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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,
Plaintiffs,

vs.

Cause No. 1:16CV299 SNLJ

MONSANTO CO., AND BASF CORPORATION,
Defendants.

=====

TRIAL DAY 12
VOLUME 12A - Pages 1961 - 2089

BEFORE THE HONORABLE STEPHEN N. LIMBAUGH, JR.
UNITED STATES DISTRICT JUDGE

FEBRUARY 11, 2020

=====

Reported by:

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Official Court Reporter
United States District Court
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Page

FEBRUARY 11, 2020

Trial Continued:

Defendant Monsanto Rests 1973

DEFENDANT BASF'S EVIDENCE:

ALYSON EMANUEL:
DIRECT EXAMINATION BY MR. MANDLER 1973
CROSS-EXAMINATION BY MS. GEORGE 2003

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EXHIBIT INDEX				
Plaintiff's				
Exhibit	Description	Id	Rec'd	
1008	Updated Tough Questions Engenia	2074	2075	
1009	Engenia Herbicide Strategic Update	2071	2071	
1013	Dicamba Tolerant Crop System Regulatory Audiences	2040	2045	
1017	Alliance Management Team Meeting December 1, 2017	2081	2082	
1220	E-mail	2067	2067	
1366	E-mail BASF Employees	2060	2061	
1371	Innovation Specialist Report	2077	2079	
1378	Original AMT Members	2021	2021	
Deft's				
Exhibit	Description	Id	Rec'd	
B-672	Dicamba Tolerant System Agreement	1982	1983	
B-673	Amended and Restated Dicamba Tolerant System Agreement	1982	1983	
B-677	Dicamba Agreement	1982	1983	
B-1029	2014 - 2017 Clarity Sales	1999	2000	
B-1030	2014 - 2017 Private Label Clarity Sales	1999	2000	
B-1044	E-mail BASF Employees	1983	1984	
B-1045	Demonstrative Timeline on Construction at Beaumont Plant	1996		
B-1046	Demonstrative Clarity Sales Chart	2000		

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The trial resumed on Tuesday, the 11th day of February, 2020, before the Honorable Stephen N. Limbaugh, United States District Judge, of the Eastern District of Missouri, Southeastern Division, before a jury and two alternate jurors, who were impaneled, selected and sworn.

9

(Proceedings resumed in open court outside the presence of the jury.)

10

11

THE COURT: Good morning.

12

MR. MANDLER: Good morning, Your Honor.

13

MR. MILLER: Good morning.

14

THE COURT: Any preliminary matters?

15

MR. MILLER: Not from us, Your Honor.

16

MR. MANDLER: Not from us, Your Honor.

17

THE COURT: Okay. What is your schedule then?

18

MR. MILLER: We're resting, Your Honor.

19

THE COURT: Okay. And you're ready to proceed

20

then?

21

MR. MANDLER: We are, Your Honor.

22

MS. GEORGE: Do you know which demonstrative you're planning to use? Are you planning on using the one you sent at midnight last night?

24

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MR. MANDLER: We intend -- the only -- the only

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change is that we took out some from the original, so it's

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less than the first one, so I don't think there's any

3 prejudice to using it. We simplified it because these are
4 complicated things, and it's a long trial.

5 MS. GEORGE: They have held us hard to this 24-hour
6 rule, and at midnight last night they revised a demonstrative
7 that they're going to use with this witness, and I haven't
8 even been all the way through it. And there's no reason to
9 revise it within the 24-hour rule at midnight while we're
10 trying to get --

11 THE COURT: Well, I think he just said that he
12 eliminated some of the things that he was going to use.

13 MS. GEORGE: He changed the slides. He didn't take
14 out stuff. He changed the slides. He made modifications to
15 them.

16 MR. MANDLER: There were objections raised by
17 Monsanto. We took out some slides. And that's -- and
18 Plaintiffs didn't give us any objections. We would have
19 responded to their objections as well.

20 So, you know, Your Honor, this case obviously is
21 moving very quickly at this point after going more than two
22 weeks. So we gave it to them as soon as we had it, you
23 know, Your Honor. It's -- if they want to object slide by
24 slide, I guess they can, but there's -- I didn't add things
25 to the slides at midnight.

1968

1 MR. RANGLES: Your Honor, the most aggressive
2 proponent of the 24-hour rule has been Mr. Mandler.

3 THE COURT: I know. I know.

4 MR. RANGLES: And I told you when we get to their
5 case, suddenly they're going to want the rules to change. Do
6 you remember me having to change my case in the middle
7 because some exhibits weren't produced to them, and I had to
8 take a witness off the stand and bring that witness back the
9 next day?

10 He has objected to anything that's not strictly
11 within the 24-hour rule. If he wants to use the
12 demonstrative, he uses the one that we got 24 hours ago.

13 Likewise, with this witness Dr. Schnabel, we
14 received his exhibits at 11:59 last night. I hate to say
15 goose and gander, but here we are. And we received no
16 sympathy for any reason on the 24-hour rule. I think it
17 would be patently unfair for him to get any relief from it.

18 MR. MANDLER: Your Honor, with their witness on the
19 stand it was Monsanto. It was Boyd Carey. I didn't have a
20 dog in that fight. Monsanto raised that issue.

21 THE COURT: Do you have your old exhibits that you
22 were going to use that they've already --

23 MR. MANDLER: We can use those, Your Honor, if --

24 THE COURT: All right. I agree with the objection,
25 so --

1969

1 MR. MANDLER: Let me at least address Dr. Schnabel.

2 THE COURT: Okay.

3 MR. MANDLER: We disclosed -- the Plaintiffs -- I
4 mean, Monsanto went through two witnesses faster than we
5 thought. They dropped some people. We dropped some people.

6 Your Honor, the fact of the matter this was
7 supposed to be a two-week trial. The Plaintiffs took the
8 entire two weeks. We're trying to get this case submitted to
9 the jury, so it's only a three-week trial. I don't think we
10 should be penalized by trying to speed things up at this
11 point.

12 If they want to send the jury home and have Dr.
13 Schnabel come back in the morning, that's just wasting the
14 jury's time, and that's on them.

15 The only thing in Dr. Schnabel's disclosure are

16 photos, which the parties said they're presumptively
17 admissible anyway. There are three demonstratives. The
18 demonstratives are -- the demonstratives are photos except
19 with one exception where it's just a list of the things that
20 he saw.

21 There's nothing in there that's a surprise.
22 There's no reason we shouldn't move this trial forward
23 quickly given that, you know, we're now in week three.

24 THE COURT: So do you have another witness or --

25 MR. MANDLER: We have -- after Ms. Emanuel, we have

1970

1 two videos, and then we're moving to Dr. Schnabel.

2 There's -- and, you know, if they want to break
3 early, have him come back in the morning, I guess we're
4 not -- we don't object to that, but it seems like a waste of
5 the jury's time.

6 THE COURT: Well, wait a minute. I thought that
7 you just said a minute ago that you could proceed with --

8 MR. MANDLER: We have three witnesses before Dr.
9 Schnabel.

10 THE COURT: Oh.

11 MR. MANDLER: One live and two video.

12 THE COURT: How long will that take?

13 MR. MANDLER: Well, it depends on how long their
14 cross is of Ms. Emanuel. The video one is an hour and one is
15 a half an hour. And so I imagine we'll be done by noon with
16 Ms. Emanuel. We'll play an hour video. We'll play a half
17 hour video. And then after that we're ready to proceed with
18 Dr. Schnabel.

19 THE COURT: Well, can you call him using the same
20 exhibits that you had before the changes?

21 MR. MANDLER: No. These are just photographs. We
22 designated which photographs we're going to show and have him

23 look at. Nothing more than that.

24 MR. RANGLES: No. They disclosed to us photos,
25 maps, a PowerPoint slide and some other stuff all at 11:59.

1971

1 And do you remember how Mr. Mandler hung me up on Ford
2 Baldwin and the photos.

3 THE COURT: I know.

4 MR. RANGLES: But I am not interested in giving
5 them relief from the 24-hour rule. If he's not prepared with
6 his homework, that's not on me.

7 MR. MANDLER: That's not the 24-hour rule with Mr.
8 Baldwin. That was the fourth amended exhibit list. It had
9 nothing to do with the 24-hour rule, and counsel knows that.

10 MR. RANGLES: Do you recall how often he cited the
11 24-hour rule?

12 THE COURT: That's right. I understand.

13 MR. MANDLER: I cited it one time. One time. Go
14 check the record.

15 MR. RANGLES: Your Honor, have I received any
16 relief from the 24-hour rule?

17 THE COURT: I understand. I understand.

18 Let's proceed now and get what we can get done, and
19 then I'll take this up over the lunch hour or at the break,
20 but I don't want the jury to wait any longer at this point.

21 One further thing, while they're bringing the jury
22 in, I am completely unclear on what you're talking about just
23 what has been disclosed at midnight and what wasn't and what
24 the difference is and what the prejudice is, and so forth.

25 MR. RANGLES: Two things, a PowerPoint regarding

1972

1 the first witness that was changed.

2 THE COURT: He said just some photographs.

3 MR. RANGLES: No. And then the later witness, Dr.
4 Schnabel -- we're talking about two different witnesses and
5 exhibits. He had photos, a map, I think part of a
6 PowerPoint is what we were disclosed.

7 MR. MANDLER: I will tell you what was disclosed.

8 MR. RANGLES: I went to sleep at midnight, so I
9 didn't see it. I wasn't aware of it until this morning.

10 THE COURT: Okay. Well, they're coming out, so
11 we'll bring it up again.

12 (Jury in.)

13 (Proceedings resumed in open court.)

14 THE COURT: Please be seated.

15 Good morning, ladies and gentlemen. Sorry for the
16 delay.

17 Mr. Miller.

18 MR. MILLER: Yes, Your Honor. Thank you. We've
19 been going two weeks. We've cut our case down. At this
20 time Monsanto rests.

21 (Defendant Monsanto Rests.)

22 THE COURT: Mr. Mandler for BASF.

23 MR. MANDLER: Yes, Your Honor. We're ready to
24 begin our case. We'd like to call Ms. Alyson Emanuel.

25 ALYSON EMANUEL,

1973

1 being produced and sworn, testified as follows:

2 THE COURT: You may proceed.

3 MR. MANDLER: Thank you, Your Honor.

4 Good morning, ladies and gentlemen.

5 DIRECT EXAMINATION

6 BY MR. MANDLER:

7 Q. Good morning, Ms. Emanuel.

8 A. Good morning

8. Good morning.

9 Q. Can you please introduce yourself to the jury?

10 A. Yes. I'm Alyson Emanuel. I was recently 30 years
11 with BASF in various positions and have recently retired as
12 of last July.

13 Q. Congratulations. Can you summarize your education for
14 the jury, please.

15 A. I have a bachelor of science in economics from Cornell
16 University and then an MBA from George Mason in 1992.

17 Q. Okay. And can you briefly summarize for us your -- that
18 30 years of experience that you had at BASF?

19 A. Yes. So in the first 15 years or so I had various
20 commercial positions to learn the businesses, including ag.
21 And I had increasing responsibility for teams and business
22 issues and negotiating third party contracts.

23 Q. And can you give us an example of some of the types of
24 kinds of contracts you would negotiate?

25 A. Yes. So one when I was running a cosmetics business

1974

1 for North America I negotiated some complex agreements with
2 our biggest customer at the time, Procter & Gamble.

3 Q. I think that 15 years probably takes us roughly up
4 through the mid 2000s. Did you step into a new role at that
5 time?

6 A. Yes. So I became head of herbicides globally in the ag
7 division.

8 Q. And what did that role entail?

9 A. Generally being in charge of the herbicide portfolio for
10 BASF. It's different products and making decisions on which
11 ones to develop or bring to the market.

12 Q. How long were you in that role?

13 A. About five years until about the end of 2011.

14 Q. During that role, Ms. Emanuel, were you negotiating

15 contracts at that time?

16 A. Yes.

17 Q. And what kind of contracts?

18 A. Supply contracts, product licensing contracts, also
19 bigger contracts, complex contracts with various customers
20 and competitors.

21 Q. What type of competitors were you negotiating contracts
22 with?

23 A. Pioneer, Syngenta, FMC, Monsanto.

24 Q. What position then did you take after leaving ag in
25 2011?

1975

1 A. I had some various executive positions. One in sort of
2 it's called market management in North America in the ag
3 division, which had a broader set of commercial
4 responsibilities. And then I ran a startup business within
5 BASF for about five years, and then my last year of head of
6 sea treatments globally.

7 Q. We've been here a long time, Ms. Emanuel. I'm going to
8 cut to the chase right off the bat here. The Plaintiffs in
9 this case are claiming that BASF and Monsanto formed
10 something called a joint venture in order to sell the dicamba
11 tolerant system. Are you aware of those allegations in the
12 case?

13 A. Yes, I am.

14 Q. And did BASF and Monsanto have contracts related to
15 dicamba products?

16 A. Yes, we had contracts.

17 Q. Are you familiar with those contracts?

18 A. Yes.

19 Q. How is it that you're familiar with those contracts?

20 A. Well, I was the lead for the team negotiating the

21 contracts.

22 Q. And as the lead for the team negotiating the contract
23 was it BASF's intent that there would be a joint venture
24 formed between BASF and Monsanto?

25 MS. GEORGE: Objection to the extent it calls for a

1976

1 legal conclusion.

2 MR. MANDLER: It's a question that the Judge just
3 said it was a jury question. We agreed there's legal
4 elements. Obviously, we briefed, but the Court decided that
5 this should go to the jury, so we have to ask a witness.

6 THE COURT: I'll sustain the objection. It's a
7 legal conclusion.

8 MR. MANDLER: Can we have a sidebar, Your Honor?

9 THE COURT: Yes.

10 (Proceedings were held at sidebar, outside the
11 hearing of the jury.)

12 MR. MANDLER: Judge, you --

13 THE COURT: Let her state her objection.

14 MS. GEORGE: Yeah. I just object to the extent
15 that it calls for her to make the legal conclusion on the
16 ultimate issue in the case.

17 To the extent she's testifying about the terms of
18 the relationship and what their intent with each part of
19 their relationship is or whether it be value sharing, or if
20 you want to ask something like that.

21 THE COURT: Why don't you ask if she intended --

22 MR. MANDLER: But that was the question. That was
23 exactly what I said.

24 THE COURT: Okay.

25 MS. GEORGE: Well, no, he asked if you intended to

1977

1 form a joint venture, which is a legal term and conclusion.

2 MR. MANDLER: Your Honor, we briefed this. We
3 wanted summary judgment on it as a legal term. The Court
4 ruled that was a question of fact for the jury. We have to
5 be able to -- if it's a question of fact for the jury, we
6 can't have our hands tied behind our back. I have to ask if
7 they intend to form a joint venture. That goes to the heart
8 of the matter. Otherwise, we get summary judgment.

9 THE COURT: Well, is that the exact question?

10 MS. GEORGE: He has -- in his slides he plans to
11 put up joint -- it's all the same.

12 THE COURT: What was the exact question?

13 MR. MANDLER: Was it your intent to create a joint
14 venture between BASF and Monsanto to sell the dicamba
15 tolerant system?

16 THE COURT: Okay. I'm going to overrule.

17 MS. GEORGE: Okay. Just so we don't have to come
18 back up here, to the extent you go into further having her
19 describe what a joint venture is and if this meets that
20 definition, I'm going to have an objection to that.

21 MR. MANDLER: You didn't raise an objection to our
22 original slides.

23 MS. GEORGE: You haven't used them yet. I don't
24 know how you're going to use them. If you plan to say
25 that -- if you plan to have her testify that there was no

1978

1 joint venture, that is a legal conclusion.

2 MR. MANDLER: I'm going to have her testify as to
3 does she have knowledge. If she was trying to create one,
4 what would be the elements.

5 THE COURT: That's fine.

6 MR. MANDLER: And those elements are here.

7 MS. GEORGE: If you're asking about the elements, I
8 won't have an objection.

9 MR. MANDLER: Okay. We understand.

10 (Proceedings resumed in open court.)

11 THE COURT: The objection is overruled.

12 BY MR. MANDLER:

13 Q. Okay. Let me restate the question again, Ms. Emanuel.

14 Was it your intent as the lead negotiator for BASF to
15 create a joint venture between BASF and Monsanto to sell the
16 dicamba tolerant system?

17 A. No.

18 Q. And why not?

19 A. Well, a joint venture is where you share profits and
20 losses, and, frankly, our understanding of Monsanto's view we
21 didn't want to be exposed to the losses.

22 MS. GEORGE: Your Honor, I'm going to just object
23 and move to strike to her defining what a joint venture is
24 without more foundation about her legal basis.

25 THE COURT: She can testify what she was doing in

1979

1 the negotiations and her understanding of what she was doing,
2 and I think that's all that she was testifying to.

3 BY MR. MANDLER:

4 Q. Did BASF want to maintain control over its own product?

5 A. Yes.

6 Q. And to your understanding, did Monsanto want to maintain
7 control over its own products?

8 A. Yes.

9 Q. Why did BASF want to maintain control over its product,
10 which ultimately became Engenia?

11 A. Well, it's very important to us. I mean, we have a
12 strong reputation of science and integrity in the market, and
13 we stand behind our products. The science behind is how we

14 do that.

15 And we really -- it's important to us to understand
16 how the product is used and what the stewardship or best
17 management practices are, that the label is being followed,
18 so it's very important to us.

