

1 **FOR DEFENDANT:**
2 **BASF CORPORATION**

John P. Mandler, Esq.
Anthony Finnell, Jr., Esq.
Tarifa Laddon, Esq.
Shane Anderson, Esq.
Faegre and Baker LLP
90 S. 7th Street, suite 2200
Minneapolis, MN 55402

5 Troy A. Bozarth, Esq.
6 Hepler Broom LLC
7 130 North Main St.
8 Edwardsville, IL 62025

12 **REPORTED BY:**

Laura A. Esposito, RPR, CRR, CRC
U.S. District Court
111 South 10th Street
St. Louis, MO 63102
(314) 244-7739
Laura_Esposito@moed.uscourts.gov

16 Proceedings recorded by mechanical stenography;
17 transcript produced by computer-aided transcription.

20 * * * *

21 MISCELLANEOUS INDEX

	<u>PAGE</u>
23 <i>Jury Instructions</i>	126
<i>Plaintiff's Opening Statement</i>	135
24 <i>Defendant Monsanto's Opening Statement</i>	174
<i>Defendant BASF's Opening Statement</i>	203

1 This is a civil case brought by the plaintiff against
2 the two defendants. It will be your duty to decide from the
3 evidence whether the plaintiff is entitled to a verdict
4 against either or both of the defendants.

5 Your duty is to decide what the facts are from the
6 evidence. You are allowed to consider the evidence in the
7 light of your own observations and experiences in life and
8 in light of your own -- I should say, and then after you
9 have decided what the facts are, you will have to apply
10 those facts to the law that I give you in these and in my
11 other instructions, and that is how you will reach your
12 verdict.

13 Only you will decide what the facts are. However, you
14 must follow my instructions whether you agree with them or
15 not. You've taken an oath to follow the law as I give it to
16 you in my instructions.

17 In deciding what the facts are, you may have to decide
18 what testimony you believe and what testimony you do not
19 believe. You may believe all of what a witness says or only
20 part of it or none of it.

21 In deciding what testimony to believe, consider the
22 witness's intelligence, their opportunity to have seen or
23 heard the things they testify about, their memories, any
24 reasons they might have to testify a certain way, how they
25 act while testifying, whether they said something different

1 at another time, whether their testimony is generally
2 reasonable, and how consistent that testimony is with other
3 evidence that you believe.

4 Do not let sympathy or your own likes or dislikes
5 influence you. The law requires you to come to a just
6 verdict based only on the evidence, your common sense, and
7 the law that I give to you in my instructions, and nothing
8 else.

9 Nothing I say or do during the trial is meant to
10 suggest what I think of the evidence or what I think your
11 verdict should be.

12 Instruction No. 2: When I use the word "evidence," I
13 mean the testimony of witnesses, documents, and other things
14 I receive as exhibits, and facts that I tell you that the
15 parties have agreed are true, and any other facts that I
16 tell you to accept as true.

17 Some things are not evidence. I'll list those for you
18 now. Lawyers' statements, arguments, questions, and
19 comments are not evidence.

20 Two: Documents or other things that might be in the
21 court or talked about but that I do not receive as exhibits
22 are not evidence.

23 Three: Objections are not evidence. Lawyers have a
24 right and sometimes a duty to object when they believe
25 something should not be a part of the trial.

1 Do not be influenced one way or the other by
2 objections. If I sustain a lawyer's objection to a question
3 or an exhibit, that means the law does not allow you to
4 consider that information. When that happens, you have to
5 ignore the question or the exhibit, and you must not try to
6 guess what the information might have been.

7 Four: Testimony and exhibits that I strike from the
8 record or tell you to disregard are not evidence, and you
9 must not consider them.

10 Five: Anything you see or hear about this case
11 outside the courtroom is not evidence, and you must not
12 consider it unless I specifically tell you otherwise.

13 Also, I might tell you that you can consider a piece
14 of evidence for one purpose only and not for any other
15 purpose, and if that happens, I will tell you what purpose
16 you can consider the evidence for and what you are not
17 allowed to consider it for.

18 Some of you may have heard the terms "direct evidence"
19 and "circumstantial evidence." You should not be concerned
20 with those terms because the law makes no distinction
21 between the weight to be given to direct and circumstantial
22 evidence.

23 Instruction No. 3: During the trial, I will sometimes
24 need to talk privately with the lawyers. I may talk with
25 them here at the bench while you are in the courtroom, or I

1 may call a recess and let you leave the courtroom while I
2 talk with the lawyers.

3 Either way, please understand that while you are
4 waiting, we are working. We have these conferences to make
5 sure that the trial is proceeding according to the law and
6 to avoid confusion or mistakes. We will do what we can to
7 limit the number of these conferences and to keep them as
8 short as possible.

9 Instruction No. 4: At the end of the trial, you'll
10 have to make your decision based on what you recall of the
11 evidence. You will not have a written copy of the testimony
12 to refer to. Because of this, you have to pay close
13 attention to the testimony and other evidence as it is
14 presented here in the courtroom.

15 Instruction No. 5: To make sure this trial is fair to
16 all parties, you must follow these rules:

17 First, do not talk or communicate among yourselves
18 about this case or about anyone involved with it until the
19 end of the trial when you go to the jury room to consider
20 your verdict.

21 Second, do not talk with anyone else about this case
22 or about anyone involved with it until the trial has ended
23 and you have been discharged as jurors.

24 Third, when you're outside the courtroom, do not let
25 anyone tell you anything about the case or about anyone

1 involved with it until the trial has ended and your verdict
2 has been accepted by me. If someone tries to talk with you
3 about the case during the trial, please report it to the
4 bailiff or the deputy clerk.

5 Fourth, during the trial, do not talk with or speak to
6 any of the parties, lawyers, or witnesses in this case, not
7 even to pass the time of day. It is important not only that
8 you do justice in this case but also that you act
9 accordingly. So if a person from one side of the lawsuit
10 sees you talking to a person from the other side, even if it
11 is just about the weather or something like that, that might
12 raise a suspicion about your fairness.

13 So when the lawyers, parties, and witnesses do not
14 speak to you in the halls, on the elevator, or the like, you
15 must understand that they're not being rude. They know
16 they're not supposed to talk with you while the trial is
17 going on, and they are just following the rules.

18 Fifth, you may need to tell your family, close friends
19 and other people that you are part of this trial. You may
20 tell them when you have to be in court, but you should warn
21 them not to ask anything about this case or to tell you
22 they -- anything they think they know about the case or to
23 talk about the case in front of you in any respect.

24 You must not communicate with anyone or post
25 information in any manner about the parties, the witnesses,

1 the participants, the claims, the charges, the evidence or
2 anything else related to the case.

3 You must not tell anyone anything about the jury's
4 deliberations once that starts in the case until after I
5 accept your verdict or until I give you specific permission
6 to do so.

7 If you talk about the case with someone besides the
8 other jurors during deliberations, it looks as if you might
9 already have decided the case or that you might be
10 influenced in your verdict by their opinions. That would
11 not be fair to the parties and it might result in the
12 verdict being thrown out and the case having to be tried
13 over again.

14 During the trial, while you are in the courthouse and
15 after you leave for the day, do not give any information to
16 anyone by any means about this case.

17 For example, do not talk face-to-face or use any
18 electronic device, whether it's a telephone, cell phone,
19 smart phone, computer, computer-like device. And, likewise,
20 do not use the internet or any internet service. Do not
21 text or send instant messages. Do not go on or use any
22 internet or other medium, including internet chat rooms,
23 blogs or other websites like Facebook, My Space, YouTube and
24 Twitter -- or Twitter. In other words, do not communicate
25 with anyone about this case, except for the other jurors

1 during deliberations, until I accept your verdict.

2 Sixth, do not do any research on the internet, in
3 libraries, newspapers or otherwise, and do not investigate
4 this case on your own. Do not visit or view any place
5 discussed in this case and do not use the internet or other
6 means to search for or view any place discussed in the
7 testimony. Also, do not look up any information about this
8 case, the law or the people involved, including the parties,
9 the witnesses, and the lawyers.

10 Seventh, do not read or otherwise receive any
11 information, including any news stories or internet articles
12 or blogs that are about this case or about anyone involved
13 with it. Do not listen to any radio or television reports
14 or digital streaming about the case or about anyone involved
15 with it.

