

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

BADER FARMS, INC.,)	
)	
Plaintiff,)	MDL No. 1:18-md-02820-SNLJ
)	
v.)	Indiv. Case No. 1:16-cv-00299-SNLJ
)	
MONSANTO COMPANY and)	
BASF CORPORATION,)	
)	
Defendants.		

**MONSANTO COMPANY’S BRIEF REGARDING
ENTRY OF JUDGMENT ON THE PUNITIVE DAMAGES AWARD¹**

At the request of Defendant BASF Corporation (“BASF”), the Court has permitted briefing on a narrow issue related to the form of judgment to be entered on the jury’s verdict. *See* 2/20/20 Order (ECF #566). The specific question at issue is whether the judgment entered on the jury’s verdict should reflect that BASF and Monsanto Company (“Monsanto”) are jointly liable for the amount of punitive damages awarded by the jury. *Id.* at 1-2.² Reserving its right to submit post-trial motions addressing any and all issues related to the jury’s verdict and any judgment the Court enters thereon, on this narrow issue Monsanto respectfully submits that: (1) the Court cannot enter a judgment on the

¹ This brief meets the Court’s 15-page limit when formatted in 12-point font for text and 10-point font for footnotes. It is formatted in 13-point font at the Court’s request.

² At the same time, the court also instructed the parties not to “relitigate the jury’s joint venture finding or other peripheral matters, as those issues are more appropriate for a motion for New Trial.” *See* 2/20/20 Order (ECF #566) at 2. Monsanto maintains that the Court’s submission of the joint venture and punitive damages claims was erroneous in many respects not addressed in this brief and expressly reserves the right to raise any and all arguments relating to these and other issues in its post-trial motions following entry of judgment.

jury's verdict that imposes sole liability for the punitive-damages award on Monsanto, because that is not the basis on which the issues were submitted to the jury and it is not the verdict the jury rendered; and (2) if the Court determines that the jury's joint-venture and conspiracy findings do not make Defendants jointly liable for the punitive-damages award, the only remedy is a new trial on all issues.

During the charge conference, this Court ruled that a joint-venture finding would make both Defendants jointly liable for any punitive-damage award. Plaintiff's punitive-damages case was argued and submitted to the jury on that basis. *See* 2/20/20 Order (ECF #566) at 2. For example, Plaintiff's counsel was permitted to, and did, argue that punitive damages were warranted based on the conduct of *both* Defendants, and counsel expressly asked the jury to enter a verdict punishing *both* Defendants. BASF's counsel, in fact, expressly advised the jury that, if it found a joint venture, *both* Defendants would be jointly liable for any punitive damages awarded. There can be no legitimate dispute that the jury's verdict was one for joint liability for punitive damages. Accordingly, the Court cannot enter a judgment holding Monsanto solely liable for the punitive-damages award.

I. FACTUAL BACKGROUND

A. Plaintiff's Request for Joint Liability for Punitive Damages Was Initially Dismissed, but Later Reinstated and Submitted to the Jury.

On April 19, 2019, Monsanto filed a motion to dismiss Plaintiff's claim that Defendants could be held jointly liable for any punitive-damages award, arguing that liability for punitive damages is several only and not joint. *See* Monsanto's Mem. in

Support of its Mot. to Dismiss, in Part, the Third Am. Compl. (ECF #175) at 14-15. The Court granted Monsanto's motion and dismissed the claim for joint liability for punitive damages. *See* 7/10/19 Order (ECF #191) at 16 ("The Court will thus grant the defendants' motion for dismissal of plaintiffs' claim for joint liability for any punitive damages award.").

As the Court acknowledges, it reversed that ruling, after the close of all the evidence, during an off-the-record charge conference. *See* 2/20/20 Order (ECF #566) at 2. During that charge conference, as this Court's 2/20/20 Order explains, the Court ruled that "a joint venturer is responsible for punitive damages assessed against its fellow joint venturer, citing *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 401-02 (Mo. App. E.D. 2014)." *Id.* Based on that determination, the Court ruled that, if the jury found a joint venture or conspiracy, Defendants would be jointly liable for any punitive damages award. *Id.*