19 Q. Did BASF and Monsanto take steps to avoid entering into
20 a joint venture?

21 A. Yes.

22 Q. And what steps did you take?

23 A. Well, there are provisions in all of the contracts that
24 say that we're independent contractors, that the costs are to
25 be paid by each party.

1980

1 Q. Okay. Let me talk about one of the concepts before we
2 get into the details of those contracts.

3 Ms. Emanuel, have you also heard that the Plaintiffs
4 are claiming that BASF was in a conspiracy with Monsanto?

5 A. Yes, I've heard that.

6 Q. Did you ever conspire with Monsanto or anyone from
7 Monsanto to do anything illegal?

8 A. No.

9 Q. And are you aware of anybody else at BASF who conspired
10 with Monsanto to do anything illegal?

11 MS. GEORGE: Objection, Your Honor, again to the
12 extent she's testifying about the legal definition of
13 conspiracy.

14 THE COURT: So what was the question again?

15 MR. MANDLER: Did you ever conspire with anyone
16 from Monsanto to do anything illegal?

17 THE COURT: Well, I'll sustain that objection.

18 BY MR. MANDLER:

19 Q. Did you ever conspire with Monsanto to do any acts that

20 were illegal?

21 THE COURT: Counsel, come back up.

22 MS. GEORGE: That's it again.

23 (Proceedings were held at sidebar, outside the
24 hearing of the jury.)

25 THE COURT: I'm going to sustain that objection,

1981

1 because you asked her if she intended to. That's the
2 difference.

3 MR. MANDLER: Okay. I mean, we have another
4 witness. We have a conspiracy claim, but no one has actually
5 said anything about the conspiracy, so I have to ask
6 somebody.

7 THE COURT: I know.

8 (Proceedings resumed in open court.)

9 THE COURT: That objection is sustained.
10 Rephrase your question.

11 MR. MANDLER: I will, Your Honor.

12 BY MR. MANDLER:

13 Q. Ms. Emanuel, did you ever do anything that you intended
14 to as an act that was a conspiracy with Monsanto to do
15 something illegal?

16 A. No.

17 Q. And are you aware of anyone at BASF intending to do an
18 act to enter into a conspiracy with Monsanto for an illegal
19 purpose?

20 A. No.

21 Q. Is it illegal to develop and sell a herbicide product?

22 A. No. That's our business.

23 Q. Okay. Let's talk about the contracts in a little more
24 detail.

25 Ms. Emanuel, I'd like to address your attention to

1 three different contracts. The first is going to be
2 something called a Dicamba Agreement, which is Trial Exhibit
3 B-677. The second is something called a Dicamba Tolerant
4 System Agreement, which is Trial Exhibit 672. And the third
5 is the Amended and Restated Dicamba Tolerant System
6 Agreement, which is Exhibit 673.

7 MR. MANDLER: And if I could approach the witness,
8 Your Honor, and give her our copies. Thank you.

9 THE COURT: You may.

10 MS. GEORGE: No objection.

11 BY MR. MANDLER:

12 Q. Ms. Emanuel, are you familiar with these agreements?

13 A. Yes, I am.

14 Q. And are these agreements that were negotiated between
15 Monsanto and BASF as it relates to dicamba products?

16 A. Yes.

17 (Defendant's Exhibit No. B-672, Dicamba Tolerant
18 System Agreement, was identified.)

19 (Defendant's Exhibit No. B-673, Amended and
20 Restated Dicamba Tolerant System Agreement, was identified.)

21 (Defendant's Exhibit No. B-677, Dicamba Agreement,
22 was identified.)

23 MR. MANDLER: Your Honor, we move for the admission
24 of 677, 672 and 673.

25 MS. GEORGE: No objection, Your Honor.

1 THE COURT: They're admitted.

2 (Defendant's Exhibit No. B-672, Dicamba Agreement,
3 was received.)

4 (Defendant's Exhibit No. B-673, Amended and
5 Restated Dicamba Tolerant System Agreement, was received.)

6 (Defendant's Exhibit No. B-677, Dicamba Agreement,
7 was received.)

8 BY MR. MANDLER:

9 Q. Ms. Emanuel, can you tell us roughly what time period
10 the agreements cover?

11 A. About 2007 to the present, so about 14 years -- 13,
12 14 years.

13 Q. And about how many pages do they cover?

14 A. I think about 300.

15 Q. Okay. We won't go through each one of those 300 pages.
16 Ms. Emanuel, did you prepare -- if we could actually -- can
17 we have 1044 for Ms. Emanuel, the Court and counsel.

18 Ms. Emanuel, did you work with me to prepare a
19 demonstrative showing the key purposes and the terms of the
20 contract?

21 A. Yes.

22 (Defendant's Exhibit No. B-1044, Demonstrative
23 Showing Key Purposes and Terms of Contract, was identified.)

24 BY MR. MANDLER:

25 Q. And does the demonstrative fairly and accurately show

1984

1 those terms and the provisions of the contract?

2 A. Yes.

3 Q. And would it aid you in explaining those things to the
4 jury what BASF's intent was in entering into those
5 agreements?

6 A. It would.

7 MR. MANDLER: Your Honor, we move for the admission
8 of demonstrative Exhibit 1044.

9 MS. GEORGE: No objection to 1044.

10 THE COURT: It's admitted.

11 (Defendant's Exhibit No. B-1044, Demonstrative

12 Showing Key Purposes and Terms of Contract, was received.)

13 BY MR. MANDLER:

14 Q. All right. Let's take a step back. You said that
15 you're competitors with -- with Monsanto, BASF is competitors
16 with Monsanto?

17 A. Yes.

18 Q. Can you give us the nature of the competition?

19 A. Fierce.

20 Q. Given that, why do we have these series of contracts
21 that you're entering into with a fierce competitor?

22 A. Well, it's important especially when you're negotiating
23 with competitors that you're very specific and precise as to
24 what's in a contract, that it's understood. Each side has
25 important points that they want in a contract, and it needs

1985

1 to be clear for the people later on that have to live with
2 it.

3 Q. Okay. Was there a particular point in time where the
4 issues between BASF and Monsanto as it related to dicamba
5 came to a head?

6 A. Well, there was some litigation.

7 Q. And when was that litigation?

8 A. 2006, 2007.

9 Q. Okay. And can you give us a description of the general
10 nature -- your understanding of the general nature of what
11 was that dispute in the litigation?

12 A. It was basically four parties disputing claims over the
13 idea -- the technology of dicamba tolerance.

14 MR. MANDLER: Excuse me. I think the slides are
15 admitted. If we could have them shown to the jury.

16 BY MR. MANDLER:

17 Q. Okay. Generally who are the parties to the litigation?

18 A. There was the University of Nebraska at Lincoln. There

19 was Monsanto, BASF and Syngenta.

20 Q. And did they all have different degrees of claims over
21 the development of the technology?

22 A. Yes.

23 Q. At some point was that litigation resolved?

24 A. Yes.

25 Q. And are you familiar with the resolution of the

1986

1 litigation through settlement and the contracts that were
2 created as it related to that?

3 A. Yes.

4 Q. Can you explain as part of the settlement what did BASF
5 give up?

6 A. So we gave up our claims. We gave up our rights and
7 ownership in dicamba tolerance to develop that. In return we
8 got some royalties.

9 Q. So you gave up your rights to control the dicamba what?

10 A. Dicamba-tolerant seed.

11 Q. Dicamba-tolerant seed. Okay. And about when did that
12 resolution happen?

13 A. In 2008.

14 Q. And then were there contracts -- as a part of that
15 settlement were there some contracts negotiated?

16 A. Yes.

17 Q. You say that BASF got a royalty right. Do you have
18 experience in negotiating royalties?

19 A. Yes.

20 Q. Can you generally explain to the jury the concept of a
21 royalty?

22 A. So a royalty, for example, if you take somebody that
23 writes a song, and they -- that song starts being played on
24 the radio, and they get paid \$0.10 a song. And it doesn't

25 matter how many times or if it's only played once they get

1987

1 paid that royalty, that \$0.10 a song.

2 Q. Okay. And is the payment a fixed payment?

3 A. Yes, it is.

4 Q. And then can you contrast that -- do you have an
5 understanding of what "profits" mean?

6 A. So profits are basically variable. It's the revenue
7 that a company or an enterprise makes minus its expenses, and
8 so they're variable.

9 Q. Are royalties the same thing as shared profits?

10 A. No. Royalties are fixed. It doesn't matter if the
11 company is losing money or makes a lot less money the royalty
12 is still \$0.10 a song, for example, where the profits can be
13 variable.

14 Q. When you were arriving at the settlement and the
15 contracts that went around the settlement, did BASF intend
16 that settlement agreement and those contracts to form a joint
17 venture?

18 A. No.

19 Q. All right. Let's go back to the timeline. What
20 happened next?

21 A. Well, then we had certain obligations. Both parties had
22 obligations defined in the contract. So BASF was developing
23 a formulation called the Dicamba Low Volatility Formulation
24 or the DLVF, and Monsanto was -- our understanding was
25 developing dicamba-tolerant seed.

1988

1 Q. Okay. And was BASF involved in any way in the
2 development of the dicamba-tolerant seed?

3 A. No.

4 Q. Did the development of those products lead to vet

5 another contract?

6 A. Yes.

7 Q. And what was the name of that contract?

8 A. It was called the Dicamba Tolerant System Agreement or
9 the DTSA, and that was in 2011.

10 Q. Okay. Do you want to go back one. Make sure we take
11 a look at -- no. Thank you.

12 So, again, what year was that?

13 A. That was in 2011.

14 Q. And is it okay if we just, given the long name, we call
15 it the DTSA for short?

16 A. That's okay.

17 Q. Thank you. Were you involved in the negotiations of the
18 DTSA?

19 A. Yes. I was the lead for BASF.

20 Q. And can you give the jury a sense of how those
21 negotiations proceeded and the nature of the negotiations?

22 A. Well, it took a long time, and it was very contentious.
23 I mean, both parties were very -- very specific about what we
24 wanted in the contracts, and we really needed to make sure so
25 that they weren't misinterpreted. And so we -- there was a

1989

1 lot of arguing, a lot of late nights, but we got it done.

2 Q. Okay. And did you intend for that contract to form a
3 joint venture? By "you" I mean did BASF intend for that
4 contract to form a joint venture with Monsanto?

5 A. No.

6 Q. And did you intentionally put in provisions in the DTSA
7 that would demonstrate your intent to form a joint venture?

8 A. Yes. As we did in every contract.

9 Q. Can we look at the next line. Was one of those
10 provisions provision 16.7 of the DTSA?

11 A. Yes.

12 Q. And I'll just read the first sentence says, "Nothing
13 contained in this agreement is intended implicitly or is to
14 be construed to constitute Monsanto or BASF as partners in
15 the legal sense." Did I read that correctly?

16 A. You did.

17 Q. And what did you intend that provision to mean?

18 A. Well, that we're not partners in the legal sense, that
19 it's not a joint venture, that each party had its own
20 independent responsibilities for developing certain
21 components and had control over those components.

22 Q. Okay. Were there other provisions that defined who had
23 control over the various products that were subject to the
24 contract?

25 A. Yes.

1990

1 Q. And if we could look at the next slide. Was provision
2 3.1 one of those provisions?

3 A. Yes.

4 Q. I'll read the first sentence here. "Monsanto shall in
5 its sole discretion and its sole expense determine when and
6 how to commercialize any DT seed product."

7 What did you intend with that provision to mean?

8 A. Well, its intent was that Monsanto had control over
9 Monsanto dicamba-tolerant seed.

10 Q. And did BASF have control over Monsanto DT seed?

11 A. No.

12 Q. All right. Were there provisions that addressed the
13 herbicide element?

14 A. Yes.

15 Q. All right. If we could look at the next slide. Was
16 3.3 was one of those provisions?

17 A. Yes.

17 A. Yes.

18 Q. And does 3.3 say "Monsanto shall in its sole discretion
19 at its sole expense commercialize DLVF and Monsanto DLVF
20 pre-mixes?"

21 A. Yes.

22 Q. And what does that mean?

23 A. Well, that means that Monsanto had control over its
24 dicamba herbicide.

25 Q. All right. And then was there another provision for the

1991

1 BASF herbicide?

2 A. Yes.

3 Q. All right. And also 3.3?

4 A. Yes.

5 Q. And that one says, "BASF shall in its sole discretion
6 and at its sole expense commercialize DLVF and BASF DLVF
7 pre-mixes." And what did that provision mean?

8 A. That meant that BASF -- that we had control over our
9 dicamba herbicide, which was eventually Engenia.

10 Q. All right. Let's go to I think back to the timeline.
11 Well, actually I think you just said this. Who had control
12 over the DT seed?

13 A. Monsanto had complete control over the Monsanto
14 dicamba-tolerant seed.

15 Q. Okay. And who had control over the Monsanto dicamba
16 herbicide I guess that eventually became Xtend?

17 A. It was Monsanto had complete control over that.

18 Q. And anything above the line in the green did BASF have
19 any control there?

20 A. No.

21 Q. All right. Below the line did BASF have any dicamba
22 seed itself?

23 A. No.

24 Q. And who controlled Engenia herbicide?

25 A. BASF.

1992

1 Q. Is this a joint venture?

2 A. No.

3 MS. GEORGE: Objection, Your Honor, calls for a
4 legal conclusion.

5 THE COURT: Sustained.

6 BY MR. MANDLER:

7 Q. Did you intend for this to be a joint venture?

8 A. No.

9 Q. All right. Let's go back to the timeline then. What
10 happened in 2013?

11 A. In 2013 Monsanto announced that it was developing and
12 bringing to the market XtendiMax or Xtend herbicide.

13 Q. And did that -- did this lead to another contract?

14 A. Yes. So the landscape had changed, and we need to
15 update the DTSA, and so we had the amended and restated DTSA.

16 Q. All right. And were some of the terms in that -- did
17 they stay the same?

18 A. Yes.

19 Q. And why don't we look at the next slide. Under the
20 terms of the Amended and Restated DTSA for 2014 did Monsanto
21 still maintain control of Monsanto's DT seed?

22 A. Yes.

23 Q. And did Monsanto still control XtendiMax?

24 A. Yes.

25 Q. Did BASF have sole control over Engenia?

1993

1 A. Yes.

2 Q. Were there terms in there that addressed whether you

3 intended there to be a joint venture?

4 A. There were provisions, yes.

5 Q. And did those terms -- did you create -- did you intend
6 to create a joint venture by those terms?

7 A. We wanted to avoid setting up a joint venture.

8 Q. Were there some new terms that addressed how the
9 royalties were calculated?

10 A. Yes.

11 Q. And did it simplify the calculation of the royalties?

12 A. Yes.

13 Q. In your various roles over time with BASF negotiating
14 contracts have you ever negotiated a joint venture?

15 MS. GEORGE: Objection. Again, object, calls for a
16 legal conclusion.

17 THE COURT: Overruled.

18 A. Well, no, because I wanted to avoid -- I wanted to not
19 set up a joint venture.

20 BY MR. MANDLER:

21 Q. And are you familiar with the elements that it would
22 take if you intended to create a joint venture?

23 A. Yes.

24 Q. And what are some of those elements?

25 A. Well, you'd have an entity, so you'd have a name.

1994

1 You'd have a charter, a board of directors. You'd have
2 pooled assets. You'd have a common building and common
3 employees. You'd have joint tax returns, financial
4 statements.

5 MS. GEORGE: Your Honor, I'm just going to object
6 to that again. He asked her to define what a joint venture
7 is, and she just gave the definition, and it did not include
8 what the elements of a joint venture are.

9 THE COURT: I think that in context all he was

10 asking was what is her understanding of what it would take
11 and if she were trying to do something like that.

12 MS. GEORGE: Sorry. That's not how I heard the
13 question, but that's okay.

14 BY MR. MANDLER:

15 Q. I'm going to ask you what you intended as it relates to
16 these elements in the three contracts that we've looked at it
17 as relates to BASF. Did you intend to create a new entity?

18 A. No.

19 Q. Did you intend and did you create a charter or a board
20 of directors?

21 A. No.

22 Q. Did you intend and did you have common employees?

23 A. No.

24 Q. Did you intend and did you have pooled assets?

25 A. No.

1995

1 Q. Did you intend and did you create any sort of profit or
2 loss sharing?

3 A. No.

4 Q. Did you create an entity that has either bank accounts,
5 financial statements or tax returns?

6 A. No.

7 Q. Are you still fierce competitors with Monsanto?

8 A. Yes, sir.

9 Q. I'd like to switch topics, Ms. Emanuel.

10 Are you familiar with BASF's plant in Beaumont,
11 Texas?

12 A. Yes.

13 Q. And do you know approximately when BASF acquired that
14 plant?

15 A. We acquired it as part of the Sandoz acquisition in

16 1996 -- '97, '96.

17 Q. But prior to BASF acquiring it, had it been there a
18 while to your knowledge?

19 A. Also, dicamba I think was brought to the market by
20 Velsicol in the early sixties, so the plant had been there
21 for a while.

22 Q. Are you aware in this case the Plaintiffs are claiming
23 that BASF scaled up production at the Beaumont plant of
24 dicamba at the same time that Monsanto was releasing
25 dicamba-tolerant seed in 2015 for cotton and 2016 for

1996

1 soybeans?