16 In fact, until the trial is over, I suggest that you
17 reduce or limit or avoid at all reading or receiving any
18 digital streaming or any newspapers or news journals, and
19 avoid listening to any television or radio newscasts at all.
20 I do not know whether there will be news reports about the
21 case, but if there are, you might accidentally find yourself
22 reading or listening to something about the case. If you
23 want, you can have someone collect information or clip out
24 any stories and set them aside to give you after the trial
25 is over.

1 I can assure you, however, that by the time you have
2 heard all the evidence in the case, you will know what you
3 need to decide the case and to return a just verdict.

4 The parties have a right to have you decide their case
5 based only on the evidence admitted here in court. If you
6 research, investigate, or experiment on your own or get
7 information from other places, sources, and the like, your
8 verdict might be influenced by inaccurate, incomplete, or
9 misleading information. Witnesses here in court take an
10 oath to tell the truth, and the accuracy of their testimony
11 is tested through cross-examination.

12 All of the parties are entitled to a fair trial and an
13 impartial jury, and you have to conduct yourselves in a way
14 that assures the integrity of the trial process. If you
15 decide a case based on information not admitted in court,
16 you will deny the parties a fair trial. You will deny them
17 justice. Remember, you have taken an oath to follow these
18 rules, and you must do so. If you do not, the case might
19 have to be retried, and you could be held in contempt of
20 court.

21 Eighth, do not make up your mind during the trial
22 about what the verdict should be. Keep an open mind until
23 after you and your fellow jurors have discussed all the
24 evidence.

25 Six: The trial will proceed in the following manner:

1 First, the plaintiff's lawyer may make an opening statement.
2 Next, the defendants' lawyers may make an opening statement.
3 An opening statement is not evidence; it is a summary of the
4 evidence the lawyers expect you will see and hear during the
5 trial.

6 After opening statements, the plaintiffs will then
7 present evidence. The defendants' lawyers will have a
8 chance to cross-examine the plaintiff's witnesses.

9 After the plaintiffs have finished presenting their
10 case, the defendants may present evidence, and the
11 plaintiff's lawyer will have a chance to cross-examine the
12 defense witnesses.

13 After you have seen and heard all the evidence from
14 all sides, I will instruct you further on the law, and then
15 the lawyers will make closing arguments that summarize and
16 interpret the evidence. Just as with opening statements,
17 closing arguments are not evidence.

18 And then, finally, you will retire to the jury room to
19 deliberate and decide on your verdict.

20 Mr. Randles, you may proceed.

21 **PLAINTIFF'S OPENING STATEMENT**

22 **MR. RANGLES:** Thank you, Your Honor. Good afternoon.

23 As you probably recall from this morning, my name is
24 Billy Randles. I'm one of the lawyers representing Bader
25 Farms and its owners, Bill and Denise Bader, a family

1 operation that grows peaches down in southeast Missouri, in
2 Campbell, Missouri.

3 This is the story of a Missouri business that has been
4 around for decades but is now doomed. It's going out of
5 business through no fault of their own, and the evidence
6 will show this business is going out of business through
7 circumstances entirely foreseen and foreseeable.

8 We will allege and prove that these defendants rushed
9 a defective, unproven, dicamba-based system on to the market
10 for their own profit and conspired to create an ecological
11 disaster for their own profit. This -- this system is
12 novel, never been tried before, and the experiment, we will
13 show, has been a failure.

14 So, we have claims, as you heard earlier from the
15 Court, for defective product design, negligence, for a
16 conspiracy, joint venture, and for punitive damages, damages
17 to punish and deter.

18 Now, before we go very far, we need to talk a little
19 bit about defining some terms, and you're going to hear a
20 lot of language in this case. I hope we give you a
21 foundation today to have a general feel for it, but I think
22 it will become second nature to you as we go.

23 What is dicamba? Well, dicamba is a synthetic-auxin
24 herbicide is the technical term. Not -- science doesn't
25 fully understand how dicamba works. The theory is that it

1 creates uncontrolled cell growth in sensitive plants and
2 thereby kills them.

3 Dicamba's been around a long time, but it's never been
4 authorized to use during the growing season, and I'll
5 explain in a minute what the evidence will show why that's
6 important. Dicamba has been around and used for limited
7 purposes, for burn-down and for early in the season in corn
8 before the growing season.

9 But in the past, you couldn't spray dicamba over
10 soybeans or cottons or most anything else that's not
11 naturally resistant to dicamba. A few things are, like
12 wheat. But it's never been authorized for use.

13 And it's never been authorized for use as a general
14 herbicide for two very good reasons: Number one, it's very
15 potent. It is very dangerous to anything that is not
16 resistant to it. And, number two, dicamba is very prone to
17 off-target movement. You're going to hear that phrase a lot
18 or see the initials OTM. What that means is it goes places
19 it wasn't meant to go.

20 And there are several ways that it moves from where
21 it's sprayed to where it's not supposed to be. One is
22 called spray drift. If you've ever sprayed a garden hose
23 during a windy day, you know spray drift, it goes up where
24 it's not supposed to. That is one form of off-target
25 movement and, we would contend, the least important.

1 The other main form is something called volatility,
2 and what it means is after you've sprayed it, it volatilizes
3 or transform into a gas. It's like evaporation in a sense,
4 and so it lifts, and when it's windy, it moves, and then
5 it's deposited where it wasn't meant to go.

6 Now, one of the signs of volatility and that applies
7 to Bader Farms, you're going to hear later, is landscape
8 damage. If you have spray drift, the droplets will show a
9 pattern where the wind was along the edge.

10 But if you have volatility, you can have what's called
11 landscape damage, which means equal damage on all parts of
12 the field as far as you can see, and that's what -- that's
13 the big danger from dicamba.

14 Now, various things can contribute to volatility.
15 You're going to hear phrases like "temperature inversions,"
16 and what means is, in hot weather in the summer,
17 particularly in Missouri bootheel, will flip, and when they
18 flip it can lift up volatile substances like dicamba and
19 transport them for miles, and then they drop where they're
20 not supposed to be.

21 So it has never been legal, until 2017, to use dicamba
22 as an in-crop herbicide during the growing season because
23 all of the factors that occur during the growing season
24 increase the likelihood of dicamba -- the hotter it gets,
25 the more likely dicamba is to volatize. The more of it you

1 spray, the more likely it is to volatize. The more humid it
2 is, that affects volatility.

3 And so all of these factors affect its likelihood to
4 volatize, and, of course, during the growing season, you
5 have sensitive crops growing nearby, and so they're more
6 likely to be in a vulnerable state where they can be
7 damaged.

8 So, they decided -- BASF and Monsanto decided to
9 develop a dicamba-tolerant system. And I'm going to show
10 you a timeline here of some of the key events. And you can
11 look at it on the TV or in front of you, whatever's most
12 convenient.

13 In 2009, they announced a plan to develop a
14 dicamba-tolerant system. In 2010, they formed something
15 called the Dicamba Advisory Council, and it may have been
16 2009, but right in that time period, and members of that
17 Dicamba Advisory Council were invited to join and provide
18 advice began to warn them of the dangers of dicamba moving
19 off target.

20 And you're going to hear, as the first witness in this
21 case, a fellow named Steve Smith, horticultural director for
22 Red Gold Tomatoes, who is one of the members of that
23 council.

24 In 2011, Monsanto and BASF developed a detailed
25 working plan to commercialize the system. And you're going

1 to see -- not in my opening because there's not time, but
2 you're going to see a number of documents about their
3 agreement to work together, contracts they signed,
4 profit-sharing they signed, things like that. And we're
5 going to talk about a little bit of that today and get into
6 the more technical aspects as we go.

7 But from 2011 to present, BASF and Monsanto formed
8 multiple working groups of their employees from the
9 different companies to hold regular meetings, working
10 together to help commercialize the system. And the
11 subcommittees worked on various issues. Some worked on
12 science, some worked on regulatory affairs, some worked on
13 marketing, commercial-type affairs, and you will see
14 examples of that, but there were multiple meetings a year,
15 either in person or by telephone, of their joint
16 interaction.

17 Well, come up to 2015. And by 2015 and 2016 Monsanto
18 had seeds ready to go that had been modified so that they
19 could be planted and withstand dicamba, they could survive
20 it, because before that, if you had sprayed dicamba over
21 cotton or over soybeans, you'd kill them.

