

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION**

BADER FARMS, INC. and )  
BILL BADER, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
MONSANTO CO., and )  
BASF CORPORATION, )  
 )  
Defendants. )  
 )

Case No.: 1:16-cv-00299-SNLJ

**DEFENDANT BASF CORPORATION'S  
OPPOSITION TO PLAINTIFF'S PROPOSED FORM OF JUDGMENT**

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**DEFENDANT BASF CORPORATION'S  
OPPOSITION TO PLAINTIFF'S PROPOSED FORM OF JUDGMENT**

Defendant BASF Corporation (“BASF”) submits this opposition in support of its objections to Plaintiff’s proposed Form of Judgment (“proposed judgment”), specifically, to the portion that would hold BASF jointly liable for the jury’s \$250,000,000 punitive damages award against codefendant Monsanto Company (“Monsanto”).

The issue here is not whether any erroneous legal or evidentiary rulings entitle BASF to relief; the Court is aware of BASF’s position on those issues, and BASF will raise them in the normal course of its motions for JMOL and new trial as contemplated by the rules. The issue here is whether the *form* of the judgment that Plaintiff has proposed to the Court accurately reflects the Court’s rulings in this litigation and the jury’s verdict. It does not. Plaintiff’s proposed form of judgment is inconsistent with the Court’s instructions and the jury’s subsequent finding that Monsanto—and only Monsanto—was liable for punitive damages; with the Court’s dismissal of Plaintiff’s claim for joint liability for punitive damages, to which Plaintiff did not object; with BASF’s due process rights under the United States and Missouri Constitutions; and with Missouri statutory law.

**PROCEDURAL BACKGROUND**

Before trial, in response to BASF’s motion, the Court dismissed Plaintiff’s claim that the defendants should be jointly liable for any punitive damages award. Specifically, the Court held:

Defendants maintain that Missouri’s statute regarding joint and several liability explicitly states that a defendant “shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.” § 537.067.2 RSMo. **Plaintiffs have no**

**objection** to a separate jury determination for assessment of punitive damages. **The Court will thus grant the defendants' motion for dismissal of plaintiffs' claim for joint liability for any punitive damages award.** Plaintiffs' claim for several liability for punitive damages remains.

Dkt. 191 at 15-16 (emphasis added).

After all the parties had presented their cases and rested, the Court intimated in an off-the-record discussion of jury instructions that it understood that BASF may be liable under a joint venture theory for punitive damages, even if those punitive damages were assessed against Monsanto for Monsanto's conduct. However, the Court never made any written or oral ruling on the record that vacated the existing order dismissing the claim of joint liability, that issued any different ruling on BASF's motion to dismiss this claim, or that explained the rationale for or the scope of any such different ruling.

In ruling on the Defendants' motions for JMOL at the close of Plaintiff's case, the Court indicated that it did not think Plaintiff had established a jury question on its claim for punitive damages from 2017 onward (a period that covered all of the independent non-vicarious claims against BASF) and stated that it would take under advisement the Defendants' motions for JMOL as to Plaintiff's claims for punitive damages for 2017 onward. (Trial Day 11, Pgs. 1682-83, 1697). At the reported motion conference on the Defendants' renewed JMOLs, the Court formally ruled that it was "not going to allow Plaintiffs to submit on punitive damages for conduct that occurred from 2017 on." (Trial Day 14, Pg. 2313). Also at the reported charge conference, the Court rejected Plaintiff's proposed instruction K, which was Plaintiff's proposed punitive damages instruction against BASF. (Trial Day 14, Pg. 2366 and attached tendered jury instructions, Dkt. 544 at

12).

The Court and the parties also engaged in a lengthy additional discussion at the charge conference about the inclusion of the phrase “jointly with another defendant” in Instruction No. 9, an instruction that pertained only to Monsanto’s 2015-2016 conduct and was cross-referenced in the Monsanto punitive damages instruction and verdict question. Monsanto argued that the phrase incorrectly implied the jury could consider BASF’s conduct in assessing punitive damages against Monsanto. The parties ultimately agreed to remove that phrase from Instruction No. 9. (Trial Day 14, Pgs. 2401- 2416). As given, the relevant portions of Instruction No. 9 stated:

In Verdict Form A, on claims of Plaintiff Bader Farms, Inc. for Negligent Design & Negligent Failure to Warn, your verdict must be for Plaintiff and against **Defendant Monsanto Company** if you believe, for only the years 2015-2016:

First, such defendant designed, manufactured, or sold any one or more component of the dicamba-tolerant system in 2015-2016, and

Second, dicamba-based herbicides have a propensity to move off target, and

Third, *such defendant failed to use ordinary care* to either:

(i) design a reasonably safe dicamba-tolerant system, or

(ii) adequately warn of the risks of off-target movement, and

Fourth, such failure, in one or more respects submitted in paragraph Third, directly caused or directly contributed to cause damage to Plaintiff Bader Farms, Inc.