The structure of the verdict form was based on the Court's ruling that the jury's finding of joint venture or conspiracy would make the Defendants jointly liable for any compensatory and punitive damage awards. Indeed, the verdict form expressly instructed the jury not to apportion fault between Defendants if it found a joint venture or conspiracy. *See* Verdict Form C (ECF #558) (requiring apportionment only if the jury found no joint venture or conspiracy). The Court also told Plaintiff's counsel that, in light of the joint venture claim, it was unnecessary to specifically reference BASF in the 2015-2016 verdict director or to add a separate 2015-2016 interrogatory for BASF, in order for the jury to hold BASF liable for punitive damages. *See generally* 2/13/20 Trial Tr. 2412:09-2416:25; *see also id.* 2412:13-14 ("THE COURT: Wait a minute. Why

does [instruction] 16 not satisfy every concern you have? That's the joint venture instruction."), 2412:19-22 ("THE COURT: So why didn't 16 take care of the whole problem that you have? Why do you need the other reference to [BASF] so long as you've got a joint venture that keeps in [BASF] regardless?"), 2416:11-12 ("THE COURT: Why do you have to have that in there? Why didn't 16 take care of all your problems?"), 2416:22 ("THE COURT: Why doesn't 16 take care of the problem?").

At the Court's urging, Plaintiff's counsel and BASF's counsel ultimately agreed at the final charge conference that BASF's liability for punitive damages (based on its 2015-2016 conduct) would be submitted and argued under the joint-venture claim. *See id.* 2410:11-15 (Court stating that BASF's 2015-2016 conduct was relevant to both joint venture and punitive damages), 2416:13-25 (Plaintiff's counsel agreeing to Court's suggestion that they simply submit and argue BASF's 2015-2016 conduct under the joint venture instruction, instead of adding a separate jury interrogatory related to it), 2416:17-19 (counsel for BASF noting that references to Monsanto's conduct in Instruction 9, the verdict director for 2015-2016 liability, "would encompass necessarily conduct that Monsanto did with BASF").

B. Plaintiff's Counsel Argued BASF's 2015-2016 Conduct as a Basis for Punitive Damages and Asked the Jury to Punish Both Defendants.

In light of the Court's ruling that a joint-venture finding would make Defendants jointly liable for punitive damages, and the structuring of the verdict form based on that ruling, Plaintiff's counsel was permitted to argue to the jury that the conduct of both Defendants in 2015-2016 warranted punitive damages, and that punitive damages should

be imposed to punish both Defendants. Specifically addressing BASF's conduct during the 2015-2016 timeframe, Plaintiff's counsel argued during closing:

BASF, as Monsanto was putting out the '16 soybeans, said I have a major concern of non-labeled dicamba formulations being used by growers on Xtend soybeans in 2016. What was their response? To warn the public? To try to dissuade their joint venture partner? No. "I feel we need to get behind Xtend soybeans and promote the opportunity to look at yield potential in 2016, and then use that momentum to sell Engenia for '17. What's it matter if innocent farmers are going to be hurt? There is money to be made and we are going to make it."

And they did make it. BASF made money selling Clarity before it was legal to spray dicamba. ... The Clarity sales went up to \$100 million as opposed to \$60 million before.

And it says down at the bottom, it says use has increased especially in 2016. Dicamba demand spike with the DT trait. They knew what they were making money doing. Farmers spraying off-label and damaging innocent farmers, but it was part of the plan [the] whole time.

... This is a BASF document describing what happened -- was happening in the bootheel. ... "There must be a huge cloud of dicamba blanketing the Missouri bootheel. That ticking time bomb has finally exploded. The scope of the damage is on a massive scale"

... They put the time bomb in the bootheel and lots of other places. ... He says the scope of the damage is massive. Yet these companies sat around going, well, you know, we don't know if the claims are valid or not. Because they chose not to investigate them in '15 and '16, and only did when they were made to.

...
BASF brought some company -- brought one company witness live and some videos, mostly to separate themselves from Monsanto. And I don't blame them for trying, because Monsanto's conduct is inexcusable, but so is theirs. They were a full participant, trotting along right behind, gathering all the cash they could, at the expense of people like Bill Bader.

02/14/20 Trial Tr. 2478:20-2479:14, 2480:12-2482:02.

Plaintiff's counsel specifically argued to the jury that the conduct of *both* Defendants warranted punitive damages:

I want to mention -- talk about punitive damages a minute. All the evidence I've told you so far warrants punitive damages; that *these defendants* acted with complete disregard for public safety. And *they* need to have a message. It was foreseeable. *They* manipulated their testing. *They* failed to investigate. *They* showed total indifference. And *they* knew the number of claims that were coming and *they* shoved this out the door on the way to make a profit.