22 In 2015, they were ready to go with cotton, but there
23 was no legally approved dicamba herbicide. And you're going
24 to see in the documents that that created a real problem of
25 illegal spraying that these defendants knew was going to

1 happen, and they put it out anyway.

2 2016, they're still selling the cottonseed but the
3 soybean seed is ready to go. Again, there's still no legal
4 herbicide to use with dicamba over it, and they put it out
5 anyway, and a tremendous amount of illegal spraying occurs,
6 just as predicted with the commensurate harm.

7 Well, in 2017, Monsanto and BASF actually received
8 permission to sell their new and improved dicamba herbicides
9 that supposedly were going to fix the off-target movement
10 problems. They didn't, and we will talk about that in a
11 minute.

12 These companies collaborated very closely on that, and
13 that's an important part of this case. The way they
14 described their own relationship is -- oh, I'm sorry, I do
15 want to mention one thing.

16 This case is about the dicamba-tolerant system. When
17 we use that phrase, what does it mean? Well, this BASF
18 document explains it pretty well. DT system equals DT crop
19 in combination with any DT system crop protection product.
20 In other words, dicamba-tolerant seeds and a dicamba
21 herbicide, that's the system. And that's the problem. When
22 you combine the two, you get the results that we allege in
23 this case.

24 They worked closely on developing this. This is one
25 of the -- one of their own documents, and you can see the --

1 in visual representation of how close they are to one
2 another.

3 I'm going to say a word about the mode of proof in
4 this case. The Court's instructions said things like
5 company documents are evidence, things like testimony is
6 evidence. We're going to be showing you, and I'm going to
7 give you sample today of their own documents, their private
8 internal documents that were discovered through this
9 litigation, that show what they were really thinking and
10 saying to themselves and to each other as it went.

11 There are a lot more you'll want to see, but the
12 reason I'm showing these documents is so that you can hear
13 the proof, not in my words but in their words. And you're
14 going to hear a lot of testimony from their employees as
15 well, as we go. And I believe it's important that you hear
16 what they had to say and when they had to say it.

17 Well, the companies described the relationship between
18 the two of them as critical. As a matter of fact, BASF
19 said, in 2012, the deregulation of -- I'm sorry, technology:
20 "The deregulation of Monsanto's dicamba-tolerant soybean
21 seed is critical to BASF's future herbicide opportunity.
22 BASF executive management has pledged to support Monsanto in
23 their seed deregulation efforts as we have a vested interest
24 in their success."

25 And this is the relationship between them. Primarily

1 Monsanto -- Monsanto was selling the seed and eventually
2 Monsanto developed their own dicamba herbicide. BASF had
3 their own old dicamba called Clarity, and then they had a
4 newer, supposedly lower volatility herbicide called Engenia
5 that started being sold in 2017.

6 And BASF's point here is: For us to sell the dicamba
7 herbicide, we got to have the seeds to spray it over. So
8 BASF had a critical -- they said, but Monsanto also viewed
9 the relationship as absolutely critical. In this Monsanto
10 document from 2013, they simply described the relationship
11 with BASF as business critical.

12 Well, as far back as 2010, these companies were at a
13 crossroads whether to proceed with this, and you're going to
14 see in these documents decision points, and at each point in
15 time when these companies had a decision to make about
16 whether to protect innocent third-party farmers or to
17 proceed with profit, they chose the latter. As far as 2010,
18 they were discussing this problem. I'll show you this
19 Monsanto document.

20 Again, 2010, "The concept we are working with is that
21 we will not only need to address these issues with the
22 agencies but also potentially in the courts. In addition to
23 or instead of coexistence and resistance, we will be
24 defending dicamba relative to drift and volatilization to
25 nearby crops. As with resistance and coexistence, I'm

1 afraid our defense will need to be centered around a strong
2 stewardship program."

3 Now, you're going to hear a lot about a stewardship
4 program, I expect, in this trial, and you'll hear that tens
5 of thousands of farmers have been trained how to do this
6 responsibly. But, we contend, as this document is evidence,
7 that the stewardship program was meant to be a defense for
8 these companies, and they knew good and well it wasn't going
9 to prevent harm.

10 He goes on to say, "Regulatory positioning is totally
11 different than actual field use and perceptions of use.
12 Once approved, covering all potential use sites, we can make
13 a determination of whether we want to minimize concern and
14 use."

15 So as far back as 2010, they were trying to decide --
16 they knew they were going to have to defend this in the
17 courts, they knew it was going to volatize, they knew it was
18 going to cause problems, and they decided to proceed and
19 then be prepared to fight it out.

20 They're also receiving, as early as 2010, warnings
21 from outside the companies of the dangers of this. They
22 were being warned not to do it.

23 Steve Smith, whom you will hear today from Red Gold
24 Tomatoes, was a member of their Dicamba Advisory Council,
25 and he advised them and testified to Congress that the use

1 of dicamba was the biggest threat to midwestern agriculture
2 that he'd ever seen, and he said its use is incompatible
3 with Midwest agriculture.

4 The Midwest Food Processors Association wrote a letter
5 to the USDA in 2010 -- 2012, I'm sorry, expressing their
6 concerns. Among other things, they said -- I apologize.
7 Among other things, they said, "Our members are concerned
8 that the increased use of dicamba will create a drift and
9 volatilization risk to specialty crop production in the
10 Midwest."

11 Now, "specialty crop" means a number of things,
12 primarily fruits and vegetables. Also, grapes and wineries.
13 The risk for millions of acres of field crops treated with
14 these herbicides could devastate specialty crop production
15 from a drift off-site movement standpoint and cause
16 significant crop injury and contamination.

17 And then in 2014, Monsanto assembled a panel of
18 academics, weed scientists and other respected academics
19 around the country, to advise them as to what the academics
20 thought they should do with respect to this dicamba system.
21 And the academics said, in part -- and these are Monsanto's
22 notes from a Monsanto note-taker. The academics concluded:
23 Managing specialty crops, don't do it. Expect lawsuits.

24 So they were warned from the outside many times that
25 this was going to happen, it was going to damage specialty

1 crops, it was going to cause devastation, it was going to
2 result in lawsuits, and they shouldn't do it.

3 But they were also talking about it inside the
4 companies. For example, in 2014, before the cottonseed came
5 out and they were discussing whether or not to release the
6 cottonseed without the legal new herbicide that was
7 supposedly going to fix the problems, Monsanto presenter
8 here listed risks of putting that seed out in '15. And it
9 said, "Risks. Growers make off-label applications of
10 dicamba." The phrase "off-label" means in a way that the
11 label doesn't approve, and here, of course, it's talking
12 about the kind that was on the market, which the old dicamba
13 like Clarity and private label used there.

14 Monsanto decided it would go ahead and put it out
15 without an accompanying herbicide. You're going to hear
16 evidence that was pretty much an unprecedented step to put
17 out a new seed system traded to a herbicide without the
18 legal herbicide.

19 And Monsanto's own folks were referring to that and
20 sort of joking about it and what it would lead up to. So
21 after the decision was made and right before the seed was
22 sold in 2015, these Monsanto employees were exchanging an
23 email that says, in part, "That I all get to work with a
24 group of renegades that launch a technology without a label
25 and thinks one sticker is going to keep us out of jail. If

1 that was the case, Rylander would be covered with stickers."

2 Now, what they're referring to is, they put out the
3 cottonseed and then they put a pink sticker on the bag that
4 said, "It's not legal to spray dicamba over this." And the
5 joke there about John Rylander is, John Rylander was
6 Monsanto's head of U.S. crop protection. So they were
7 mocking the fact that the sticker was going to accomplish
8 anything.

9 Further, BASF and Monsanto had a joint conference
10 together in Puerto Rico, and Boyd Carey from Monsanto took
11 notes of what was said, and you will see Boyd Carey here
12 tomorrow. And he stated he was recording what Dan Westberg,
13 who's here in the courtroom today for BASF, told them before
14 the 2016 growing season. You'll see the date, 2/11/16. So
15 this is after the cotton season was out and the illegal
16 spraying and before the soybean was released for '16,
17 without a legal herbicide. And Dr. Westberg said, "Stated
18 that off-label use of dicamba in cotton was widespread in
19 cotton last year and that it will be rampant in 2016."

20 And the evidence will show his prediction was exactly
21 right, that the off-label spraying was rampant in 2016. But
22 these warnings did not prevent this going out. And, as a
23 matter of fact, the companies decided to go ahead and put it
24 out because it was in their interest.

