this issue really does go hand  
7 in hand with Plaintiff's Motion in Limine No. 4.  
8 Because what Monsanto would effectively be allowed  
9 to argue, is that because it needs EPA approval to  
10 put certain labels on its products at times, that  
11 it would basically be making it an impossibility  
12 preemption argument. It wouldn't -- that -- you  
13 know, it would not be able to actually put a label  
14 on its product. And that argument is simply wrong  
15 as a matter of law.

16 If you look at the Hardeman Ninth  
17 Circuit decisions, Monsanto's able to change its  
18 label via the notification process, and that's  
19 something that it can do irrespective of what EPA  
20 decides. And so, you know, what we want to avoid  
21 is having a side trial on the incredibly  
22 complicated regulatory procedures that go into  
23 label approval and all of that stuff, because it's  
24 really irrelevant for the jury's determination.  
25 The law is that Monsanto is at all times

1 responsible for the adequacy of the label, not  
2 EPA. And so that's really at the core of our  
3 argument.

4 And I think that, you know, there are  
5 two issues, right? One is avoiding wasting  
6 everyone's time going into the incredibly complex  
7 process of, you know, what EPA does vis-a-vis  
8 labels. And the second is to avoid really, you  
9 know, incorrect legal argument to the jury that  
10 would sort of allow the jury to assume the Court's  
11 role and sort of -- you know, and particularly  
12 what we want to avoid is the jury saying Monsanto  
13 was negligent, Monsanto failed to warn, but we're  
14 going to give Monsanto a pass because we don't  
15 think EPA would have approved a label. And so  
16 that's why this was something that I think every  
17 other court to issue -- to hear this issue has got  
18 this type of argument out. And so we ask that  
19 Your Honor do the same thing.

20 THE COURT: Mr. Hasken, are you going to  
21 be arguing on this?

22 MR. HASKEN: Yes, Your Honor. The  
23 framing of plaintiff's motion and how Mr. Wool is  
24 presenting the motion, I think is just wrong for  
25 what we're -- what -- they're trying to exclude



1 EPA regulatory evidence. They're trying to use  
2 this Motion in Limine No. 6, Motion in Limine No.  
3 4, you see it in motion in limine, Plaintiff's  
4 Motion in Limine No. 5. They're trying to exclude  
5 EPA's revised glyphosate issue paper where it  
6 studies the carcinogenicity of glyphosate.  
7 They're trying to exclude the revised 2017 paper  
8 where they restudy it further. They're trying to  
9 exclude the Dear Registrant letter.

10 And they're calling it preemption.  
11 They're saying if you let this evidence in, it's  
12 going to be confusing, it's going to be  
13 preemption, they're arguing preemption. That's  
14 not why the evidence is coming in. That's not  
15 what its probative value is. The probative value  
16 of EPA's actions, as it takes in the formal course  
17 of a regulator issuing these reports, is it goes  
18 directly to the claims in the case. It goes to  
19 their negligent failure to warn and their  
20 negligent design claims. It goes to the punitive  
21 damages claims.

22 Those claims, under Missouri law,  
23 involve state of mind. They involve conduct. And  
24 Missouri law is very clear that compliance with  
25 regulatory action with industry standards is

1 relevant evidence to those claims. So we're  
2 not -- this isn't coming in as preemption. I  
3 mean, I can cite some of the cases, I mean, Lane  
4 versus Armstead Industries, 779 S.W. 2nd 754, a  
5 Missouri Western Court of Appeals case. On the  
6 issue of punitive damages, and this is quote,  
7 "Where the focus of the attention" -- I apologize,  
8 that's the wrong quote. But, "Compliance with  
9 industry standard and custom impinges to prove the  
10 defendant acted with a nonculpable state of mind."  
11 And in that case, that industry standard comes in.

12 And in that case it was a ANSI standard,  
13 an industrial standard that came out seven or  
14 eight years after the product was put on the  
15 market, and the Court of Appeals says that comes  
16 in. That comes in as probative of the claims in  
17 the case.

18 THE COURT: Give me that page cite  
19 again, sir. 779 S.W. 2nd?

20 MR. HASKEN: 754. And then the relevant  
21 holding and the discussion is at 759 and 60 of  
22 that case. And we see that throughout a lot of  
23 different cases. And we'd be happy to submit, if  
24 you would like, a supplemental authorities on  
25 these cases, if you would like. But, I mean, the

1           Alcorn versus Union Pacific, 50 S.W. 3rd 226,  
2           Missouri Supreme Court case from 2001, makes it  
3           abundantly clear that compliance with regulatory  
4           requirements comes in as relevant to punitive  
5           damages.

6                         So that is what -- this isn't about  
7           preemption. At no point are we going to be  
8           submitting, like I said last time, a director that  
9           asks the jury to make the findings of clear  
10          evidence that you saw articulated in the Merck  
11          versus Albrecht case. That is unequivocally a  
12          question of law for the Court. We're not --  
13          that's not why this evidence is relevant.

14                        And then, additionally, the evidence is  
15          also relevant to the extent it's about causation.  
16          It's about EPA scientific findings about the  
17          seminal question in this case. Which is, does  
18          Roundup through glyphosate-based herbicides cause  
19          cancer. And so if plaintiffs are going to rely on  
20          IARC and their experts are going to testify that  
21          IARC is a basis for their opinions that Roundup  
22          does cause cancer, then as a matter of  
23          impeachment, as a matter of cross-examination,  
24          something like the Dear Registrant letter has to  
25          come in.

1                   I mean, the first couple sentences, I  
2                   mean, it's the third sentence of the Dear  
3                   Registrant letter, EPA disagrees with IARC's  
4                   assessment of glyphosate. "EPA scientists have  
5                   performed an independent evaluation of available  
6                   data since the IARC classification to reexamine  
7                   the carcinogen -- carcinogenetic potential of  
8                   glyphosate and conclude that glyphosate is, quote,  
9                   'not likely to be carcinogenic to humans.'"  
10                  Closed quote.

11                  So it's directly relevant to challenge  
12                  plaintiff's experts. If plaintiff's expert -- and  
13                  they do rely on IARC. From 2015, EPA's  
14                  re-examination of the data that IARC looked at in  
15                  conclusion as stated in these 2016 issue papers on  
16                  glyphosate, the 2017 issue paper, the 2019 Dear  
17                  Registrant letter saying we looked at IARC's data,  
18                  we disagree with it. It's relevant to come in to  
19                  challenge plaintiff's experts. It has nothing to  
20                  do with preemption. It has nothing to do with the  
21                  possibility of preemption.

22                  So we respectfully think six should be  
23                  denied and we would ask Your Honor to reconsider  
24                  kind of the tentative interlocutory ruling from  
25                  last week about the Dear Registrant letter as

1 well.

2 MR. WOOL: Your Honor, I think that  
3 we're talking about two slightly different things  
4 here. And I just want to be very clear about what  
5 plaintiff's MIL No. 6 is about. Six is precisely  
6 about the 2019 letters of registrants and Monsanto  
7 being able to argue to the jury that EPA would not  
8 have approved an adequate label. That's really  
9 the focus of that motion. And, you know, the  
10 other EPA decisions, whether it's the 2017 issue  
11 paper or the 2019 letter of registration decision,  
12 those are kind of separate, right?

13 And, you know, Mr. Hasken raised the  
14 point that Monsanto wants to be able to say,  
15 "Well, EPA considered IARC's decision and rejected  
16 it." Well, they have -- and he listed a number of  
17 documents that stand for that proposition process  
18 that Monsanto can use that say, you know, EPA did  
19 consider this and disagreed with IARC apart from  
20 that letter. Now, the reason that the letter in  
21 particular is very confusing and misleading to the  
22 jury, is because that speaks to a couple of things  
23 that aren't at issue here. It speaks to  
24 Proposition 65, it speaks to what might have  
25 happened if Monsanto had proposed an adequate

1 label.

2 And that's really what the focus of this  
3 motion is about. And we can talk about the other  
4 stuff in a minute, but, you know, I kind of think  
5 that it's important to keep the focus of this  
6 conversation on the topic at hand, which is  
7 whether Monsanto should be able to introduce the  
8 letter and argue to the jury that EPA would have  
9 rejected an adequate warning.

10 And I think it's important, especially  
11 with respect to the letter, to remember that this  
12 letter was not the process of any formal EPA  
13 action. It has no force of law, it's tantamount  
14 to me calling up the court's clerk and the court  
15 clerk saying, well, you know, Judge McKenzie's  
16 probably going to deny your motion. And me taking  
17 that out and saying that's the same thing as  
18 getting a formal order from the Court. It's not  
19 -- you know, it's basically the same thing as if  
20 you called up EPA and the person answering the  
21 phone said, you know, EPA disagrees with IARC.

22 And so I think that Mr. Hasken's point  
23 about the other EPA documents that allow them to,  
24 you know, to kind of show that EPA did consider  
25 the IARC conclusion and rejected it, you know, I

1 think that they've got a number of ways to do this  
2 without getting into the letter. Which, you know,  
3 as Your Honor knows, it only speaks to glyphosate,  
4 it doesn't speak to Roundup. It talks about  
5 rejecting a Proposition 65 warning, which has  
6 nothing to do with this case, it's a California  
7 law. And so, you know, apart from allowing  
8 Monsanto to make an argument that on its base is  
9 legally invalid, it introduces a considerable  
10 amount of confusion, we would have to introduce a  
11 lot of testimony about what Monsanto did ask EPA  
12 to do, what they didn't, what other registrants  
13 did.

14 And in particular, you know, prior to  
15 this letter, a number of registrants did ask EPA  
16 to put a cancer warning on their labels, EPA did  
17 allow them to put that warning on. And, you know,  
18 and that's the type of evidence that we would have  
19 to present if this argument is allowed to go  
20 forward. And we think that that's just really a  
21 sideshow for the jury in terms of going into the  
22 extraordinary complicated nature of EPA approvals  
23 and regulatory actions and that sort of thing.  
24 And so, you know, in a nutshell, they have other  
25 ways to show that EPA disagreed with IARC apart

1 from this letter.

2 THE COURT: Okay. So as it relates to  
3 this, I would like to first, you know, address  
4 kind of the overarching issue of motions in limine  
5 that it's -- it becomes a customary trend.  
6 Motions in limine, to my way of thinking, are  
7 strictly being ruled on based upon what is  
8 presented within the confines of the -- of a  
9 synopsis of what you're asking the Court to  
10 preclude. What is the natural inclination of  
11 attorneys is to expand on that and attempt to,  
12 within that, also consider that you can conclude  
13 other things or also being excluded, because, gee  
14 whiz, if we follow this path, the judge must also  
15 mean this is excluded.

16 Natural inclination in every case we  
17 have, I understand it and I am strictly telling  
18 you that's not how it works. With this motion, I  
19 want to address within the Merck case important  
20 elements of it that I think should be some element  
21 of a guide post on this subject matter. And  
22 because I know that there seems to be an obvious  
23 conflict between the EPA scientist and perhaps the  
24 IARC scientist, and there's going to be a lot of  
25 inquiry of the experts on this subject in a



1 variety of ways. And that's by no means lost on  
2 me, because I've read many a page where that's a  
3 part of the conversation. But let's read into the  
4 record Justice Brennan's part of this opinion so  
5 we're all establishing what I think and where  
6 we're at.

7 I go into the opinion and I find it on  
8 Page 833 of the lawyer's edition. "And in the  
9 Court of Appeals' view for a defendant to  
10 establish a preemption defense under Wyatt, the  
11 fact finder must conclude that it is highly  
12 probable that the FDA would not have approved a  
13 change to the drug's label. Moreover and  
14 importantly, the Court of Appeals also held that  
15 whether the FDA would have rejected a proposed  
16 label change is a question of fact that must be  
17 answered by a jury."

18 If you reference further down in the  
19 opinion under Footnote 6, it states after a cite,  
20 "We here decide that a judge, not a jury, must  
21 decide the preemption question and we elaborate  
22 Wyatt's requirements along the way." Then it also  
23 references an explanation of why that is. Found  
24 on -- sometimes I get confused on what page we're  
25 on. It appears it's on Page 837. "The complexity

1 of the preceding discussion of the law helps to  
2 illustrate why we answer this question by  
3 concluding that the question is a legal one for  
4 the judge, not a jury."

5 It goes into another description of  
6 that, I'm not reading everything into it. But it  
7 reads also on 837, and with two words onto Page  
8 838, "To understand the question as a legal  
9 question for judges makes sense, given the fact  
10 that judges are normally familiar with principles  
11 of administrative law. Doing so should produce  
12 greater uniformity among courts, and greater  
13 uniformity is normally a virtue when a question  
14 requires a determination concerning the scope and  
15 effect of federal agency action."

16 I read that into the record because I am  
17 aware that there has been a lot of dialogue on  
18 this. I sustain Motion in Limine No. 6, because  
19 what Motion in Limine No. 6 requests is that the  
20 Court preclude any testimony or evidence that the  
21 EPA would have rejected a proposed labeling change  
22 by Monsanto. In other words, that does not go  
23 into the science by whatever their analysis was  
24 for why they came to that conclusion. It is the  
25 conclusion. Because this Court in Merck says

1 specifically, these regulatory issues are for a  
2 judge because of the nature of those proceedings,  
3 not for a jury. And so I've already ruled on  
4 preemption, clearly.