You are going to be asked to talk about joint venture and conspiracy. The joint venture is absolutely established in this case.

Id. 2476:18-2477:03 (emphases added). Plaintiff's counsel also expressly and specifically urged the jury to impose punitive damages to punish *both* Defendants:

Now, punitives. You will notice on the verdict form it says there's going to be a process if you say yes to punitives. And you certainly should. *These defendants need to be punished*. If you let *them* off without punishment, you are patting *them* on the head and sending *them* home and saying keep doing what you're doing. And I don't think any of you believe that.

Id. 2549:03-09 (emphases added).

C. Counsel for BASF Expressly Told the Jury that, if It Found a Joint Venture, BASF Would Be Jointly Liable for Any Punitive-Damage Award.

BASF was well aware, as a result of the Court's ruling during the charge conference and the structure of the verdict form, that it would be held jointly liable for any punitive-damage award if the jury found a joint venture. In fact, counsel for BASF expressly told the jury that BASF would be jointly liable for any punitive-damage award if the jury found that the Defendants were engaged in a joint venture. During closing argument, BASF's counsel explained:

I will spend the last bit of time I have talking about joint venture and conspiracy. The only reason these are on here is for BASF to be held liable for things that happened in '15 and '16. When you are asked about '15 and '16 both from the punitive side and on the liability side, you will only see Monsanto's name there.

Now, again, I don't think you get there because I don't think there's causation, but for '15 and '16 you won't see BASF's name because we didn't have a product there. ***So for both punitives and liability, what the plaintiffs want you to do is find a conspiracy and joint venture because that means BASF shares Monsanto's losses.***

So I'm asking you, if you think it's unfair for BASF to share the losses for '15 and '16 when they had zero control over the seed, to say no to these two. And that's all you need to do.

02/14/20 Trial Tr. 2527:09-24 (emphases added).

After the jury returned its verdict finding Defendants were engaged in a joint venture and a conspiracy, counsel for BASF immediately took steps consistent with their understanding that the jury's verdict meant BASF was jointly liable for any punitive-damage award. Indeed, counsel for BASF lodged objections to Plaintiff's proposed instructions for the Phase II proceeding in which the amount of punitive damages would be assessed, and joined Monsanto's submission of proposed instructions for the Phase II proceeding. *See id.* 2584:01-18, 2595:16-2596:03. There can be no legitimate dispute by BASF that the verdict rendered by the jury was a verdict to impose joint liability for punitive damages on both Defendants.

II. ARGUMENT

Monsanto contends that the jury's punitive-damage award and findings of joint venture and conspiracy cannot stand for many reasons, and that no judgment awarding punitive damages against Monsanto may properly be entered. However, at the Court's

direction and in accordance with the Federal Rules of Civil Procedure, Monsanto reserves those arguments for briefing in its post-trial motions to be filed after the entry of judgment on the jury's verdict. Monsanto submits the instant briefing solely in response to the Court's request. On the narrow issue presented, Monsanto respectfully submits that the Court cannot enter a judgment imposing sole liability for the punitive-damage award against Monsanto. Rather, if the Court *now* determines that entry of a judgment imposing joint liability for punitive damages is improper, it would be required to order a new trial on all issues.

A. The Court Cannot Enter Judgment Imposing Punitive Damages Solely Against Monsanto, Because that Is Not the Verdict the Jury Rendered on the Case Submitted to It.

It is fundamental that, other than granting appropriate post-judgment relief, any judgment entered on a jury's verdict must conform to and follow that verdict. *See Bennett v. Butterworth*, 52 U.S. 669, 675 (1850) (“Now if anything is settled in proceedings at law where a jury is impanelled to try the facts, it is, that the verdict must find the matter in issue between the parties, and ***the judgment of the court must conform to and follow the verdict.***”) (emphasis added); *Mut. Benefit Health & Accident Ass'n v. Thomas*, 123 F.2d 353, 356 (8th Cir. 1941) (except for remittitur, motion under Rule 50, or the granting of a new trial, “[i]n actions at law, where issues of fact are submitted to the jury as they were in this case, the judgment must conform to and follow the verdict”); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989) (noting that Federal Rule of Civil Procedure 58 and the Seventh Amendment require that “judgment be entered on the

verdict if the jury's answers are clear and consistent, subject, of course, to the usual motions under rules 50 and 59 for judgment notwithstanding the verdict or a new trial").