25 For example, BASF document stated -- and this is also

1 dated before the release of the 2016 soybean seed, "I also
2 have a major concern of nonlabeled dicamba formulations
3 being used by growers on Xtend soybeans in 2016. We would
4 hear retailers talking about some of their grower, reports
5 of growers bragging, etc., that they fully intend to use
6 Clarity, etc., and disregard labels."

7 All right. So they were hearing this information and
8 they were hearing that there was going to be off-label
9 spraying of this volatile dicamba. So what did they do?

10 Goes on to say in this document, "I feel we need to
11 get behind Xtend soybeans and promote the opportunity to
12 look at the yield potential in 2016 and then use that
13 momentum to sell Engenia for 2017. We only have the
14 opportunity to sell Engenia in 2017 if Xtend soybeans are
15 planted."

16 So BASF was counting on selling Engenia, the new
17 supposedly lower volatility herbicide, in 2017, over the
18 beans, but there was a chance to make a profit in 2016 that
19 BASF did not pass up, even though it involved illegal
20 spraying.

21 In January 21st of 2015, BASF says, "Dicamba project
22 update," and then states in this document, "Preparations are
23 being made to import unregistered Yangnong dicamba technical
24 for production, scale-up, and eventual use in Clarity
25 herbicide production in April 2015."

1 So before the cottonseeds were sold in 2015, again, no
2 legal -- no dicamba's legal to be used -- they scaled up
3 their Clarity production. Then they sold more.

4 Notice it says, "Business Planning Debrief." The date
5 is 11/30/16, after these two years. It says, "Clarity plus
6 PL brand performance metrics, geographic sales change." And
7 you'll note at the bottom of the document it says -- it
8 shows how DT seed was available in 2016. Use is increased,
9 especially in 2016, and then it says, "Dicamba demands spike
10 with the DT trait." As a matter of fact, in some regions
11 BASF sales representatives were bragging that the -- that
12 they doubled their sales.

13 "All of the cotton, DT cotton that is planted this
14 year has been sprayed off-label, and growers are being very
15 mum about their applications. We know from the increase in
16 PL" -- that means private label -- "private label Clarity
17 sales in our district. My numbers are double from
18 6500 gallons to 12,800 gallons."

19 So take a little pause here. Seeds sold in 2015
20 without a legal herbicide to go over it, sold in 2016
21 without a legal herbicide to go over it, spraying is
22 rampant, spraying was foreseen. What happened?

23 Well, the EPA issued a very rare compliance advisory
24 during the 2016 season, and it says, "United States
25 Environmental Protection Agency, Compliance Advisory,

1 August 2016. Title: High Number of Complaints Related to
2 Alleged Misuse of Dicamba Raises Concerns."

3 And it says, in part, "To date, the Missouri
4 Department of Agriculture has received approximately
5 117 complaints alleging misuse of pesticide products
6 including -- containing dicamba. Missouri growers estimate
7 that more than 42,000 acres of crops have been adversely
8 affected. These growers have reported damage on a number of
9 crops, including peaches," and then it lists tomatoes,
10 cantaloupes, and a wide variety of other crops. And then it
11 goes on to list "similar problems in many other states."

12 Well, but all this time these companies were saying,
13 "Well, just wait 'til we get to put our new dicamba
14 herbicides out. We fixed the volatility problem, and it's
15 going to be okay once we put our new stuff out."

16 But during the development of these new supposed lower
17 volatility programs, they had their own suspicions of the
18 problems, and they prohibited real-world type testing to
19 prevent those problems from coming out.

20 For example, in 2015, a Monsanto executive reports,
21 "We do not want to run volatility studies with XtendiMax."
22 Now, remember, they're preparing to sell it to the public
23 and trying to get authorization to sell it, but they're
24 saying, "We don't want to run volatility studies."

25 Now, there are two kinds of research that goes on in

1 this industry. One is academic research where the
2 manufacturer allows academics access to its products before
3 they're sold to the public to test all aspects of it. And
4 you're going to hear from Boyd Carey from Monsanto tomorrow
5 that that's the industry custom. That's what's usually
6 done. He could only think of one exception in his 30 years
7 of experience, and that was when Monsanto refused to do it
8 in the past.

9 But in this case, they didn't let academics test it
10 before it came out. Well, sort of. They let them do one
11 kind of testing but not another. They allowed academics to
12 test for efficacy, meaning how well dicamba killed weeds,
13 because dicamba's good at killing stuff, and indeed, the
14 academics found that it was really good at killing weeds and
15 a lot of other things, but it was good at killing weeds.
16 But they would not let them test the primary threat that
17 dicamba posed to third parties, which is volatility and
18 off-site movement. They kept them from doing that.

19 And you may hear some excuses in this courtroom like,
20 Well, you got to have good laboratory practices for the EPA.
21 But just keep in mind, they were content with the academics
22 to test for efficacy for killing weeds but they wouldn't let
23 them test if these formulas actually were safer for third
24 parties, as they were saying they were.

25 And they went to great extents to prevent academics

1 from testing it. Dr. Jason Norsworthy from University of
2 Arkansas asked for just a small amount to test before it
3 came out on the market to see if it volatized. And here's
4 what they told him in 2015: "We mentioned that we were not
5 testing formulation this year because of the difficulty in
6 producing quantities that would allow for broader testing,
7 which caused quite a bit of mirth among the people on the
8 email. Ha ha ha. Difficulty in producing enough product
9 for field testing. Ha ha ha. Bullshit." That's what the
10 Monsanto employees were saying among themselves about the
11 excuses they were giving publicly.

12 So, what happened? Real-world testing was avoided.
13 Now, you're going to hear about, I expect, thousands of
14 humidome tests and petri dishes.

15 Here's what the reality of the testing was: They
16 created new tests, indeed, even new processes at Monsanto,
17 setting a very low bar that these new formulations could
18 jump over, but the intent at all times was to avoid
19 real-world conditions. What are the conditions that cause
20 greater volatility? High temperatures, spraying over large
21 amounts, spraying in real weather conditions, spraying over
22 plants.

23 So they did testing that involved spraying tiny
24 amounts in a cool greenhouse on glass dishes, and then
25 saying, "Well, we've got measurements." Sometimes they

1 would even spray it with dirt in the glass dish.

2 But large-scale testing outside where there's weather,
3 that was studiously avoided. And the two studies they did
4 outside, you're going to hear extensive testimony about,
5 were designed in a way to minimize risk and were very small
6 scale, 4 acres and 8 acres. Not the hundreds of thousands
7 of acres of real world farming conditions as we see here.

8 So at all times it was meant to be a way to avoid
9 real-world conditions. As a matter of fact, at one point a
10 scientist from BASF described Monsanto's testing procedures
11 as voodoo science. So the real world testing was avoided,
12 both within the company, and the academics were prevented
13 from doing it. The new herbicides then become legal in '17
14 and get sold. Problem solved.

15 Well, let's see what happened. This is -- well, right
16 before I move to that, I want to move to one other, I think,
17 vivid example of what was going on inside the companies with
18 their own testing.

19 This document from 2013 is a document concerning a
20 video they wanted to prepare. They wanted to shoot a
21 promotional video about the new dicamba, so they planted --
22 they had, in the greenhouse, dicamba-tolerant soybeans and
23 regular soybeans, and the problem they had is they couldn't
24 keep the dicamba on the dicamba-tolerant beans long enough
25 to keep the regular beans in good shape. It kept moving.

1 And so they said, "The only major issue in this video
2 is the untreated control eventually shows dicamba systems
3 due to volatility." In other words, it was volatilizing in
4 the greenhouse. Unless we substitute a DT soy for the RR
5 control, in other words, a dicamba-tolerant soybean for the
6 old soybean, I'm not sure how to get around this problem.
7 Of course, we could eliminate the control completely. So
8 they can't solve volatility in their own greenhouse, and
9 they can't keep it in place.

10 But the product goes out the door, is sold widely in
11 2017, supposedly lower volatility, supposedly safe. What
12 happens? Well, the EPA is forced to issue another
13 compliance advisory in July of 2017, this time entitled,
14 "Crop Damage Complaints Related to Dicamba Herbicides
15 Raising Concerns."