Dkt. 554, Final Instruction at 10 (Instruction No. 9) (emphases added).

The Court’s only instruction to the jury concerning punitive damages related solely to Monsanto, and incorporated Instruction 9, quoted above. That instruction read:



INSTRUCTION NO. 14

**(Punitive Damages)**

**(Plaintiff Bader Farms, Inc. v. Defendant Monsanto Company)**

If you find in favor of Plaintiff Bader Farms, Inc. under INSTRUCTION NO. 9 (Negligent Design & Failure To Warn: 2015-2016) and *if you believe the conduct of Defendant Monsanto Company as submitted in INSTRUCTION NO. 9, showed complete indifference to or conscious disregard for the safety of others*, then in Verdict Form A, *you may find that Defendant Monsanto Company is liable for punitive damages*.

You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others.

If you find that Defendant Monsanto Company is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial.

Dkt. 554, Final Instructions at 15 (Instruction No. 14, discussion of burden of proof omitted).

Consistent with the jury instructions' sole focus on Monsanto's liability for punitive damages, the only question the Court submitted to the jury on punitive damages was whether Monsanto was liable for such damages. The question did not mention BASF, either individually or as an alleged participant in a joint venture or conspiracy:

If you found in favor of Plaintiff Bader Farms, Inc. and against Defendant Monsanto Company on the claim of Negligent Design & Failure To Warn: 2015-2016, complete the following paragraph by writing in the word(s) required by your verdict.

We, the undersigned jurors, find that Defendant Monsanto Company **[is]** liable for punitive damages pursuant to INSTRUCTION 14.

Dkt. 550 at 2 (jurors' insertion bracketed and bold). The question asking the jury to determine the amount of the punitive damage award also focused entirely on assessing

punitive damages against Monsanto, with no mention of BASF or any joint venture or conspiracy:

VERDICT FORM C - PUNITIVE DAMAGES

Note: Complete this form as required by your verdict.

We, the jury, assess punitive damages against Defendant Monsanto Company at \$ [250,000,000.00] (stating the amount; or, if none, write the word “none”).

Dkt. 558 at 1 (jurors’ insertion bracketed and bold).

Finally, the jury provided the following answers to the Court’s questions concerning joint venture and conspiracy:

If you found in favor of Plaintiff Bader Farms, Inc. on any claim in Verdict Form A:

1. Were defendants acting in a joint venture? (circle one) [YES]
2. Were defendants acting in a conspiracy? (circle one) [YES]

Dkt. 551 at 1 (jurors’ insertions bracketed and bold). Plaintiff did not request that the Court instruct the jury to consider or disregard any particular conduct by Monsanto or BASF in answering this question, and the Court gave no such instruction.

After the jury returned its verdict, Plaintiff informally submitted a proposed form of judgment that would hold BASF jointly liable for the jury’s award of punitive damages against Monsanto, notwithstanding the Court’s dismissal of that claim. Plaintiff has proposed the following language:

Plaintiff shall have judgment against Defendant Monsanto Company and Defendant BASF Corporation, jointly and severally, for Actual Damages in the amount of \$15,000,000.00, and for Punitive Damages in the amount of \$250,000,000.00, plus post-judgment interest as allowed by 28 U.S.C. § 1961, and the costs of this action.

After BASF informed the Court that it objected to this form of judgment, the Court granted additional briefing on the issue. Dkt. 566. The Court recognized that, although it “stated during informal instructions conferences its belief that a joint venturer is responsible for punitive damages assessed against its fellow joint venturer ... no formal resolution of the matter was made on the record,” and that the Court had earlier “dismissed the plaintiff’s claim for joint liability of its punitive damages count in July 2019.” *Id.* at 2.

### ARGUMENT

BASF objects to entry of Plaintiff’s proposed judgment holding BASF jointly liable with Monsanto for the \$250,000,000.00 punitive damage award on four grounds.

- **First**, the proposed judgment is inconsistent with and unsupported by the jury’s verdict. The Court’s instructions on punitive damages and the jury’s resulting findings dealt with Monsanto’s conduct and liability alone. Without findings and instructions regarding BASF, the judgment cannot hold BASF jointly liable for the punitive damages award against Monsanto.
- **Second**, the Court previously dismissed—with Plaintiff’s agreement—Plaintiff’s claim for joint liability for punitive damages, and Plaintiff cannot re-raise that claim now. BASF would suffer substantial prejudice if the Court were to reverse its ruling now, after the close of evidence and the verdict.
- **Third**, the proposed judgment would violate BASF’s due process rights because it would (1) impose joint liability for punitive damages on BASF without a jury finding regarding BASF’s *individual* culpability, (2) impose joint liability for punitive damages on BASF without a jury finding that punitive damages against BASF were justified, and (3) resurrect Plaintiff’s claim for joint liability for punitive damages after the close of evidence, depriving BASF of its right to defend against that claim.
- **Fourth**, the proposed judgment is inconsistent with Missouri law, which provides that in multi-defendant tort cases, each “defendant shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.” Mo. Rev. Stat. § 537.067(2). The jury did not allocate fault for punitive damages between BASF and Monsanto.