2 A. Yes.

3 Q. And do you know whether, in fact, BASF did scale up
4 production at the Beaumont plant in 2015 and 2016?

5 A. Well, no. Actually, it went down, because we were doing
6 downsizing and construction at the plant.

7 Q. And how do you know that?

8 A. Well, because I'm familiar with Beaumont, and I asked
9 for the numbers and reviewed the numbers and talked to some
10 of the people involved.

11 Q. Ms. Emanuel, did you work to put together a
12 demonstrative showing the timeline of the construction at the
13 Beaumont plant and the production during those periods?

14 A. Yes.

15 (Defendant's Exhibit No. B-1045, Demonstrative
16 Timeline on Construction at Beaumont Plant, was identified.)

17 BY MR. MANDLER:

18 Q. And does that demonstrative fairly and accurately show
19 what those facts were?

20 A. Yes.

21 Q. And would it aid you to help explain this to the jury if
22 you're able to use that demonstrative?

22 you is able to use that demonstrative.

23 A. Yes.

24 MR. MANDLER: If we can show that Exhibit B-1045 to
25 Ms. Emanuel, Court and counsel.

1997

1 BY MR. MANDLER:

2 Q. Is that the demonstrative?

3 A. Part of the demonstrative.

4 Q. I guess we have to have a few more clicks before it
5 comes in, don't we?

6 MR. MANDLER: Your Honor, we'd move Exhibit B-1045
7 demonstrative purposes only.

8 MS. GEORGE: No objection.

9 THE COURT: You may do so.

10 MR. MANDLER: Permission to publish to the jury.

11 BY MR. MANDLER:

12 Q. Ms. Emanuel, when did BASF start the discussions about
13 some construction at the Beaumont plant?

14 A. Well, certainly in 2010, 2011, and planning really
15 started in earnest in 2013.

16 Q. And when did construction begin?

17 A. In about 2014.

18 Q. And how long did the construction period last?

19 A. Well, the intense phase was 2014 to 2017, but it also
20 went into 2018, and as a matter of fact even into 2019.

21 Q. And was there some -- I don't know, did some production
22 come online in 2017?

23 A. Yes. Some operations came back.

24 Q. And I think you mentioned it was still ongoing even in
25 2018?

1998

1 A. Yes, even last year.

2 Q. All right. And did you take a look at the sales
3 numbers or the production numbers -- I guess the dicamba
4 production numbers during that period of construction?

5 A. I did.

6 Q. And specifically did you look at them at the time that
7 Monsanto released the DT cotton seed and the DT soy seed?

8 A. I did.

9 Q. In 2014 when construction began did BASF know that
10 Monsanto -- when Monsanto was going to release its seed?

11 A. No.

12 Q. So what happened to those sales -- they're not sales,
13 the production of dicamba during the construction period at
14 Beaumont?

15 A. Well, we got into very intense construction, and the
16 production actually went almost down in half.

17 Q. Okay. So was there a massive scale up in relation to
18 the release of the dicamba-tolerant seed?

19 A. No. It went down almost by half.

20 Q. All right. I want to turn to one other topic, please,
21 and that's sales of BASF's product Clarity during that same
22 time period. And I'd like if we can have for Ms. Emanuel,
23 the Court and counsel two exhibits -- the 2014 to 2017
24 Clarity sales, which is Exhibit B-1029, and the 2014 through
25 2017 private label Clarity sales, which is Exhibit B-1030.

1999

1 (Defendant's Exhibit No. B-1029, 2014 - 2017
2 Clarity Sales was identified.)

3 (Defendant's Exhibit No. B-1030, 2014 - 2017
4 Private Label Clarity Sales, was identified.)

5 MR. MANDLER: And if I can approach and provide
6 hard copies to the witness, Your Honor.

7 THE COURT: You may.

8 THE WITNESS: Thank you.

9 BY MR. MANDLER:

10 Q. Ms. Emanuel, are you familiar with these documents?

11 A. Yes.

12 Q. And are they the sales figures during the periods I
13 mentioned 2014 through 2017 for both Clarity and private
14 label Clarity?

15 A. Yes.

16 MR. MANDLER: Your Honor, we move the admission of
17 B-1029 and B-1030.

18 MS. GEORGE: I only object to the extent that he
19 just characterized it as the sales of Clarity. Those are not
20 the sales to growers, but the sales to some of the
21 distributors or retailers. With that clarification I don't
22 object.

23 MR. MANDLER: I agree.

24 THE COURT: Okay.

25 MR. MANDLER: BASF doesn't sell to growers. It

2000

1 sells to distributors.

2 THE COURT: Okay. They're admitted.

3 (Defendant's Exhibit No. B-1029, 2014 - 2017
4 Clarity Sales, was received.)

5 (Defendant's Exhibit No. B-1030, 2014 - 2017
6 Private Label Clarity Sales, was received.)

7 BY MR. MANDLER:

8 Q. Did you take the numbers on these two different reports
9 of sales and create a chart, a demonstrative chart, of those
10 sales over time?

11 A. Yes.

12 Q. And would that aid you in explaining the sales to the
13 jury?

14 A. Yes.

15 Q. If we could bring up for Ms. Emanuel, the Court and
16 counsel B-1046. Is that the demonstrative chart of those
17 sales over time?

18 A. Yes.

19 (Defendant's Exhibit No. B-1046, Demonstrative
20 Clarity Sales Chart, was identified.)

21 MR. MANDLER: Your Honor, we move admission for
22 demonstrative purposes of B-1046.

23 MS. GEORGE: No objection.

24 THE COURT: You may use it for that purpose.

25 MR. MANDLER: If we could publish that. Thank you.

2001

1 BY MR. MANDLER:

2 Q. So, Ms. Emanuel, let's look first at Clarity sales.

3 And is Clarity a product that BASF sells itself under its own
4 branding?

5 A. Yes, to distributors.

6 Q. Okay. And does this graph show what happened to those
7 sales during the period 2014 to 2016?

8 A. Yes, it does.

9 Q. So in 2014 was there any DT seed on the market?

10 A. No.

11 Q. Okay. And in 2015 the jury has heard that Monsanto
12 introduced DT cotton seed, and in 2016 the jury has heard
13 that Monsanto introduced DT soybeans. So how did -- in the
14 ten states where cotton and soy are grown how did those sales
15 of Clarity compare in '15 and '16 as compared to 2014?

16 A. Well, they went down. It recovered to some extent in
17 2016, but a sharp dip in 2014 and 2015.

18 Q. So was there a spike of Clarity sales during those
19 years?

20 A. No. It went down.

21 Q. Okay. All right. And does BASF also sell some of the
22 Clarity formulation to other distributors and other
23 re-labelers to sell under different brands?

24 A. Yes.

25 Q. And is that term sometimes referred to as private label

2002

1 Clarity?

2 A. Yes.

3 Q. And looking at the second slide of Exhibit 1046 on the
4 left-hand side are those some of the companies to which BASF
5 sells private label Clarity?

6 A. Yes. Those are distributors.

7 Q. And on the right-hand are those some of the other names
8 that it's sold under?

9 A. Yes.

10 Q. Once BASF sells to it those companies, does BASF have
11 any control whatsoever over its distribution and marketing?

12 A. No.

13 Q. And did you also look at private label Clarity sales?

14 A. Yes.

15 Q. And for the same 10-state region where cotton and
16 soybean is grown?

17 A. Yes.

18 Q. And, again, in 2014 there wasn't any DT seed. When
19 Monsanto released DT cotton seed and DT soybean seed in 2015
20 and 2016, did those sales go up, or did they go down?

21 A. They went down.

22 Q. All right. Thank you, Ms. Emanuel. I want to just
23 wrap up with a couple of final questions. At any time did
24 BASF intend to create a joint venture with Monsanto?

25 A. No.

2003

1 Q. And at any time did BASF intend to conspire with
2 Monsanto to create an ecological disaster?

3 A. Absolutely not.

4 Q. That's all I have. Thank you for your time today.

5 THE COURT: Ms. George.

6 CROSS-EXAMINATION

7 BY MS. GEORGE:

8 Q. Excuse me, Ms. Emanuel, while I get set up here just a
9 second.

10 Ms. Emanuel, you've been -- I should introduce
11 myself. I'm Tracey George. I represent Bader Farms along
12 with my co-counsel. We've never matter before, have we?

13 A. No.

14 Q. But you have a met a co-counsel of mine, Mr. Bilsborrow.
15 Do you remember meeting him?

16 A. He's the one that deposed me?

17 Q. He took your deposition previously. Do you remember
18 that?

19 A. Yes.

20 Q. And, you know, what's interesting about that deposition
21 is when he took your deposition, you said that you left BASF
22 herbicides starting in 2011 with minimal involvement after
23 2012. Do you recall that?

24 A. Yes. So I was in a market management position and --
25 for the following year, and then went on to other positions

2004

1 within the ag division.

2 Q. Well, don't you also recall telling him that any
3 testimony regarding any payments that might be made under the
4 dicamba tolerant agreement or dicamba tolerant systems
5 agreement and all of that you don't know and wouldn't be able
6 to testify about that because that would be speculating,

7 because you can't testify about anything after 2012 specific
8 to dicamba? You don't remember that?

9 A. I do remember that.

10 Q. So you told him that in your deposition under oath, but
11 now when it's time for BASF to face the music in court and
12 try and avoid liability for damage happening at Bader Farms
13 suddenly you have an encyclopedic knowledge of the agreements
14 post 2012, whether or not there was a joint venture, whether
15 or not there was a conspiracy and how the commercialization
16 went down; is that true?

17 A. I'm sorry, what was the question?

18 Q. Well, the question is you previously testified that
19 anything beyond 2012 would be speculating for you. You said
20 that you left anything relating to dicamba behind in 2012,
21 and so any testimony on that for you would be speculating.
22 Do you recall?

23 A. Yes.

24 Q. So I'm just trying to understand the basis of your
25 knowledge today if when you told my co-counsel in deposition

2005

1 that anything about dicamba that you would be testifying
2 about after 2012 would be speculation. Why would that
3 change when you're facing these ladies and gentlemen of the
4 jury trying to avoid liability for BASF in this case?

5 A. Well, I've become familiar with the restated agreement,
6 which was very similar to the 2011 agreement, and I have it
7 here.

8 Q. Well, actually what you said in your deposition was you
9 had no idea why the amended restated agreement even came
10 about, why there was even an amendment to the dicamba
11 tolerant agreement. You don't remember saying you had no
12 idea why it was amended?

13 A. Not directly.

13 A. Not directly.

14 Q. Do you want me to play that part of your deposition for
15 you, or is it -- or if you think about it, is that probably
16 what you said?

17 A. I don't remember that directly.

18 Q. Can you play the clip just to remind Ms. Emanuel what
19 she said about that.

20 "Do you recall why the dicamba agreement was amended
21 as reflected with this agreement?" "No."

22 So does that remind you that did not have any idea
23 why the agreement was amended?

24 A. Yes.

25 Q. Okay. Because I just want to make sure that the jury

2006

1 has a clear picture here of what the scope of your knowledge
2 is, and so if something has changed, I want you to let me
3 know; is that fair?

4 A. Yes.

5 Q. Okay. And by the way you're not an attorney, ma'am;
6 right?

7 A. No.

8 Q. You didn't go to law school?

9 A. No.

10 Q. So do you know what the elements are of a joint venture
11 or for establishing a joint venture under the law of the
12 State of Missouri?

13 A. No.

14 Q. Okay. So do you know whether or not any of the acts
15 that you engaged in in entering into these agreements with
16 Monsanto meet any of the elements under the law of a joint
17 venture in the State of Missouri, do you?

18 A. I know in my experience of the contracts I've negotiated
19 what not to put in a contract so that it's not a joint

20 venture.

21 Q. So by not putting it in the contract you mean let's not
22 create any record evidence of this joint venture we're
23 forming, and I've been very educated about what to not write
24 in that contract to avoid any liability; is that the scope of
25 your knowledge?

2007

1 A. No. My behavior and my actions follow the contract.

2 Q. Well, earlier I thought you testified that some of the
3 things that you -- made you know that there was no joint
4 venture --

5 A. I'm sorry, I didn't quite hear that. Could you repeat?

6 Q. Sure. I'm happy to. I believe you testified earlier
7 that some of the things that you avoided doing that inform
8 your knowledge that you didn't form a joint venture were
9 things like combining the business or shared bank accounts:
10 Is that some of the things you were doing?

11 A. Yes.

12 Q. Do you have any idea at all if those things are required
13 under the law in the State of Missouri to form a joint
14 venture?

15 A. Not specifically.

16 Q. You don't? And would it surprise you to learn that
17 there is actually no requirement to have a shared bank
18 account to form a joint venture in the State of Missouri?

19 MR. MANDLER: Objection. Now she's asking for a
20 definition and her opinion on the law.

21 MS. GEORGE: He opened that door by asking whether
22 she intended to form a joint venture and by asking her some
23 of the things she did or didn't do.

24 MR. MANDLER: Right. My questions were to her
25 intent. This is asking her if she knows what the state of

2008

1 the law is.

2 THE COURT: Yeah. I'll sustain the objection.

3 We're getting a little far afield.

4 BY MS. GEORGE:

5 Q. You haven't mentioned much about the umbrella agreement.

6 You're aware of the umbrella agreement; right?

7 A. Yes.

8 Q. And you're aware that the umbrella agreement as the
9 creation of the AMT, Alliance Management Team, between
10 Monsanto and BASF came out of that umbrella agreement; right?

11 A. Yes.

12 Q. And you were actually a member of that AMT, weren't you?

13 A. Yes.

14 Q. And as a member of the AMT, just so the jury
15 understands, that was a group of people where there were four
16 representatives from Monsanto and four representatives from
17 BASF, though the BASF employees included BASF SE and Corp;
18 right?

19 A. Yes.

20 Q. Okay. And in that group, which included you, your
21 responsibilities were to approve joint work plans between
22 these two companies to commercialize a dicamba tolerant crop
23 system; true?

24 A. That was part of the responsibilities for the umbrella
25 agreement, but we were negotiating the DTSA at the same time

2009

1 in parallel.

2 Q. Right. And as a participant in the AMT you are aware
3 that there were work plans between these two companies to
4 complete regulatory approval tasks, commercialization working
5 group tasks and development tasks. You're aware of that;

6 right?

7 A. Yes. Those were the responsibilities that were set up
8 for the two parties to fulfill their obligations under the
9 contracts, and which was much more specifically detailed than
10 the DTSA.

11 Q. Well, in addition to their responsibilities let's make
12 sure the jury understands this wasn't BASF having some
13 responsibilities and going their own way, meet you back in
14 five years, and Monsanto having some responsibilities, go
15 their own way, meet you back in five years, was it? This was
16 shared responsibilities; right?

17 A. No. It was not shared responsibilities. The work
18 groups were set up to establish a structure where the goal
19 was of the work group had people from both parties, that they
20 had to fulfill their responsibilities. The work groups had
21 provided a structure for those work groups to bring forward
22 those -- the documents that were necessary.

23 Q. Can you say that last part again? I think I missed it.
24 To bring forth documents: Is that what you said?

25 A. Well, there were -- the -- certainly there were

2010

1 regulatory submissions that needed to be made, and the work
2 groups provided for exchange of materials for testing of the
3 components that were being developed by each of the parties,
4 and the work groups set up a structure for the two parties to
5 communicate with each other.

6 Q. Well, you were doing more than communicating, weren't
7 you? You were jointly working together to bring forward a
8 dicamba tolerant system, which included completing regulatory
9 tasks, and development tasks, and commercialization tasks for
10 which these companies worked together; correct?

11 A. So BASF was developing the DLVF which became Engenia,

12 and Monsanto was developing its dicamba-tolerant seed, which
13 it had sole discretion over if, when and how it would
14 register it, deregulate it as well its own herbicide.

15 Q. Okay. Can you pull up Exhibit 3, which is already in
16 evidence, and show that to the jury and the witness and the
17 Court.

18 Ma'am, could you please take a minute and look at
19 Exhibit 3, which has already been admitted into evidence.
20 Ma'am, I'll represent to you that the evidence in this case
21 has already been established that this was one of the work
22 plans that was approved by the AMT, a body upon which you
23 sit. Does that look familiar to you?

24 A. It's similar to other work plans I'm sure that we
25 reviewed.

2011

1 Q. You don't have any reason to dispute that these work
2 plans were approved by a joint vote of the AMT, which
3 includes members from Monsanto, BASF Corp and BASF SE?

4 A. No. I have no reason to dispute it.

5 Q. Okay. Well, let's look at some of these activities.
6 And, by the way, what you'll notice here is under the
7 Responsible Party column -- although you seem to suggest
8 Monsanto's responsible for one thing and BASF's responsible
9 for another, we have an entire column of events and
10 activities, and the responsible party listed is both. Do you
11 see that?

12 A. The sales of seed says each party doing their own thing.

13 Q. Well, let's look down at that. Focus Area, left-hand
14 column, Volatility Assessments. Do you see all of that?

15 A. Yes.

16 Q. So if you look down, this is all of the -- and I'm not
17 suggesting there weren't more added later, but for this work
18 plan these are some volatility assessment activities for

-- from these are some relevant, assessment documents --

19 which the responsible parties are both; right?

20 And, in fact, if you look at the one -- we didn't
21 highlight these. They were in the original. But if you look
22 at the one that's above the first highlighted row,
23 "Recommendation on Common Methods to Be Used to Assess
24 Volatility and Repeat Lab Studies By Each Party."