16 It says, in part, "Despite the conditional approval of
17 new dicamba products with drift-reduction agents and further
18 use restrictions set in place prior to the 2017 growing
19 season, some states are reporting high numbers of dicamba
20 complaints. By early July, we already had reports of
21 hundreds of complaints received by state agencies in
22 Arkansas, Missouri, and Tennessee (a significant increase
23 from last year). Both physical drift and volatilization of
24 dicamba from the target application site have been
25 reported."

1 So supposedly the problem in '15 and '16 were the old
2 dicamba products. So the new dicamba product comes out, and
3 the problem, according to the EPA, gets worse, not better.
4 But this wasn't a surprise to these companies. Privately,
5 before the product was even released, they were already
6 computing the number of claims that were going to occur as a
7 result of the release of this new and supposedly improved
8 product.

9 For example, in 2015, Monsanto prepared a projection
10 of the potential claims going forward. And you'll notice
11 that, for '16, it listed 1305. For 2017, again, the first
12 year with the new and improved herbicide, 2700. 2018, it
13 goes up again to 3200, and doesn't start declining until
14 2019, 2020, as I've asked their witnesses. That's because
15 by then, virtually everyone's planting the dicamba-resistant
16 crops, and so there's less target area.

17 So they were computing this. To give you some idea of
18 this and what the compliance advisory was talking about, the
19 USDA reports that in the five years before this system went
20 on the market, there were no more than 40 dicamba off-target
21 complaints in the entire nation, in any given year in that
22 five-year period, and there were only three in Missouri the
23 three years prior. You've seen from the EPA the reports of
24 hundreds, and you've seen, from their estimates, thousands.
25 So that's what changed. But -- so they foresaw these

1 things. They prepared these claims estimates before the
2 products were sold, and they sold them anyway, knowing that
3 this harm was going to occur.

4 Well, they came up with a plan to deal with the
5 claims. For example, this is a document called, by
6 Boyd Carey -- again, whom you'll see tomorrow -- about,
7 "When you investigate, the key don'ts are, do not visit a
8 driftee inquiry if the farmer's not a customer." In other
9 words, it was Monsanto's policy of, if you got hit by
10 dicamba and you called, if you weren't a Monsanto customer,
11 they wouldn't come. Seed, trait, or chemistry. No.

12 "Driftee" is meant as an internal term only. They so
13 thoroughly anticipated off-target movement problems,
14 Monsanto coined a phrase for the people who were going to
15 receive the damage, and they called them driftees.

16 But the purpose of this claim system was never to
17 actually get to the bottom of it. Again, another Monsanto
18 document, planning the development of the dicamba inquiry
19 form. And the dicamba inquiry form was what they gave to
20 the people they sent out when they did go out to look at
21 fields, and they said, "The purpose," their words,
22 "developed to gather data that could defend Monsanto."

23 So you're going to hear about their investigations and
24 that sort of thing, but the investigations were never meant
25 to get to the truth; they were meant to protect the

1 companies.

2 Further, before a single investigation had ever been
3 made by these companies, by Monsanto or BASF, they had both
4 decided they would never settle an off-target movement
5 claim, ever. This is 2015. Monsanto had not invested a
6 claim yet, and they didn't in '15 or '16, or most -- or --
7 and then they started in '17 just for their customers, and
8 later on expanded it.

9 Incident flow management chart 2016. If a call comes
10 in, it gives you your various scenarios, but they all end at
11 the bottom of the page: No settlement.

12 BASF had a similar policy. As a matter of fact, BASF
13 had this policy with regard to dicamba for years before the
14 new products. BASF does not accept responsibility for
15 off-target application errors.

16 EPA, however, requires that BASF report all off-target
17 allegations that involve BASF product. Thus, investigate
18 and submit as off-target and disclaim. So the investigation
19 that they both started doing in '17, because the EPA made
20 them, as part of selling the herbicide, was never meant to
21 get to the truth; it was meant to protect the companies.

22 As a matter of fact, they even came up with ways to --
23 this system of -- of denying off-target movement claims
24 wasn't a new one. And this Monsanto document in 2016
25 characterizes it: "For 30 years BASF has denied volatility

1 as the issue with Clarity. It's all been off-target
2 trespass, drift. Now they're making volatility the number
3 one reason Clarity sucks. We need to get on this right now.
4 Deny, deny, deny."

5 And you will find that the policy of these defendants
6 and the -- one of the driving engines of the conspiracy is,
7 no matter what anyone says about dicamba, deny, deny, deny.
8 You'll see it through the documents, you'll see it with the
9 witnesses, you're going to see it here.

10 So, there was a lot of warning that this was going to
11 happen. It went bad in '16 -- in '15 and '16. It went bad
12 in '17. They couldn't control the product in their own
13 greenhouse. So why put it out with all this damage likely
14 to occur? Because the damage occurring was part of the
15 plan. As far back as 2013, Monsanto, a Monsanto executive
16 whose testimony you're going to hear today, prepared a slide
17 show for how to sell the new dicamba products.

18 And you see the bottom says, "Stakeholder,
19 dicamba-tolerant grower, sees no trait value." And you see
20 the flow here. The grower doesn't have weed resistance
21 issues. Doesn't need it. So the grower says, "Why should I
22 pay for something I don't need?" What's the answer?
23 Protection from your neighbor. You pay for it to protect
24 yourself from dicamba damage.

25 Likewise, BASF had the same plan but they were

1 determined to deny it publicly. And the phrase "defensive
2 planting," planning to protect yourself from your neighbors,
3 had become to common in the agriculture community and
4 discussed so widely that BASF felt the need to deny it. And
5 so you see here, updated tough questions on Engenia at the
6 end of 2017. And BASF said, "If anyone asks, tell them we
7 have not considered defensive planting in our sales
8 projections."

9 But, about a year earlier, in one of their internal
10 documents discussing strategic update and potential market
11 opportunity, BASF listed one of the market opportunities for
12 the dicamba system was defensive planting. So the damage
13 was not a surprise and the damage was not an unintended
14 consequence. The damage was an essential element of selling
15 this product. And it's been implemented.

16 For example, in 2017, Monsanto has a document talking
17 about how you go to driftees and convert them to the
18 product. "I think we can significantly grow business and
19 have a positive effect on the outcome of 2017 if we reach
20 out to all the driftee people. Most investigations I did
21 involved the driftee people. Most driftee people were
22 interested in the technology and can be walked back to
23 neutrality on the damage affecting yield and, in many cases,
24 turned into new users."

25 So this system had the -- it added advantage from the

1 defendants' perspective of literally forcing people to adopt
2 it because if you're damaged this year, you're going to buy
3 it next year. And, of course, that works if you plant
4 cotton or soybeans. There is no such thing as a
5 dicamba-tolerant peach tree so that's not an option in this
6 case.

7 But in 2017, the chief technology officer of Monsanto
8 sent to the chief officer -- executive in Monsanto, whose
9 testimony you will hear in this courtroom, by video, a chart
10 of an analysis of the amount of damage that had occurred in
11 2017, prepared by Dr. Kevin Bradley from the University of
12 Missouri, and it lists here, in the map, states and the
13 number of reported complaints, and then the total number of
14 damaged acres. So he listed 2708 formal complaints that
15 year. Remember, that's up from no more than 40 a year
16 before this system went on the market. 2708, with total
17 damage of soybeans of 3.6 million acres throughout the
18 country.

19 And when I asked Mr. Begemann, the chief -- the top
20 executive at Monsanto in the United States, "What did you do
21 about this?" He said, "Nothing." I said, "Did you look
22 into it? Did you ask anybody to look into it?" "No."

23 But at about the same time all these reports of damage
24 were coming in, Monsanto had a sales meeting, and in the
25 sales meeting they were asked to describe what words would

1 best summarize 2017 to you: "Xtend-deli-icious,
2 invigorating, success, Xtendiful, cha ching." And the
3 evidence would be this was a highly profitable endeavor for
4 both of these companies. So the system is out. The
5 promised advantage in the system doesn't materialize.

6 Now, I want to be clear. I am not saying that under
7 certain conditions the new herbicides don't show some lower
8 volatility than the old ones, but the more real world you
9 get, the less of a difference there is, and dicamba's so
10 dangerous that any volatility is damaging to further plants.
11 And as you extend the amount of acres sprayed, you increase
12 the amount in the air. And that's what's going on.