Any one of these four grounds provides sufficient basis for the Court to reject Plaintiff's proposed judgment and instead enter judgment in the following form<sup>1</sup>:

Plaintiff shall have judgment:

- (1) Against Defendant Monsanto Company and Defendant BASF Corporation, jointly and severally, for Actual Damages in the amount of \$15,000,000.00,
- (2) Against Defendant Monsanto and Defendant BASF Corporation for post-judgment interest as allowed by 28 U.S.C. § 1961, and the costs of this action, and
- (3) Against Defendant Monsanto only for Punitive Damages in the amount of \$250,000,000.00.

**I. Plaintiff's Proposed Judgment Is Inconsistent with and Unsupported by the Jury's Verdict, Which Found Monsanto, Not BASF, Liable for Punitive Damages.**

The purpose of a judgment is to put into a final appealable form all the decisions in the case, including the substance of the jury's verdict. A court's judgment based on a verdict must therefore be consistent with the verdict itself. *See Wilson v. Eberle*, 15 Alaska 651, 654 (D. Alaska 1955) (explaining that "the appropriate judgment to be rendered" by the court "cannot go beyond the scope of facts embraced in the verdict of the jury, which is conclusive"). Here, Plaintiff asks the Court to enter a judgment imposing joint liability on BASF for a punitive damage award against Monsanto. Neither the Court's instructions nor the jury's verdict supports such a judgment.

**A. The Court's punitive damages instructions did not mention BASF.**

The proposed judgment's imposition of joint liability would be inconsistent with the

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<sup>1</sup> Apart from form, BASF reserves the right to challenge to challenge the *substance* of the jury's verdict and the Court's judgment in posttrial motions for new trial and judgment as a matter of law, as noted above.

Court's jury instructions. The Court should presume that the jury followed the Court's instructions in deciding interrogatories submitted to them. *See E. I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1271 n.44 (8th Cir. 1980). Here, the jury was directed to focus on Monsanto's conduct—and only Monsanto's conduct—in deciding whether to impose punitive damages.

None of the Court's instructions—including Instructions 9 and 14, which underpin the punitive damage award—directed the jury to consider BASF's conduct when determining punitive damages. Instruction No. 9, which defined the negligence claims against Monsanto, permitted the jury to find for Plaintiff and against *Monsanto* if the jury found that *Monsanto* “failed to use ordinary care.” Dkt. 554 at 10 (Instruction No. 9). This instruction told the jury to consider whether Monsanto was negligent based on its *own* conduct as an *individual* company; jurors were not instructed to consider any conduct Monsanto engaged in jointly with another entity such as BASF. Likewise, Instruction No. 14, the instruction governing the claim for punitive damages against Monsanto, cross-referenced to the conduct the jury relied on in Instruction No. 9, telling the jury that it could find *Monsanto* liable for punitive damages “if you believe the conduct of Defendant Monsanto Company as submitted in INSTRUCTION NO. 9, showed complete indifference to or conscious disregard for the safety of others.” Dkt. 554 at 15 (Instruction No. 14). Taken together, these instructions foreclose any conclusion that the jury could have based its punitive damage award against Monsanto on any conduct that Monsanto engaged in jointly with BASF.

The *Blanks* case itself shows why the jury's verdict does not support the imposition

on BASF of joint liability for the punitive damages awarded against Monsanto. *See Blanks v. Fluor Corp.*, 450 S.W.3d 308 (Mo. App. E.D. 2014). There, the trial court permitted the jury to find a particular defendant liable for punitive damages *either* as a partner in a partnership *or* based on its conduct as a “dominating principal,” but the Missouri Court of Appeals struck the “domination” ground because the trial court had misstated the law on that theory. 450 S.W.3d at 406. Because the “dominating principal” theory failed, the partner could only be held liable for punitive damages for its conduct as a partner. But the jury instructions required the jury “to consider undifferentiated conduct,” that is, conduct that related to the defendant’s domination and conduct that related only to its role as a partner. As a result, the Court of Appeals had no basis on which it could conclude that the jury would have found the partner liable for punitive damages based *only* on its conduct as a partner, and it reversed the punitive damage award on that ground:

Our reversal of the punitive-damage awards is necessary because of the failure of the verdict directors to distinguish between Fluor’s liability as a dominating principal and its liability as a partner. We have struck the domination claim as based on an incorrect statement of agency law. As a result, Fluor’s liability for punitive damages is predicated on Fluor’s conduct as a partner. But, ***given instructions requiring the jury to consider undifferentiated conduct, we cannot conclude that the jury would have found Fluor liable for punitive damages based only on Fluor’s conduct as a partner.*** Although we have found children’s partner theory and the issue of punitive damages submissible against Fluor, given the instructions submitted, this does not equate to a finding of liability for punitive damages. And we cannot determine from the record whether the jury would have found liability for punitive damages based solely on the partner theory. We therefore must reverse the punitive-damage awards and remand to the trial court for further proceedings.