25 "Common Methods," that sort of sounds like something

2012

1 you guys might be doing together, doesn't it?

2 A. It was a method that BASF actually developed, and we
3 needed to make sure that we explained it to Monsanto and that
4 they agreed with it so that the measurement for the
5 volatility of the DLVF was according to the contract, and we
6 were fulfilling our obligations.

7 So we had to propose a method, and they had to agree
8 to it in order for us to meet our contractual obligations.

9 Q. Right. You guys were reaching agreements together on
10 how all of this is going to be done because you're
11 collectively carrying out the responsibilities with these
12 joint work groups to commercialize a dicamba tolerant crop
13 system together; correct?

14 A. Well, if we were to develop the DLVF and Monsanto had to
15 accept that, then to prove to them that it met our
16 contractual obligations we had to show a method that they
17 agreed with, so that's why it was called a common method.

18 Q. A contractual obligation to jointly commercialize a
19 dicamba tolerant system?

20 A. It wasn't jointly commercialized. We were supposed to
21 develop our component, Engenia, and Monsanto had sole
22 discretion over if, when and how to develop its
23 dicamba-tolerant seed as well as its herbicide.

24 Q. It's dicamba-tolerant seed that BASF got paid for every

25 single acre that was planted; correct?

2013

1 A. Yes, that's a royalty.

2 Q. Okay. Do you -- by the way, I've taken a long look at
3 these hundreds of pages of agreements that we've talked about
4 today. Do you know if the word "royalty" is anywhere in the
5 dicamba tolerant systems agreement, or is that a term that
6 you're using for the jury?

7 A. The 2011 agreement? It is.

8 Q. The Dicamba Tolerant System Agreement is the term
9 "royalty" in relationship to the value share anywhere in
10 there?

11 A. It's section 2.2.

12 Q. It's a traited acre payment. Isn't that what you call
13 it? Let's look at the payment section.

14 A. I'm sorry, ma'am, what agreement are we looking at?

15 Q. The Dicamba Tolerant System Agreement. That's B-672.
16 That's been admitted. And I want you to go, Nate, if you
17 could, to page 52, which is the value share payments that
18 we've been talking about. Go to page 52.

19 I want you to look down at Section 7 there where it
20 says, "DT system payments."

21 A. I'm sorry. You're looking at the 2014.

22 Q. I'm looking at Exhibit 672, which was your counsel
23 entered into evidence with you.

24 A. Okay.

25 Q. Do you mind reading that Section 7.1 to yourself and

2014

1 letting the jury know anywhere in this system payment where
2 you guys call it a royalty payment?

3 A. I'm sorry, what do you want me to read? Do you want me

4 to read this section --

5 Q. 7.1, this traited acres. This is the DT systems payment
6 section; right?

7 A. "So Monsanto shall make value share payments to BASF in
8 respect of traited acres as provided in this Section 7.1
9 specifically and this agreement generally traited acres
10 payments."

11 Q. And that's -- they call that a "value share payment" to
12 BASF. Are those the words that are written? Did I read that
13 correctly for this jury?

14 A. Yes, you did.

15 Q. Did I leave out the word "royalty" anywhere when I was
16 reading that paragraph to this jury?

17 A. You left out Section 2.2 in the same agreement that says
18 royalties.

19 Q. But, listen, I'm talking about the value share payments
20 on the traited acres, which I asked you if Monsanto paid BASF
21 for every traited acre of that seed that was planted, and you
22 said, yes, a royalty.

23 So I'm saying let's go to the traited acre payment
24 section of that contract, and you tell me where it's called a
25 royalty in that section about the traited acre payment about

2015

1 the seed planted, which is the question I asked you.

2 A. I'm talking about Section 2.2 where there's commercial
3 licenses and royalty-bearing and royalty-free licenses, which
4 was the basis for those payments.

5 Q. Where did I ask you about licenses when I was asking you
6 about getting paid for the soybean acres that were planted?

7 A. Well, you asked me about royalties, so I'm responding
8 about royalties.

9 Q. Okay. So your answer is that I am correct, nowhere in
10 this DT system payment section, which is what I was asking

11 you about, the seeds that were planted -- do you remember me
12 asking you if BASF got paid on every traited acre of soybean
13 that Monsanto or its affiliates or licensees sold?

14 A. Up to a certain cap, yes.

15 Q. Right. And I'm telling you to please let this jury
16 know where that payment is described as a royalty in this
17 section?

18 A. It's not in this section. It's in Section 2.2.

19 Q. And in 2.2 it is not defining the traited acres DT
20 system payment, is it?

21 A. I'd have to read it more carefully as to what was the
22 basis for the traited acre payment.

23 Q. Well, what would be also interesting for the jury to
24 know is that in your deposition you said you have no
25 knowledge of any payments at all made under this agreement.

2016

1 Do you recall that?

2 A. This is the 2011 agreement. This is -- there were no
3 payments made, because the system wasn't on the market until
4 the 2014 agreement was -- my understanding was amended and
5 restated.

6 Q. Ma'am, in your deposition you didn't know of any
7 payments under the Amended Restated Dicamba Tolerant Systems
8 Agreement either. And you said, correct me if I'm wrong,
9 that you would be speculating to even answer a question about
10 what payments were made under even the amended restated
11 agreement; true?

12 A. Yes. And as the demonstratives show that I was
13 informed that the DT cotton seed was introduced to the market
14 in 2015.

15 Q. So your testimony is based upon stuff that you didn't
16 tell us in your deposition but that you've learned from your

17 attorneys coming here to tell this jury BASF shouldn't be
18 liable for what happened to Bader Farms?

19 A. I'm sorry, what was the question?

20 Q. I need some help from you on that, because you testified
21 that you had no knowledge at all about any payments between
22 Monsanto and BASF with these agreements. Do you remember
23 that?

24 A. Under the 2011 agreement.

25 Q. No, not just under the 2011 agreement. Do we need to

2017

1 pull your deposition?

2 A. I'm sorry.

3 Q. Do you believe you testified at your deposition that you
4 have knowledge of payments even under the amended restated
5 agreement? Is that what you're telling this jury?

6 A. No.

7 Q. Well, let's be clear, because you equivocate when I say
8 you have no knowledge of any payments under the agreements,
9 and limit it to 2011. That's not fair to this jury, because
10 what you said was you didn't have knowledge of any payments
11 under the amended one either.

12 A. Okay. I testified to that in the deposition.

13 Q. Well, that's important, isn't it, right, ma'am, to give
14 consistent testimony even when you come into the Court? You
15 want to be consistent, don't you?

16 A. Of course.

17 Q. So now when you sit here and you're asked questions by
18 BASF counsel about the payments that happened, you suddenly
19 have knowledge of the payments, what they really were, that
20 they're more akin to some lady singing on a PowerPoint than
21 they are the value share payments that's actually written in
22 this contract, and you testified earlier you have no
23 knowledge of any of that; isn't that important?

24 A. I'm sorry, ma'am, what was the question?

25 Q. I actually believe you don't understand. I'll move on.

2018

1 So can we go back to Exhibit 3.

2 A. Is this the same page from before?

3 Q. It is, ma'am. So you don't have any reason to dispute,
4 do you, that the approved work plans for these joint working
5 groups between Monsanto and BASF were carried out by
6 individuals that were made up of shared teams of Monsanto and
7 BASF employees? Do you have any reason to dispute that?

8 A. Shared teams of employees sitting in separate buildings
9 in separate offices in separate companies.

10 Q. Are you telling this jury that those people did not
11 meet?

12 A. Oh, no, they met.

13 Q. Are you telling this jury that under the laws in the
14 State of Missouri that they're required to get a building and
15 work in it together in order for there to be a joint venture?
16 You're not saying that, are you?

17 MR. MANDLER: Objection, Your Honor, calls for a
18 legal conclusion.

19 MS. GEORGE: Thank you.

20 THE COURT: I'll overrule the objection.

21 BY MS. GEORGE:

22 Q. Do you believe, ma'am, that in order to form a joint
23 venture, since you said you didn't intend to do that that,
24 these employees had to go rent a space and put their desks in
25 it and look at each other while they're working to carry out

2019

1 all of these plans in order to constitute a joint venture?

2 A. If you're asking me, I can't testify to what the

3 requirements are in Missouri.

4 Q. I agree with you. But when I ask you if these
5 activities were carried out jointly between these two
6 companies, you said they were separate because they weren't
7 in the same building.

8 A. I -- there were meetings. There were workshops. They
9 talked on the phone. Were they joint teams? Were they
10 working for the same company? No.

11 Were they -- they were still working for BASF.
12 They're working for Monsanto. There were updates that had
13 to be done.

14 Q. How often do you think these folks met, or do you know?
15 And if you don't know, I'm happy to take your admission to
16 this jury that you do not know.

17 A. I don't know specifically.

18 Q. Okay. Can we put up exhibit -- Plaintiff's Exhibit
19 1378, but not for the jury, because it hasn't been admitted
20 yet.

21 A. Could I have a bottle of water or a glass of water or
22 something?

23 MR. MANDLER: I'll get you a glass of water.

24 MS. GEORGE: I'll wait. I needed one before I
25 asked you, so I understand. I'll let you get a drink before

2020

1 I ask.

2 MR. MANDLER: May I approach, Your Honor?

3 THE COURT: Yes.

4 MR. MANDLER: Sorry about that. I should have done
5 that earlier.

6 THE WITNESS: Thanks.

7 BY MS. GEORGE:

8 Q. And, ma'am, I want you to understand that my intensity
9 around this issue is not personal to you, but you understand

10 that there's a lot riding on these conclusory statements.

11 There's a lot riding on this for my client. Do you
12 understand that?

13 A. I understand it's important.

14 Q. It is. And so you understand why I can't just accept
15 speculation or statements that aren't based on knowledge,
16 that that's why I'm following up with you. Do you understand
17 that?

18 A. I understand you're following up with me.

19 Q. Can you take a look at Exhibit 1378 that I just put up
20 for you?

21 A. Are we going to make that -- oh, thank you.

22 Q. And, Nate, there's a line that's not showing up at the
23 very, very top. The header on that can you make sure that
24 Ms. Emanuel can see that?

25 Ms. Emanuel, do you have any reason to dispute that

2021

1 this is the list of members on the original AMT, including
2 the various work groups? Do you recognize this?

3 A. Yes.

4 (Plaintiff's Exhibit No. 1378, Original AMT
5 Members, was identified.)

6 BY MS. GEORGE:

7 Q. And your name is on that, isn't it?

8 A. Yes.

9 MS. GEORGE: Your Honor, I move this into evidence
10 and ask to publish to the jury.

11 MR. MANDLER: No objection, Your Honor.

12 THE COURT: It's admitted.

13 (Plaintiff's Exhibit No. 1378, Original AMT
14 Members, was received.)

15 BY MS. GEORGE:

16 Q. Now, Ms. Emanuel, this is some pretty small print, so
17 I'm going to ask Nate to do all of us a favor and zoom in on
18 the AMT members. Well, first look at the top. It says,
19 "BASF Monsanto DT System Agreement;" right? Do you see that
20 at the very top?

21 A. Contact list, yes.

22 Q. Okay. And, obviously, it doesn't say BASF Monsanto
23 agreement for Monsanto to go off and do its things on the
24 seed and BASF to go off and do its thing on some herbicide.
25 It doesn't say that on there, does it?

2022

1 A. No. It says, "BASF Monsanto DT System Agreement Contact
2 List."

3 Q. Right. Okay. And then let's look at the AMT members.
4 I think you've acknowledged that the rule of the AMT was to
5 approve -- among other things, to approve these joint work
6 plans between the two companies; right?

7 A. Yes, that was one responsibility.

8 Q. And here we have Monsanto individuals for and we have
9 BASF individuals for, and that includes you; correct?

10 A. Correct.

11 Q. And that's -- and then that's because pursuant to the
12 parties' various agreements there was required to be equal
13 representation; right?

14 A. Yes.

15 Q. And that allowed there to be equal voting in approving
16 these work plans; right?

17 A. There were other things that AMT did that required equal
18 representation, but I don't dispute what you said.

19 Q. That they would also be having equal representation in
20 voting on approving the various work plans of all of these
21 individuals; right?

22 A. Yes.

22 A. It -- Okay. Yes.

23 Q. Okay. Because I can pull up your deposition if you
24 want to -- I mean, you remembered in your deposition that the
25 role of the AMT was to approve these work plans; right?

2023

1 A. No, I remember that.

2 Q. And Ron Repage reported to you; right?

3 A. I'm sorry, excuse me?

4 Q. Do you remember Ron Repage, he reported to you?

5 A. Yes, Ron Repage.

6 Q. And he testified to this jury. I don't know if you're
7 aware that he's already testified in this case?

8 A. Uh-huh.

9 Q. Is that a yes?

10 A. Yes. Sorry.

11 Q. And you're aware that he testified -- maybe you're not
12 aware that he testified that there was equal voting. Do you
13 remember that?

14 A. Yes, that's the four and the four.

15 Q. Okay. So let's zoom back out, Nate. Get rid of that
16 clip. And this next section here, this is the CWG; right?
17 And that's the commercialization working group; right?

18 A. Yes.

19 Q. Sorry. So the commercialization work group, these
20 individuals from Monsanto and BASF are working together to
21 complete commercialization tasks; correct.

22 A. Yes.

23 Q. And I think, you know, we could scroll through all of
24 the pages of the work plan that we had before, but you don't
25 dispute that those work plans include tasks toward

2024

1 commercializing the DT system and its components; right?

2 A. For example, press release, exchange. In other words,
3 there was a requirement in the contract that if there was
4 press release to be made, that that needed to be exchanged.

5 Q. Right. Because you're aligning your messages as a
6 company. You're aligning your messages on this system; true?

7 A. Sometimes.

8 Q. Sometimes. Okay. Let's back out of that. And the
9 next one we have is development working group members.

10 These are the individuals from both Monsanto and BASF that
11 are pooling their efforts and regularly meeting to develop
12 this DT system; true?

13 A. So what the development working group did was we were
14 developing the DLVF, and Monsanto was developing its DTC and
15 its herbicide, and there needed to be an exchange of
16 materials and as well as testing of our Engenia on Monsanto
17 seed, and so the question is how did you exchange materials
18 and what method were you going to use to test and what were
19 the results.

20 Q. And you-all worked together on that; correct?

21 A. Well, the field tests and the other tests were done by
22 the independent parties, and then the results were -- the
23 methods were exchanged in advance so that each party could
24 approve the method, and then so that the results then could
25 be reviewed and that they were found to be valid by each

2025

1 party, because they had previously looked at the methods from
2 each party.

3 Q. So because per your agreement you-all had to align on
4 protocols and methodologies, and that sort of thing, to
5 complete your developmental testing, make sure the other
6 approved about your approach, and you communicated all along
7 the way; correct?

8 A. Well, if we wanted to see if Engenia actually worked on
9 DT seed, then we needed to make sure, and Monsanto needed to
10 make sure that how it was applied to the seed and what the
11 methodology of application was and evaluation was that they
12 were okay with that so that the results were -- were
13 understandable and done in a way that they had understood.

14 Q. So after you got their approval to do what it is you
15 were going to do you may have gone and done some testing, but
16 you're still going to report back your results to them, and
17 you're going to compare notes on that and move forward
18 accordingly; true?

19 A. That's because we wanted to sell Engenia over the top of
20 Monsanto's DT seed.

21 Q. Right. Because it's a system, isn't it?

22 A. It's a -- it's Monsanto seed and their herbicide, and we
23 wanted the ability to sell Engenia over the top as well.

24 Q. I think we've established that you guys were
25 commercializing a dicamba tolerant system. You don't

2026

1 disagree that your agreement was called Dicamba Tolerant
2 Systems Agreement?

3 A. That was what was the name for the 2011 agreement.

4 Q. And then after that when you had years to change the
5 name, you changed it to Amended and Restated Dicamba Tolerant
6 System Agreement; right?

7 A. I'm sorry, what was the question?

8 Q. You acted as if there was some major name change after
9 this 2011 agreement --

10 A. No.

11 Q. -- but all you did was called it amended and restated.
12 It was still called the Dicamba Tolerant System Agreement;
13 correct?

14 A. It was called -- yes, it was the same name, but it was

15 amended and restated.

16 Q. And you can take this one down. And certainly you don't
17 dispute with me that there's also a regulatory group, right,
18 where the two parties are aligning their messages and
19 comparing notes and having joint meetings with the EPA for
20 regulatory approval of their various products within the DT
21 system; correct?

22 A. Well, we were required by contract to help support the
23 registration of the dicamba herbicide that was going to go
24 hopefully over the top of DT seed.

25 Q. Right. You were required by your contract with

2027

1 Monsanto. So BASF and Monsanto agreed to mutually support
2 each other's efforts to get regulatory approval; true?

3 A. We were required by contract to provide access to the
4 data and inquiries from governments to help them get their
5 herbicide registered and make sure there was a herbicide to
6 go over the top.

7 Q. You know, I keep -- you keep switching it to say we were
8 required by contract. Did someone force BASF under duress to
9 enter into this contract?

10 A. No.

11 Q. No. So you agreed -- every time I say agreed to do
12 something you switch it to we were required by contract. Am
13 I missing something?

14 A. I'm sorry, we agreed in the contract.

15 Q. Okay. You can take this down, Nate. Thank you.

16 Ma'am, do you dispute that there were at least 19
17 meetings of the Alliance Management Team to discuss the
18 commercialization process of the dicamba tolerant system?