5 And so when it comes to the science and  
6 your concerns in that regard, Mr. Hasken, and  
7 whether this ruling then allows that that evidence  
8 would be eliminated as being considered, the fact  
9 is no. Because that's not what I'm addressing  
10 here. I'm addressing the specifics of whether  
11 anyone would have rejected a proposed labeling  
12 change by Monsanto because it's specifically  
13 relating to a regulatory action by a regulatory  
14 agency, which is outside the bounds of what Merck  
15 appears to present to me as a specific thing for a  
16 jury to consider. Okay? Much more elaborate on  
17 that ruling than many others, because I think it  
18 does afford us a synopsis of an analysis of many  
19 different rulings on some of these subjects.

20 If that's not clear to you, let me know.  
21 But -- and what you'll find in my order is,  
22 sustained. Not a long dialogue on why it's  
23 sustained, because I've already told you.

24 MR. HASKEN: Your Honor, can I make a  
25 very short record?

1 THE COURT: Sure.

2 MR. HASKEN: Monsanto does -- agrees  
3 that the preemption question, impossibility  
4 preemption question, clear evidence in Merck  
5 versus Albrecht, is a question of law.  
6 Undisputed. Our position is simply that EPA's  
7 actions, including its actions informing  
8 registrants of glyphosate-based herbicides that it  
9 would be misbranding to put a cancer warning, and  
10 its final or interim registration decision in  
11 January of 2020 also saying a cancer warning isn't  
12 necessary, is admissible evidence that goes  
13 towards the claims in this case. And so that  
14 issue is separate and apart from whether or not  
15 preemption, the legal construct of it, would be  
16 presented to the jury.

17 And as we do go down this road further,  
18 Ms. Sastre or Mr. Adams, I assume, most likely  
19 will try to convince you that this evidence comes  
20 in for its probative value, its impeachment value  
21 and I just want to make clear that we do believe  
22 that this is relevant to substantive claims in  
23 this case. And as we understand your ruling in  
24 No. 5 from last time, a lot of it's -- a lot of it  
25 was not sustained on plaintiff's motion as well.

1                   THE COURT: Say that again, sir, I  
2                   didn't understand the last word you said.

3                   MR. HASKEN: That there is a specific  
4                   Motion in Limine No. 5 where you granted a ruling  
5                   specifically about some of these regulatory  
6                   documents that is unchanged from this particular  
7                   ruling on No. 6 about preemption.

8                   THE COURT: Right. Now, I understand  
9                   the distinction between the two and I understand  
10                  preemption as a matter of law, but I also  
11                  understand what Merck's talking about. And I  
12                  would presume that the FDA and the EPA have some  
13                  regulatory approaches to the subject that are  
14                  different because of the difference in the  
15                  products or the -- you know, that they are  
16                  individually regulating.

17                  Because obviously there's a vast  
18                  difference between a pesticide and a -- and some  
19                  medicine there or drug that's being regulated  
20                  because of the nature of what we're talking about  
21                  between, you know, the efficacy of allowing  
22                  someone to be cured of an illness, knowing that  
23                  there's a possibility that there's some side  
24                  effects that could present itself, and apparently  
25                  a balancing of the concerns regarding efficacy and

1 side effects. That's obviously apparent. And you  
2 all practice in this area more than I do, you  
3 would be able to tell me better. And I would  
4 presume the EPA has a different analysis to afford  
5 in that regard.

6 So these are interlocutory, I suspect I  
7 will hear many times these subjects. But let's  
8 talk about that, because this is something I don't  
9 want you to get lost on. What I find in jury  
10 trials, and especially long jury trials, that in  
11 my experience in the past, there has been an  
12 obligation and a sense that we are affording not  
13 enough time in the courtroom with the jury in the  
14 box, and too much time with the jury in the jury  
15 room waiting for us to address legal arguments.  
16 And I find that to be very problematic.

17 And so I'm referencing this now for two  
18 reasons. Number one, we do have the ability to  
19 allow jurors to regulate when they're coming in so  
20 that they're not obliged at -- to -- at 9:00  
21 o'clock, sit over there until 10:30 while we argue  
22 through things. So we need to be aware that if  
23 there's issues to be addressed, that we be  
24 confronting that so we can allow the jurors'  
25 schedules to be changed, perhaps, from day to day,

1           so we're not making them sit over there waiting  
2           for us with nothing to do but sit there. I think  
3           it -- not only is it not helpful, it can cause  
4           problems. It can cause problems, you know, for a  
5           number of reasons.

6                         So what you can expect is, is that I  
7           will afford you some time to argue issues. We  
8           will be in the courtroom by 8:00 a.m. almost every  
9           day. I can't eliminate the rest of my docket, and  
10          at the same time, court reporters have to be given  
11          their break. I need less breaks than a court  
12          reporter because my job isn't physical. Theirs  
13          is. We all know that. So I may say you are  
14          limited in the amount of time that you have to  
15          address an issue. You have five minutes, you have  
16          ten minutes. Because I don't want a jury who  
17          expects to come into the courtroom at 9:00 a.m. to  
18          be obliged to sit over there for inordinate  
19          amounts of time while we address legal issues. So  
20          we need to be prepared on that and we need to be  
21          aware of the necessity of doing it that way.  
22          Okay?

23                         I don't think that you lawyers who have  
24          done this are unaware of those problems arising  
25          from time to time and I want to confront them

1 right from the beginning so there's no surprise  
2 when I start taking action like that, okay?

3 MR. ADAMS: Very good, Your Honor. Your  
4 Honor, on that particular point.

5 THE COURT: Robert Adams, by the way.

6 MR. ADAMS: Yep, thank you. Mr. Hasken  
7 said we will probably raise this in the future, I  
8 think things are going to become clear, especially  
9 after opening. The reason why all of this stuff  
10 --- my view is, is that the EPA documents which  
11 are government documents and will be admissible  
12 under the statute, the reason why they come in,  
13 there's a variety of reasons. But why a lot of  
14 the particular documents, especially this Dear  
15 Registrant letter comes in, is because it's  
16 relevant on punitive damages.

17 I know you're very familiar with the  
18 Alcorn case and the Suzuki case. The type of  
19 arguments that they're making here are made in  
20 almost any type of case where there is a  
21 government investigation, where there is a finding  
22 by a government entity about an accident or a  
23 particular defect investigation. So I know you're  
24 very familiar with the Rodriguez versus Suzuki  
25 case. In that case, you know, the issue was



1           whether government reports by NHTSA, the National  
2 Highway Traffic and Safety Administration, should  
3 have come in. Two of those reports were after the  
4 accident. And the Supreme Court said, you know,  
5 recognizing that there's certain issues that are  
6 associated with that preemption, different  
7 arguments, but they're relevant to punitive  
8 damages and the state of mind of the defendant.

9           And so that's one of the things that I  
10 wanted to point out here, is that Missouri law is  
11 very clear that while some of this evidence may  
12 not be relevant to the issue of defect, it may not  
13 be relevant to the issue of failure to warn. If  
14 it's relevant to the state of mind of the  
15 defendant, then it comes in. And so their  
16 argument that, well, we're arguing preemption.  
17 We're not. We are stating to the Court that under  
18 Missouri law, it is highly relevant as to the  
19 defendant's state of -- the mind as to whether a  
20 warning is necessary, that the government  
21 authority in charge of warning labels has said  
22 that we will not allow a warning on a product that  
23 contains glyphosate, that says it's going to cause  
24 cancer or that IARC has found that it's probable  
25 that it's going to cause cancer. That's why it

1 comes in. It's not a preemption argument, but  
2 it's directly relevant to the state of mind of the  
3 defendant.

4 I also wanted to make it perfectly clear  
5 that this Dear Registrant letter -- and Mr. Wool  
6 said it a couple of times -- is only relevant to  
7 glyphosate. The first line of the letter says,  
8 "We are writing to you concerning the label and  
9 labeling requirements for products that contain  
10 glyphosate." That means Roundup. That's directly  
11 relevant to their argument that, well, Monsanto,  
12 you should have put a warning label on your  
13 product after IARC made this conclusion. And the  
14 finding is -- and, you know, we'd be willing, even  
15 if the Court finds it necessary, we could redact  
16 certain portions of this. But the finding of the  
17 EPA in direct response to that argument is, is  
18 that you can't put that type of warning whether  
19 it's based on IARC onto your labels. And that's  
20 why it comes in.

21 So again, I wanted to highlight that  
22 because it's a very important issue in this case  
23 and we will be revisiting that later. And like  
24 Mr. Hasken said, we'd be happy to, you know,  
25 advance some of the punitive damage cases that

1 make it very clear that this type of evidence  
2 comes in because it's relevant to the issue of  
3 state of mind. Not only under Alcorn, but under  
4 Rodriguez.

5 I'll tell you, my personal experience  
6 in, for example, the Liberty bus case involving  
7 NTSB investigation, that came into evidence. The  
8 same type of arguments were made in that case.  
9 That was by Mr. Robb, Gary Robb, and the court  
10 allowed it in. And the Court of Appeals affirmed  
11 that. Similar to the medical device case that Ms.  
12 Sastre and I tried in front of Mr. -- Judge  
13 Scheiber. All of the findings by the government  
14 came into evidence. Same arguments were made.  
15 You know, they're making a preemption argument.  
16 We're not. It's relevant to punitive damages.  
17 And again, I appreciate the Court's indulgence in  
18 letting me speak on that issue, but it is very  
19 important to the parties in this case.

20 THE COURT: You're free to, you know,  
21 brief anything on those subjects that you want to.  
22 You know, these hearings allow me to hear with a  
23 little more specificity those points to which you  
24 find to be of real significance that, you know, I  
25 need to zero in on. Not lost on me, I'll do it.

1 MR. ADAMS: Very good.

2 THE COURT: And present it. Pretrial  
3 briefs, right? I mean, do what you need to do. I  
4 suspect I'm going to see a trial brief at some  
5 point.

6 MR. ADAMS: You certainly will.

7 THE COURT: All right. Let's move on.  
8 And so we can certainly hear the arguments on the  
9 motion in limine filed by the defendants. I think  
10 we're up to No. 15, that's what my notes show. If  
11 you think I'm wrong about that, I'm glad to re --

12 MR. ADAMS: No, you're exactly right,  
13 Your Honor. And I'll be handling the motion. And  
14 this is Robert Adams, for the court reporter,  
15 representing Monsanto. Monsanto's Motion in  
16 Limine No. 15 moves --

17 THE COURT: Sorry, Mr. Adams. I'm in  
18 the courtroom, someone's walked in. Off the  
19 record, please.

20 (Discussion off the record.)

21 THE COURT: Okay. Sorry.

22 MR. ADAMS: No problem. Monsanto's  
23 Motion in Limine No. 15 is to exclude reference to  
24 glyphosate bans. Bans is a term of art used  
25 primarily by the plaintiffs in these cases, where

1           they will point to different municipalities or  
2           counties or in some cases entities overseas that  
3           have made decisions not based upon science, but  
4           based upon other factors, to say that they're  
5           going to limit the use of glyphosate-based  
6           products, which includes Roundup, in their  
7           particular area.

8                         And the basis of our motion is that that  
9           type of unscientific finding is not legally --  
10          logically relevant to the issues in this case.  
11          It's prejudicial because the suggestion that there  
12          has been a, quote, ban, closed quote, on a  
13          glyphosate-based product, which is Roundup, brings  
14          to mind in the jury that that's based on science.  
15          They're not based on science. And we'll be able  
16          to show that. The direct implication is, is that  
17          -- the basis is, is that there was some type of  
18          regulatory agency or some type of scientific  
19          entity that determined that Roundup or  
20          glyphosate-based product causes cancer. That  
21          doesn't exist in these cases and that's why it's  
22          prejudicial.

23                         In this case, we're dealing with Mr.  
24          Shelton who lived in Kansas City. And there is no  
25          ban on glyphosate in Kansas City or in Missouri,

1 and there's no ban in the United States. So it  
2 raises a tangential issue, too, that would lead to  
3 Monsanto having to point out that, oh, by the way,  
4 this, quote, ban that the plaintiffs are referring  
5 to is not based on science, it doesn't have  
6 anything to do with the issues that we're trying  
7 in this case. And so it is -- that's again the  
8 reason why it's not legally or logically relevant.

9 Two courts -- and we cited this in our  
10 papers, Your Honor -- two courts that have  
11 addressed this exact issue have excluded it. I  
12 would reference the Court to Attachment B., the  
13 Caballero Court. And that is attachment to our  
14 motion on Pages 56 and 57. The trial judge goes  
15 into the rationale for excluding that type of  
16 information. And essentially the information that  
17 they offered in that case, which I believe will be  
18 the same type of information that the plaintiff's  
19 lawyers will offer in this case, is that the  
20 so-called evidence based on -- that supports these  
21 bans is based on hearsay articles and newspapers  
22 and things like that and that it's not based upon  
23 a scientific determination.

24 So again, if you reference Page 57 in  
25 particular, I think is relevant to the Court's

1 issue right here, that in that case the Court  
2 actually examined the evidence and determined that  
3 it's not relevant to the case. And based on that,  
4 Your Honor, I think that you should exclude any  
5 reference to a so-called ban.

6 MR. WOOL: Your Honor, this is merely  
7 the other side of the coin that we were talking  
8 about earlier with EPA evidence and that we talked  
9 about last week with Monsanto's introduction of  
10 the foreign regulatory decisions. What Monsanto  
11 is effectively arguing is that it wants to be able  
12 to introduce the regulatory decisions that it  
13 finds favorable and exclude the ones that go  
14 against it.