*Id.* at 406-07 (emphasis added).

The argument against joint liability here is even more compelling. In *Blanks*, the

court's instruction permitted the jury to find the defendant liable for punitive damages based on either of two theories, one of which was later ruled invalid. Here, the Court's instruction permitted the jury to award punitive damages against Monsanto *solely* based on Monsanto's individual conduct; the jury was not even given the option of determining whether that individual conduct was in furtherance of a joint venture or conspiracy, and thus could be attributed vicariously to other members of the joint venture or conspiracy. Under the *Blanks* holding, then, the instructions and verdict here provide no basis as a matter of law for a judgment finding BASF jointly liable for punitive damages that the jury was instructed to base on Monsanto's individual conduct. And the verdict therefore provides no basis for imposition on BASF of joint liability for the punitive damages award against Monsanto.

**B. The jury's findings do not support imposition of joint liability.**

Plaintiff's attempt to impose joint liability on BASF for the punitive damage award against Monsanto is also inconsistent with what the jury actually found. The punitive damages question the jury answered asked *only* whether Monsanto was liable for punitive damages. Dkt. 550 at 22 ("We, the undersigned jurors, find that Defendant Monsanto Company [is] liable for punitive damages pursuant to INSTRUCTION 14.") (jurors' insertion bracketed). It did not mention either BASF individually or a joint venture or conspiracy involving BASF. Similarly, the question asking the jury to determine the amount of the punitive damage award mentioned only Monsanto. *See* Dkt. 558 ("We, the jury, assess punitive damages against Defendant Monsanto Company at \$ [250,000,000.00]") (jurors' insertion bracketed). It likewise did not mention either BASF

individually or a joint venture or conspiracy involving BASF. The jury thus was not asked to and did not in fact impose or assess punitive damages against BASF, and any judgment that does so would be inconsistent with the jury's verdict and should be rejected. *See, e.g., Khalaf v. Ford Motor Co.*, 2018 WL 7254708, at \*2 (E.D. Mich. July 23, 2018) (rejecting proposed judgment form submitted by plaintiff because, “[i]n the verdict form, the jury found that Plaintiff had established his entitlement to punitive damages only against Defendant Ford,” but “Plaintiff’s proposed judgment provides that the entirety of the jury’s award . . . is to be assessed against all three Defendants jointly and severally”).

Not only do the jury’s findings contain no explicit imposition of liability for punitive damages on BASF, the findings do not permit any *inference* that the jury imposed such liability on BASF. BASF could theoretically have been liable for punitive damages here under only one legal theory: if Plaintiff proved by clear and convincing evidence that BASF itself acted in “complete indifference to or conscious disregard for the safety of others.” *See, e.g., Gray v. Cottrell, Inc.*, 2007 WL 4210292, at \*1-2 (E.D. Mo. Nov. 27, 2007). But the jury did not make findings necessary to hold BASF liable under that legal theory because the jury was never asked to—and indeed, did not—find that BASF itself acted in complete indifference to or conscious disregard for the safety of others.

Plaintiff’s proposed judgment appears to assume that BASF could also have been held vicariously liable for punitive damages based on acts of Monsanto performed in the course of the business of a joint venture or conspiracy of which BASF was a member. As discussed above, such an assumption is incorrect. *See* Part I.A. (explaining that, unlike the jury in *Blanks*, 450 S.W.3d 308, the instructions and verdict here provide no basis for a



judgment finding BASF jointly liable for punitive damages because the jury was instructed to base that determination on Monsanto's individual conduct).

But even *assuming* for the sake of argument that such a theory of vicarious liability were viable, that theory cannot support entry of a judgment that imposes vicarious liability on BASF for punitive damages because the jury did not make the findings necessary to hold BASF liable under that theory. The jury was never asked to find, and did not find, that any Monsanto conduct showing indifference or disregard occurred in the course of the business of any joint venture or conspiracy that included BASF as a member. *See* 9B Wright & Miller, Federal Practice and Procedure: Civil § 2510 (explaining that the court's judgment must be "in conformity with the jury's findings").