19 A. There could be 19 meetings over the time period of 2011
20 to the end of the -- to the end of the AMT in 2015.

21 Q. Oh, the AMT ended in 2015. Are you sure?

22 A. Well, the umbrella agreement expired in 2015.

23 Q. Ma'am, the truth is the AMT met even in 2017 to discuss

24 under the umbrella agreement the joint defense of this case

25 and the claims of off-target movement; isn't that right?

2028

1 A. I don't know that.

2 Q. Well, then how can you -- if you don't know that, how

3 can you tell this jury for certain that the AMT quit meeting?

4 What's the basis for your knowledge?

5 A. Because I know the -- I was on the AMT in 2015 when the

6 umbrella agreement expired and the AMT dissolved, and there

7 couldn't be a meeting under the AMT.

8 Q. It's your testimony there could not be a meeting under

9 the AMT after 2015. Are you sure?

10 A. Whenever the umbrella agreement expired, and it's my

11 recollection it was in 2015, maybe 2016.

12 MS. GEORGE: I think now would probably be a good

13 time for a break.

14 THE COURT: We'll take a recess for 10 or

15 15 minutes. Remember the admonition I've given you. Do not

16 discuss the case among yourselves or with others or permit

17 anyone to discuss it in your presence. Do not form or

18 express any opinion about the case until it's given to you

19 decide.

20 Go to the jury room now, and we'll call you back

21 shortly. Thank you for your patience.

22 Court is in recess.

23 (Jury out.)

24 THE COURT: You may step down.

25 (Witness stepped down from the stand.)

2029

1 (Proceedings stood in temporary recess.)

2 (Proceedings resumed in open court outside the
3 presence of the jury.)

4 THE COURT: Any preliminary matters?

5 Okay. You can bring the jury in.

6 (Proceedings resumed in open court.)

7 (Jury in.)

8 THE COURT: Please be seated.

9 You may continue.

10 MS. GEORGE: Thank you, Your Honor.

11 BY MS. GEORGE:

12 Q. Ms. Emanuel, before we broke, I was asking you about the
13 AMT continuing to meet, and I believe that you said that you
14 thought they didn't meet again after 2015. Do you recall
15 that?

16 A. It was my understanding that the umbrella agreement
17 expired at some point and that the AMT couldn't meet,
18 although the AMT continued under the DTSA. So I was -- I
19 might have misunderstood the question.

20 Q. So now looking back do you think maybe the AMT did
21 continue to meet? I'm not trying to trick you. I just want
22 to understand what your --

23 A. It could have been under the DTSA.

24 Q. Okay. And is it your testimony that all of the AMT
25 meetings that took place reviewing the work plans and being

2030

1 updated about these companies' efforts on the Dicamba
2 Tolerant System Agreement were not meeting under the umbrella
3 agreement? That's not what you're saying, is it?

4 A. No. When the umbrella agreement was in force or that
5 the AMT met to do many other things, also reviewed the
6 progress on the various plans, but then when the umbrella

7 agreement expired, then the AMT continued under the DTSA.

8 Q. You'll agree with me, though, that the DTSA, the amended
9 restated DTSA and the DTSA define the AMT as that group that
10 was established under the umbrella agreement; correct?

11 A. It made reference to the umbrella agreement.

12 Q. Right. And just to give the jury a little -- we're not
13 going to go through the contracts, but just some brief
14 understanding here, Nate, could you pull up B-672, which is
15 in evidence.

16 A. Which is, I'm sorry?

17 Q. It's in evidence. It's the Dicamba Tolerant System
18 Agreement.

19 A. The 2011?

20 Q. Well, you have executed it, right, or you can tell me if
21 you --

22 A. I'm just confirming.

23 Q. Right.

24 A. Yes.

25 Q. Let's go to page 15 of that agreement, which is actually

2031

1 the Bates Number at the bottom you'll see, Ms. Emanuel.

2 We'll pull it up for you. Do you see there in paragraph 1.51
3 where it says DT system?

4 A. Yes.

5 Q. And that says, "The DT system means a DT crop or DT seed
6 product in combination with any DT system crop protection
7 product;" correct?

8 A. Yes, I see that.

9 Q. And "DT" means dicamba tolerant; right?

10 A. Yes.

11 Q. And so we're talking about a dicamba-tolerant seed or
12 crop in combination with any dicamba tolerant system crop

13 protection product. So let's break that down first. Nate,
14 can you go back to the agreement. Can you highlight DT seed
15 product there, paragraph 1.5.

16 Do you see that? "The DT seed product means any seed
17 of a DT crop. Seed from which a DT crop is or may be grown;"
18 right?

19 A. Yes.

20 Q. And that doesn't limit itself in any way to DT seed,
21 which is only distributed directly personally by Monsanto;
22 right? It could include DT seed that they license and
23 distribute to growers; correct?

24 A. I don't know that.

25 Q. You don't know that?

2032

1 A. Well, I'm sorry, what was the question?

2 Q. Well, it says here, "DT seed product means any seed of a
3 DT crop. Seed from which a DT crop is or may be grown." Do
4 you understand that to mean the dicamba-tolerant trait and
5 seed that was being developed by Monsanto?

6 A. Yes, I do.

7 Q. And because it's your testimony that BASF didn't have
8 anything to do with that; right?

9 A. Yeah, we didn't develop any DT seed.

10 Q. And it's your understanding, and I think I saw it on
11 your attorney's demonstrative that you used this morning,
12 that that DT seed is controlled wholly by Monsanto; correct?

13 A. What I was talking -- whenever I was talking about in
14 the demonstrative --

15 Q. Yes.

16 A. -- was saying that the sole discretion and control for
17 that particular point was on -- over Monsanto's DT seed.

18 Q. And you were saying not BASF, but you were saying that
19 Monsanto controlled the DT seed; correct?

20 A. They controlled their DT seed.

21 Q. Well, should we pull back up the demonstrative and see
22 what it said? Because maybe I'm wrong, but I thought it said
23 Monsanto controlled DT seed. Should we pull up -- do you
24 want me to pull it up?

25 A. No. I -- okay.

2033

1 Q. You do?

2 A. I -- yeah. I'm sorry. What was the question?

3 Q. Well, you seem to be making a distinction. And what I'm
4 asking you is whether or not Monsanto controls DT seed. And
5 it was on your demonstrative.

6 A. They had sole discretion over if, when and how their DT
7 seed would come into market.

8 Q. And then let's look -- Nate, can you at the very top
9 paragraph 1.41 would you highlight dicamba trait. Can you
10 take a look at that?

11 A. Yes.

12 Q. And the trait is what's contained within the seed;
13 correct?

14 A. Yes.

15 Q. Okay. And this says, "Dicamba trait means any trait
16 controlled by Monsanto or any member of the Monsanto group
17 that confers dicamba tolerance;" correct?

18 A. Yes.

19 Q. You can take that back down, Nate. Thank you. And then
20 could you go back to -- let's see. No. You were on the
21 right page. Sorry. I'm not navigating well. I'm sorry.
22 So it's page 15, I guess, of that, right, of B-672.

23 Page 15.

24 Okay. Ms. Emanuel, can you look at -- Nate, could
25 you pop out Paragraph 1.52 at the bottom. And this defines

1 the DT system crop protection product, because I think we
2 went over just a second ago that the system is DT seed or
3 crop in combination with the DT system crop protection
4 product. Do you recall that?

5 A. Yes.

6 Q. And included in here there's a lot of acronyms, but I
7 think the jury has heard some of them, so I think they're
8 going to pick up with us pretty quick, but it includes BASF
9 DGA herbicide; right? And BASF DGA herbicide is Clarity;
10 right?

11 A. Yes.

12 Q. Or any BASF DGA herbicide pre-mix commercialized by a
13 member of the BASF group or a member of the Monsanto group or
14 any distributor of any of the foregoing; right?

15 A. Yes.

16 Q. Meaning it includes herbicides like Clarity or Clarity
17 PL even if BASF, which it doesn't tend to do, walks door to
18 door and hands it out and sells it, it would include
19 distributor sales of that?

20 A. If those products were registered.

21 Q. Okay. And then -- but I will say nowhere in this
22 particular paragraph does it say only if it's registered,
23 does it?

24 A. No. But it can't be used over the top unless it is.

25 Q. Well, I understand that that's your position that there

1 are labels, and we've heard a lot in this case about farmers
2 need to follow the law, and I'm not disputing that there are
3 labels for herbicide. What I'm talking about is the
4 definition in this contract of DT crop protection product.
5 Do you see that?

6 A. Yes, I do.

7 Q. Can you show me where in this paragraph it says, "only
8 if its registered"?

9 A. It doesn't.

10 Q. Okay. So then Subparagraph B after that says, "Any DGA
11 herbicide commercialized by member of the Monsanto group or
12 any distributor thereof;" right?

13 A. Yes.

14 Q. Okay. And then it also talks about DLVF, and the jury
15 has seen that -- if they see that again after this week, it
16 will probably be too soon for them. DLVF is dicamba low
17 volatility formula; right?

18 A. Formulation.

19 Q. Formulation. So DLVF formulation whether or not it's a
20 tank mix. And then it says, "Or any Monsanto DLVF pre-mix
21 that is commercialized by a member of the Monsanto group or
22 any distributor thereof;" right?

23 A. Yes.

24 Q. Right. And then the last one is, "A dicamba low
25 volatility formulation or any BASF DLVF pre-mix that is

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1 commercialized by a member of the BASF group or any
2 distributor or a licensee thereof." Do you see that?

3 A. Yes.

4 Q. And that was the definition of one component of the DT
5 system. It was the DT seed or crop plus what's in this
6 paragraph; true?

7 A. Yes.

8 Q. Okay. We can take that down.

9 Now, Ms. Emanuel, you told this jury that it was
10 never the intention to enter into any kind of a joint
11 venture. Do you remember that testimony?

12 A. Yes.

13 Q. Are you aware that there's been testimony in this case
14 from Dr. Birk? Do you know Dr. Birk?

15 A. BASF Jeff Birk?

16 Q. Yes.

17 A. Yes.

18 Q. Yeah. And he's -- you know him. He's one of the
19 members of the development working group, the joint working
20 group between BASF and Monsanto?

21 A. I thought he was regulatory.

22 Q. I'm sorry. Regulatory. You're right. You're right.
23 He's regulatory.

24 So you know him?

25 A. Yes. I don't know him very well, but I know him.

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1 Q. And he's presented to the AMT, hasn't he?

2 A. Yes. I wasn't -- I don't think I was in the AMT when he
3 did, but I'm sure he did.

4 Q. Fair enough. There's been testimony from Dr. Birk in
5 this case, and in that testimony exhibits came in where there
6 were invoices in which BASF referred to its relationship with
7 Monsanto in invoicing for payments as a joint venture. Are
8 you aware of that?

9 A. I was aware that there was an instance of somebody
10 sending over an invoice to that effect, yes.

11 Q. Are you aware that there were multiple instances?

12 A. No.

13 Q. Okay. Let's just look at a couple really quick.
14 Nate, will you pull up 1158, please. It's already been
15 admitted into evidence so we can show it to the jury.

16 We won't belabor this, because the jury has already
17 seen it. But you'll see -- Nate, if you can highlight up at
18 the top. There you go.

18 the top. There you go.

19 Do you see the subject line of that December 2015
20 e-mail where it says, "Information for Monsanto invoice for
21 dicamba joint venture;" right?

22 A. Yes.

23 Q. And you recall when we asked you -- when my colleague
24 Mr. Bilsborrow asked in your deposition if you knew anything
25 about the payments between these two companies, and you said,

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1 "No:" Do you recall that?

2 A. Yes.

3 Q. And then you recall he asked you, "Who would we go to
4 talk to to find out about that?" Do you recall that?

5 A. Yes.

6 Q. And do you recall that you said -- including the list of
7 people you said, "the accounting people?" Did you say that?

8 A. Not directly, but I would have, yeah. I could have.

9 Q. Okay. So let's pop that back out, Nate, so we can see
10 that that's an invoice -- an invoice there for "residue
11 tolerance testing pursuant to their" it says -- I'm
12 quoting -- "Monsanto invoice for dicamba joint venture."

13 You don't have any reason to dispute that BASF
14 referred in this document to its relationship pertaining to
15 dicamba with Monsanto as a joint venture, do you?

16 A. I see Heidi Pittner refer to it as a joint venture.

17 Q. Okay. You can take that down and let's pop up 1159.

18 Okay. Do you see that, that's another one from Dr. Birk to
19 Heidi Pittner? Do you see that where it says 2015 dicamba
20 joint venture invoice?

21 A. But it's same invoice. It's the same e-mail; right?

22 Q. Well, it's not the same -- well can we pop it back out.
23 Let's scroll down there to the bottom. I'm sorry. Is just
24 one page? Okay. I'll find the other invoice.

25 You don't dispute, though, that there were -- oh,

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1 wait is this it? Oh, there -- this is several invoices here
2 scrolling through for residue tolerance testing. Were you
3 aware of those payments at all?

4 A. I'm sorry, I'm not sure what this is.

5 Q. Because you still don't have any idea about payments
6 that were exchanged between the companies for their joint
7 efforts for dicamba; right? That hasn't changed since your
8 deposition, you just don't know?

9 A. No.

10 Q. Okay. Nate, let's pull up -- let me ask you this
11 question, are you aware that -- it's not just limited to
12 Heidi Pittner or some individuals in contract compliance.
13 Are you aware that BASF and Monsanto refer to themselves as
14 joint venture when they're communicating with regulatory
15 authorities like the EPA?

16 A. I was not aware.

17 Q. Okay. Could you -- for not the jury, because we haven't
18 admitted it yet -- can you please pull up Plaintiff's 1013.

19 Ms. Emanuel, you would agree that it's important to
20 be as clear and accurate and honest as possible when
21 communicating with regulatory authorities; right?

22 A. Yes.

23 Q. Okay. Do you see this document? You'll see at the
24 bottom on the right there's a Bates Number MDL BASF 00704371.

25 Do you see that?

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1 A. Yes, I see that.

2 Q. Do you have any reason to dispute that this was produced
3 to us from BASF in this litigation?

4 A. No.

5 Q. And then also at the bottom you'll see some initials
6 that say "WBJ," Wendy Bair-Johnson. Do you know her?

7 A. Yes.

8 Q. Okay. You can scroll back up to the top. And at the
9 top it says, "Dicamba Tolerant Crop System Regulatory
10 Audiences." Do you see that?

11 A. Yes.

12 (Plaintiff's Exhibit No. 1013, Dicamba Tolerant
13 Crop System Regulatory Audiences, was identified.)

14 MS. GEORGE: Your Honor, we move this into
15 evidence.

16 MR. MANDLER: Your Honor, this was subject to a
17 motion in limine. Can we approach?

18 THE COURT: Yes.

19 (Proceedings were held at sidebar, outside the
20 hearing of the jury.)

21 MR. MANDLER: Your Honor, this is the one we
22 objected to as a draft, and there's no foundation that was
23 actually submitted. They have made it all black and white,
24 but there were multiple colors in it during the deposition
25 testimony. Mr. Birk said he didn't recognize it and didn't

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1 know whether it was submitted to the EPA.

2 So this witness obviously is not in regulatory.
3 They can't lay the foundation that this was ever submitted.
4 They're trying to imply that it was submitted, but there's no
5 foundation that it was.

6 MS. GEORGE: First of all, there's no edits on this
7 and no colors in it. I printed it exactly off the system.
8 But I'm entitled to ask her if she disagrees with the
9 characterization that was made in this document.

10 MR. MANDLER: Right. But you can ask her but not

11 admit the document because you haven't laid a foundation.

12 MS. GEORGE: Sure I can.

13 MR. MANDLER: We don't know that it was submitted
14 to EPA.

15 MS. GEORGE: It doesn't matter --

16 MR. MANDLER: And when they had --

17 THE COURT: She's indicated she's not going to try
18 to admit it.

19 MR. MANDLER: Okay. As long as you can -- she just
20 moved to admit it, and that's when I objected to it.

21 MS. GEORGE: Well, I can at least show it to the
22 jury and ask her about it.

23 MR. MANDLER: Well, not --

24 MS. GEORGE: And I won't --

25 MR. MANDLER: Well, I don't think she --

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1 MS. GEORGE: But I can ask for her testimony if she
2 agrees or disagrees with this characterization.

3 MR. MANDLER: She characterized it as being
4 submitted to the EPA. The counsel has already said that, and
5 that foundation isn't there.

6 THE COURT: Why don't you rephrase this whole line
7 of questioning so that -- to cure these problems that he's
8 raised.

9 MR. ROSENBERG: And, Your Honor, the only thing
10 that has been shown to the jury that's not been admitted into
11 evidence has under the -- we haven't shown anything not
12 admitted into evidence.

13 THE COURT: It is what?

14 MS. GEORGE: Sure we have. We've shown
15 demonstratives. We've shown --

16 MS. ROSENBERG: This can't be moved in for

17 demonstrative purposes.

18 MS. GEORGE: This is impeachment evidence.

19 THE COURT: Right.

20 MR. MANDLER: Right. But you can ask her about it,
21 but not show it to the jury, because that's not in evidence.

22 MS. GEORGE: Sure I can show this to the jury.

23 MR. MANDLER: So far the rule has been only
24 admitted evidence has been shown to the jury.

25 THE COURT: Oh, I don't think that's right.

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1 MR. MANDLER: That has been the rule in the case so
2 far.