As shown above, here the jury was asked to determine only whether the conduct of both Defendants warranted punitive damages and, if so, to set an amount of punitive damages for which the Defendants would both be liable. Plaintiff did not present a case for Monsanto's sole liability for punitive damages, and the jury did not resolve the questions that case would have entailed. Instead, Plaintiff's counsel asked the jury to punish both Defendants with a single award of punitive damages for which both Defendants would be held jointly liable. There is no verdict finding (1) liability for punitive damages based solely on Monsanto's conduct, or (2) the amount of punitive damage for which Monsanto alone should be liable. The Court cannot post-verdict substitute a finding of sole liability for the jury's joint-liability findings. *See Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 641-43 (7th Cir. 2011) (reversing judgment that did not reflect joint liability after "[t]he judge advised the jury that ... the officer and the Town would be jointly liable for a single damages award on each claim"); *see also Tex. Comp. Ins. Co. v. Heard*, 93 F.2d 548, 549 (5th Cir. 1937) ("The action of the court was to substitute a finding which the jury could have made, but did not, for a finding which it had made and which was inconsistent with that substituted by the court. The failure to follow the verdict requires a reversal of the judgment."). The jury decided, and could *only* have decided, the case that was actually submitted to it: a case asserting two defendants' joint liability for punitive damages based on claims of joint venture and conspiracy. Thus, the Court cannot enter a judgment on the verdict holding Monsanto

solely liable for the punitive-damages award because that is not the verdict the jury rendered.

The Court determined that a finding of joint venture or conspiracy would make Defendants jointly liable for any punitive-damage award. The jury was instructed under that theory, the case was argued under that theory, and the jury made its findings under that theory. The Court is not at liberty to enter a judgment on the verdict holding Monsanto solely liable for the full amount of the punitive-damage award. The question of Monsanto's sole liability for punitive damages was not tried by the parties, submitted by the Court, or decided by the jury.

B. If the Court Determines that Defendants Are Not Jointly Liable for Punitive Damages, a New Trial on All Issues Is Required.

If the Court reverts to its initial ruling and determines that it cannot enter judgment against both Defendants jointly for punitive damages based on the jury's joint venture finding, it must set aside the jury's verdict and order a new trial on all issues. Where a verdict of joint liability cannot be sustained as to one of the defendants, it cannot be sustained as to any defendant if a different verdict might have resulted without consideration of all defendants. *See, e.g., Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 555-56 (1899). As the Supreme Court explained in granting a new trial after reversing a joint liability finding:

We are also of the opinion that ... the judgment should be wholly reversed, and no judgment entered upon the verdict as to [Defendant Leetch], because the original verdict was against the three defendants, and it was given under such circumstances that we might well fear the amount was enlarged by the evidence as to the wealth of the corporation, and it is possible, if not probable, that, if a verdict had been rendered against the

individual defendant alone, it would have been for a materially less amount. At any rate, the jury has never been called upon to render a verdict against a sole defendant; and while it may be said that, whether against one or against all the defendants, the plaintiff suffers the same damage, and should be entitled to a verdict for the same sum, still the question arises whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to permit this verdict to stand against Leetch alone while we set it aside as against the other defendants.

Id. The same analysis applies here. A different verdict might have resulted if the conduct of BASF had not been considered, or if the jury had not been told that BASF would be jointly liable for the amount of any punitive damages award. Under those different circumstances, the jury might have found punitive damages not warranted at all, or might have awarded a lesser amount of punitive damages. Thus, a determination that Defendants are not jointly liable for the punitive-damage award will require a new trial.

Citing *Washington Gas-Light*, the Eighth Circuit recently ordered a new trial on the issue of punitive damages where it found the plaintiff had failed to prove a basis for holding one of the defendants, Schaeffler Group USA, liable for the punitive damages award as a successor corporation, but the jury had considered that defendant's conduct in awarding punitive damages:

The jury awarded Kirk \$13,000,000 in punitive damages against both Schaeffler Group USA and FAG Bearings, LLC. The jury returned a general verdict, which failed to distinguish how much Schaeffler Group USA owes from how much FAG Bearings, LLC owes. ***Since Kirk invited the jury to base the award in part on Schaeffler Group USA's conduct (e.g., that Schaeffler Group USA's 2010 environmental statement "misleading[ly]" told the public that FAG Bearings' release of TCE was "accidental"), the general award cannot be upheld against FAG Bearings***

only. In addition, because Kirk’s counsel in closing argument emphasized defendants’ *joint* ability to pay an adequate punitive damages award and referred the jury to testimony that Schaeffler Group USA “ha[s] enough resources to handle this,” granting FAG Bearings, LLC a new trial on the issue of punitive damages is consistent with the Supreme Court’s decision in *Washington Gas-Light Co. v. Landsen*, 172 U.S. 534, 556 (1899):

Where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, then we think the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment in toto and grant a new trial in regard to [the remaining] defendants.