To hold otherwise would improperly shift the burden of proof regarding punitive damages from Plaintiff to BASF. Plaintiff bears the burden of proving its claim of punitive damages by clear and convincing evidence. *See Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004). But Plaintiff failed to request a verdict form that would have allowed it to satisfy that burden as to BASF (perhaps because it had earlier told the Court it had no objection to separate punitive damages determinations). To be sure, the verdict form asked the jury: "Were defendants acting in a joint venture?" and "Were defendants acting in a conspiracy?" Dkt. 551. And the jury answered "Yes" to these questions. *Id.* But Plaintiff did not request that the Court instruct the jury to consider or exclude any particular conduct by Monsanto or BASF in answering this question. Plaintiff could have asked that the Court direct the jury to determine whether Monsanto's actions "in complete indifference to or conscious disregard for the safety of others" were

performed in the course of the joint venture or conspiracy. It made no such request. Or Plaintiff could have asked that the Court direct the jury to find whether any conduct performed in the course of the joint venture or conspiracy exhibited “complete indifference to or conscious disregard for the safety of others.” Again, it did not do so. Plaintiff thus failed to seek the findings that would have allowed it to carry its burden of proof with respect to its request for punitive damages from BASF, and the judgment the Court enters should not suggest that it in fact satisfied that burden.

**II. The Proposed Judgment Is Inconsistent with the Court’s Unopposed Dismissal of Plaintiff’s Claim for Joint Liability for Punitive Damages.**

Plaintiff’s proposed judgment is not only improper in light of the jury instructions and verdict, it is also procedurally improper. Plaintiff stated that it had no objection to the dismissal of its claim for joint liability for punitive damages, and this Court dismissed the claim, expressly noting Plaintiff’s lack of an objection. This dismissed claim cannot be revived, after trial and after the verdict, through the backdoor of a proposed judgment.

**A. Plaintiff’s earlier concessions waived any claim that BASF is jointly liable for the punitive damages award against Monsanto.**

At two different steps of this case, Plaintiff elected to forgo a claim for joint and several liability for punitive damages. First, Plaintiff informed the court that it “ha[d] no objection to a separate jury determination for assessment of punitive damages,” Dkt. 191 at 16, effectively stipulating to separate submissions and thus to several-only liability for punitive damages. *See* Dkt. 183 at 28 (“[T]o the extent Monsanto is asking that the jury separately determine the amount of punitive damages assessed between it and BASF, Plaintiffs have no objection.”); Black’s Law Dictionary (11th ed. 2019) (defining

stipulation as a “voluntary agreement between opposing parties concerning some relevant point”). Based on this *de facto* stipulation, “[t]he Court thus grant[ed] the defendants’ motion for dismissal of [the] claim for joint liability for any punitive damages award.” Dkt. 191 at 16. Then, when it came time to instruct the jury, Plaintiff agreed to a jury verdict form that did *not* provide for a “separate jury determination” of punitive damages; instead, the form provided only for a jury determination of *Monsanto’s* liability for punitive damages. *See* Dkt. 550 at 22 (“We, the undersigned jurors, find that Defendant Monsanto Company [is] liable for punitive damages pursuant to INSTRUCTION 14.”) (jurors’ insertion bracketed).

A waiver is the “intentional relinquishment of a known right.” *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012). Here, Plaintiff twice intentionally relinquished any claim that BASF was jointly liable for a punitive damage award against Monsanto, first in failing to object to the separate punitive submissions and the consequent dismissal of the claim for joint liability for punitive damages, and second in agreeing to a jury verdict form that spoke only to Monsanto’s liability for punitive damages.<sup>2</sup> Both of these positions are necessarily inconsistent with any judgment imposing joint liability on both defendants for the same punitive damage award. Having waived the argument that BASF and Monsanto

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<sup>2</sup> Indeed, Plaintiff is now estopped from taking a different position on joint liability, after expressly not objecting to the dismissal of a specific claim for joint liability, and inducing BASF to rely on that dismissal. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (alteration and internal quotation marks omitted).

could be jointly liable for punitive damages, and having failed to request a special verdict form asking the jury to assess punitive damages against BASF, Plaintiff cannot now revive its claim by proposing a judgment that would hold BASF and Monsanto jointly liable for punitive damages. *See United States v. Davis*, 826 F.3d 1078, 1082 (8th Cir. 2016) (“When a party expressly agrees to an instruction ... any objection to the instruction is waived.”); *Miller v. Albright*, 657 F.3d 733, 736 (8th Cir. 2011) (a party “waive[s] the right” to challenge “any error in the jury instructions and verdict form [when] he fail[s] to object to them”).

**B. Any retraction of the Court’s order dismissing Plaintiff’s claim for joint liability for punitive damages would severely prejudice BASF.**

In submitting a proposed judgment that would hold BASF jointly liable for the punitive damages award, Plaintiff fails to grapple either with the fact that the Court has already dismissed Plaintiff’s claim for joint-liability on punitive damages or with the severe prejudice that a reversal of that dismissal now, after trial and verdict, would cause to BASF.