15 Now, you've heard a lot about how these  
16 decisions weren't based on science, but not a lot  
17 as far as what they were based on. I would also  
18 point out that there have been a number of foreign  
19 regulatory decisions since that Caballero case.  
20 So, you know, really, all that we are trying to do  
21 is kind of show the jury the entire picture, that  
22 if Monsanto's going to say, hey, EPA and these  
23 foreign regulatory decisions support us, just show  
24 the jury that that's not unanimous and that there  
25 are regulatory agencies out there, municipalities

1 all across the board who have evaluated the  
2 science, who have looked at IARC, relied on IARC  
3 or other evidence, and have concluded that  
4 glyphosate should be banned and that it's  
5 dangerous.

6 And so, you know, I think that it would  
7 be highly misleading to allow Monsanto to paint a  
8 one-sided and inaccurate picture that every  
9 regulatory bodies who look at this has concluded  
10 that it's safe, because that's just not true.

11 MR. ADAMS: Your Honor, briefly. I'd  
12 address, you know, Mr. Wool argues that this is --  
13 the bans are relevant to rebut the proposition  
14 that regulatory agencies have determined that the  
15 product is safe, it doesn't require a warning,  
16 based upon a scientific review. Well, the  
17 problem, as I pointed out before, is that the bans  
18 are not based upon science. And, in fact, the  
19 Court in Caballero said that the plaintiffs, if  
20 they could establish that the ban is actually  
21 based upon science and supported by independent  
22 scientific endeavor, comparable to that of these  
23 regulatory agencies, then the Court may consider  
24 it. They can't do that, because these bans are  
25 not based upon science finding that there is an



1 issue with respect to Roundup or glyphosate-based  
2 herbicide causing cancer. That's the problem.  
3 It's apples and oranges.

4 The apple is that we're going to refer  
5 to the EPA, Health Canada and a variety of  
6 different regulatory agencies that did engage in a  
7 very robust scientific review of all of the  
8 evidence to determine whether the product would be  
9 allowed to be used in the country, whether the  
10 product needs a label on it. All of those  
11 agencies concluded that the product is fine, it's  
12 not carcinogenic, you don't need a label on it.  
13 What plaintiff's want to refer to are decisions  
14 like from a municipality or county saying you're  
15 not going to be able to use it here because we're  
16 concerned about insects or bees. That's an  
17 orange. So that's why the bans should not be  
18 referenced in this case.

19 THE COURT: Anything further?

20 MR. WOOL: Your Honor, I guess if the  
21 ban is only related to bees or insects, that's  
22 something that, you know, we're not going to look  
23 like fools getting up in front of the jury and say  
24 glyphosate is banned here because of bees. What  
25 we would want to introduce are the bans and

1 regulatory decisions that relate to the human  
2 health concerns. So I don't think that there's a  
3 direct conflict here on that. And again, I think  
4 this is just necessary so that the jury's not  
5 misled into thinking that, you know, that the case  
6 is completely one-sided.

7 THE COURT: Okay. Well, look, the  
8 limited information I have on this is contained I  
9 think -- let me take a look at this real quick,  
10 because there's so many of those that I can't  
11 analyze them without some additional review.

12 At this stage, without additional  
13 information, I would sustain the motion in part  
14 and deny it in part. I would sustain it to the  
15 extent that, you know, there has to be some  
16 scientific foundation established for certain  
17 entities to have indicated that they were banning  
18 this product as a result of a human issue. I  
19 think the goose-gander approach addressed by Ms.  
20 Sastre last week is a good one here. I mean, if  
21 we're going to get into regulatory agencies and  
22 their methodology of what they're doing, then to  
23 look at this and consider that every ban is  
24 excluded carte blanche is not fair, because those  
25 bans could be based upon perhaps scientific

1 evidence that's to the contrary.

2 And without knowing more, I -- and to  
3 give you this indication that you'll not get into  
4 any of this would be unfair, because then that  
5 would lead you to preparation for trial, thinking  
6 that you're not going to get into any of these  
7 bans. So the ultimate position I would take is,  
8 it depends. What's the ban for? What's the ban  
9 based on? Mr. Adams referenced exhibits. Within  
10 one of the exhibits, there's a reference to  
11 Germany banning it because of concerns about  
12 insects and that it's going to kill green and kill  
13 insects. Well, I don't know if that's the entire  
14 document, I don't know where that's at. And I  
15 don't know what number of bans we're talking  
16 about? Are we talking about seven, are we talking  
17 about 70 or are we talking about 700? I don't  
18 know.

19 So there's a limitation on how to  
20 approach this. But I think the best approach I  
21 can give you preliminarily as we sit here, is I  
22 sustain it unless you can establish that the bans  
23 are based upon a regulatory decision relating to  
24 science and IARC, you know, has been found by IARC  
25 or something to that effect, you know, just some

1 scientific approach to that issue. Because all  
2 this regulatory evidence, it's -- if it's coming  
3 in, then I would presume that some of that  
4 regulatory evidence on the flipside should also be  
5 considered.

6 MR. ROE FRAZER: Yes, Your Honor. As I  
7 understand it, goose-gander, for any bans they  
8 want to talk about, they have to have a scientific  
9 foundation for.

10 THE COURT: Right.

11 MR. ROE FRAZER: Yes, sir.

12 THE COURT: But, you know, when I  
13 overruled the motion in limine, I overruled it  
14 because it was my perception, incorrect, that  
15 those regulatory decisions were being based upon,  
16 you know, an analysis of the science, you know,  
17 not on a political, you know, analysis or a  
18 political body including on a vote what they were  
19 going to do. So a lot of this is -- you know, you  
20 all handling these cases with regularity doesn't  
21 allow -- allows you a lot of information, but it  
22 doesn't give it to me. So let me write this down  
23 so we can be real clear.

24 MR. ROE FRAZER: Yes, Your Honor, I  
25 think I misspoke. I said if they -- I said

1 banned. If they subject an approval as to be  
2 scientific based. A regulatory approval.

3 THE COURT: Sure. To be -- you know, to  
4 establish a bright line rule there, Mr. Frazer, I  
5 think would be perhaps sending us down a different  
6 path. Because, again, I'm trying to, you know,  
7 embrace the entirety of the science that you're  
8 describing and that might take some time. And so  
9 some of these rulings may be difficult to make  
10 until I hear more. But let me just finish what  
11 I've written here and let's see if this -- let's  
12 see this through.

13 I have written without -- with an eye to  
14 editorialization, after additional conversation,  
15 sustained in part and denied in part. Sustained  
16 unless the ban is founded upon a regulatory  
17 decision and/or science regarding glyphosate or  
18 perhaps Roundup, I don't know what the ban was  
19 related to, being carcinogenic to humans.

20 MR. ADAMS: That's fine, Your Honor.  
21 Thank you. I think we all understand your ruling.

22 THE COURT: Mr. Wool, you're on mute  
23 maybe.

24 MR. WOOL: I was just concurring. I  
25 think that's the right line to draw.

1 THE COURT: Okay. Move on to No. 16.

2 MR. ADAMS: Madam Court Reporter, this  
3 is Robert Adams from Monsanto. I'm also covering  
4 this motion. Motion In Limine 16 seeks to  
5 exclude any evidence, arguments or reference to  
6 Bayer's recent decision to discontinue  
7 glyphosate-based Roundup sales. And in  
8 particular, Your Honor, this is focused on a  
9 recent press release and also announcement made by  
10 Bayer that in 2023 -- and this is attached to our  
11 motion -- in 2023, the company is going to  
12 discontinue sales in solely the U.S. residential  
13 lawn and market -- lawn and garden market  
14 regarding Roundup. And that press release goes on  
15 to say that this move is being made exclusively to  
16 manage litigation risk and not because of any  
17 safety concerns.

18 So what plaintiffs want to do is say  
19 that this is relevant to the issue of whether  
20 Monsanto should take the product off the market or  
21 Monsanto should issue a warning, that it's  
22 relevant to the issue that the product is  
23 carcinogenic. It's not relevant to the issue and,  
24 in fact, it's extremely prejudicial to allow into  
25 evidence that this limited discontinuation of

1 sales is somehow relevant to any issue in the  
2 case. Because it's not.

3 The problem that admission of this  
4 evidence leads to is, as I referenced in the press  
5 release announcing it, is that it was made  
6 exclusively to manage litigation risk and not  
7 because of any safety concerns. So if this  
8 document is admitted, then it requires us to go  
9 into the fact that the company has been deluged by  
10 lawsuits promoted by aggressive advertising by  
11 plaintiff's lawyers, and I'm not being critical of  
12 that, it's just a fact, that motivated the company  
13 to discontinue sales in the lawn and garden use.

14 And what the Court needs to understand  
15 is that that is a very limited fraction of the  
16 total sales of glyphosate. Glyphosate is going to  
17 be continue to be sold to farmers and, in fact, if  
18 you want to go out and buy glyphosate in 2023, you  
19 may not be able to buy it in the retail store, but  
20 you can go to a tractor supply store and buy it.  
21 So again, that is why this type of evidence is  
22 extremely prejudicial and it's really not  
23 relevant. The plaintiff's response is, is that,  
24 well, it goes to the feasibility of the fact that  
25 the company would take the product off the market.

1 Well, that could be true in any case. I mean, any  
2 company can take their product off the market.

3 The problem is, again, is that it's  
4 extremely prejudicial, because it puts us in a  
5 position of having to bring it out, and I don't  
6 think the plaintiffs are going to like this, that  
7 the -- that this was based upon an evaluation of  
8 the litigation risk that -- and if you see the  
9 advertising cost that has been incurred since the  
10 IARC decision, it will blow your mind. And all of  
11 that is going to be opened by this type of  
12 evidence coming in. So we don't think it's an  
13 appropriate issue that should be gone into in  
14 front of the jury. It's going to create a  
15 sideshow that ultimately is not going to be  
16 relevant to the issue of whether there should have  
17 been a warning or whether the product is  
18 defective.

19 MR. MCMURTRAY: Good morning, Your  
20 Honor. Patrick McMurtray for plaintiffs. Number  
21 one, of course, Mr. Adams did not give you any  
22 legal reason why it shouldn't be allowed. This is  
23 not a post-injury remedial measure, this is a  
24 public announcement by the defendant. And number  
25 two, it's significant here because it shows that





1 is they realize that their explanation simply  
2 isn't believable or credible, and so they want to  
3 avoid that. In fact, it shows that apparently the  
4 only risk-benefit analysis of this product that  
5 they've done is with regard to litigation. And  
6 Your Honor, none of that, none of that is reason  
7 to keep the statement of the defendant out,  
8 because it shows what they could have done, should  
9 have done. And if they need to explain their  
10 statement, that's a short explanation.

11 THE COURT: When I read this motion in  
12 limine and then I read the response, I -- and  
13 wrote the words "subsequent remedial measure" next  
14 to the motion. And I don't understand why that  
15 isn't being addressed legally. Because perhaps  
16 I'm not aware of it, so but why isn't it relevant?  
17 I mean, why isn't that legal argument relevant to  
18 the conversation?

19 MR. ADAMS: I think it is, Your Honor.

20 MR. MCMURTRAY: Because they're not  
21 admitting that the product causes anything, Your  
22 Honor. They deny any causation, and so there's  
23 no -- this is not a reaction to an injury, they're  
24 saying it's a reaction to the evil plaintiff's  
25 bar. And that's not subsequent remedial measure.

1           It's not like they put up a warning. That would  
2           be the classic example, Your Honor, that they  
3           finally admit that they are wrong. They put a  
4           warning on the product, then you're right, we  
5           couldn't get that subsequent warning in. But here  
6           they are deliberately choosing the path of, oh,  
7           we're taking this off because of the lawyers, not  
8           because it's an unsafe -- not because it's an  
9           unsafe product.

10                         MR. ADAMS: And Your Honor, it isn't  
11           akin to a subsequent remedial measure. I mean, it  
12           is not relevant. The fact that it's -- and I  
13           think the key point is, is that the fact that  
14           we're going to continue to sell -- the vast  
15           majority of Roundup sales is going to continue to  
16           go on. We're just -- because of the litigation  
17           risk associated with consumers that are bombarded  
18           with advertisements to file cases, that's why  
19           we're going to discontinue it in a limited market.  
20           And so it's not relevant.

21                         And Mr. McMurtray says, well, Mr. Adams  
22           doesn't cite any case. You can find a ton of  
23           cases under Missouri law dealing with the issue of  
24           whether it's legally and logically relevant.  
25           Here, the prejudice and the waste of time and

1           confusion of issues associated with bringing this  
2           in front of the jury is -- shows that it should  
3           not come into evidence.

4                   THE COURT: Well, here's the -- so the  
5           feasibility argument. I can -- I can embrace a  
6           feasibility argument if we're talking about the  
7           Crown Vic and where they put a gas tank. I can  
8           embrace it in the other engineering concepts where  
9           you have the -- whatever that engineering  
10          principle is, you know, where you, you know, your  
11          first is to eliminate it. If you can't eliminate,  
12          then you guard it. And if you can't guard it,  
13          then you warn about it. And so there's that  
14          feasibility analysis.