13 So when all these claims started coming in, and
14 potential lawsuits, these companies had to come up with a
15 plan. And Monsanto's plan, in part, was, point the finger
16 elsewhere. Blame applicators, blame environmental
17 conditions, blame anything but dicamba.

18 For example, an internal Monsanto use form, it says,
19 "Xtend Inquiry Guidance," you'll see up at that top, "for
20 internal use only." So when you're investigating, this is
21 guidance to the people they sent out to investigate: "What
22 to look for during the course of investigation and
23 information collection. Are symptoms consistent with those
24 typically caused by dicamba? Could symptoms potentially be
25 caused by another non-dicamba factor, environmental stress,

1 high temperature, drought, etc.?" In other words, they were
2 trained to look for different factors other than dicamba.

3 Furthermore, when the reports started coming in from
4 the bootheel about severe damage, the directive from
5 Monsanto, high-ranking Monsanto executive John Chambers,
6 was, "Make sure you point the finger at disease. I'm not
7 sure how we will be able to separate the two but we need to
8 make sure disease impact is not overlooked in the
9 conversation around drift."

10 So there's already a plan to look for other symptoms,
11 talk about the environment, and point the finger at disease.
12 Here in a minute I'm going to talk about how it's exactly
13 what's happening in this case.

14 Now, I'm going to show you a timeline of events at
15 Bader Farms, but I just want to give you a preview right
16 now. Bader Farms was hit by off-target movement in '15 and
17 '16. And we're going to come back to it, but look here near
18 the end. 2015 cotton was released and Bader Farms was hit.
19 In 2016 the soy was released and Bader Farms was hit.

20 Now, in both years, Bill Bader called Monsanto and
21 asked them to send someone out. In both years they refused
22 to do so. Okay. But in this period after he called them
23 and before the lawsuit was filed -- because the lawsuit
24 wasn't filed 'til January of 2016 -- Bill Bader went and
25 testified before the Missouri Legislature in September of

1 2016.

2 And a Monsanto person sent Boyd Carey an email
3 characterizing Bill Bader's testimony and outlining what
4 they intended to do with Bill Bader before the lawsuit was
5 ever filed, and he says, "As I said earlier, the Missouri
6 extension rep thinks Mr. Bader may be looking at this as an
7 opportunity to cash in on a problem that has existed in his
8 peach orchard that is not related to auxin chemistry,"
9 "auxin" meaning dicamba. "Will be interesting to see where
10 this one goes. All I know is a decent lawyer will have a
11 field day with Mr. Bader if he gives similar testimony to
12 what he said yesterday."

13 So a plan was already in place before a lawsuit was
14 ever filed. And after repeated requests from Bill Bader
15 to -- for Monsanto folks to come down, they refused to come
16 down until long after the lawsuit was filed.

17 But Monsanto was already meeting and deciding, without
18 ever visiting his farm, what they were going to say about
19 Bill Bader. As a matter of fact, Dr. Boyd Carey will
20 testify that after Bill Bader called him -- after he called
21 Bill Bader back and talked to him, he then met with a group
22 of folks at Monsanto to try to come up with what might be
23 wrong at Bader Farms.

24 And I asked him, "Well, instead of speculating in the
25 conference room in St. Louis, wouldn't it have been better

1 to just go to Bader Farms and look?" But you will hear the
2 policy at Monsanto actually prohibited him from going and
3 looking. So the defense was constructed before the case was
4 ever filed and before anyone ever went.

5 Let's look at the timeline of Bader Farms. You'll
6 see, in 1970, Bill Bader begins working in peach orchards.
7 Bill Bader's been working in peach orchards for over 50
8 years. In 1976 he starts managing Risley Orchards. In 1986
9 he purchases Risley Orchards, and in 1988, Bader Farms
10 becomes incorporated, and it grows eventually to a thousand
11 acres of peaches.

12 It's the largest peach orchard in the State of
13 Missouri. Millions of bushels of peaches have been sold at
14 Bader Farms since it has been growing there. And it has
15 been, as I said, at times -- the largest orchard in
16 Missouri, at its peak producing 40 to 50 percent of the
17 total peaches in the State of Missouri.

18 As we've already talked about, in 2015, the cottonseed
19 was released. It was -- there was a widespread of the
20 cottonseed in southeast Missouri. Bader Farms peaches were
21 damaged. He suspected dicamba. He called Monsanto. No one
22 came. They told him they didn't have the resources to send
23 someone down to Campbell, Missouri.

24 2016, the soy is sold along with the cotton. They're
25 damaged again. Bill Bader calls again. A lawyer calls him

1 back. At the lawyer's directions, Boyd Carey calls him
2 back, but nobody comes.

3 Then in 2017, the new herbicides are released to go
4 along with the seeds. Bader Farms is hit again with
5 dicamba, and Bill Bader suspects dicamba. And we will talk
6 a little bit more about the science of that in a minute.

7 But, as I mentioned to you, Bill Bader's -- they've
8 been in business at Bader Farms since 1986. They've sold
9 millions of bushels of peaches. Bill Bader has received an
10 award from the governor as a friend of agriculture. Bader
11 Farms has been recognized as, you know, an important peach
12 producer. I think most of you probably heard of Bader Farms
13 and gotten their peaches at some point.

14 But now Bader Farms is doomed. It cannot recover from
15 the damage it has sustained. Bader Farms has had tens of
16 thousands of peach trees die. He's had to push out tens of
17 thousands, plant new ones, and the new ones are being killed
18 by dicamba about as fast as they can be planted.

19 Well, we got an expert who's going to come in and talk
20 to you about this and tell you how dicamba works. His name
21 is Dr. Ford Baldwin. Dr. Ford Baldwin is an emeritus
22 professor from the University of Arkansas, Ph.D. in
23 agronomy, weed scientist, weed science. For 45 years
24 Dr. Baldwin has been walking fields and diagnosing herbicide
25 injuries in sensitive plants.

1 He's done it his whole life, and he's going to have
2 more experience diagnosing herbicide injury on plants than
3 any expert you're going to hear come into this courtroom.
4 Depending on who they call, he may well have more than all
5 the other experts combined. And he's going to tell you that
6 dicamba leaves an unmistakable fingerprint. There are
7 certain symptoms that, to a trained eye, can only tell you
8 it's dicamba, and there are certain reactions of the plant
9 that can only tell you it's dicamba.

10 He tells you beyond a shadow of a doubt the dicamba
11 sprayed over the top is what's destroying Bader Farms. He's
12 going to tell you that the other causes you're going to hear
13 mentioned in this courtroom are not the primary cause of the
14 damage.

15 When dicamba gets into a plant, like a tree,
16 particularly after repeated exposures, what it does is
17 weakens the tree. It weakens its resistance to things that
18 it normally could resist. So much like a human patient with
19 AIDS may die of a cold, a tree weakened by dicamba may well
20 have the final straw be something a healthy tree would shrug
21 off: A frost, a hail, change in moisture, mites, dear.
22 Things that the trees at Bader Farms have been shrugging off
23 for decades, now they can't.

24 And you're going to hear testimony, oh, there are
25 years the yield's been up at Bader Farms and years the yield

1 has been down, and there have been frost storms and hail.
2 Of course, there have. It's agriculture. We don't argue
3 that you have up-and-down years in agriculture, but the
4 thing is, in the past, anytime there's been something happen
5 in the environment, a tough year, the peach trees have
6 always been able to recover.

7 But here, coinciding with the release of this system
8 in 2015, the trees can't recover. The trees just keep
9 dying. They're not strong enough to recover. And I think
10 one thing they're going to talk about is disease. Just like
11 Monsanto decided to do all the way back in 2016, point to
12 disease.

13 They're going to point to disease, something called
14 armillaria root rot. Well, armillaria root rot has existed
15 in southeast Missouri, according to their own experts, for
16 at least a thousand years. Armillaria root rot has existed
17 the whole time Bader Farms has been in business. Hasn't
18 been a problem.

19 Dr. Baldwin's going to tell you there's some root rot
20 on the farm. It's not overrun with it. But the root rot,
21 the scientific literature is clear, is what's called a
22 secondary pathogen. In other words, it's not a root cause,
23 it's not a disease; it's a symptom. Healthy trees don't get
24 it. Trees that are already weakened and sick do get it.

25 So some of the trees are dying from root rot. We

1 won't deny that. But what caused the condition that allowed
2 the root rot to prosper was the tree's so weakened by
3 dicamba. And it's the same thing when you hear talk of hail
4 or ice or drought. One of their witnesses actually -- they
5 may come to testify. One of their experts actually talks
6 about the drought conditions of 2019 in southeast Missouri,
7 after record rainfall.