3 MS. GEORGE: Not to mention drafts are just as much
4 evidence as actual documents. This is somebody putting their
5 thoughts about and characterizing it. Whether they send it
6 or put it up as a poster on their wall it's evidence.

7 MR. MANDLER: But that's not what you said. You
8 said this was submitted to EPA.

9 MS. GEORGE: I'm going to say whether or not this
10 was submitted to EPA do you agree with this characterization?

11 THE COURT: Yeah. Why don't you just read it to
12 her. Just read it and not show it.

13 (Proceedings resumed in open court.)

14 BY MS. GEORGE:

15 Q. Ma'am, can you see this Exhibit 1013?

16 A. Yes.

17 Q. And do you see that it says -- and, by the way, you said
18 that you do know who Wendy Bair-Johnson is?

19 A. Yes.

20 Q. What's her position?

21 A. She is in the North American organization in the ag
22 division I think for state registrations.

23 Q. So she actually does have responsibility for putting

--
24 together materials in support of registration of BASF
25 products?

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1 A. I don't know.

2 Q. You don't know that?

3 Okay. Well, let's read and see what this says and
4 see if you agree or disagree with this characterization of
5 BASF and Monsanto's relationship as drafted by Wendy; okay?

6 THE COURT: Counsel, I'm going to ask you to come
7 up again.

8 (Proceedings were held at sidebar, outside the
9 hearing of the jury.)

10 THE COURT: It seems like she did lay a sufficient
11 foundation for this document.

12 MR. MANDLER: How so?

13 THE COURT: Because she said -- she just testified
14 she knew who this person was and is.

15 MS. GEORGE: And that she puts materials in for
16 registration.

17 MR. ROSENBERG: She didn't testify who drafted
18 that.

19 MS. GEORGE: It's right on here. It's her draft.
20 It says, 2011 Wendy Bair-Johnson. She agreed that was her,
21 and that's her draft, and that's her job to put materials
22 together for registration.

23 MR. MANDLER: Right. But there's no foundation
24 that it was ever used for that.

25 THE COURT: Well, that's a different point, but so

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1 I'm going to allow this in. I think that she's got enough
2 foundation with this witness, not with the other witness.

3 MR. MANDLER: To be admitted or just --

4 THE COURT: Sure.

5 MR. MANDLER: We'll reserve our objection.

6 THE COURT: That's fine.

7 MR. ROSENTHAL: Same objection.

8 (Proceedings resumed in open court.)

9 MS. GEORGE: Your Honor, I move Plaintiff's 1013
10 into evidence.

11 MR. MANDLER: Same objection, Your Honor.

12 THE COURT: It's admitted then.

13 (Plaintiff's Exhibit No. 1013, Dicamba Tolerant
14 Crop System Regulatory Audiences, was received.)

15 BY MS. GEORGE:

16 Q. Okay. Ms. Emanuel, can you -- oh, sorry, we're going to
17 wait until it's published. It's -- we're on a little lag
18 there.

19 And in this document how does Ms. Bair-Johnson
20 describe BASF and Monsanto's relationship? Do you see that
21 first sentence? Can you read that first sentence to the
22 jury?

23 A. It says, "BASF and Monsanto Corporations are engaged in
24 a joint venture which carries the potential to solve the
25 problem of glyphosate resistant broadleaf weeds in important

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1 broadleaf crops."

2 Q. And then after that, Ms. Bair joins and talks about the
3 companies combining their expertise; right?

4 Let's -- I'll read that one for you since both of us
5 are getting dry I'll take a turn, okay, for you.

6 It says, "Together the companies have combined their
7 expertise in crop and dicamba herbicide technologies to bring
8 about an effective foolproof system for growing soybeans and

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9 COTTON.

10 Then it says, "Monsanto has engineered the crops, and
11 BASF has brought to the fore a new formulation of dicamba for
12 use in tolerant crop systems."

13 Did I read that correctly?

14 A. You did.

15 Q. Despite your representations today -- and you can take
16 that down, Nate. Thank you.

17 Despite your representations today that BASF and
18 Monsanto are not engaged in a joint venture, certainly at
19 least some employees at Monsanto feel comfortable enough with
20 that characterization to put it in documents; correct?

21 MR. ROSENBERG: Objection, misstates the document.

22 MR. MANDLER: I object under the parol evidence
23 rule.

24 THE COURT: Both are overruled.

25 MS. ROSENBERG: Because it's a BASF document. She

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1 said a Monsanto employee.

2 THE COURT: Oh, well --

3 MS. GEORGE: I meant to say BASF employee. I
4 didn't know I said --

5 THE COURT: Thank you for that clarification.

6 MS. GEORGE: Yeah. I misspoke on that.

7 BY MS. GEORGE:

8 Q. A BASF employee felt comfortable enough putting that
9 characterization in writing; correct?

10 A. Wendy Bair-Johnson.

11 Q. You also talked about Monsanto not -- or BASF and
12 Monsanto not engaging in a conspiracy. Do you recall that
13 testimony?

14 A. Yes.

15 Q. And do you recall the testimony that you didn't intend

16 to enter into a conspiracy to create -- and I'm not going to
17 remember the phrase Mr. Mandler used, but I believe an
18 ecological disaster or however he called it: Do you remember
19 that?

20 A. I don't remember those specific words, but --

21 Q. And I can't recall them either, but maybe John does, but
22 it was something along those lines characterizing what
23 conspiracy that you didn't intend to enter into. Do you
24 recall that testimony?

25 A. I remember him asking me if I -- if we intended to enter

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1 into a conspiracy, and I said, "No."

2 Q. Okay. Do you recall -- let's just talk about this. So
3 do you have any knowledge or awareness of BASF and Monsanto
4 agreeing to discussing things like limiting testing?

5 A. I'm sorry, I didn't get the end of the question.

6 Q. Do you have any knowledge or awareness of the fact that
7 BASF and Monsanto's regulatory work groups discussed the
8 possibility of limiting testing?

9 A. Well, in the sense of if there were already tests
10 available, I'm sure there were discussions about whether
11 there was more testing necessary.

12 Q. You think that's the only reason that Monsanto and BASF
13 would have discussed limiting testing is because there might
14 already be enough available?

15 A. I don't know. I think it was one reason. It could be
16 one reason.

17 Q. Let's put up Plaintiff's 1149, which is already admitted
18 into evidence.

19 Ms. Emanuel, I'll represent to you, and you can read
20 it right there for yourself, that this is notes from a BASF
21 MON regulatory working group meeting from February 5th of

22 2015. Do you see that?

23 A. Yes, I do.

24 Q. And you're aware of Jeff Birk, that's a BASF employee;
25 right?

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1 A. Yes.

2 Q. And then there's also Monsanto employees on here too;
3 right? Do you know Dr. Bhakta? She's testified for the
4 jury. Do you know her?

5 A. No.

6 Q. How about Jerry Cabbage, do you know him?

7 A. No.

8 Q. You have no reason to doubt that he was on the
9 regulatory team over at Monsanto?

10 A. I don't know, but I don't doubt it.

11 Q. Okay. Let's zoom back out on that. Let's look at the
12 second to last paragraph there at the bottom. There it
13 says, "EPA confirmed that their primary concerns about the DT
14 system are spray drift, volatility, and potential effects on
15 the progeny of plants exposed to dicamba. Monsanto is
16 preparing a white paper to try and help EPA work through
17 these issues and to give EPA a defensible position for making
18 a positive registration decision." Do you see that?

19 A. Yes, I do.

20 Q. And then the next paragraph below that in these notes in
21 this combined meeting of Monsanto and BASF employees says,
22 "2015 field testing concerns." Do you see that?

23 A. Yes, I do.

24 Q. And then it says, "Monsanto raised a concern about the
25 amount of third party academia field testing that will be

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1 done with Engenia in 2015. Monsanto is concerned about

2 results that could negatively impact EPA's registration
3 decision and how tightly BASF controls the release of data by
4 third parties. BASF biology and Tech Service will be
5 advised on Monsanto's concerns." Did I read that correctly?

6 A. Yes, you did.

7 Q. Is it still your testimony that there was no discussion
8 of limiting testing other than in situations where maybe you
9 already had enough?

10 A. I said it was -- it could be one reason.

11 Q. And this could be another, right, that they're worried
12 about negatively impacting EPA's registration, that could be
13 another reason that was discussed together between Monsanto
14 and BASF employees; right?

15 A. I'm sorry, what was the question?

16 Q. The question is that this could be another reason. It's
17 not just the instance where you already have enough testing.
18 Monsanto and BASF employees together in their regulatory
19 working group meeting, which is a part of the joint working
20 group, had discussions about Monsanto's concerns notifying
21 BASF they're worried about negatively impacting EPA
22 registration if there's more field testing done; right?

23 That's another reason?

24 A. That's what it said.

25 Q. Okay. And in testifying that you don't believe there

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1 was ever any intention to engage in a conspiracy with
2 Monsanto were you aware that there was discussion at BASF
3 about scaling up production of Clarity before 2015? Are you
4 aware of that?

5 A. I'm sorry, scaling what?

6 Q. Scaling up the production of Clarity. Well, lets back
7 up and make sure you understand, because I know earlier you

8 had testified that you didn't really have any knowledge of
9 after '15, but now it seems that you've got a lot more
10 knowledge that you believe that you have about the parties'
11 relationship.

12 And if I understand correctly, you believe you were
13 informed enough to tell BASF's attorney that there was no
14 intention to engage in a conspiracy; right?

15 A. I don't -- there was no intent to enter into a
16 conspiracy.

17 Q. Okay. Does that also include the intent to conspire to
18 flood the market with Clarity in advance of Monsanto selling
19 the DT seed? Do you believe you didn't do that, BASF didn't
20 do that?

21 A. Well, our production went down, our sales went down.

22 Q. Well, maybe we should hop to that, because I don't know
23 how long you've been sitting in trial, but there's actually
24 been testimony to the contrary.

25 Can you please pull up Plaintiff's 1164, which has

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1 already been admitted into evidence and can be shown to the
2 jury.

3 First, to be clear, Ms. Emanuel, what you showed the
4 jury about Clarity sales going down, that wasn't sales to
5 growers, was it?

6 A. No. That's correct. It was sales to distributors.

7 Q. And don't you think the most important indicator of
8 what's going to be sprayed on a field is what's actually sold
9 to growers?

10 A. I can't speak to that.

11 Q. You can't speak to that? Do the retailers all come out
12 and spray all the growers' fields for them, or do the growers
13 go purchase the product from the retailers and the
14 distributors to then go spray?

15 A. I can't speak to that.

16 Q. Well, it's important in this case, ma'am, because if
17 you're testifying to the Court that Clarity sales went down,
18 and, therefore, the market could not have been flooded in
19 Clarity at the time Monsanto sold DT seed, we really need to
20 get to the bottom of this distinction; right? Does that make
21 sense to you?

22 A. I know the numbers that we discussed this morning were
23 the audited numbers of our production from Beaumont as well
24 as the sales of Clarity and private label Clarity to
25 distributors.

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1 Q. Do you think there's a possibility that BASF might have
2 dumped quite a bit of Clarity into the hands of its retailers
3 and distributors in 2014 so that it might have it on hand
4 when that Xtend soy, for example, goes on the market?

5 A. I don't know. We don't have control over what happens
6 after we sell to the distributors.

7 Q. Well, let's look at it, because you may say to this jury
8 you don't have control over it, but BASF counts on those
9 dollars in its sales projections and its sales figures,
10 doesn't it?

11 A. I don't know that.

12 Q. You don't know that. That's kind of an important piece
13 of information, isn't it?

14 A. I'm sorry.

15 Q. All right. Well, let's look at page 8 of that document,
16 Nate. It's slide seven, but it's page 8 on your numbers.

17 Are you aware that in BASF's own internal sales
18 document -- and this is in evidence already -- that Clarity
19 and private label brand performance metrics -- do you see
20 this analysis -- that there was a dicamba demand spike with

21 the trait, and actually sales went through the roof in 2016?
22 Do you see that?
23 A. Is that the red bar?
24 Q. It is. Nate, could you blow that up so that
25 Ms. Emanuel can take a look at that.

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1 And the numbers are a little hard to read, I'll give
2 you that, but you can tell from the words on the slide, and
3 we can back out, that it shows that from '14 to '15 to '16
4 that the sales ultimately -- when the Xtend soy hit the
5 market, that Clarity and Clarity PL actually went through the
6 roof? Do you see that?
7 A. Right. Were most of the sales in Texas?
8 Q. No. This is for the whole country here, ma'am?
9 A. No, I know, but isn't the map showing where the sales
10 are?
11 Q. Well, you look at it here. And there's another bar. We
12 can get to it if you're familiar with the territories. Do
13 you know what District 201 is?
14 A. No.
15 Q. So me telling you what territories and which sales
16 aren't going to help here anyway; right?
17 A. No.
18 Q. Okay. So look at what this slide says, "Use has
19 increased, especially in 2016." And that's talking about
20 Clarity and Clarity private label sales as reflected at the
21 top of that slide: Do you see that?
22 A. Yes, I see that.
23 Q. And then it says, "DT seed was available in cotton
24 states in 2016." Do you see that?
25 A. I see that.

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1 Q. Do you know Missouri is considered a cotton state?

2 A. Yes, I know that.

3 Q. Okay. So in Missouri in 2016 when Xtend soy is
4 available to farmers the sales to farmers of Clarity and
5 Clarity PL went through the roof. Do you have any reason to
6 dispute that?

7 A. I have no reason to dispute it. I know the numbers
8 that we presented were the numbers to distributors.

9 Q. What do you think causes the injury ultimately? I mean,
10 where do you think you should dial in to find out what
11 farmers are spraying in their fields? Don't you think it's
12 important to look at this assessment and see what growers
13 bought in 2016?

14 A. So my testimony is about the audited numbers for
15 Beaumont and the sales to distributors. I don't know -- I'm
16 not familiar with the document. I don't know who did it or
17 when it was done.

18 Q. So then I think we can agree that those numbers about
19 the sales to retailers are relatively worthless at predicting
20 what was dumped into the market by BASF's own distributors
21 and retailers in 2016; true?

22 A. I can't testify to that.

23 Q. Okay. Let's back out of that slide a second. And do
24 you see what it says at the very bottom of that slide? Do
25 you see that bullet?

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1 A. Yes.

2 Q. It says, "Dicamba demands spike with DT traits." Do
3 you see that?

4 A. Yes.

5 Q. And that kind of flies in the face of your testimony
6 earlier that Clarity sales are just going down and have

7 nothing to do with the increased sales of Xtend seed; right?

8 A. I can't testify to that. I know that our demand
9 numbers were down. I know that the audited numbers of
10 production from Beaumont of sales of Clarity of sales of
11 private label to distributors went down.

12 Q. Well, and let's go back just a second. You don't
13 dispute for a second to this jury that BASF gets paid off of
14 every bottle of Clarity, including Clarity private label?

15 A. Yes, we get paid on those sales.

16 Q. Okay. You can take that down. And you keep talking
17 about the Beaumont facility capacity basically becoming
18 incapacitated or something because of this expansion. Is
19 that -- help me understand your characterization about that.

20 A. Well, I didn't say incapacitated, I believe. I believe
21 I said that -- and we showed a demonstrative that the
22 production numbers went down significantly in 2015 and 2016.

23 Q. Do you have any reason to dispute that BASF's solution
24 to that was to import dicamba from China to make up for that?

25 A. No. I know our demand was down.

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1 Q. Your demand was down? Was your demand down from
2 Monsanto who you were agreeing to supply this dicamba to in
3 the course of your agreement? Did you know that?

4 A. That was under the DTSA that we were to supply Monsanto
5 a certain amount.

6 Q. Right. And in those -- and you're aware that
7 Mr. Repage testified that part of the reason that you
8 expanded dicamba -- or the Beaumont facility -- business case
9 justification for that was the agreement to supply dicamba to
10 Monsanto. Do you have any reason to dispute that?

11 A. I don't dispute that. It was also to get ready for
12 Engenia.

13 Q. Okay. Let's put up Exhibit 1150, which has already been
14 admitted into evidence. By the way, this is a dicamba
15 project update. I'll give you a second to take a look at
16 it.

17 You'll see at the bottom that Dr. Birk is one of the
18 individuals who worked to draft this. That's not in dispute
19 in this case. He testified that he participated in that. Do
20 you see that?

21 A. Yes.

22 Q. Okay. Let's back up there. And I want to -- first I
23 want to point out in the top paragraph, the second to last
24 sentence -- Nate, there we go -- where it says, "Monsanto."

25 It says, "Monsanto has proprietary rights to the

2058

1 trait and serves as the technical lead associated with
2 development of dicamba use on the DT seeds," which is DT
3 crops; right?

4 A. That's what it says.

5 Q. And then it says, "BASF owns dicamba and provides
6 associated technical and regulatory support." Do you see
7 that?

8 A. Yes.

9 Q. Then I want to go to the last page of this agreement or
10 this document. It would be page 5. Do you see at the top
11 where it says, "dicamba supply"?

12 A. Yes.

13 Q. There's a -- I won't read all of the Chinese news,
14 because I honestly don't want to embarrass myself saying them
15 completely wrong, but let's go to the second paragraph. Do
16 you see where it says in this BASF document, "Preparations
17 are being made to import unregistered Yangnong dicamba
18 technical for production scale up and eventual use in Clarity
19 herbicide production in April 2015"? Do you see that?