15                   Here, I don't know where you move the  
16          ball down the field on, you know, whether a  
17          company can or cannot take a product off the  
18          market and eliminate it and then that be -- there  
19          be dialogue on that. I mean, sure, you can pull a  
20          market off the -- you can pull a product off the  
21          market. Now, I suppose Bayer could pull aspirin  
22          off the market, too. Nobody could stop them from  
23          pulling aspirin off the market, they just do it.

24                   And so here's the point. You know, I  
25          suspect there will be, other, other dialogue on

1           this. I sustain the motion. I don't -- I see it  
2           as a subsequent remedial measure. I don't see any  
3           basis for it to be admissible, especially in 2023,  
4           for an incident that happened as long ago as a  
5           decade or more since the exposure or whatever the  
6           exposure time frame is. Because I think an  
7           analysis of that would allow us to go down a path  
8           with incredible amounts of information that would  
9           be prejudicial to both sides. That this is just  
10          a -- you know, you could have pulled it off the  
11          market. Yeah, but we didn't because it was only  
12          after you lawyers came in and started suing  
13          everybody. And then all of a sudden that  
14          devolves.

15                        I just don't see where that's going to  
16          be helpful, nor do I find that this necessarily  
17          creates an opportunity to present an argument on  
18          feasibility. It's always feasible. So that's my  
19          ruling.

20                       MR. ROE FRAZER: Your Honor, could I ask  
21          one question, please?

22                       THE COURT: Sure.

23                       MR. ROE FRAZER: Since that was not  
24          argued in their motion as a post-remedial measure,  
25          would -- and we weren't ready for that, we would

1 ask that they have to reform their motion and file  
2 it. In that I understand the Court's ruling, not  
3 trying to reargue the ruling. But we would ask  
4 that Monsanto take a public position that this is  
5 a post-remedial measure, Your Honor. It's not in  
6 their motion and it wasn't in their argument until  
7 Your Honor brought it up and Mr. Adams then in his  
8 reply mentioned it. So we would request that they  
9 formally amend their motion and put that reason in  
10 there as a grounds for this motion in limine to be  
11 sustained.

12 MR. ADAMS: And, Your Honor, with all  
13 due respect, that's not an appropriate argument to  
14 be made. I mean, we could be here for weeks if  
15 based upon the law you make decisions and then we  
16 ask, well, can they reamend their motion to  
17 include certain bases. I mean, we're -- neither  
18 side cited any law in the case other than the  
19 basic law that you can exclude evidence that is  
20 not logically and legally relevant. That's what  
21 you did. So with all due respect, we don't think  
22 that the Court should engage in a process of  
23 having parties amend their motion to include  
24 certain things that the opposition wants to be  
25 included in the motion.

1                   THE COURT: I'm ruling on the evidence  
2                   that the evidence comes in and I'm making  
3                   evidentiary rulings that I think are appropriate,  
4                   regardless of the bases that one party or the  
5                   other concludes that it should or shouldn't be  
6                   included. So I'm going to deny the request that  
7                   they have to reform that or reframe that. I don't  
8                   know what purpose it would have in the Allan  
9                   Shelton case. And so I'm going to move on.

10                   All right. Let's move on to 17.

11                   MR. ADAMS: I've got good news for Your  
12                   Honor and the plaintiff's counsel here. We are  
13                   going to withdraw Monsanto's Motion in Limine No.  
14                   17 after, you know, some of the discussion that  
15                   the Court has had earlier last week and today. So  
16                   we're withdrawing No. 17. And our next motion is  
17                   Defendant's No. 20.

18                   THE COURT: Can we take a break and  
19                   let's address that in about five or ten minutes,  
20                   okay?

21                   MR. ADAMS: Very good, Your Honor.  
22                   Thank you.

23                   (Short recess was taken.)

24                   THE COURT: All right. Let's address  
25                   No. 20, please.

1 MR. HASKEN: Good morning, Your Honor.  
2 Tim Hasken for defendant Monsanto. In Defendant's  
3 Motion in Limine No. 20, we are seeking to exclude  
4 the argumentative and pejorative term "ghost  
5 writing." The term stems from one email by one  
6 Monsanto employee about one scientific paper from  
7 2000. This is out of the thousands of emails  
8 produced in this case, the hundreds of scientific  
9 papers relevant to the issues in this case. And  
10 the term "ghost writing," which is undefined, it  
11 is argumentative, will simply mislead and distract  
12 the jury from the actual issues.

13 Now, plaintiffs have developed evidence  
14 that Monsanto paid for certain studies or that  
15 Monsanto was involved in the editing of certain  
16 studies. And that's fine. But to call all this,  
17 argumentatively, ghost writing, to claim that --  
18 to put everything under this Monsanto's  
19 participation in science in the development of  
20 scientific articles, under this umbrella of this  
21 argumentative term that shows up in one email  
22 about one article with no definition, adds nothing  
23 to the case. It is misleading, it is confusing  
24 and it should be excluded.

25 MR. WOOL: Your Honor, David Wool for



1 the plaintiff. First of all, this is not  
2 plaintiff's term. This is not something like  
3 magic tumor. This is Monsanto's own term. It is  
4 not true that this comes from a single email,  
5 there are multiple documents. Mr. Hasken  
6 referenced the 2000 ghost written article. This  
7 term also comes up in an employee review where he  
8 is praised for ghost writing the article. This  
9 has been allowed into every trial that has gone  
10 forward.

11 And in particular as to one employee who  
12 ghost wrote articles that are separate from the  
13 2000 article that Mr. Hasken referenced, I'd like  
14 to just point Your Honor to a part of the  
15 transcript. And that is David Saltmiras, Pages 68  
16 to 69. He's asked, "So are you suggesting" -- he  
17 says, "So are you suggesting that I have ghost  
18 written?" Question: "Have you?" Answer: "Yes."  
19 Question: "Tell us the different ways in which  
20 you have ghost written. As you said, there are  
21 different situations." Answer: "So one situation  
22 I can think of is in a manuscript termed Grime, et  
23 al.'" And that's a 2015 paper.

24 And so the notion that this is just one  
25 limited incident is just simply false. And this

1 goes directly to Monsanto's liability and state of  
2 mind. It goes to the various regulatory decisions  
3 that we've talked about before, because EPA relies  
4 on these ghost written articles. And it wasn't  
5 until this litigation that anybody knew that it  
6 was actually Monsanto that was writing the  
7 articles and paying more reputable authors to put  
8 their names on there so the articles carried more  
9 weight. So I think this is a fairly easy open and  
10 shut issue.

11 THE COURT REPORTER: Mr. Wool, what was  
12 the name? You referenced a person's deposition?

13 MR. WOOL: David Saltmiras. S-a-l-t --  
14 sorry, let me actually get this so I know I get it  
15 right for you. I'm terrible at spelling, as  
16 you've probably guessed. S-a-l-t-m-i-r-a-s.

17 THE COURT REPORTER: Thank you so much.

18 MR. HASKEN: Just briefly on reply. The  
19 evidence is going to show that Monsanto -- in  
20 almost all these cases, Monsanto's financial  
21 contribution disclosed in the statement of  
22 interest, Monsanto employees that participated in  
23 the article's review process are disclosed in the  
24 statement of interest. And the example Mr. Wool  
25 gave demonstrates the problem. Ghost writing is

1 not a term that means anything. So if they want  
2 to put in evidence that Monsanto edited an article  
3 before it went to the journal, that's fine. But  
4 you can't call it ghost writing, because the term  
5 itself means nothing. It has no value. And what  
6 they're going to do is they're going to call every  
7 action by a Monsanto employee, whether it's  
8 involved in paying for a study, whether it's  
9 involved in sending study materials to an author  
10 or editing a manuscript, they're going to call it  
11 all ghost writing. But again, it's an  
12 argumentative term, it's untethered from facts and  
13 it has no value. It has no other prejudice in  
14 this trial.

15 MR. WOOL: Your Honor, ghost writing is  
16 a --

17 THE COURT: Overruled. No. 30, The  
18 George study.

19 MR. HASKEN: Yes, Your Honor. Tim  
20 Hasken for defendant. The George study is not, as  
21 it's designed, a carcinogenicity study. The  
22 George study, as its study designers intended,  
23 does not prove, does not show anything about  
24 Roundup's carcinogenicity. And for that reason,  
25 IARC excluded George from its hazard assessment.

1 EPA excluded the George study from its risk  
2 assessment. The European regulators do not  
3 consider George in their risk assessment.

4 The George Study -- and that's what this  
5 case is about. Does Roundup cause cancer? The  
6 George study doesn't answer that question. It's  
7 not designed to answer that question. It's not a  
8 mouse feeding study like some other toxicology  
9 studies are that will come in. It's a different  
10 type of study. And it simply doesn't go to  
11 whether Roundup causes cancer. And that's why all  
12 the major scientific bodies and regulatory bodies  
13 exclude it from their assessments and it should be  
14 excluded here.

15 MR. WOOL: Your Honor, David Wool again.  
16 This is an attempt at a second bite of the apple  
17 for Monsanto. In Your Honor's ruling allowing Dr.  
18 Sawyer's testimony, I believe Your Honor  
19 specifically allowed his testimony on the George  
20 study. And this idea that every single study has  
21 to get plaintiffs all the way there in terms of  
22 proving cancer just isn't the way that science  
23 works. There are a ton of studies out there, I  
24 don't think any person is arguing that any one  
25 study by itself proves our case or for Monsanto

1           that a single study proves Roundup's safety.

2                     The George study is what's called a  
3           promotor study, to see if glyphosate and Roundup,  
4           you know, encourage already developed cancers to  
5           continue to develop. I think it's scientifically  
6           relevant. And again, most importantly, Your Honor  
7           has already ruled that this is coming in through  
8           Dr. Sawyer.

9                     MR. HASKEN: Your Honor, none of IARC's  
10          omitted George. EPA in its risk assessments omits  
11          George. European regulators in their risk  
12          assessments omit George. We're not saying one  
13          study has to get you there, but it has to be a  
14          study designed to test whether or not Roundup's a  
15          carcinogen. And that's not George. George is not  
16          designed as a carc study. It's not a  
17          carcinogenicity study. It cannot prove that  
18          Roundup causes cancer and, therefore, it has no  
19          probative value.

20                    THE COURT: It's overruled. 31,  
21          Seralini study. S-e-r-a-l-i-n-i.

22                    MR. HASKEN: Yes, Your Honor. Tim  
23          Hasken for defendant Monsanto. Seralini study has  
24          been excluded by every court that has considered  
25          this motion. And the reason is because it's

1 uniformly rejected as unreliable science. The  
2 peer review journal that it initially got  
3 published in depublished the study. It was so  
4 flawed that the journal had to pull it down. It  
5 then got republished in a non-peer review journal  
6 a couple years later. But the study simply has  
7 none of the methodological requirements needed to  
8 be reliable. That's the reason why IARC doesn't  
9 consider it, EPA doesn't consider it. No  
10 regulator considers it. Not a reliable scientific  
11 article. It was depublished from a peer review  
12 journal. It has no bearing in this case. The  
13 jury shouldn't be subjected to science that isn't  
14 peer reviewed and that the weight of scientific  
15 bodies reject. And that's the sixth or seventh  
16 other trial judges who've heard this motion before  
17 have excluded it.

18 MR. WOOL: Your Honor, this a little bit  
19 of a red herring. So the exclusive basis that we  
20 would want to admit the Seralini study is to show  
21 that it is feasible to test formulated Roundup.  
22 To do a carcinogenicity study with formulated  
23 Roundup. You heard last year -- last week, I'm  
24 sorry -- I believe it was from Mr. Hasken, I  
25 apologize, but that it was impossible to do a

1 long-term feeding study with a formulated  
2 glyphosate-based herbicide. The Seralini study  
3 shows that that is not true.

4 Now, whatever criticisms of the study on  
5 a scientific basis that there are, none of them go  
6 to the idea and nobody really disputes that the  
7 mice were fed and that they ate formulated  
8 glyphosate-based herbicides. And so that's why we  
9 want to introduce the study, to show that this is  
10 feasible.

11 Now, as to the point that other trial  
12 judges excluded the study, I think that's a little  
13 bit misleading. I think -- I'm the only one here  
14 who was involved in the Hardeman trial. And in  
15 the Hardeman trial, what Judge Chhabria did, for  
16 example, was exclude the study as probative of the  
17 fact that Roundup can cause cancer. We did not  
18 try to introduce the study in that trial for the  
19 purpose that we would introduce it here, which is  
20 only to show that you can feed mice formulated  
21 glyphosate-based herbicides and they will eat it.

22 And so, you know, this goes directly to  
23 one of Monsanto's defenses, which is, well, it  
24 would have been impossible for us to do this study  
25 that plaintiffs are asking. And so all we are

1           trying to do with the study is say, Look, one  
2           person has tried to do this. You can criticize  
3           any aspect of the study that you want, but there's  
4           nobody out there who's actually saying that those  
5           mice didn't eat the formulated herbicides.

6                         THE COURT: And how would you expect to  
7           get it in? I mean, if the -- in what context,  
8           with what witness and what -- and to what degree  
9           would the study be referenced? In other words,  
10          its findings, the foundation for it, the -- you  
11          know, the process of how it was performed, what?