The Court “grant[ed] the defendants’ motion for dismissal of plaintiff’s claim for joint liability for any punitive damages award.” Dkt. 191 at 16. That Order necessarily bars entry of a judgment finding BASF jointly liable for the punitive damages awarded against Monsanto. The Court has neither reversed nor modified its order dismissing Plaintiff’s claim for joint liability for any punitive-damage award, and Plaintiff has never filed a motion asking it to do so. *See Fed. R. Civ. P. 7(b)(1)* (“A request for a court order must be made by motion,” which must “state with particularity the grounds for seeking the order; and ... state the relief sought”).

At an off-the-record jury instruction conference, the Court raised the possibility that a joint venturer may be responsible for punitive damages assessed against its fellow joint venturer, citing *Blanks*. But that off-the-record statement, made after the close of evidence, did not reverse the dismissal of Plaintiff's joint-punitive-damage claim. The Court did not characterize that statement as a new order reversing its previous pronouncement on the issue; on the contrary, the Court commented in its February 20, 2020, Order that "no formal resolution of the matter was made on the record." Dkt. 566 at 2. The parties did not treat the statement as altering the legal relationship between them. And no reasoning for such a reversal appears in the record.

Indeed, this understanding of the record is the only one consistent with the well-understood principle that it is a court's *on-the-record* decisions that bind the parties and control the issues. It is not "sound practice for a judge to keep his reasoning entirely off the record." *United States v. Lawson*, 776 F.3d 519, 521 (7th Cir. 2015). Thus, "when judges hold conferences or discussions off the record, they must eventually record both what they concluded and why." *Id.* (citing *United States v. Nolan*, 910 F.2d 1553, 1559 (7th Cir. 1990)). Likewise, although a judge may elect to have an instruction conference in chambers without a court reporter, "[a]t the conclusion of the conference the judge must make formal rulings on the record and offer counsel an opportunity to make their objections known." *United States v. Murphy*, 768 F.2d 1518, 1535 (7th Cir. 1985); *see also McKnight By & Through Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1410 n.10 (8th Cir. 1994) (the court "strongly discourage[s]" off-the-record arguments). Given the lack of any on-the-record action by the Court to alter its dismissal order, BASF could only conclude, both

at the instructions conference and now, that the Court's off-the-record comment that BASF might be jointly liable for punitive damages imposed on Monsanto was just that, an off-the-record comment.

This understanding of the record is only fortified by the prejudice that BASF would suffer should the Court's off-the-record statement at the jury instruction conference be construed as an order that revived the dismissed claim for joint liability for punitive damages. Although the "district court enjoys wide discretion" in managing a trial, the court should avoid rulings that unfairly "prejudice" an objecting party. *Vasquez v. Colores*, 648 F.3d 648, 652 (8th Cir. 2011). The Court made the comment on which Plaintiff mistakenly relies at an off-the-record discussion of jury instructions that occurred *after* the close of evidence.

But BASF litigated trial of this case in reliance on the Court's dismissal of Plaintiff's joint-punitive-damage claim. BASF presented its evidence and cross-examined the witnesses with confidence that it did not need to defend against such a claim. For example, even assuming a joint venturer or conspirator could be held vicariously liable for punitive damages, such vicarious liability could arise *only* if the conduct on which the punitive-damage award is based occurred in the course of the business of the joint venture or conspiracy. *See Blanks*, 450 S.W.3d at 402. Had a claim for joint punitive-damages liability been a part of the case during trial, BASF could and would have presented evidence demonstrating that the Monsanto conduct at issue was performed *individually* by Monsanto

and *not* as part of any joint venture or conspiracy with BASF.<sup>3</sup> Such evidence would have exonerated BASF from vicarious liability for Monsanto's punitive damages.

Plaintiff's proposed form of judgment implicitly suggests that the Court revived Plaintiff's joint punitive-damages claim *after the trial was complete and the verdict was in*. In other words, Plaintiff maintains that the Court reintroduced a claim against BASF into the case, in an off-the-record conference, at a point in the trial at which BASF had no opportunity to defend against that claim, to its severe prejudice. The same prejudice would of course result if the Court were to change its decision now, in its entry of judgment, after the close of evidence and the jury's verdict. BASF believes Plaintiff is mistaken, and submits that the Court did not and would not have deprived BASF of any opportunity to present evidence on this significant issue, and that the Court would not have permitted the resulting severe prejudice to BASF in the form of a \$250,000,000 joint liability that, but for the supposed last-minute reversal, BASF would not have suffered.