Kirk v. Schaeffler Grp. USA, Inc., 887 F.3d 376, 389-90 (8th Cir. 2018) (first emphasis added) (citations omitted).³

³ While the *Kirk* court remanded for retrial of punitive damages issues only, that approach is impermissible here. Punitive damages must be based on the conduct that harmed the Plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003). Here, it is impossible to determine what 2015-2016 conduct the jury found caused injury to Bader Farms, Inc. and warranted punitive damages -- whether it was conduct of Monsanto or BASF or both, and whether it was a failure to warn, a deficiency in product design, dumping Clarity in the market, or some other conduct. Thus, a second jury would not know what conduct to consider as the basis of any punitive damage award and could only award punitive damages after improperly reexamining the issue of what conduct caused Bader Farms, Inc.’s injury. *See Hardman v. AutoZone, Inc.*, 214 F. App’x 758, 765-66 (10th Cir. 2007) (affirming new trial on all issues “because alternative theories of liability were submitted to the first jury and a second jury tasked only with having to determine a new punitive damage award would unfairly be required to ‘speculate as to what AutoZone conduct formed the basis of the first jury’s verdict of liability and award of nominal damages.’”); *Blyden v. Mancusi*, 186 F.3d 252, 268-69 (2d Cir. 1999) (bifurcation of punitive damages for trial by second jury violated reexamination clause because it was unclear what acts the liability jury found constituted misconduct and harmed the plaintiffs). Even if it were possible to determine what conduct the jury found caused Bader Farms, Inc.’s harm and warranted punitive damages, a second jury still would have to reexamine the nature of that same conduct to decide the punitive damages issues. *See Simo v. Mitsubishi Motors N. Am., Inc.*, 245 F. App’x 295, 302 (4th Cir. 2007) (retrial limited to punitive damages would be improper because evidence supporting punitive damages was the same as evidence supporting underlying

Here, entering judgment against Monsanto for the full amount of the punitive-damages award -- after the jury was permitted to consider BASF's conduct and its joint liability for the amount when determining the punitive-damages award -- would work a clear injustice to Monsanto. Thus, if the Court determines that BASF is not jointly liable for the punitive damage award, it must order a new trial. *Id.*; *see also Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 458 (10th Cir. 1989) (“We may reverse a joint judgment as to one defendant and sustain it against another unless it involves a cause of action ‘of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him while reversed for error as to the other defendants. ...’”); *id.* (“Here, where the jury failed to apportion damages based on separate acts, the injustice of allowing the verdict to stand against a single defendant appears even more striking.”) (granting new trial); *Emmke v. De Silva*, 293 F. 17, 22 (8th Cir. 1923) (where verdict awarding punitive damages against defendants jointly could not be sustained as to one defendant, punitive-damage award had to be vacated as to both defendants). Any other result would be fundamentally unfair and violate Monsanto's federal due process rights. *See Lassiter v. Dep't of Social Servs. of Durham Cty., N.C.*, 452 U.S. 18, 24 (1981) (due process “expresses the requirement of ‘fundamental fairness’”).

liability). Because the liability and punitive damages issues are necessarily inextricably intertwined, a new trial limited to punitive damages would violate Monsanto's rights under the re-examination clause of the U.S. Constitution. U.S. Const. amend. VII; *see also infra* at pp. 12-13 (collecting cases). Retrial on fewer than all the issues also could not be had without confusion and uncertainty regarding the nature of the liability findings, which would amount to a denial of a fair trial, in violation of Monsanto's federal due process rights. *Id.*

Here, a ruling that Defendants cannot be held jointly liable for the punitive-damages award would require a new trial on all issues, not just punitive damages. *See Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (a partial new trial “may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice”). Damages issues cannot be separately retried where they are interwoven with the issue of liability. *Id.* Due process requires that punitive damages be based on “the conduct that harmed the plaintiff.” *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003). Thus, punitive damages issues are inextricably intertwined with an examination of the conduct found to have injured the plaintiff. Here, it is unclear what conduct the jury found caused Bader Farms, Inc.’s harm in 2015-2016 and warranted punitive damages. Thus, retrial of punitive damages alone would be improper.