12                        MR. WOOL: So as far as the specific  
13          witness, I would have to go back to the testimony,  
14          Your Honor, so I apologize for that. But what we  
15          would effectively show is, hey, Monsanto's aware  
16          of this study, the -- Monsanto's aware that the  
17          mice in the study were fed formulated product.  
18          And either get Monsanto to admit or point out that  
19          there's no relevant criticism out there that the  
20          mice didn't actually eat the herbicide. You know,  
21          that the criticism of the study that Monsanto has  
22          made in the public and the reasons why it was  
23          retracted don't go to the -- what we think is the  
24          essential question of whether or not you can do a  
25          carcinogenicity study with a formulated product.



1                   And if the testimony's not there, I'm  
2                   going to be taking a 30(b)6 witness in I think  
3                   about a week and a half, two weeks or something  
4                   like that. And so, you know, if there's no other  
5                   testimony, we could have a very short designation  
6                   if it simply goes to Monsanto's awareness of the  
7                   study's methodology and whether or not there's any  
8                   credible evidence whatsoever that the animals in  
9                   that study did not actually eat formulated  
10                  glyphosate herbicides.

11                  MR. HASKEN: Your Honor, putting this  
12                  study that's been universally rejected as  
13                  unreliable, as evidence that Monsanto could have  
14                  done a 18-month to 24-month mouse-feeding study  
15                  that complies with scientifically acceptable  
16                  standards makes no sense. This study isn't  
17                  scientifically acceptable. There's no showing,  
18                  there's no evidence that however they can -- fed  
19                  these mice is in any way something that would pass  
20                  muster with scientific agencies, with regulatory  
21                  agencies reviewing the study. It is a rejected  
22                  study, it has no probative value. And having it  
23                  come in for this side door purpose when it is a  
24                  rejected study, it doesn't have evidence that it's  
25                  methodologically sound. It should be excluded.

1           It's misleading to the jury.

2                       MR. WOOL:  If I can make just one  
3           additional point, Your Honor.  As for reasons why  
4           it's been rejected on a scientific basis, the  
5           reasons are things like there weren't enough mice,  
6           that sort of thing.  That, you know, not something  
7           that it goes to the question of feasibility of  
8           this particular type of study that -- and you  
9           heard it last week, Monsanto intends to argue to  
10          the jury it was impossible to do this study.  They  
11          never tried, the person that did it was able to  
12          get the animals to eat the formulated herbicides.

13                      THE COURT:  Well, I guess I'd need to  
14          conceptualize how this is going to be presented to  
15          a jury.  Would you propose that if a Monsanto  
16          witness were to be asked a question, Sir, isn't it  
17          true that you can perform studies on lab animals,  
18          whatever way -- whatever -- where they are fed  
19          formulated Roundup?  Nope, we can't do that.  
20          Well, it was done in Seralini's, right?  Yeah,  
21          that was done, but it was a discarded study, so we  
22          don't -- we still don't think we can do it.  Is  
23          that how it comes in?

24                      MR. WOOL:  That could be -- you know, I  
25          think that that's probably the best way.  And, you

1 know, again, Your Honor kind of stopped one step  
2 short of where we would want to go, which is  
3 that's -- you know, the study may have been  
4 discarded, but it wasn't discarded because of any  
5 questions about whether the animals would eat the  
6 product.

7 THE COURT: Right. Presumably.

8 MR. WOOL: Right.

9 THE COURT: All right. So several --  
10 there's lot of documents in this. I'm taking it  
11 under advisement, I want to read those documents,  
12 you know, now that I, in a better way, have an  
13 understanding of what the limited use of it would  
14 be by the plaintiff, okay? All right. Any other  
15 motions in limine we're going to hear this  
16 morning?

17 MR. BLAIR: That's all I had on my list,  
18 Judge.

19 THE COURT REPORTER: I'm sorry, who was  
20 that?

21 MR. BLAIR: I'm sorry, that was Wylie  
22 Blair.

23 THE COURT: Okay. So let's take up next  
24 the motion for defendant Monsanto to identify all  
25 local contractors in the juror questionnaire.

1 MR. BLAIR: Sure, Judge. Wylie Blair  
2 for the plaintiffs. The basis for this motion is  
3 that Monsanto/Bayer has a very heavy presence in  
4 the Kansas City area. Just looking at their  
5 website, they have a 240-acre facility where they  
6 manufacture and some 550 crop science employees  
7 there. The manufacturing includes producing top  
8 selling seed treatments, herbicides, fungicides  
9 and insecticides, et cetera. So the types of  
10 product that we're talking about here.

11 To that end, given the nature of their  
12 best presence in Jackson County to where potential  
13 jurors may be contractors of Monsanto, we need to  
14 know who their contractors are that they use for  
15 whatever is outsourced within those operations.  
16 For instance, if you've got an owner of a company  
17 who's sitting there in the veneer, who makes 90  
18 percent of his income off of a subcontract with  
19 Bayer/Monsanto, that's a pretty significant  
20 conflict that needs to be fleshed out. But we  
21 have no way of knowing who those contractors are,  
22 whereas the defense obviously does and can easily  
23 produce that information. And that's a type of  
24 thing that we need to know going into voir dire.

25 THE COURT: Defense.

1 MS. SASTRE: Rob, are you handling this?

2 MR. ADAMS: Yeah. I'll go ahead and  
3 handle this, Your Honor. There's no basis for  
4 this, Your Honor. We put in our papers the  
5 reasons why this inquiry shouldn't go in to. I'll  
6 tell you from my personal experience, this has  
7 been -- you know, in a Ford case where we've got a  
8 Claycomo plant, you know, within 15 miles of here,  
9 there's never been an inquiry going into are you a  
10 contractor or do you work for Ford in a  
11 contractual capacity. The jury questionnaire is  
12 going to ask about people's dealings with  
13 Monsanto. So it will likely come through if a  
14 person even knows that they've had any dealings  
15 with Monsanto. But to require -- their sole  
16 reason for doing this is to try to argue that  
17 Monsanto has multiconnections to the community.  
18 That is not appropriate.

19 A juror, if the juror feels that they  
20 have some type of dealings with Monsanto that  
21 could affect their ability to be biased, that's  
22 going to come up through one of the other  
23 questions. There is simply no basis for a jury  
24 questionnaire to go into a long litany of, you  
25 know, do you work for a company that has ever

1           contracted with Monsanto. That's not done in --  
2           and then you can look at the Newton Nolte case  
3           where it was not done with respect to a number of  
4           different companies that actually do contractual  
5           work for Ford Motor Company. I can give you a lot  
6           of other examples of it. But it's simply not an  
7           appropriate inquiry for a jury questionnaire.

8                         If anything, they can ask the question,  
9           Are you aware of any relationship that you or your  
10          employer may have with Monsanto that would affect  
11          your ability to be fair here. That's it. I mean,  
12          it wouldn't -- they shouldn't be allowed to force  
13          into a questionnaire a long litany of questions  
14          and have us identify a long list of potential  
15          contractors for them to then create the impression  
16          that we're somehow saturated within the community.  
17          It's not fair, it's not appropriate.

18                        MR. BLAIR: Judge, Wylie Blair. My  
19          short response will be that just because something  
20          wasn't done in the Ford case or another case,  
21          doesn't mean that it's not appropriate here. And  
22          they can easily provide this information, it's not  
23          going to be overly difficult or cumbersome for  
24          them to identify who their contractors are. And,  
25          you know, we don't want to end up with someone

1           that slips through and gets on a panel who, like I  
2           said, has a significant conflict that, you know,  
3           we were unaware of. And this has happened in  
4           prior cases that I've been involved in.

5                        To include the last talc trial that we  
6           tried, whereas, you know, we had a -- someone with  
7           a contract with J. and J. who ended up being the  
8           foreperson on our last jury. So it's a real  
9           concern. And we're not trying to, you know, get  
10          into the -- try and make some argument or  
11          inference that it's the level of the presence of  
12          the -- of Bayer in Kansas City, rather we're just  
13          trying to identify, you know, who has conflicts  
14          and what those conflicts are so that we can root  
15          that out in voir dire.

16                       MR. ADAMS: Again, Your Honor.

17                       THE COURT: Let me ask, Mr. Adams, let  
18          me ask a question. Mr. Blair, is it possible -- I  
19          mean, let us -- I think you have a right to  
20          inquire of a panel as to whether or not any juror  
21          is or works for a contractor who is associated  
22          with Bayer/Monsanto. I would presume we're going  
23          to use the word "Bayer" here on the questionnaire  
24          and it's going to be used during voir dire,  
25          because, you know, Bayer now has taken ownership

1 of Monsanto, right?

2 MR. BLAIR: Yeah.

3 THE COURT: And so why -- I understand  
4 that you may not know who all the contractors are,  
5 but obviously that can be an area of inquiry and  
6 jurors can answer in the positive.

7 MR. BLAIR: Well, we're not asking for  
8 every contractor that Bayer has nationwide, we're  
9 just asking for those that they use locally in  
10 Jackson County, where there may be a decent  
11 likelihood that we would draw someone who is a  
12 contractor for or works for a contractor for  
13 Bayer. And I think that Mr. Frazer had that come  
14 up in his last Cerro Copper case over in St. Clair  
15 County, where they had an I.T. person who was a  
16 contractor for Cerro copper. So I don't think  
17 it's burdensome and I think it's just easier for  
18 them to identify who the contractors are so we can  
19 easily make further inquiry if we indeed do see  
20 people in the voir dire who check the box saying I  
21 work for this contractor.

22 MR. ADAMS: Yeah. And again, Your  
23 Honor, I mean, I'm happy to provide you juror  
24 questionnaires that have been used in Jackson  
25 County before. I don't know about Mr. Frazer's





1 by the denial, it does not mean in any respect  
2 that is going to -- that you're going to be  
3 limited on voir dire on the subject of who's --  
4 you know, who works for someone that's associated  
5 with Monsanto or Bayer. It's just as a part of  
6 the questionnaire identifying all those  
7 contractors, I'm not going to oblige the defendant  
8 to do that.

9 That does segue into the rest of the  
10 questionnaire. I want to tell you what I've done.  
11 I've just -- I've attempted to formulate a  
12 question that would address hardship and who has  
13 an undue hardship if they were obliged to sit on  
14 the jury. And I have concluded by operation of  
15 pen to paper, that a question of that nature is  
16 very difficult to formulate that can get the point  
17 across that I could do by just asking the question  
18 in a way I think appropriate, and then being  
19 allowed to dialogue with those jurors who may have  
20 an issue to determine the basis for it.

21 In other words, we ask a question --  
22 what you can expect my question to be, and it's  
23 off the top of my head at this very moment, but  
24 what it is in every case is, Ladies and Gentlemen  
25 of the Jury, I've inquired of the attorneys, they

1           have advised me that this case will last no less  
2           than three weeks and most likely into a fourth  
3           week. Our schedule is 8:00 to 5:00. You are  
4           customarily going to be asked to be here by 8:00  
5           or by 8:30 so that we can start court punctually.  
6           You can expect that at the conclusion of the day,  
7           those days will end at 5:00, unless we end at just  
8           a few minutes after that to allow a witness's  
9           testimony to be concluded. The only exception to  
10          that is during deliberation, if you were to  
11          request to stay -- or you would stay with us past  
12          5:00, if that's what you wanted to do during  
13          deliberation, but you can certainly break during  
14          deliberation, if I deem appropriate, and stay past  
15          5:00.

16                         Now, with all that information in front  
17          of you, this is also a case where the following  
18          dates would be excluded as being available to the  
19          Court. May 9, I've already checked on that, my  
20          staff is not available. May 19, May 20 and May  
21          27. Okay. My question to those on the panel. Is  
22          there anyone here who finds that service on this  
23          jury for that time frame would be an undue  
24          hardship, a hardship greater than that that would  
25          be experienced by your fellow jurors, your

1 neighbors as you sit here today, if you were to be  
2 required to be a juror on this case for a case  
3 that would last three weeks and into a fourth.

4 The hands go up, that's the end of the  
5 question. The hands go up, I then take the burden  
6 on of addressing those jurors and pressing them on  
7 the subject, rather than obliging the lawyers to  
8 do it. Doesn't mean you couldn't do it, it would  
9 just allow me to press it. There are those  
10 people, let's say -- and I'll just pull a  
11 corporation out of the blue -- sir, I work for  
12 Ford, if I'm missing four weeks from work, I can't  
13 possibly hold on to my job, I -- you know, et  
14 cetera. Sir, are you aware that Ford actually has  
15 a benefit that's available to you that relates to  
16 jury service and they will accommodate you and  
17 allow you to be off and also pay you while you're  
18 on jury duty? I think that's true with Ford, I  
19 can't say for sure. But it's certainly true of  
20 governmental agencies, you know, or schools or  
21 whatever, you know. So I get into that, okay.

22 Then I hear I'm a sole proprietor, if  
23 I'm not there, my shop's not open. I'm a clock  
24 maker. If I'm out of work for four weeks as a  
25 clock maker, I will not be able to keep my store

1 open or pay my bills, you know, those kind of  
2 things. So there's all kinds of hardship issues  
3 that if I put it on paper, I think would just  
4 lengthen the process of jury selection, not  
5 shorten it. Because every juror would have to be  
6 confronted with that which you're addressing.