**C. Any retraction of the Court's order dismissing Plaintiff's claim for joint liability for punitive damages would create retroactive error in the Court's related rulings.**

Any last-minute reversal of the Court's dismissal of the joint-punitive damages

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<sup>3</sup> Indeed, the Court's stated grounds for submitting *any* punitive damage claim to the jury make clear that in the Court's view, the only conduct that could have supported a punitive damages claim related to: (1) Monsanto's release of the dicamba-tolerant seed in 2015 and 2016 without an accompanying herbicide—which the Court acknowledged BASF had nothing to do with, and (2) Monsanto's cessation of academic testing prior to registration—which BASF indisputably did not do. (Trial Day 14, Pg. 2313). Given these facts and the jury instructions and verdict forms provided to the jury, the jury could *only* have awarded punitive damages against Monsanto, and against Monsanto alone, as the instructions and verdict form directed.

claim would also upend evidentiary and jury-charge rulings by the Court that are consistent *only* with the earlier dismissal. On the evidentiary side, in the phase of the trial that addressed the amount of punitive damages to be awarded, the Court allowed Plaintiff to submit evidence of Monsanto's net worth. Under Missouri law, however, such evidence is *inadmissible* where punitive damages are sought against partners *jointly*. See *Blue v. Rose*, 786 F.2d 349, 353 (8th Cir. 1986); *State ex rel. Hall v. Cook*, 400 S.W.2d 39, 42 (Mo. banc 1966).<sup>4</sup> Thus, any resurrection of Plaintiff's joint punitive-damages claim now would render that net-worth evidence retroactively inadmissible, and would create multiple problems and contradictions in the post-trial motions.

A similar problem would arise with respect to jury instructions. The Court instructed the jury that it could find a joint venture between BASF and Monsanto based on "the greater weight of the evidence." Dkt. 554 at 5, 17 (Instructions 4 and 16). Given the Court's ruling that punitive damages against BASF were not available based on BASF's *own* conduct, see Trial Day 14, Pgs. 2313, 2366; Dkt. 544 at 12, Plaintiff must base the joint-punitive damages language in its proposed judgment on BASF's supposed vicarious liability for punitive damages through a joint venture or conspiracy with Monsanto. But the burden of proof for punitive damages under Missouri law is clear and convincing evidence, not the greater weight of the evidence. *Werremeyer*, 134 S.W.3d at 635. Had the Court intended to permit the imposition of punitive damages against BASF based on Plaintiff's joint-venture theory, it would have had to require Plaintiff to prove a joint

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<sup>4</sup> Both of these decisions pre-dated the 2005 passage of Missouri Revised Statute section 537.067(2).



venture by clear and convincing evidence.<sup>5</sup> The Court’s use of the “greater weight” instruction instead is consistent *only* with its dismissal of any claim that BASF could be vicariously liable for punitive damages. Any reversal of that dismissal now would create retroactive error in the jury instructions.

### **III. The Court Should Reject Plaintiff’s Proposed Judgment Because Entry of the Proposed Judgment Would Violate BASF’s Due Process Rights.**

Plaintiff’s proposed judgment would also violate BASF’s due process rights under the United States and Missouri constitutions in at least three ways.

First, the proposed judgment would impose joint liability for punitive damages on BASF without a jury finding regarding BASF’s *individual* culpability. The proposed judgment therefore runs afoul of the due process requirement that punitive damages be based on a “meaningful *individualized* assessment of appropriate deterrence and retribution.” *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (emphasis added); *see also, e.g., Bell v. Clackamas Cty.*, 341 F.3d 858, 867 (9th Cir. 2003) (reversing and remanding trial court decision regarding punitive damages because, in considering “whether the jury’s award against each of those defendants comports with due process,” “the trial court should [have] evaluate[d] the degree of reprehensibility of each of the defendant’s misconduct individually, as opposed to *en grosse*”).

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<sup>5</sup> This argument concerning the requirement of clear and convincing evidence to support entitlement to punitive damages through a joint venture finding is separate and different from BASF’s argument elsewhere that clear and convincing evidence is necessary to prove the existence of a joint venture at all. *See* Dkt. 323, BASF’s Reconsideration Mot. at 3-4. BASF still urges the latter argument, but it does not go to the form of the judgment at issue here, and BASF will address it in its motions for new trial and JMOL.

Second, as discussed in the section I above, the proposed judgment would arbitrarily impose joint liability for punitive damages on BASF without any jury finding that punitive damages were justified under Missouri law by either (1) the conduct of BASF itself or (2) conduct by Monsanto in furtherance of any joint venture or conspiracy of which BASF was a member. Such arbitrary punishment is not constitutionally permitted. “The Due Process Clause prohibits the imposition of ... *arbitrary punishments* on a tortfeasor.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (emphasis added); *see also Lewellen v. Universal Underwriters Ins. Co.*, 574 S.W.3d 251, 275 & n.17 (Mo. Ct. App. 2019) (reversing punitive damage award where “the jury was allowed to award punitive damages without the information necessary to exercise that power in a constitutionally-permissible manner,” including wrongly excluded evidence and incorrect jury instructions).