8 And 2019 provides almost a laboratory experiment for
9 you about whether it must be dicamba. You'll recall in
10 2019, there was so much rainfall in southeast Missouri that
11 the planting was delayed. Therefore, the spring was
12 delayed. So the early harvest at Bader Farms actually went
13 up in the early part of 2019.

14 And our expert, Dr. Ford Baldwin, sat down and wrote
15 out a report after the early harvest, and he said, "This is
16 because the spraying has been delayed, and when the spraying
17 does start, the harvest is going to plunge." And he was the
18 only person to sit down and write a prediction in 2019 as to
19 what was going to happen.

20 The spraying started late in 2019 in southeast
21 Missouri, of dicamba. The trees were hit again and the
22 harvest collapsed during the second half. The one thing
23 that changed was dicamba.

24 As a matter of fact, Dr. Baldwin's going to tell you
25 that agriculture in southeast Missouri has not changed from

1 the time Bader Farms was formed in its basic conditions, the
2 threats to the trees, with the exception of one thing, and
3 the one thing that changed from 2015 forward is the one
4 thing that caused the problem.

5 For example, we have collected from Monsanto their own
6 sales records of where they shipped seeds in southeast
7 Missouri. This is the 2015 map. You see the green dot in
8 the middle, more or less, that's Bader Farms. We drew a
9 circle of basically 15 miles around, and these were the
10 folks who bought dicamba-tolerant cotton in 2015 around
11 Bader Farms.

12 In 2016, these are the folks that bought
13 dicamba-tolerant cotton and dicamba-tolerant soybeans in a
14 15-mile radius around Bader Farms.

15 In 2017, this is the number of people buying
16 dicamba-tolerant soybeans and dicamba-tolerant cotton in a
17 15-mile radius around Bader Farms.

18 And in 2018, this is the number of people buying
19 dicamba-tolerant cotton and dicamba-tolerant soybeans in a
20 15-mile radius of Bader Farms. Bader Farms is sitting right
21 now in a sea of dicamba, and that's what's destroying it.

22 We're going to hear testimony from Dr. Joseph
23 Guenther. He is from the University of Idaho. He is an
24 agronomic economist. His specialty is agriculture
25 economics. He's testified and qualified as an expert all

1 over the country to testify in matters like this. He has
2 experience valuing orchards and the damages to orchards in
3 the past. And what he is going to tell you is that, basing
4 his opinion on what Dr. Ford Baldwin has said, which is that
5 Bader Farms cannot continue in existence being hit by
6 dicamba year after year, he's going to give you a
7 calculation of the damages, of the loss to Bader Farms, the
8 economic loss.

9 And I told you it was a big number in jury selection,
10 and it is. His estimate is \$20.9 million. That's the loss
11 of the business. The destruction of Missouri's largest
12 peach orchard, that's the economic loss.

13 So, you're going to hear a lot of testimony in this
14 case. You're going to hear a lot of disagreement. There's
15 not much of anything we're going to agree on except maybe
16 some dates.

17 As the Court said, you alone are the sole judges of
18 credibility. You decide who to believe. You look at
19 motives, you look at a witness's demeanor, look at what's
20 said in public compared to what's said in private, look at
21 their incentives, and decide for yourself who to believe.

22 I've shown you a pattern of evidence, and we will show
23 you a lot more, as this case progresses, of these companies
24 saying one thing in public and one thing in private and
25 doing all they can to avoid testing and carefully processing

1 this product to make it safe for third parties.

2 When I asked the Chief Executive Officer of Monsanto,
3 "Have you ever seen a Monsanto document, have you ever heard
4 a conversation at Monsanto expressing the slightest sympathy
5 for any driftee, any person hurt by off-target movement?"
6 He said, "No." And I asked him, "Have you ever expressed a
7 word of sympathy?" And he said, "No."

8 And that's explainable from what you've seen and what
9 you're going to see. This damage was foreseen, foreseeable,
10 and entirely avoidable. If this system hadn't been pushed
11 to market, defective, with huge gaps in the knowledge about
12 what we know and what we actually don't know, then this
13 damage wouldn't have occurred.

14 There is, in their own documents, admissions that they
15 don't know the basics like how high a concentration actually
16 hurts sensitive plants, how it behaves differently in the
17 real world, the difference between laboratory conditions and
18 real-world conditions, the difference between what you have
19 to do to get regulatory approval and actually find out if
20 it's safe in the real world.

21 All of these things could have been done but were
22 chosen not to be done. As a matter of fact, in the
23 testimony, you will repeatedly hear from their folks, when
24 the product's about to go finally out the door, 2016, final
25 approval is coming down the pipe for the new improved

1 herbicides.

2 Here's what one of their scientists says that they
3 don't know, "All, we don't know how long a sensitive plant
4 needs in a natural setting to show volatility damage. We
5 don't know what concentration in the air causes a response
6 either. There is a big difference for plants exposed to
7 dicamba vapor for 24 versus 48 hours. Be careful using this
8 externally."

9 They knew they didn't know the basic facts of this
10 product. They intentionally prevented themselves from
11 knowing the basic facts of this product. They did
12 everything they could to keep the dangerous facts from the
13 scientific community, from the public, and from regulators.

14 And the catastrophe that happened right after
15 surprised no one inside these companies, but unfortunately,
16 it's devastated millions of acres around the country, and
17 unfortunately for my client, it's ruined their family
18 business, a business that has been going on since 1986 in
19 its current form and much longer before that. There's no
20 reason that business could not have gone on for decades in
21 the future, but now it's over.

22 And we're going to put before you the facts, and we're
23 going to ask you, when this case is over, to evaluate those
24 facts, to make these defendants pay for what they did to
25 Bader Farms, to award punitive damages for the

1 intentionality and recklessness of this course of action.
2 In short, when I stand back up here, I'm going to ask you
3 for justice, and that will be a plaintiff's verdict.

4 Thank you.

5 **THE COURT:** Ladies and gentlemen, we'll take a
6 ten-minute recess before we hear the opening statements from
7 defense counsel. During this time, remember the admonition
8 I gave you, three or four pages of it. Do not discuss this
9 case among yourselves or with others, do not permit anyone
10 to discuss it in your presence, and do not form or express
11 any opinion about the case until it's finally given to you
12 to decide.

13 So go now to the jury room, and we'll take a
14 ten-minute recess and call you back out then. Court's in
15 recess.

16 *(Jury out)*

17 *(Court recessed from 2:44 p.m. to 3:00 p.m.)*

18 *(Following proceedings outside presence of jury:)*

19 **THE COURT:** Any preliminary matters?

20 **MR. RANGLES:** No, Your Honor.

21 **MR. MILLER:** No, Your Honor.

22 **THE COURT:** Lead counsel, come up.

23 *(Sidebar off the record)*

24 *(Jury in)*

25 *(Following proceedings in the presence of jury:)*

1 **THE COURT:** Mr. Miller?

2 **DEFENDANT MONSANTO'S OPENING STATEMENT**

3 **MR. MILLER:** Thank you, Your Honor.

4 May it please the Court, counsel, ladies and gentlemen
5 of the jury.

6 You know, when you listen to an initial opening
7 statement from one of the attorneys, you can, I would
8 imagine -- I've never had the pleasure of sitting in the
9 jury box, but you could sit there and think to yourself,
10 *Well, aren't we done now? We know what happened, let's just*
11 *get on with voting and move this along. Why do we have to*
12 *spend two to three weeks here?*

13 Well, there's a reason why, in a trial, both sides --
14 in this case, all three sides -- get to put their evidence
15 in front of you, and that's because there's always more to
16 the story. And I want to talk about the more-to-the-story
17 here. I want to talk about some of the things that
18 plaintiff's counsel has not told you about that you're going
19 to see during the course of this trial.

20 Let me give you one example. For example, plaintiff's
21 counsel talked about the fact that Monsanto was not having
22 academic scientists test the volatility of XtendiMax in 2015
23 and 2016 when EPA was determining whether it should be
24 allowed to be sold to the public, and EPA was evaluating the
25 test results of volatility as one of the things they were

1 looking at.