7 You have another juror. You know, I  
8 have recently been diagnosed with a very serious  
9 illness, I have an appointment with -- my first  
10 appointment with my doctor is next Tuesday. I've  
11 waited two months to get in and I have to make  
12 that appointment. Right? Those kind of things.  
13 So that's why I'm concerned about putting a  
14 hardship question into the questionnaire. I think  
15 we could put something in there, we -- I'm not  
16 privy to all the questionnaires that have been  
17 used in the past. The only one I am privy to, I  
18 don't know if I can present it to you, because I  
19 don't know if it's a court document. But  
20 certainly I have been conversing with Judge  
21 Torrence, he is trying a case where a  
22 questionnaire is being used on a criminal case  
23 involving an attorney who was shot and killed a  
24 couple of years ago in the Brookside neighborhood  
25 area and the trial relates to the person who is

1 charged with that. It was a very note -- it was a  
2 case with a lot of media attention and for which  
3 there's a lot of complexity.

4 Be that as it may. They're using a  
5 questionnaire, so I've been privy to that one.  
6 But I don't have any others. And I will not  
7 betray anything other than the truth, I have not  
8 used a questionnaire in jury selection before. So  
9 that's where I'm at. Let's open the floor. Where  
10 are we?

11 MR. BLAIR: Judge, I think that's fine  
12 from plaintiff's perspective. I think, really,  
13 it's a matter of, you know, inquiring and checking  
14 boxes on whether they meet the criteria under the  
15 statute for a hardship. So I think that the oral  
16 approach is indeed best.

17 MR. ADAMS: And, Your Honor, we had --  
18 this is Robert Adams for Amy -- we had submitted  
19 -- Anthony Martinez submitted a version of that  
20 question for the Court's consideration. The good  
21 news is, is that the way you are articulated it is  
22 pretty close to the way we suggested that you ask  
23 the question. So I think that's fine. And then  
24 the bigger issue is dealing with the details of  
25 the questionnaire that we have provided to the

1           plaintiffs and their comments on that. I don't  
2           know if you want to segue into that issue or not.  
3           But with respect to the hardship question, I think  
4           that's fine. And you can look at our email for  
5           the suggestion to see if you want to alter it.  
6           But again, I think the way you articulated it was  
7           pretty close to the way we suggested.

8                         THE COURT: Let me -- so let's be clear  
9           on how we're going to approach this. What my  
10          expectation is, is that the panel will come in and  
11          will be addressed initially in three different  
12          sections. And they're going to be given  
13          essentially two hours apiece. I think we start at  
14          9:00, 11:00 and 2:00. I think that's how we are  
15          doing it. I'm going to have to check the times.  
16          But we're going to get them all in, we're going to  
17          present them each with a questionnaire, we're  
18          going to get the questionnaires answered.

19                         But what I'm anticipating that I do is  
20          to qualify them upon arrival. And what we  
21          customarily do, at least in Jackson County, and I  
22          -- this is the only place I've been a judge, so  
23          it's the only place I know where we qualify people  
24          the way we do. And if everybody says yeah, that's  
25          how they do it everywhere else.... By

1           qualification, that means to me are they qualified  
2           to serve as a juror legally under our statute.  
3           And if the statute is well known to you, then  
4           excuse me while I reference it for those who may  
5           not have it available to them.

6                         Anyway. There is a criteria for who's  
7           qualified. And I'm going to inquire of them on  
8           that subject. And I would anticipate there being  
9           some element of that that would relate that this  
10          is a -- you know, probably not with any specifics,  
11          but this will be a lengthier trial. And that  
12          often, that qualification period, again, it's not  
13          on the record, just allows me to go through the  
14          criteria that the statute outlines of who is and  
15          who isn't available or eligible. Because we'll  
16          have those who've moved out of Jackson County  
17          since the summons was issued. We'll have those  
18          who have medical conditions for which our jury  
19          supervisor after an examination of the  
20          individual's basis for being excused, are then  
21          allowed to be excused.

22                         There's those who do approach us at the  
23          qualification time with a concern that allows them  
24          a deferment, which means we put them back on in  
25          six months. Those kind of things. So I'm not



1 going to go into the hardship question and  
2 qualification, I'm just going to inquire of those  
3 who come to me and indicate an issue regarding  
4 their qualification. And there's a catch-all  
5 element of the statute that relates to something a  
6 little less particular than where you live,  
7 whether you got a felony conviction and those kind  
8 of things. And it deals with medical and other  
9 issues, something like that.

10 So long story short, I would presume  
11 that there will be those who come in to answer the  
12 questionnaire that we'll address on qualifications  
13 before they ever answer the questionnaire for whom  
14 an excuse may be allowed. Okay. Nothing new  
15 about that in Jackson County, I would presume  
16 everybody does it that way, but that's just a  
17 presumption. So then I intend to give them the  
18 questionnaire, allow them to answer the  
19 questionnaire. I don't intend to have the lawyers  
20 in the room with me when we're doing all this.

21 Then I would presume that we'll get the  
22 questionnaires to you on the 28th. And then my  
23 proposition would be, can we address this on the  
24 29th and -- on the record and give us all one day  
25 to work with our questionnaires and review those

1 and then materially take up those to whom an issue  
2 is presented to determine if they should or should  
3 not be, you know, excused on whatever basis is the  
4 rationale for them to be excused or stricken?  
5 Such as, I know Allan Shelton, such as, you know,  
6 I am an employee of Bayer. Such as whatever, you  
7 know, I've been a patient of Dr. McGuirk or  
8 whoever is the, you know -- or things like that,  
9 you know, whatever that may be.

10 MR. BLAIR: Wylie Blair for the  
11 plaintiffs. I think that that approach is just  
12 fine.

13 THE COURT: Okay.

14 MR. ADAMS: And, Your Honor, Robert  
15 Adams for Monsanto. We agree. I think -- and we  
16 can deal with the details on how we get the  
17 questionnaires to the parties. But assuming we  
18 get the questionnaires to the parties on the 28th  
19 with enough time for us to review it, I think it  
20 then makes sense for us to meet with the Court on  
21 the 29th and cover issues like you just raised.

22 THE COURT: I'm going to be in a  
23 position where I -- Amy has obligations as one of  
24 the officers of the Court Reporters Association  
25 here in Missouri on the 29th. I'll address that

1 personally. If that becomes problematic, I'll let  
2 you know. And so, yeah, again, I'm going to seek  
3 your valuable insight on these issues as attorneys  
4 who have addressed cases of this nature on this  
5 process, and ask you all -- you know, there's a  
6 spirit of cooperation that I expect on issues like  
7 this that aren't related to the adversarial nature  
8 of the proceedings, but more on the logistical  
9 aspect as officers of the court, where we're  
10 attempting to eliminate the necessity of, you  
11 know, undue delay and difficulty for citizens  
12 getting summoned to jury duty, right? So  
13 hopefully on that end we are able to address that.

14 What I'm going to be doing here in a  
15 couple minutes -- you're probably noticing I have  
16 individuals joining us now for my 11:00. So you  
17 may be sitting through the 11:00 so we can keep  
18 going, or you can take a break and I can tell you  
19 that I'll be back at 11:15, whatever you want to  
20 do. That's not yet, though. Okay.

21 Let's talk about the questionnaire then.  
22 Materially where are we on that?

23 MR. ADAMS: Materially where we are at,  
24 is we have revised the questionnaire and submitted  
25 it to the other side. And they have some issues

1 with respect to the content of the questionnaire.  
2 We can talk about that now. I think they're  
3 pretty simple issues that we could resolve and I  
4 think that would make sense to do it so we can get  
5 a final version to the Court pursuant to when you  
6 wanted it. Which I think was the -- I thought  
7 April 13th, but I may be wrong.

8 THE COURT: Mr. Blair, are you going to  
9 comment on this or is someone else?

10 MR. BLAIR: I think that Shawn Foster  
11 will be handling.

12 THE COURT: Mr. Foster. You're on mute,  
13 sir.

14 MR. FOSTER: Can you hear me now, Judge?

15 THE COURT: Yes, sir.

16 MR. FOSTER: So Judge, we basically have  
17 four issues I think we can talk about. And that  
18 is, you know, obviously the purpose of the  
19 questionnaire is to get basic demographic  
20 information and obvious conflicts. And when you  
21 look at what -- we got a ten-page questionnaire  
22 from the other side that I think with almost every  
23 question, it has please explain, give your  
24 opinions. And just going through the college  
25 process with my daughter, I could see that

1 questionnaire taking five days to fill out.

2 And so, you know, I want to stick to  
3 kind of the higher points, but I can delve down  
4 into the details. But the one thing that they're  
5 doing is, it's voluminous, but it's also asking  
6 the jurors to pledge the credibility to certain  
7 witnesses and documents. It's asking for them to  
8 pledge their credibility for the reputation of the  
9 product, the safety of the product. They do that  
10 by asking, Do you believe Roundup's a good  
11 product? Do you believe it's a safe product?

12 They ask what we -- the old question,  
13 the widow versus the corporation or the deceased  
14 family versus the corporation questions. And that  
15 issue's been discussed since the 1800s in  
16 Missouri, that you're always going to get somebody  
17 that is going to say, well, obviously I'm going to  
18 feel for the widow. But that doesn't mean they're  
19 not -- you got to go to the further questions to  
20 see if they're biased or if they could be fair.

21 I think the questionnaire as it stands  
22 now, Judge, would be -- would probably add days to  
23 the trial. It's not going to -- you know, the  
24 whole reason for the questionnaire is to  
25 streamline the process. But if you get these

1           questions, all it's going to do is have the  
2           plaintiffs have to immediately start, you know,  
3           trying to ask the people and ask certain questions  
4           on there, they're going to have to go to each  
5           witness and try to rehabilitate them right from  
6           the beginning.

7                         Where I think all those questions -- I'm  
8           all for a long voir dire. I think that it should  
9           be able to speak the truth. But when you're  
10          asking the witnesses to pledge their credibility  
11          to a product or its safeness, I think they're  
12          afraid to talk after they write all that down in  
13          these forms. And when you see their form, it  
14          truly will explain why. One of the question is --  
15          they're not even about the potential juror, it's  
16          about people you know. Close friends. Has a  
17          close friend had cancer? Why do you think that  
18          they got cancer? That could take somebody three  
19          pages to fill out. And why that's relevant, I  
20          don't know.

21                        I mean, you can ask these questions, I  
22          think they can all be reworded. I'm all about  
23          having a wide-open voir dire. But I think it's  
24          better to be done during voir dire. I think this  
25          questionnaire is way out there. We had this issue

1           come up with -- in front of Judge Burleson in the  
2           ADM case with the Sunshine law firm. And what  
3           Burleson did, which I think is the best way to  
4           handle it, is to say hey, you have no right to use  
5           a questionnaire, I'm doing -- I'm allowing you  
6           guys to do it to the benefit of both sides. If  
7           you can't agree on a question, then don't send it  
8           to me. You have to be able to agree on every  
9           question or don't send it to me, I just won't use  
10          the questionnaire. That's the one way we could do  
11          it.

12                         The other way we could do it, which I  
13           don't think it's a good use of the Court's time,  
14           is we can do converse questions to their questions  
15           and make them just as inflammatory as their  
16           questions about, Do think a big company should be  
17           able to take advantage of little people? Do you  
18           have a feeling about that? That's just a waste of  
19           the Court's time.

20                         So I think before we spend a lot of time  
21           on this, I think it should be that we get with  
22           Rob, and if we can agree on the questions during  
23           the questionnaire, if both sides can't agree on  
24           it, then the question's not in the questionnaire.  
25           It gives room to compromise, if they got a

1 question they really want in there that we don't  
2 think should be, and vice versa. But I think  
3 that's the best way to try to get this wrapped up  
4 sooner than later.

5 MR. ADAMS: Your Honor, I'll respond if  
6 I may. I think when you see the actual  
7 questionnaire, there are no inflammatory  
8 questions. We have asked questions patterned off  
9 of the questionnaire that was approved by Judge  
10 Atwell in the Newton Nolte case, and also the  
11 questionnaire that was approved by Judge Scheiber  
12 in the Scheer versus Boston Scientific and Bard  
13 case. None of those questions are in any way  
14 inflammatory or asking for unusual explanations.  
15 Again, it goes to the heart of the matter why you  
16 use a questionnaire in a case like this. It's  
17 going to be a long, complicated process. And to  
18 say that, well, these questions aren't appropriate  
19 and, therefore, we should abandon the  
20 questionnaire is not right. That's not what  
21 judges have done in Jackson County before.

22 What we have asked plaintiffs several  
23 times is, is that tell us what your issues are  
24 with the questionnaire. And in our most recent  
25 meet and confer with them, they identified two



1 areas. One, they identified question No. 17 that  
2 had to do with prior jury service, saying that  
3 that is not appropriate and shouldn't be inquired  
4 into. And then they raised an issue about  
5 question No. 18, juror litigation experience.  
6 Those questions are commonly asked on  
7 questionnaires, but I bring those up because  
8 they're not bringing forth good faith criticisms  
9 of the questionnaire. They simply do not want to  
10 use it.

11 That goes back to the whole reason why  
12 courts have allowed questionnaires in complicated  
13 cases like this. We should not have to spend a  
14 significant amount of time in voir dire, going  
15 into issues that, frankly, jurors are going to be  
16 -- they're going to be more efficient in  
17 responding to these questions when lawyers are not  
18 present and when they can just sit down in the  
19 allotted time that the Court has given to them.  
20 And you're going to see that this questionnaire  
21 that we have actually has fewer questions than the  
22 questionnaire that Judge Atwell used in the Nolte  
23 trial or that Judge Scheiber used in the Scheer  
24 trial.