Third, if the Court were to revive Plaintiff’s claim for joint liability for punitive damages now, after the close of evidence and verdict, the Court would unfairly and unconstitutionally deprive BASF of its right to defend against that claim. “[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *not only of the conduct that will subject him to punishment*, but also of the severity of the penalty that a State may impose.” *Campbell*, 538 U.S. at 417 (emphasis added). Here, BASF had no notice either of the conduct by Monsanto that would subject BASF to punitive damages or of the possibility that BASF would be subjected to punitive damages at all. As discussed in section II above, BASF did not know it needed to distinguish Monsanto’s conduct in furtherance of any joint venture or conspiracy from

Monsanto's individual conduct until *after* evidence was closed and the trial was effectively over.

BASF had no notice it would have to defend against a claim of joint liability for punitive damages until it was too late to present any defense. Imposing joint liability for punitive damages on BASF at this point in the litigation would deny BASF the notice that due process requires.

#### **IV. Missouri Revised Statute Section 537.067(2) Prohibits Plaintiff's Proposed Judgment.**

Missouri Revised Statute § 537.067(2) also bars any entry of judgment imposing joint liability on BASF for the punitive damages award against Monsanto. The statute provides that in tort cases involving multiple defendants, “[t]he defendant shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.” Mo. Rev. Stat. § 537.067(2). Here, the jury made no such allocation of fault. Indeed, because the jury found for Plaintiff on joint venture and conspiracy claims, the jury was instructed *not* to allocate fault. Dkt. 551 at 1. Thus, even assuming *arguendo* that the jury's findings supported a punitive damage award against BASF—which they do *not*, as detailed in section I.B—the lack of any allocation of fault nevertheless bars the Court from imposing punitive damages on BASF at all, much less imposing joint liability for the punitive damages awarded against Monsanto.

The *Blanks* case does not suggest otherwise. *Blanks* did not address the limitation on an award of punitive damages imposed by Missouri Revised Statute § 537.067(2), citing instead the Eighth Circuit's decision *Blue v. Rose*, 786 F.2d 349, 352–53 (8th Cir. 1986),

which pre-dated the 2005 passage of the punitive-damages limitation in § 537.067(2). 450 S.W.3d at 401. The *Blanks* court also cited Mo. Rev. Stat. § 358.130, a section of the Uniform Partnership Act, for the proposition that a partnership is liable for any penalty that may be incurred. *Id.* at 365-68. Whatever that statute’s applicability in *Blanks*, which involved a formally incorporated partnership, it is not controlling with respect to the implied joint venture and civil conspiracy at issue here. In any event, Mo. Rev. Stat. § 537.067(2) is not necessarily inconsistent with *Blanks*. In *Blanks*, the jury assessed *separate* punitive damages award against each defendant-partner; it did not assess a single punitive damages award against one partner and hold the other partners jointly liable for the award, the issue raised here by Plaintiff’s belated attempt to revive its joint punitive-damages claim through the form of judgment. *Id.* at 363.

Section 537.067(2), not § 358.130, is controlling here. If Missouri’s legislature had intended to exempt putative joint venturers or co-conspirators from the ambit of § 537.067(2), it could have done so. *See Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 404 (Mo. banc 1986) (“The legislature is presumed to have intended what the law states directly”). The legislature’s use of the word “only” in the phrase “shall *only* be severally liable” in § 537.067(2) shows that the legislature intended to limit liability for punitive damages to each defendant’s pro rata share of fault as determined by the jury. *See State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002) (by adding the word “only” to the phrase “shall be commenced,” “the legislature has evinced its intent ... [to] limit[] permissible venues ... only to one of the three locations designated in the statute” and this language was “unambiguous”). To hold otherwise would render

the limiting language in § 537.067(2) meaningless. *See id.* at 144 (construction that renders a term “mere surplusage, included for no reason ... is not favored”) (internal quotation and citation omitted); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998) (“Traditional rules of statutory construction require every word of a legislative enactment be given meaning”). The Court cannot hold BASF Corporation jointly liable for punitive damages awarded only against Monsanto.

### CONCLUSION

For these reasons, the Court should reject Plaintiff’s proposed form of judgment and instead enter judgment as BASF has proposed.

### FAEGRE DRINKER BIDDLE & REATH LLP

Dated: February 25, 2020

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**CERTIFICATE OF SERVICE**

I certify that on February 25, 2020, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the all counsel of record registered to receive electronic Notices of Electronic Filing generated by CM/ECF.

/s/ John P. Mandler\_\_\_\_\_