20 A. Yes.

21 Q. And then as we saw a second ago in this slide, "BASF
22 through its distributors and retailers sold significantly
23 more Clarity and Clarity PL in 2016;" right?

24 A. No. I believe that the demonstratives show that our
25 sales were down in private label Clarity to distributors.

2059

1 Q. No. Your sales show that they were down. I'm talking
2 about the sales to growers.

3 A. I know that those are audited numbers of what we sold to
4 distributors, and, you know, we -- I'm not familiar with what
5 sales were from distributor to growers.

6 Q. Well you certainly have the ability to do that, because
7 someone at BASF -- Nathan Borgmeyer and others -- were
8 putting together these numbers to assess the sales.

9 You don't have any dispute that BASF put together
10 this analysis of the sales of Clarity and Clarity PL to
11 growers, do you?

12 A. You mean the slides you showed me?

13 Q. Yeah.

14 A. No. That was done by BASF, but I don't know by when or
15 by whom.

16 Q. Well, presumably it wasn't done before 2016, right,
17 since it was assessing what happened in 2016?

18 A. I'm sorry, I'd have to look at the document again.

19 Q. Okay. Do you think that they put their sales -- their
20 final sales numbers together before the season even happened?

21 A. No. It looks like it was a document done sometime in
22 2016.

23 Q. Right. And actually if you can go -- and it's talking
24 like that. See, "use has increased, especially in 2016."
25 It doesn't say use is going to increase, does it?

2060

1 A. No, it doesn't say that.

2 Q. Right. So those are presumably actual numbers in
3 BASF's document; right? I mean, this is already into
4 evidence.

5 A. I'm sorry, what's the question?

6 Q. Do you have any reason to dispute that this is, in fact,
7 a reflection of the Clarity sales to growers in 2016, this
8 big red bar?

9 A. I can't testify. I know what we sold to distributors.
10 I know that these are audited numbers. Those are the numbers
11 that I'm familiar with. I can't testify on what happens
12 after we sell to distributors. I personally can't testify.

13 Q. Okay. Fair enough. You can take that down.

14 Let's go ahead and just as a double-check on these
15 Clarity sales and what actually happened, despite the numbers
16 that you showed, will you please pull up Plaintiff's 1366.
17 It's not into evidence yet.

18 Ma'am, this is an e-mail from -- to and from BASF
19 employees. Do you see that?

20 A. Yes.

21 (Plaintiff's Exhibit No. 1366, E-mail BASF
22 Employees, was identified.)

23 BY MS. GEORGE:

24 Q. And the re line is "DT cotton and soybean estimates,"
25 And it's in June of 2016. Do you see that?

2061

1 A. Yes, I do.

2 Q. And are you aware that BASF does, in fact, reach out to
3 its sales managers to get estimates for what's going on and
4 what its sales are going to be in DT cotton and soybean? Do
5 you have any reason to dispute that?

5 you have any reason to dispute that.

6 A. No, I have no reason.

7 Q. Okay. We move to offer this into evidence.

8 MR. MANDLER: Same objection as previously,
9 relevance, foundation.

10 THE COURT: Okay. The objection is overruled.
11 It's admitted.

12 (Plaintiff's Exhibit No. 1366, E-mail BASF
13 Employees, was received.)

14 BY MS. GEORGE:

15 Q. Ma'am, I'm going to draw your attention to the bottom
16 part of this e-mail. And the reason I'm dialing in on this
17 is because I want to make clear that just because you have
18 some charts that were put together showing Clarity sales go
19 down that BASF might be receiving a different story from its
20 field; okay?

21 So let's look at this e-mail. We'll give it a
22 second. We're putting her through a lot of back and forth
23 over here.

24 Okay. The second paragraph there that says, "Some
25 key points in cotton." Do you see this?

2062

1 A. Yes.

2 Q. It says, "Some key points in cotton. All of the DT
3 cotton that is planted this year has been sprayed off label,
4 and growers are being very mum about their applications. We
5 know this from the increase in PL Clarity sales in our
6 district. My numbers are double from 6,500 gallons to
7 12,800 gallons." Do you see that?

8 A. Yes.

9 Q. So now that you see that does it cause you to question
10 whether there's any relevance at all to numbers that show
11 what you've put together this morning or had this morning

12 about sales just to distributors?

13 A. I'm sorry, can you repeat the question?

14 Q. Do you understand the importance here of what's going on
15 where the field is reporting that Clarity sales, private
16 label Clarity sales are more than double in a year when DT
17 soy has hit the market, but there's no approval herbicide for
18 over the top?

19 A. So when we sell it to distributors, we discourage that
20 they ship it around, but as far as I understand you can't
21 stop that. And I'm not familiar with this document, but
22 that's what I believe is being discussed.

23 Q. As far as you understand you can't stop that? Is that
24 your testimony, that BASF has no control over how its
25 distributors distribute its product?

2063

1 A. On the transshipping between on who we ship to, and then
2 who they further ship it to it's my understanding.

3 Q. Do you not believe that there are contracts that you
4 have with your distributors governing that relationship and
5 what they do with your product?

6 A. I am not familiar with those contracts, ma'am.

7 Q. Would it surprise you given that your job has been
8 largely devoted to negotiating contracts that BASF would have
9 contracts with its distributors and retailers governing what
10 they're able to do and not do with their products?

11 A. No. I know they have contracts governing what they do.
12 And but as far as transshipment my understanding is that
13 that's difficult to control and especially between locations.

14 Q. Okay. Well, then list all of the steps that BASF took
15 to control its distributors who got those sales in front of
16 you to keep them from selling it to growers when it was
17 unlawful. Can you name one?

18 A. I'm not familiar with the actions. I know that there
19 were -- I can't testify specifically.

20 Q. Fair enough. You can take those down, and can we pull
21 up Exhibit 1075, which is already in evidence.

22 Because I think, Ms. Emanuel, what actually happened
23 is instead of stopping any distribution or dissemination to
24 growers of Clarity what BASF actually did was promote seed
25 sales -- go ahead and promote Xtend Seed sales. Does that

2064

1 sound like something you recall happening?

2 A. I'm not personally aware of it.

3 Q. Well, and the only reason I'm asking about this is
4 because you testified there was never an intention to enter
5 into kind of conspiracy; right? So this is why --

6 A. That's correct.

7 Q. Okay. So you don't believe there was any kind of a
8 conspiracy for BASF to agree to go out and promote the seed
9 sales of Monsanto so that those seeds could be in the ground
10 and BASF could sell more Clarity and potentially more Engenia
11 whenever that got approved?

12 A. So there was no -- so when the DT seed was deregulated
13 and approved and there were registered products registered to
14 go over the top of DT seed, then those sales of Engenia that
15 would be revenue for us. I'm sorry, I don't think I'm
16 understanding.

17 Q. Well, let's just look at this document, the bottom
18 bullet point on the page. And this is a report to Duane
19 Rathmann from the sales field. Duane Rathmann is a BASF
20 employee; okay?

21 At the bottom in the first bullet point it says, "As
22 Jared Roskamp alluded in his monthly, I also have a major
23 concern of non-labeled dicamba formulations being used by
24 growers on Xtend soybeans in 2016. We would hear retailers

25 talking about some of their growers reports of growers

2065

1 bragging, et cetera, that they fully intend to use Clarity,
2 et cetera, in 2016 and disregard labels. Did you hear that?

3 A. I see that that's what's written, yes.

4 Q. And these are retailers. BASF salespeople work with the
5 retailers like you were talking about and like in your
6 charts; right?

7 A. Yes.

8 Q. And the retailers are reporting to BASF that growers are
9 bragging that they're going to spray Clarity. Do you see
10 that?

11 A. It also says that we have major concern.

12 Q. Right. And I'm wanting to get to what was done.

13 Okay. Let's look what was done. Let's turn to the
14 next page. The second -- the first bullet point on the
15 second page, let's look at the fourth row down. There's a
16 sentence that starts "I feel."

17 It says, "I feel we need to get behind Xtend soybeans
18 and promote the opportunity to look at the yield potential in
19 2016. Then use that momentum to sell Engenia for 2017. We
20 only have the opportunity to sell Engenia in 2017 if Xtend
21 soybeans are planted." Do you see that?

22 A. Yes.

23 Q. And is it still your position that there was no
24 conspiracy today between Monsanto and BASF to get those seeds
25 in the ground and to flood the market with Clarity?

2066

1 A. There was no conspiracy -- so what the contractual
2 obligations were is that they deregulate the DT seed. It
3 goes in ground. There has to be herbicide registered over

4 the top. It's either Xtend or it's Engenia.

5 And when Engenia is sprayed over the top of DT seed,
6 we get those revenues. And that's not -- that's our
7 business.

8 Q. But your retailers are reporting to your salespeople
9 that growers are going to spray this off label and are
10 bragging about it, and the next breath is to say we should
11 promote these seed sales; right? You read that.

12 A. I think what it said is that we need to encourage
13 Engenia, which should have had an over the top right
14 registration over the top of DT soybeans.

15 Q. I think this may have come from a higher level than you
16 recognize. Let's look at Plaintiff's 1220. And this has not
17 been entered into evidence, so we can't show it to the jury
18 just yet.

19 You know who Paul Rea is, don't you?

20 A. Yes.

21 Q. Who's Paul Rea for the jury?

22 A. At the time of this e-mail or now?

23 Q. Well, let's start with at the time of this e-mail.

24 A. I'm not really sure. He was in the North American
25 organization for ag.

2067

1 Q. He's pretty high up at BASF, isn't he?

2 A. His current position is Senior Vice President. I don't
3 remember what his position was in 2012.

4 Q. Okay. And this is another report from -- or another
5 request of the field sales team pertaining to the DT system.
6 Do you see that?

7 A. Yes, I'm sorry.

8 (Plaintiff's Exhibit No. 1220, E-mail was
9 identified.)

10 MS. GEORGE: I move this into evidence, Your Honor,

11 Plaintiff's 1220.

12 MR. MANDLER: Objection, relevance.

13 MS. GEORGE: I'm about to establish that.

14 THE COURT: It's overruled. It's admitted.

15 (Plaintiff's Exhibit No. 1220, E-mail, was

16 received.)

17 MS. GEORGE: Ms. Emanuel -- we'll wait and publish

18 that. Sorry.

19 BY MS. GEORGE:

20 Q. If you could look at the bottom e-mail there, which by

21 the way this is in 2012; right? So this was around the time

22 that you were actually closer to the time when you were more

23 actively involved; right?

24 A. I was still involved with dicamba at the time, yes.

25 Q. Okay. And if you look at the bottom there, it's an

2068

1 e-mail to the field sales team on which -- by the way, you're

2 copied on this, did you know that? Do you remember this?

3 A. Yes. Yes.

4 Q. You're copied on it, and Paul Rea is copied on it and

5 Neil Bentley. These are pretty high up individuals at BASF

6 Corp, correct, executive level?

7 A. Yes, executive level.

8 Q. Yes. "Field sales team" -- it says there -- "the

9 deregulation of Monsanto's dicamba tolerant soybean seed is

10 critical to BASF's future herbicide opportunity. Our

11 dicamba chemistry is being vilified by organized opposition

12 as a primary reason not to approve the DT trait. BASF

13 executive management has pledged to support Monsanto in their

14 seed deregulation efforts as we have a vested interest in

15 their success." Do you see that?

16 A. Yes.

17 Q. Is it still your position even though this is written
18 clearly right here from BASF executive management that
19 Monsanto was solely responsible for getting the trait
20 deregulated and BASF had not a thing in the world to do with
21 it?

22 A. What it says is that we have an interest in their
23 success, but it was their sole discretion if, when and how.
24 We didn't even know they were going to introduce DT cotton in
25 2015.

2069

1 Q. Well, actually, if you look here, what it says is that
2 you pledge to support Monsanto's efforts. And then you go
3 down and tell the field team to go out to farmers and get
4 them to fill out forms online to convince the USDA to
5 deregulate Monsanto's trait. Do you remember that now?

6 A. It says to encourage them to speak to the need and the
7 value of the DT system.

8 Q. Right. To get the trait deregulated so that Monsanto
9 and BASF's DT system could come to market because in the
10 words of this e-mail BASF has a vested interest; correct?

11 A. We were going to make revenue from selling Engenia over
12 the top of DT seed.

13 Q. You were also going to make revenue off of every sale of
14 the seed?

15 A. Yes, a royalty.

16 Q. We've discussed the absence of the word royalty from
17 that value share payment. Do you remember that?

18 A. Yes, I remember discussing it.

19 Q. Okay. In fact, there's another reason that BASF wanted
20 to sell seed even in 2015 and 2016; right? Can you think of
21 another one?

22 A. So we weren't selling seed.

23 Q. Well, you wanted Monsanto to sell the seed, right?

23 Q. Well, you wanted Monsanto to sell the seed, right?

24 A. We wanted Monsanto to be successful to bring the seed to
25 the market so we could sell Engenia over the top.

2070

1 Q. In fact, BASF was counting on the fact that farmers were
2 afraid they were going to get drifted on and buy even more
3 seed, and BASF considered that a market opportunity; right?

4 A. I don't know that.

5 Q. Well, let's put up Exhibit Plaintiff's 1009.

6 THE CLERK: Has that been admitted?

7 MS. GEORGE: It's not.

8 BY MS. GEORGE:

9 Q. Ms. Emanuel, do you know who Nathan Borgmeyer is?

10 A. I know the name. I've never met him.

11 Q. Nathan Borgmeyer has already testified in this case.
12 Did you know that?

13 A. I don't, but I believe you.

14 Q. Do you have any reason to dispute that Nathan Borgmeyer
15 testified in this case that he was the Engenia launch team at
16 BASF?

17 A. I wouldn't -- I think he was very important to it.

18 Q. You don't have any reason to dispute that he had primary
19 responsibility for the Engenia launch at BASF, do you?

20 A. I don't know that formally, but I wouldn't dispute it.

21 Q. And you don't have any reason to dispute that actually
22 Nathan Borgmeyer also served on the commercialization work
23 group, the joint work group between the parties? You don't
24 have any reason to dispute that, do you?

25 A. No.

2071

1 Q. And you don't have any reason to dispute that when
2 Mr. Borgmeyer testified here before the jury he actually said

3 it was within the realm of his responsibilities to put
4 together sales reports and things like that regarding the
5 Engenia?

6 A. It would have been in his responsibilities if he was
7 what he says he was.

8 Q. If you look at the first page of this Exhibit 1009,
9 you'll see that this is an Engenia Herbicide Strategic Update
10 by Nathan Borgmeyer dated September of 2016. Do you see
11 that?

12 A. I do.

13 (Plaintiff's Exhibit No. 1009, Engenia Herbicide
14 Strategic Update, was identified.)

15 MS. GEORGE: Your Honor, we move this into evidence.

16 MR. MANDLER: Same objection as previously
17 identified in the motion in limine.

18 THE COURT: The objection is overruled. It's
19 admitted.

20 (Plaintiff's Exhibit No. 1009, Engenia Herbicide
21 Strategic Update, was received.)

22 BY MS. GEORGE:

23 Q. Ms. Emanuel, on this Engenia herbicide strategic update
24 dated September 13th of 2016 let's turn to page 2. If you
25 could blow that up, Nate, so that the witness could see it.

2072

1 Do you have any reason to dispute that BASF viewed
2 farmers' fear as a market opportunity?

3 A. I'm sorry, can you repeat the question?

4 Q. Do you have any idea of what defensive planting is?

5 A. No.

6 Q. Well, we asked Nathan Borgmeyer about that, and there's
7 been a lot of discussion in this case about defensive
8 planting. Are you aware that there are farmers who planted

9 Xtend seed in defense to protect themselves from neighbors'
10 dicamba drifting over onto their farm by vapors or otherwise
11 and harming their fields. Have you ever heard of that?

12 A. No.

13 Q. Okay. Well, do you have any reason to dispute that
14 BASF considered people's fear and defensive planting a
15 potential market opportunity to BASF?

16 A. See, that's what Nathan Borgmeyer believed.

17 Q. Well, do you have any reason to dispute that this was
18 also in the possession of his boss Neil Bentley?

19 A. I have no reason to dispute that.

20 Q. And you testified a second ago that Neil Bentley is
21 among those executives that were copied on that e-mail?

22 A. I don't remember seeing his name, but I don't dispute
23 it.

24 Q. Do you have a problem with the idea that BASF would
25 consider it a sales opportunity that farmers are buying Xtend

2073

1 seed and putting it in the ground because they're afraid
2 they're going to get damaged?

3 A. I'm sorry, can you rephrase the question?

4 Q. Sure. This slide reflects Nathan Borgmeyer who was in
5 his words responsible for the Engenia launch; right? That
6 BASF considers defensive planting as a potential market
7 opportunity. Do you see that? That's pretty clear, isn't
8 it?

9 A. I see that's what it says on the chart.

10 Q. And just a second ago you testified that in order to be
11 for BASF's benefit those seeds had to get in the ground so
12 they can sell product. That's what you testified to; right?

13 A. Engenia being sprayed over the top of DT seed was a
14 business opportunity for us.

15 Q. Well, do you have a problem with that still being a

16 business opportunity if you know farmers are putting that
17 seed in the ground because they're afraid that you're going
18 to damage their livelihood or wipe out their peach orchard?