25 Now, I'm happy to, you know, sit down

1 with Mr. Foster or people from our team can sit  
2 down with them, but they have to engage in a good  
3 faith process of going through individual  
4 questions and telling us what the problem is that  
5 they have with it. And then I suggest if we need  
6 to bring particular questions to the Court's  
7 attention, we can do that. And you can decide,  
8 you know, is this somehow inflammatory. I don't  
9 think that any of these questions, they are simply  
10 asking for information. Like such as, do you know  
11 of anyone who has cancer? Do you know of the  
12 reason? There's nothing wrong with that, you  
13 could do that in open court. But the reason why  
14 we don't want to do it in open court, is because  
15 if you have a venire panel the size of what we  
16 have, it's going to take a week. And that again,  
17 I'm kind of repeating myself, but it goes back to  
18 why we have the questionnaire. So we can, again,  
19 engage in this process, but they have to use good  
20 faith.

21 The last time we talked with them, they  
22 identified these two questions. The questions are  
23 commonly asked, and so there's no basis for those.  
24 If they want to raise other ones, that's fine,  
25 too, but we need some finality on it. And we need

1           -- if -- and they have our questionnaire. And so  
2           if they have particular issues, we're fine to work  
3           with them on crafting the question differently.  
4           But to simply say oh, we don't think it's useful  
5           or we don't think it's appropriate, is not good  
6           faith.

7                         MR. FOSTER: And Judge, if I could  
8           just --

9                         THE COURT: Hold on. Mr. Foster, can I  
10          -- I allowed Mr. Adams to complete his thoughts  
11          without interrupting him. I will return to this  
12          case in a few minutes. I'd encourage you to stay  
13          with me, because this hearing that I'm about ready  
14          to hold is going to be hopefully short. If I find  
15          it's otherwise, then I will -- I will let you know  
16          that we're going to take a break. But, otherwise,  
17          I'd ask you to stay with me and we'll then return  
18          to the record on your case.

19                         (Recess.)

20                         THE COURT: We'll return to the record  
21          in Shelton versus Monsanto. And we're prepared to  
22          hear from Mr. Foster on the subject of the  
23          questionnaire. Go ahead, sir.

24                         MR. FOSTER: Judge, just in response, I  
25          want to be clear. We agree that there should be a

1 questionnaire, we have no problem with the  
2 questionnaire. I just think it should be used  
3 appropriately and not turn this into -- obviously  
4 jury consultants have written these, I understand  
5 why they want to know if somebody's been in the  
6 military. Because they want a rule follower. All  
7 these questions have been fine. And I'm telling  
8 you, these questions that are asked are all to  
9 pledge credibility towards the product, toward the  
10 witnesses. Whether it be the EPA, we all have  
11 seen the jurors. Most of them are going to start  
12 having issues just by fatigue.

13 When you have 50 or 60 questions and you  
14 have to explain or give your opinions to, everyone  
15 -- they are just going to stop. And then in voir  
16 dire, those questions are still going to be asked.  
17 I mean, I don't think anybody -- some of these  
18 questions, Judge, how worried are you that your  
19 family member is going to get cancer? Is Roundup  
20 a good product? Is Roundup a safe product? Have  
21 you ever been mistreated by a corporation? Have  
22 you or a close member had cancer? What were your  
23 thoughts?

24 Are they like going to ask everyone in  
25 voir dire, does anybody here believe that Roundup

1 is a safe product? Are they not going to ask --  
2 and then when they say -- somebody says well, I  
3 don't think it's a safe product, explain why.  
4 They explain why, I assume the next question is  
5 going to be does anybody else in here have those  
6 strong opinions? Now somebody raises their hand  
7 and says, Yeah, after that, I don't think it's a  
8 safe product. And then Mr. Adams gets up and  
9 goes, Well, wait a minute. You pledged here on  
10 this when you said -- you just said it was a safe  
11 product two hours ago. So then that does exactly  
12 what you don't want in voir dire. Now everybody's  
13 heard that, that silenced everybody. Now nobody  
14 is going to raise their hand and say anything  
15 different than what they said in that  
16 questionnaire.

17 So I do believe that questionnaires are  
18 good for things like if you want to know where a  
19 potential juror's kids went to college. We don't  
20 want to spend all day going around asking where  
21 your kids went to college. Get that information.  
22 If there's -- you know, none of those answers to  
23 those questions, Judge, are going to make it to  
24 where we come to you and ask you to excuse the  
25 juror. It's just going to be more to ask those

1 exact same questions the next day.

2 So we know in talc that a two-page  
3 questionnaire took an hour. We know their  
4 questionnaire without us conversing all of these  
5 inflammatory questions, you know, to ask if you  
6 already feel sympathy for somebody that has cancer  
7 over a big corporation. There's a Missouri case  
8 that says if you ask that question about a widow  
9 versus a big corporation, 99 percent are going to  
10 say they have sympathy for the widow. That  
11 doesn't mean they don't get on the jury. So what  
12 purpose would that question have? And you know  
13 Mr. Adams is going to ask it during voir dire.

14 So we're just saying keep the  
15 questionnaire, you know, to very demographic  
16 questions, to obviously great conflict questions.  
17 But let's not do voir dire in the questionnaire  
18 and then come back later, you know, in closing  
19 argument and say, Remember when we did voir dire  
20 and we asked you questions? We expect you to  
21 stick with those questions. Well, then they're  
22 going to get confused whether when they said  
23 Roundup's good in the questionnaire, it's just the  
24 way it's written and the questions asked.

25 All those questions can be asked, I

1 don't have a problem with it. They should just be  
2 asked during voir dire. And they're going to be  
3 asked anyways. And they're going to ask somebody,  
4 raise your hand if you believe what he just said.  
5 And then there's going to be conflicts with what  
6 they said in their questionnaire and what they  
7 didn't say and it will just turn into a nightmare.

8 So we're just asking to streamline it.  
9 We do want a questionnaire, we're for a  
10 questionnaire. And I think as we work on it, I  
11 think what pushes both sides together is to say  
12 hey, the Court's doing you guys a favor allowing  
13 you to do a questionnaire. And if you can't agree  
14 on the questions, they're not going to come in.  
15 And then it forces compromises and it gets a lot  
16 shorter of a questionnaire.

17 THE COURT: Okay. Obviously I'm dealing  
18 with this in a vacuum. I'll hear from you, Mr.  
19 Adams, on the subject, I just don't have, you  
20 know, the document in front of me to analyze.

21 MR. ADAMS: Yeah, agreed. And, you  
22 know, you note that Mr. Foster doesn't identify  
23 specific questions that he has problems with.  
24 And, you know, the -- it's illogical to say that  
25 all of the questions that we ask in the

1 questionnaire they're fine with and they can be  
2 asked in the courtroom. So that's what he just  
3 said. And then say well, we don't think the  
4 questionnaire is appropriate. Well, the whole  
5 idea on the questionnaire is, is that, one, it's  
6 not going to take a lot of time. It's down now, I  
7 believe we're down to 50 -- let's see. Let me  
8 look, Judge.

9 In our latest iteration that we sent  
10 them, 55 questions. The questionnaire that was  
11 approved by Judge Atwell and used in that case was  
12 69 questions. I know that Judge Atwell engaged in  
13 the same procedure that Judge Scheiber did, which  
14 is to bring them in like you're proposing, bring  
15 the jurors in and they fill it out in less than an  
16 hour. This is not a difficult questionnaire. But  
17 again, the whole purpose is, is to get information  
18 prior to the time that you go into voir dire so  
19 you don't have to ask general questions. You can  
20 hone in on what was responded to in the  
21 questionnaire. And that's why it saves a lot of  
22 time.

23 I can tell you that the converse -- and  
24 I know you have been involved in cases where voir  
25 dire lasts a long time. In the Liberty bus case,



1           voir dire lasted a week, because we didn't have a  
2           questionnaire. It's -- this is a expedited  
3           procedure, both sides will get more information.  
4           If they have problems with specific questions,  
5           then send me in the email with it. But to simply  
6           say, well, you know, we don't think you should use  
7           a question that you can ask in the open court  
8           anyway, is an appropriate way of dealing with the  
9           language in the questionnaire. Because again, it  
10          goes back to the purpose of it, which is to  
11          streamline the process.

12                        If you looked at the Newton Nolte  
13          questionnaire, it asked jurors how they feel about  
14          Ford, do they have problems with Ford vehicles,  
15          things like that. That's what we patterned our  
16          questionnaire after. Could we ask that in open  
17          court in voir dire? You betcha. But it would  
18          take a lot of time with the venire panel that we  
19          have to go through all those responses.

20                        So here's my proposal, and I totally  
21          understand, Your Honor, that you don't have the  
22          questionnaire in front of you. What I propose is  
23          that based upon what we've already sent them, they  
24          provide us in the email, either today or Monday,  
25          with the specific problems that they have to

1 specific questions, as opposed to saying we think  
2 the questionnaire should just be limited to  
3 hardship. That's not appropriate. But give us  
4 specific issues that they have on individual  
5 questions, we will then respond to that and we can  
6 meet and confer. But we need specifics as far as  
7 what problems they have.

8 If, you know, Mr. Foster wants to see  
9 questionnaires that have been done in prior cases,  
10 like Newton Nolte, I've got them. I can provide  
11 them to you. I mean, this process should not be  
12 difficult. Newton Nolte was, you know, I was  
13 involved for Ford and Grant Davis was on the other  
14 side. The Scheer case, Tom Cartmell was on the  
15 plaintiff's side, I was on the defense side along  
16 with Ms. Sastre. We were able to work it out. So  
17 this is a true saving of the Court's time and the  
18 parties time. So what I would propose, they send  
19 us an email with specific issues that they have on  
20 individual questions and then we will respond to  
21 it. And if we can't agree, we'll give it to the  
22 Court.

23 THE COURT: Okay.

24 MR. FOSTER: I agree with that, Judge.

25 MR. ADAMS: You're on mute, Your Honor.

1                   THE COURT: Thank you. So I don't know  
2                   if you all having a, you know, if not an in-person  
3                   meeting but a WebEx meeting, you know, to just  
4                   parse that out, may be a little more of an  
5                   efficient manner to address that. So what I would  
6                   propose we do is get me something by the 13th and  
7                   then if you say Judge, can we have till the 15th,  
8                   I would think that the 15th would be all right,  
9                   with the idea that we've got to get this  
10                  addressed. So I have a bench trial, a murder  
11                  bench trial on Monday, it will last two and a half  
12                  days. I then have another murder case the  
13                  following Monday, that's a jury trial. That will  
14                  last four days or more. And then I obviously  
15                  won't be trying any cases the week of April 25,  
16                  because we're picking a jury on the 27th. And so  
17                  -- at least that's my plan right now. So that's  
18                  where we stand there.

19                  The only exception to that could be that  
20                  Judge Youngs could step in and handle the  
21                  questionnaire if I have a very short trial. But  
22                  you're going to need me by Thursday or Friday,  
23                  whenever we can get to this. Long story shorter,  
24                  how's the 15th sound? Extend this to the 15th?

25                  MR. ADAMS: I think the 15th is fine,

1 Your Honor. What I would propose, though, is to  
2 cut down on the time and to really hone in what  
3 specific issues they have. Just -- Shawn, just  
4 send me an email with any questions that, you  
5 know, you have a problem with or that you want  
6 different language. And if you could do that by  
7 noon on Monday the 11th, we'll respond on the 13th  
8 or the 12th, and then we can get on a Zoom and  
9 figure it out.

10 MR. FOSTER: That works for me.

11 THE COURT: That works for me. Good.  
12 So yeah. So there's been a mention of the use of  
13 a court reporter for daily transcript that is  
14 independent of the Court. I have heard that, I am  
15 concerned about that, and I'm going to address  
16 that issue with my reporter, Amy McCombs, so we  
17 can determine how we're going to go with that.  
18 And so I will put you on notice now, I've never  
19 had that in court. I have some serious concerns  
20 about it, one of which is a jury seeing someone  
21 transcribing the events for which isn't Amy and  
22 what's that mean and do we get that and all those  
23 kind of things. So I've got some concerns there  
24 as to that. And I understand that there might be  
25 a request for daily copy. So Amy and I are going

1 to be consulting on that, as well as a  
2 determination on a circuit-wide level whether  
3 that's even appropriate, okay?

4 MR. ADAMS: Understood.

5 THE COURT: As it relates to an  
6 instruction, the, you know, the instruction  
7 committee with the latest edition of the book has  
8 given us direction and encouragement to present to  
9 the jury an instruction that more materially  
10 addresses issues for which your -- the case  
11 involves. I would encourage the attorneys to draw  
12 an inclusion that you can create such an  
13 instruction that is fair. It's not argumentative  
14 and it's not taking sides in any way, but just  
15 flushing out what are the issues. If you're not  
16 able to and we go to the fallback position, then  
17 we would use the one that we have been using and I  
18 -- that is just a generic version of what we're  
19 doing in voir dire.

20 I'd also, though it may not be  
21 necessary, I would order that the plaintiffs will  
22 present to the Court the standard instructions  
23 that we'll be using, including 2.01. And remember  
24 that 2.03 is the new implicit bias instruction  
25 that is required both prior to jury selection and

1 is required to be read during the course of the  
2 instructions after closings. I would then tell  
3 you that without any doubt I'd let jurors take  
4 notes. Jurors have the option of being allowed to  
5 ask questions and I'd open the floor to that  
6 discussion on how you want to handle that.