Indeed, many courts have held that punitive damages cannot be severed from trial of liability issues. *See, e.g., W. Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 293 (8th Cir. 1990) (finding that district court’s flawed punitive damages jury instruction required reversal, and concluding that “the question of punitive damages is not sufficiently distinct from the [liability questions] to permit a new trial on the issue of punitive damages alone”); *Slater v. KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980) (“In addition, any award of punitive damages must turn on an assessment of [the defendant’s] conduct. Thus, we conclude that the issues of damages and liability in this case are so interwoven as to require a new trial on both.”); *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 411 (8th Cir. 1976) (“Inasmuch as the issues of liability, actual damages and

punitive damages are intertwined, the new trial should encompass all issues.”). As the Fourth Circuit has explained:

It has been suggested that since no error has been found in the amount of compensatory damages the judgments as to them should be affirmed and that the trials on remand should be limited to the question of punitive damages only

[W]e are unable to say that the new trial can be restricted to the single issue without injustice to the defendant, since the evidence relating to wilful misconduct is so inextricably tied up with that relating to primary negligence that a fair trial upon either issue requires a trial of both issues together.

Atlantic Coast Line R.R. Co. v. Bennett, 251 F.2d 934, 938-39 (4th Cir. 1958); *see also Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1178 (10th Cir. 1981) (“If the plaintiff declines to accept a reduced [punitive damage] judgment, there should be a new trial on all issues since we feel that a new trial on less than all the issues could not be had without confusion and uncertainty, which would amount to a denial of a fair trial.”); *Spence v. Bd. of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1202 (3d Cir. 1986) (“In order to prove that the defendants’ conduct warranted punitive damages, plaintiff would have to present to the jury all the facts leading up to defendants’ decision to transfer her.”); *Smyth Sales v. Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944) (“[T]he determination of the amount of punitive damages, if any, to be awarded under the Connecticut law cannot appropriately take place except in connection with the consideration of the defendant’s liability and of all the circumstances which it is asserted give rise to that liability. It would, therefore, be inappropriate for us under these circumstances to direct what under other circumstances we might well be inclined to

order, namely, a new trial of the issue of damages only.”) (applying Connecticut law, which required finding that conduct for which liability was imposed be found malicious or wanton in order to award punitive damages); *Panjwani v. Star Serv. & Petroleum Co.*, 395 S.W.2d 129, 133 (Mo. 1965) (“[U]pon this particular record the issues of tortious misconduct and consequent liability in the first instance and punitive damages are not entirely separate and distinct but are so interwoven that it was an abuse of discretion to not award a new trial on all issues.”). Because an award of punitive damages requires a determination regarding the nature of the conduct found to have caused Plaintiff Bader Farm Inc.’s alleged harm, the issues of liability and punitive damages cannot be severed and tried separately.

III. CONCLUSION

There can be no doubt that the jury intended for its punitive-damages verdict to be imposed against both Defendants. Counsel expressly so advised the jury, based on the Court’s ruling that a finding of joint venture or conspiracy would result in joint liability against both Defendants for compensatory and punitive damages. If the Court now determines that it incorrectly submitted the case to the jury based on its ruling that a joint venture or conspiracy finding would make both Defendants jointly liable for punitive damages, the remedy is to order a new trial on all issues.

Dated: February 25, 2020

Respectfully Submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ A. Elizabeth Blackwell

A. Elizabeth Blackwell, # 50270MO
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Tel : (314) 259-2000
Fax : (314) 259-2020
Liz.Blackwell@bclplaw.com

THOMPSON COBURN
Christopher M. Hohn, #44124MO
Jan Paul Miller, #58112MO
Daniel C. Cox, #38902MO
Jeffrey A. Masson, #60244MO
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
chohn@thompsoncoburn.com
jmiller@thompsoncoburn.com
dcox@thompsoncoburn.com
jmasson@thompsoncoburn.com

WINSTON & STRAWN, LLP
John J. Rosenthal
1700 K Street, NW
Washington, DC 20006
202-282-5000
Fax: 202-282-5100
Email: jrosenthal@winston.com

Attorneys for Defendant Monsanto Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of February, 2020, the foregoing was filed electronically via the ECF/CM system with the Clerk of Court which will serve Notice of Electronic Filing upon all counsel of record via electronic mail.

/s/ A. Elizabeth Blackwell