19 A. I can't testify to that.

20 Q. Okay. And despite BASF putting this in a sales
21 strategy are you aware that BASF was saying publicly that it
22 had never considered defensive planting in its sales
23 strategy?

24 A. I'm sorry, what was the beginning of the question? I'm
25 sorry.

2074

1 Q. Ma'am, despite this testimony here and this exhibit here
2 showing that defensive planting is reported as a potential
3 market opportunity to BASF internally, are you aware that
4 externally BASF was telling anyone who asked a tough question
5 that they had never done this? Are you aware of that?

6 A. I'm not specifically aware.

7 Q. First of all, let's go to the first page of the one that
8 you were just on here. Let's go to the first page of the
9 slide. Do you see that where it is "internal use only"?

10 A. Yes.

11 Q. Let's take this down and let's put up Exhibit 1008.
12 1008. And this has not been admitted into evidence.

13 Are you aware that BASF regularly puts together
14 talking points to align its message when interacting with
15 growers and others and the other stakeholders in the
16 industry?

17 A. We provide talking points to salespeople, yes.

18 Q. All right. And you do you see at the top of this
19 particular document this is -- it says, "Updated Tough
20 Questions Engenia," and there's a date November 15, 2017. Do
21 you see that?

22 A. I do.

23 (Plaintiff's Exhibit No. 1008, Updated Tough
24 Questions Engenia, was identified.)

25 BY MS. GEORGE:

2075

1 Q. Okay. And at the bottom you'll see that that's got a
2 BASF Bates Number of 48333. Do you see that?

3 A. Yes.

4 Q. You don't have any reason to dispute that that was
5 produced to us in this litigation?

6 A. No.

7 Q. Okay.

8 MS. GEORGE: Your Honor, I move this into evidence.

9 MR. MANDLER: Same objection as previously.

10 THE COURT: Overruled. Admitted.

11 (Plaintiff's Exhibit No. 1008, Updated Tough
12 Questions Engenia, was received.)

13 BY MS. GEORGE:

14 Q. So this Updated Tough Questions on Engenia, I'd like you
15 to turn, Nate, to page 5 of this highly confidential document
16 that's stamped. These are tough questions that BASF expects
17 to get and some proposed answers. Do you see that?

18 A. I see that it says "Updated Tough Questions."

19 Q. Okay. So I want you to -- Nate, if you could highlight
20 the second question, the "Does BASF expect this increase?"
21 Do you see that? And get the answer in there.

22 This says, "Does BASF expect this increase in
23 planting to lift demand for its dicamba herbicide Engenia?"
24 Did I read that correctly?

25 A. Yes.

2076

1 Q. And this is more than a year later: right? This is the

1 following year after Nathan Borgmeyer's internal presentation
2 listing defensive planting as a potential marketing
3 opportunity, this is BASF's answer, "We have not considered
4 defensive planting in our sales projections." Do you see
5 that?
6

7 A. Yes.

8 Q. Would you agree with me that that's an example of BASF
9 saying one thing internally when preparing to count its
10 dollars and one thing externally when it has to answer tough
11 questions to stakeholders?

12 A. What I saw in the chart that you presented to me from
13 Nathan Borgmeyer is that he identified it as a rather vague
14 market opportunity. What I see here is that it's saying
15 it's not in our sales projections.

16 Q. Ms. Emanuel, does BASF make a practice of being vague in
17 its sales projections, or does it make an attempt to be
18 pretty accurate when advising people like Neil Bentley about
19 what Engenia's sales projections are going to be?

20 A. No. We try to be very specific in our sales
21 projections.

22 Q. I just have a couple more things for you, Ms. Emanuel.
23 Despite your testimony that there was no conspiracy and there
24 was no joint venture, did you ever take the opportunity to
25 look and see what the fallout was in 2016 of all of this

2077

1 Clarity sales to growers and the defensive planting going on?
2 Did you ever take an opportunity to look into that?

3 A. You're asking me personally if I ever looked into that?
4 No, I didn't.

5 Q. Well, you personally -- and that's fair. I am asking
6 you personally, because you personally were brought here by
7 BASF to tell the jury that there was no conspiracy, and so

8 you personally are who I have to ask; right?

9 A. Yes.

10 Q. Okay. And so if you're going to represent something
11 that strongly about an ultimate issue in this case that
12 there's no conspiracy, wouldn't it be important for you to
13 look about whether or not there was any fallout from this
14 huge increase of Clarity sales in 2016?

15 A. I'm not sure what you're asking me that I should have
16 done.

17 Q. Well, let's look at it. Can you pull up
18 Plaintiff's 1371. This has not been entered into evidence
19 yet.

20 Ma'am, this is a July 4, 2016, Innovation Specialist
21 Report from a BASF salesperson, a field person. Do you
22 recognize the label innovation specialist?

23 A. Yes.

24 (Plaintiff's Exhibit No. 1371, Innovation
25 Specialist Report, was identified.)

2078

1 BY MS. GEORGE:

2 Q. And those are people with boots on the ground; right?

3 A. That's my understanding.

4 Q. And in July 4th of 2016 this is in that year when the
5 Clarity spike showed on the sales report that we discussed
6 earlier; right?

7 A. That you showed me, yes.

8 MS. GEORGE: We move this into evidence, Your
9 Honor.

10 MR. MANDLER: Objection, lack of foundation.

11 MS. GEORGE: She said she knows who innovation
12 specialists are, and they're reporting from the field what
13 happened, and she said there's no conspiracy, and I'm

14 entitled to all of that.

15 MR. MANDLER: Your Honor, can we approach on this
16 one?

17 THE COURT: Yeah.

18 (Proceedings were held at sidebar, outside the
19 hearing of the jury.)

20 MR. MANDLER: This was on the fourth amended
21 exhibit list. This is one that was late disclosed. It was
22 disclosed -- this one was disclosed one week into trial, so
23 this is one of the ones that we moved to disclose as being
24 late.

25 MS. GEORGE: I'm impeaching her. I don't have to

2079

1 give you my impeachment documents even before today.

2 THE COURT: Yeah. That is for impeachment.

3 MR. MANDLER: Well, but if it's impeachment, it's
4 not admissible for impeachment. If it was on the late
5 disclosed list, it can't be admitted.

6 MS. GEORGE: But I just laid the foundation, and
7 then it can come in.

8 THE COURT: Yeah. I disagree with that. I'll
9 overrule your objection.

10 (Proceedings resumed in open court.)

11 BY MS. GEORGE:

12 Q. Ms. Emanuel, I'd like to draw your attention to the
13 second bullet point.

14 THE COURT: So the objection is overruled. And you
15 moved for the admission; right?

16 MS. GEORGE: Yes, I do move for the admission of
17 Plaintiff's 1371.

18 THE COURT: So it's admitted.

19 (Plaintiff's Exhibit No. 1371, Innovation
20 Specialist Report, was received.)

21 MS. GEORGE: Thank you.

22 BY MS. GEORGE:

23 Q. The second bullet point here on this report from the
24 BASF field person -- I want to go to the second -- let's
25 see -- four rows down where it says, "The one thing." Do

2080

1 you see that, Nate? Thanks.

2 "The one thing most acres of beans have in common is
3 dicamba damage. There must be a huge cloud of dicamba
4 blanketing the Missouri Bootheel. That ticking time bomb
5 finally exploded. The scope of damage is on a massive
6 scale, and fingers are pointing in all directions from grower
7 to grower. It will be interesting to see how all the
8 complaints are handled."

9 Did I read that correctly?

10 A. You did.

11 Q. And it doesn't say, "We're surprised that this ticking
12 time bomb exploded." It says, "The ticking time bomb
13 finally exploded," doesn't it?

14 A. Yes.

15 Q. You can take that down. Oh, you know what, let's do
16 one more thing with this document that's relevant to our
17 discussion today.

18 You testified earlier that you -- that BASF and
19 Monsanto are fierce competitors; right?

20 A. Yes.

21 Q. Okay. Well, let's look at the second page of this
22 document where you see competition. And this, by the way,
23 is in 2016. Okay. Do you see Monsanto listed anywhere in
24 these competitors?

25 A. In this particular report, no.

2081

1 Q. Okay. You can take that down.

2 And instead of competing with each other, ma'am, the
3 truth is that Monsanto and BASF were still meeting together
4 through the Alliance Management Team to handle the fallout of
5 this -- of the complaints related to off-target movement;
6 true?

7 A. I don't know that.

8 Q. You're not aware of an Alliance Management Team meeting
9 that took place in December of 2017?

10 A. No, I'm not.

11 Q. Let's go ahead and pull up Plaintiff's 1017. You
12 testified earlier that you didn't believe there were any AMT
13 meetings after 2015 at least pursuant to I believe you
14 said -- you qualified it and said the DTSA or the umbrella
15 agreement -- I forget how you qualified it.

16 A. The umbrella agreement had expired by this time, so the
17 AMT was also in the DTSA and could continue to meet under the
18 DTSA, but not the umbrella agreement.

19 Q. But you don't dispute that this is an Alliance
20 Management Team Meeting on December 1st of 2017, including
21 both BASF and Monsanto participants, do you?

22 A. No. I see that.

23 (Plaintiff's Exhibit No. 1017, Alliance Management
24 Team Meeting December 1, 2017, was identified.)

25 MS. GEORGE: I move this into evidence as

2082

1 Plaintiff's 1017.

2 MR. MANDLER: No objection, Your Honor.

3 THE COURT: It's admitted.

4 (Plaintiff's Exhibit No. 1017, Alliance Management
5 Team Meeting December 1, 2017, was received.)

6 MS. GEORGE: Thank you, Your Honor.

7 BY MS. GEORGE:

8 Q. What's -- this meeting took place in Chicago
9 December 1st of 2017. And you're aware of the complaints
10 that came in for off-target movement in 2017 for Engenia?

11 A. Not specifically.

12 Q. Not specifically. Okay. You're not aware that there
13 were any complaints pertaining to off-target movement of
14 Engenia in 2017?

15 A. I -- I don't know if there were. If there were, I
16 don't remember at that time.

17 Q. So you had a -- finally the time bomb exploded in 2016
18 with the cloud over the Bootheel and every soybean damaged
19 according to that; right?

20 And then you have 2017, and you don't recall, but
21 there's been testimony in this case that there were -- from
22 BASF 3,000 calls relating to Engenia, including off-target
23 movement and other calls. You're not aware of that?

24 A. No.

25 Q. You still maintain that Monsanto and BASF are fierce

2083

1 competitors; right?

2 A. We are fierce competitors.

3 Q. Okay. Well, let's look at what happened here in
4 December 1 of 2017, second page, second bullet point. It
5 says "2017 off-target occurrences." First it says,
6 "Monsanto is no longer pursuing glufosinate contamination
7 topic."

8 Were you aware that there were accusations that these
9 off-target occurrences were due to contamination?

10 A. I'm not aware.

11 Q. Well, let's look at the second bullet point. "Joint
12 defense agreement is finalized and signed. Cooperation

13 between BASF and Monsanto has been ongoing" -- or "going on."

14 Did I read that correctly?

15 A. You did.

16 Q. And you still maintain that Monsanto and BASF did all of
17 their activities separately and are fierce competitors?

18 A. I maintain that we had our equal responsibilities and
19 that we're still competitors.

20 MS. GEORGE: All right. No further questions.

21 THE COURT: All right. Why don't we take our lunch
22 break from now until, say, 1:15. And please remember the
23 admonition I've given you not to discuss the case. So you're
24 excused for lunch, and we'll reconvene at 1:15.

25 (Jury out.)

2084

1 (Proceedings resumed in open court outside the
2 presence of the jury.)

3 THE COURT: You can be seated.

4 So why don't we take up this matter about the 11:59
5 disclosure.

6 MR. MANDLER: Your Honor --

7 THE COURT: So I really don't know what you -- what
8 kind of exhibits you're talking about.

9 MR. MANDLER: So let me just give a little bit of
10 background. Obviously, Monsanto only called two witnesses,
11 and we didn't know for sure until yesterday morning that they
12 weren't going to call their economist or their CPA that --
13 and then we made some decisions as to who we were going to
14 call as soon as we figured out our lineup.

15 And I had given Plaintiff's counsel Sunday night
16 what I thought my lineup was. And as soon as I knew that the
17 lineup was slightly different I gave them that information.
18 We disclosed as soon as we can.

19 If we don't get to Dr. Schnabel this afternoon, so

20 be it, but we disclosed our -- most of these series of
21 photographs, three PowerPoint slides, two of which are
22 PowerPoint slides made up of photographs. There is just one
23 page with a list of numbers and maybe an article.

24 So I don't think when they look at it they're going
25 to have any issues with what we disclosed, but if they want

2085

1 the extra time until tomorrow morning, that's fine. I just
2 want to make sure that we're using the jury's time well given
3 that they've been here two weeks, two days.

4 We're moving faster, but I don't think that's a bad
5 thing, Your Honor. There was certainly no ill intent. As
6 soon as we knew that things were moving faster we disclosed.
7 So if they want to wait until tomorrow they can wait until
8 tomorrow.

9 But, you know, it really is -- we're being pressed
10 at the end of the case. And in my defense I did raise this
11 at our first pretrial conference that we should have some
12 time allotment so, you know, we all go could through this and
13 knowing what would happen, but they used two weeks of a
14 two-week trial, and now we're moving quickly.

15 That's what's going on. If they want to wait
16 until tomorrow for us to put on Dr. Schnabel, we certainly
17 can.

18 THE COURT: So wait. So I don't understand the
19 reasons that you had to make these changes.

20 MR. MANDLER: There were no changes. It's just our
21 disclosures of the pictures he's going to talk about when he
22 testifies. There's no changes at all. It's just we told
23 him what -- you know, it's the 24-hour rule as to the
24 pictures.

25 No changes. They were on our exhibit list.

1 There's no surprise here. It's just which ones he's going to
2 talk about. And, frankly, it will probably be fewer than
3 what's on the list, because, you know, hey, we've already
4 heard a lot from the other experts, so but they're disclosed.

5 THE COURT: Well, do you think you might whittle it
6 down then some after you converse with --

7 MR. MANDLER: I mean, they're -- we're not required
8 to whittle them down. We're going to show him and discuss
9 which ones in order for him to describe his opinion
10 thoroughly to the jury. You know, it's not --

11 THE COURT: Okay. Well, here's my point, it's a
12 violation of the 24-hour rule. They say they're prejudiced.
13 I'm going to take their word for it. And so --

14 MR. MANDLER: Well, I mean, you can't exclude the
15 witness based on that on the 24-hour rule. That's -- I
16 mean, Your Honor, that wasn't in our control. I think
17 Monsanto will say they didn't know when --

18 THE COURT: And I understand that. And you've got
19 a decent excuse for it.

20 MR. MANDLER: Right.

21 THE COURT: Kind of.

22 MR. MANDLER: I mean, kind of. We couldn't have
23 excluded -- I mean, we didn't know when we had -- you've seen
24 my chart. I had him projected as testifying on Wednesday,
25 because I thought Monsanto was going to put on a longer case.

1 As soon as we knew he -- there was a chance he
2 might come up this afternoon we disclosed.

3 THE COURT: Okay.

4 MR. RANGLES: Your Honor, I'm not saying the

5 witness should be excluded. The witness was disclosed more

5 witness should be excluded. The witness was disclosed more
6 than 24 hours ahead. I never said that. They can put him up
7 there. They can't use these exhibits. We are prejudiced by
8 that. That was midnight last night. I was asleep, and then
9 I was in court this morning.

10 I'm supposed to cross him on things I've never had
11 a chance to look at?

12 THE COURT: Okay. By every indication we're ahead
13 of schedule believe it or not, and so I'm willing to excuse
14 the jury whenever you're finished today. That's your last
15 witness I take it then?

16 MR. MANDLER: It is, Your Honor.

17 THE COURT: I may require you to put on every bit
18 of evidence that you have before that, and what's left after
19 this witness?

20 MR. MANDLER: We have about an hour and a half of
21 video.

22 THE COURT: Okay. So I think that will be the
23 remedy. We'll just recess for the day. And I sure could
24 use some time working on all the legal issues in the case
25 with counsel. Especially --

2088

1 MR. MANDLER: We'll do that.

2 THE COURT: -- verdict directing instructions.

3 MS. ROSENBERG: And, Your Honor, just so you know
4 with the witness on the stand just time wise Monsanto has a
5 few questions, and it won't take more than a few minutes.

6 MR. MANDLER: And we have a bit redirect.

7 THE COURT: All right. All right. Well, we'll
8 reconvene in an hour then.

9 (Proceedings stood in temporary recess.)

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1 C E R T I F I C A T E

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3 I, Alison M. Garagnani, Registered Merit Reporter
4 and Certified Realtime Reporter, hereby certify that I am a
5 duly appointed Official Court Reporter of the United States
6 District Court for the Eastern District of Missouri.

7 I further certify that the foregoing is a true and
8 accurate transcript of the proceedings held in the
9 above-entitled case and that said transcript is a true and
10 correct transcription of my stenographic notes.

11 I further certify that this transcript contains
12 pages 1962 through 2089 inclusive and that this reporter
13 takes no responsibility for missing or damaged pages of this
14 transcript when same transcript is copied by any party other
15 than this reporter.

16 Dated Cape Girardeau, Missouri, this 12th day of
17 February, 2020.

18

19

20 /s/Alison M. Garagnani
21 Alison M. Garagnani, CCR, CSR, RMR, CRR
22 Official Court Reporter

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