7 MR. ADAMS: I don't know if you want to  
8 hear from me or you want to hear from Mr. Foster  
9 first.

10 THE COURT: It doesn't matter to me.  
11 You all can tell me what you think about jurors  
12 asking questions.

13 MR. ADAMS: Yeah, as far as jurors  
14 asking questions, I've got mixed feelings about  
15 it, Your Honor. I think in some cases it's  
16 informative, it just depends upon the jury.  
17 Because other cases, it really lengthens the  
18 trial. So I'm open to suggestions from Mr. Foster  
19 and his team. My personal view is, in a case that  
20 is going to last this long, it's really probably  
21 not worth it, because it's just going to -- we're  
22 going to have to deal with at the end of each  
23 witness that's called, there will be questions,  
24 the Court will have to consider whether, you know,  
25 the parties should respond to the questions,



1           dealt with putting this together before with the  
2           Shook firm in the talc cases that we've tried.  
3           Haven't had any problem putting together something  
4           that is neutral or -- and agreeable. So I'll --  
5           you know, I'll take the liberty of sending  
6           something over to you guys, basically just  
7           patterned after what was agreed to before that's  
8           neutral.

9                         MR. ADAMS: That sounds good. And what  
10           I would propose on these dates, Your Honor, is  
11           that plaintiffs by Monday at noon, so the 11th on  
12           noon, you provide us, you know, Wylie, the draft  
13           of the early case summary and then also provide us  
14           specific objections or requests to revise the  
15           statements in our questionnaire. And I think we  
16           can turn it around and provide you our responses  
17           on the 12th at 3:00 o'clock, and then on the 13th,  
18           let's get together and hash out the issues on the  
19           questionnaire. And then if we can't agree, we'll  
20           submit it to the Court. And Judge, either you or  
21           Judge Youngs can deal with it. Does that sound  
22           agreeable?

23                         THE COURT: Sounds good to me.

24                         MR. BLAIR: Yeah, I think that's --  
25           Wylie Blair. That's fine with me.



1                   THE COURT: So another issue that I  
2                   think we have to confront is time limits on voir  
3                   dire. I'm not talking about 15 minutes. I'm  
4                   talking about a few hours, all right. We have to  
5                   realize that -- it's my expectation that we bring  
6                   in a number of jurors somewhere between 50 and 65.  
7                   And now that I've got Division 1, now I can manage  
8                   that a little differently. And I'm going to do it  
9                   in a reasonable way that won't necessarily allow  
10                  for the distancing that the third floor would  
11                  allow for where there's every other chair, but  
12                  some opportunity for -- to expand that, but also  
13                  to allow our court reporter be able to hear  
14                  everybody, okay. You go to the back of that room  
15                  and have people shouting back there, that's a  
16                  problem. So we'll manage that.

17                  But if we're bringing one panel in on  
18                  the 2nd and then if it becomes necessary for a  
19                  panel on the 3rd, then I think we're falling into  
20                  a situation where we need to just address how much  
21                  time each side would have for voir dire. Because I  
22                  don't want 4:30 to arrive and now counsel for the  
23                  defendant, let's conduct voir dire. That's kind  
24                  of a -- that's not an ultimate conclusion for how  
25                  that's going to be, I'm just talking in a general

1 way because we have to be practical.

2 MR. ADAMS: I agree to the limits, Your  
3 Honor. And as you said before last week, you  
4 know, the plaintiff's probably have more to cover.  
5 So what I was thinking is, is that I don't know  
6 what total time would be for each panel. But  
7 let's say -- let's just pick total time is going  
8 to be seven hours or total time is going to be six  
9 hours. I would say that plaintiffs get a little  
10 bit more than we do.

11 And so I guess the first issue is what's  
12 the total time that we -- that the lawyers can ask  
13 questions and then I think we can figure how to  
14 divide that fairly.

15 THE COURT: Who's picking the jury for  
16 the plaintiffs, have you all decided yet?

17 MR. ROE FRAZER: I think I drew the  
18 short stick, Your Honor.

19 THE COURT: Thank you, sir. So, yeah.  
20 What we have to confront is the hardship  
21 questions. Now, I would propose I ask them for  
22 the reasons I stated. I think that avoids any  
23 issue or limits any issue that the lawyers have to  
24 confront by you asking the questions and I deny  
25 the hardship excuse. If I'm asking the questions,

1           they'll -- you know, they're presuming I'm making  
2           the decision and then, you know, there you go.  
3           And since I have to make it anyway, really I don't  
4           -- I ask the questions because I think under the  
5           statutes, I have almost exclusive authority to do  
6           that without really any obligatory input, though I  
7           would certainly allow you to.

8                         And then what I'd like to do, you know,  
9           and I'm really dialoguing just for a few more  
10          minutes. Think about it, you know. So Mr.  
11          Frazer, unless you've picked juries in Jackson  
12          County before, let me just tell you how we  
13          customarily do it here. And I know it's different  
14          than other places. I'm not suggesting it's the  
15          right way, it's just how we've always done it. We  
16          put them into the -- you know, one through 18 go  
17          into the jury box. We use the row that has the  
18          bar on it and then we put it into the gallery.

19                        Customarily I ask hardship questions, I  
20          get those answers. I hear from those jurors and  
21          then -- as to whom have a hardship. And then we  
22          make a determination and then we allow you to ask  
23          the rest of the questions, and those folks that  
24          are here on -- who have expressed a hardship, then  
25          stay with us throughout the conclusion of the voir

1           dire process. And the reason I do that is to  
2           allow you all to ask questions regarding the  
3           hardships. Not to exclude you from the process  
4           and the inquiry, but just -- and therefore let  
5           them stay.

6                         Now, you know, I would think that if you  
7           thought -- I would think if you thought. What if  
8           we just analyzed the idea of taking a break after  
9           the hardship questions, determine if there's those  
10          that we can just mutually agree have no chance of  
11          being on this jury and allowing them to be  
12          excused. That way they're not part of this  
13          dialogue anymore, their chair is empty and we move  
14          forward. That obviously has its problems. And  
15          the problem being that others perhaps would also  
16          raise their hand, why am I still here but she got  
17          to go? That's an issue. Oh, is that get out of  
18          here, let me know, answer a question of a similar  
19          nature and let me get out of here, too.

20                        So that's just -- that doesn't have to  
21          be decided today. I'm just seeing a panel of 65  
22          and telling you that, you know, we have to embrace  
23          the idea of some limitation on the hours available  
24          for questions and how to address that in the  
25          appropriate way. Because usually, Mr. Frazer, and

1 I'm sure you're aware of this and please don't  
2 presume that I don't think you're aware of this,  
3 I'm just aiding you with my dialogue on this. We  
4 then just let everybody go and you just ask  
5 questions in the -- of a general nature to all the  
6 jurors and then at the conclusion of that, we let  
7 Mr. Adams, you're going to be conducting voir  
8 dire, Mr. Adams goes through that. And then I  
9 permit some individual questions based upon the  
10 answers afforded and perhaps the questionnaire.  
11 Then we're done. They step outside or perhaps we  
12 advise them, we'll give you a call, let you know  
13 when you're starting. And then we determine if we  
14 have enough from the first day's panel based after  
15 we consider hardships, strikes for cause, and each  
16 side getting peremptories, whether we have enough.

17 That's my vision of it and those are  
18 just -- I want you to realize, I don't have time  
19 to draw conclusions on that. Maybe it's a subject  
20 that you all talk about. I'm presuming that you  
21 all will conduct, you know, personal conversations  
22 with each other to, you know, to see if there's a  
23 way you can present this on a different date.  
24 What do you think of that?

25 MR. BLAIR: Judge, this is Wylie Blair.

1           Sorry, go ahead, Roe.

2                   MR. ROE FRAZER:  No, you go ahead.

3                   MR. BLAIR:  I just had one question in  
4 terms of the procedure.  Do you anticipate those  
5 who raise their hand and want to be heard on a  
6 hardship, having that hardship heard in the  
7 presence of the other jurors?  Because I think  
8 that you hit on something, that if it's in the  
9 presence of the other jurors, that they hear, you  
10 know, I -- that got them off, sounds like a good  
11 thing for me to say, too.

12                   THE COURT:  I think it would be the only  
13 way to do it.  I don't know how -- I mean, to call  
14 every juror up, go into a side bar dialogue with  
15 them at length would be very time consuming.  And  
16 I don't think we have the time to do that.  Nor is  
17 it the customary way.  I mean, you know.  Mr.  
18 Frazer, did you have a comment?

19                   MR. ROE FRAZER:  I was just wanting to  
20 get clarification on one thing, Your Honor.  It  
21 sounds to me like the -- I'm perfectly fine with  
22 you asking any hardship questions first.  I've  
23 never -- I agree with you, sometimes if I ask them  
24 or follow up -- I'd actually, if I have any  
25 questions, prefer to give them to you for your

1 consideration and whether to follow up or not. So  
2 that's my usual practice. But I'll do whatever  
3 Your Honor wants.

4 And then secondly, as I understand it,  
5 both the plaintiff and the defendant will do a  
6 general voir dire, and if somebody raises their  
7 hand or indicates they want to answer a question,  
8 the specific question will be taken up in the next  
9 phase of voir dire. Or do I take them up right  
10 then? Okay.

11 THE COURT: Juror 27, do you have an  
12 answer to my question.

13 MR. ROE FRAZER: Good. That's the way  
14 I've normally done it, I just wanted to -- I don't  
15 think that --

16 THE COURT: I've been known to talk too  
17 much, it may be more confusing than simple and I'm  
18 trying to avoid that. I'll just say it, okay?

19 MR. ROE FRAZER: Sure.

20 THE COURT: Did you have any questions  
21 or issues there, Mr. Adams?

22 MR. ADAMS: I don't, Your Honor. And I  
23 agree with Mr. Frazer, that I'd rather have you  
24 ask the hardship questions.

25 THE COURT: Okay. We need to get back

1           together. There's parts of this that I even  
2           wonder what are we making a record on some of  
3           this. I wouldn't suggest that it's obligatory,  
4           but I'm going to continue to do it.

5                        So, anyway, the next issue, and I want  
6           you all to think about it, not answer it today  
7           because we've got time to consider it. Is how  
8           many alternates you want to keep. What I envision  
9           is, is that the jury will sit in the jury box  
10          exclusively, unless I have jurors that seem to  
11          have a problem with doing that. And I tried one  
12          -- I attempted to try one this week and I had a  
13          juror that had some real material concerns about  
14          it because of who lived in her house and with  
15          being that close to other folks. Because she  
16          wanted to first be masked, and had some concerns.  
17          They were legitimate. I would never question  
18          anyone's concerns. They will be given all the  
19          credit that they're afforded, no matter what my  
20          personal position is on some of those concerns.

21                       Nonetheless, what I envision is and with  
22          my courtroom, I have -- we're going to try the  
23          case in Division 13, not in 1. We're just picking  
24          a jury in 1. I've got the 12 chairs for the  
25          jurors, plus six more for others, and we could



1 keep more than two alternates. I would propose  
2 and encourage us to keep at least four alternates.  
3 More, less, you tell me, but at least four.

4 MR. ROE FRAZER: I think four is a fair  
5 number, Your Honor.

6 MR. ADAMS: I'm fine with that, too,  
7 Your Honor.

8 THE COURT: Okay. All right. So --

9 MR. BLAIR: Judge, Wylie Blair. Quick  
10 question. Last time that I tried a case in front  
11 of, well, in Jackson County, it was in front of  
12 Judge Grate a number of years ago. And I don't --  
13 it may have been the Judge's own policy, but it  
14 wasn't known to the other jurors who the  
15 alternates were prior to them being dismissed at  
16 the end of the case. As the Judge, do personally  
17 have a practice when it comes to that?

18 THE COURT: That is what I intend.  
19 However, to propose that I can consider that to be  
20 something that doesn't become apparent when they  
21 get, you know, the notebooks and where they're  
22 seated, what I customarily do to avoid that to the  
23 degree I can, is I started -- and if you see me  
24 pointing, it's because I'm looking at my jury box.  
25 I go from one to seven on the back row, eight

1 starts the middle row, on through whatever that  
2 number is, probably 13. Three more in the front.  
3 And the reality, the three folks in the front are  
4 actually alternates. Only because I just tried to  
5 seat everybody in some order.

6 And then the only thing I suppose they  
7 could pick up on is the fact that their jury  
8 notebook, which is numbered so that we can keep  
9 track of them, and they will have numbers at least  
10 internally so Lindsey knows whose book to put  
11 where. We will give them notebooks, okay.

12 MR. BLAIR: Got it.

13 MR. ROE FRAZER: That's fine.

14 THE COURT: I don't think it's a big  
15 deal anyway. But again, I get it. I don't tell  
16 them, though.

17 MR. BLAIR: We agree.

18 THE COURT: So it's five after 12:00.  
19 I've got some other stuff I've got to deal with.  
20 I think we can leave. I'm going to have -- I'm  
21 going to be obliged to leave the record so my  
22 court reporter can have her lunch. And I will  
23 stay on so we can determine when we could get back  
24 together. We need -- as time starts crunching, we  
25 better -- I'm available even after-hours, as long

1 as it's not with a reporter. We're leaving the  
2 record. Thank you, Amy.

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