2 What he didn't tell you was, after the EPA approved,
3 initially, XtendiMax for sale in November of 2016, almost
4 immediately thereafter, Monsanto welcomed academics to test
5 its product so that they could see for themselves that it
6 was low volatility and completely easy to use.

7 In fact, Monsanto was so in favor of having the
8 academics look at its product and check it out for
9 themselves, they actually funded some of the academics
10 themselves. They gave them funds. They said, *This is*
11 *completely unlimited. You can do with it whatever you want.*
12 *Go and test it however you want.*

13 And the academics actually got them -- together
14 themselves, and they decided what protocols they were going
15 to use. They decided how they were going test XtendiMax.

16 And you know what their test results showed? Exactly
17 the same thing that the test results that Monsanto had
18 submitted to the EPA the year before showed. It showed that
19 XtendiMax with VaporGrip is low volatility, completely safe
20 to use if you follow the label, and EPA got all those tests
21 results.

22 EPA evaluated all those test results, the academic
23 test results, and two years later, in 2018, after having all
24 that additional information, some of which Monsanto provided
25 free funds to the academics to go do with what they wanted,

1 the EPA approved XtendiMax again. That's the whole story
2 regarding the academic testing. So you need to know what
3 all the evidence is.

4 Now, I want to spend most of my time talking about
5 what counsel got to at the very end of his argument, and
6 that is, I want to talk about the central issue in this
7 case. And the central issue in this case is, has Bader
8 Farms peach orchard been damaged by dicamba sprayed over
9 Xtend seed? That's the key question that you all are going
10 to have to decide in this case.

11 That's the question, frankly, that all of the
12 different claims that the plaintiffs have brought rest on.
13 They have to prove to you that the peach trees had been hit
14 again and again and again by dicamba, and not just by any
15 dicamba, they have to prove that they've been hit by dicamba
16 that was sprayed over top of Xtend seed, either Xtend cotton
17 or Xtend soybean. If they don't prove that to you, all of
18 their claims fail.

19 So what's the evidence going to show about that?
20 Well, the evidence is going to show, very briefly -- and
21 then I'm going to go into a lot more detail. The evidence
22 is going to show that they don't have any direct evidence of
23 dicamba sprayed over Xtend seed harming their peach orchard.

24 In fact, their own expert witness, Dr. Baldwin, who
25 counsel referred to, who's the only witness on the

1 plaintiff's side you're going to hear from that's going to
2 claim that's what was happening there, he's going to admit
3 to you that he doesn't have any direct evidence that it was
4 dicamba sprayed over Xtend seed that's been causing any
5 damage at Bader Farms.

6 You also are going to hear that there are problems.
7 There have been issues that have caused some crop loss at
8 Bader Farms, but the evidence is also going to show, not
9 from us, not because we say it, but from some of the things,
10 some of the claims that Mr. Bader himself has filed and
11 signed, swearing they are true, that the causes of those
12 problems have nothing to do with dicamba sprayed over the
13 top of Xtend seed.

14 And, yes, you are going to hear about armillaria. It
15 is a rot root that, over time, kills a peach orchard. And
16 you're going to be able to see for yourself that that has
17 been going on for years before the first Xtend seed was ever
18 sold.

19 I'm going to show you, in the opening, some of the
20 pictures you're going to see going back, of Bader Farms,
21 Bader's peach orchard, for years before the first Xtend
22 seeds were sold, where the peach trees are dying out exactly
23 as armillaria does. That's the other side of the story that
24 you're going to hear.

25 So, as I said -- can we get that first one up? Thank

1 you.

2 The plaintiffs have to prove the central question in
3 this case. They have to prove that their damages were
4 caused by dicamba sprayed over Xtend crops. Let's talk
5 about what is the evidence going to be regarding that issue.

6 Now, let's say you had some peach trees and you
7 thought there was something wrong with the peach trees and
8 you wanted to find out, *What's hurting my peach trees?*
9 *Specifically, is it dicamba hurting my peach trees?*

10 Well, who would you go to? You go to a peach tree
11 expert. Well, you're going to hear from Wayne Mitchem.
12 Mr. Mitchem, you're going to find out, has been working with
13 peach trees for 25 years. He helps farmers in North
14 Carolina, South Carolina, Georgia -- which, by the way,
15 South Carolina and Georgia, two of the top three
16 peach-producing states in the country. Only California is
17 up there with them.

18 He helps farmers in those states figure out how to
19 better manage their peach orchards. He helps them figure
20 out how to grow more peaches. He's the guy, when there is a
21 complaint by a farmer out in that area that, *There's*
22 *something hurting my peach trees*, he's the one that goes out
23 to investigate what's happening with peach trees. We all
24 know about Georgia peaches. They're famous. He's the guy
25 that Georgia goes to when there's a problem with Georgia

1 peaches.

2 The bottom line is, Mr. Mitchem is a leading expert on
3 peach trees. He knows peach trees. And here's what he's
4 going to tell you. He's going to tell you that if a peach
5 tree is being killed by dicamba, it has a very specific
6 symptom that it shows, because what you've heard, and
7 counsel has already referred to it, the way dicamba works,
8 scientists believe, is that it goes to the newest growth of
9 the tree first and makes it sort of overgrow. And so those
10 would be the new little shoots, the new little leaves.
11 That's where it attacks the plant, be it a weed or whatever,
12 a tree or a crop.

13 And so what Mr. Mitchem is going to tell you is, if a
14 peach tree is being killed by dicamba, it's going to have
15 something called terminal death. What's that? Well, that's
16 terminal death right there in front of you on that monitor.
17 This is a picture of a peach tree in Georgia that
18 Mr. Mitchem took that was hit by dicamba. And if you
19 notice, you see the area -- I can't use my pointer because I
20 can't quite reach it from over there -- well, let's see.
21 Nope.

22 You see the little area where the new leaves are
23 growing, that's called the terminal. The terminal on the
24 plant is basically the end of the branch where the new buds
25 and the new leaves are coming out, and you could see for

1 yourself the terminal growth there is dead or dying. It's
2 wilted, it's brown, it's dying away. That's terminal death.
3 And Mr. Mitchem will tell you, based on his experience with
4 peach trees, that if dicamba is attacking a peach tree,
5 killing it, you're going to have terminal death. Dicamba
6 equals terminal death.

7 So, Mr. Mitchem went to Bader Farms. He went to Bader
8 Farms six times. He went there in 2017, he went there in
9 2018, and he went there in 2019. A couple of the years,
10 obviously, more than once. And he walked the fields. And
11 there are a lot of fields to walk at Bader Farms, and he
12 looked at literally thousands of terminals on thousands of
13 the Bader Farm peach trees.

14 And what did he see? He saw this: Completely healthy
15 terminals on every single tree. This is a picture taken at
16 Bader Farms, again by Mr. Mitchem, in July of 2017. Now,
17 mind you, July is the time of year, it's right in the
18 growing season, and so according to plaintiffs, this is when
19 they're getting hit by dicamba virtually every day, because
20 Dr. Baldwin's going to tell you it was a just a continual
21 thing going on up there, in his opinion.

22 So this is right in the middle of when these trees
23 supposedly are being killed by dicamba. You can see for
24 yourself the terminal growth, though, is perfectly healthy.
25 You can see the little green leaf right in the middle there,

1 green and healthy.

2 What about the following year? Same thing. July of
3 2018, Mr. Mitchem goes back to Bader Farms. Again, he walks
4 the fields. Again, he looks, and this is what he sees:
5 Healthy terminal growth. You can see the new shoots there
6 coming out of the peach trees. Completely fine. Nothing's
7 wilting, nothing's turning brown or black or dying.

8 Literally thousands of terminals he looked at, and he
9 was looking for terminal death. He wanted to see if there
10 was anything. You know how many times Mr. Mitchem found
11 terminal death at Bader peach orchard? Zero. He never
12 found one terminal out there, and they're not going to put
13 anybody in front of you who ever did find any terminals out
14 there that were dying. None. And he will tell you, based
15 on his experience specifically with peaches and peach trees
16 and peach orchards, if there's no terminal death, this tree
17 is not being killed by dicamba. It's as straightforward as
18 that.

19 Now, if he didn't see terminal death out there, what
20 did he see? He saw perfectly healthy peach trees.

21 Dr. Baldwin, their expert -- and counsel referred to
22 this a little bit, he didn't get into a lot of detail -- but
23 when he testifies here in front of you, he's going to tell
24 you, *Well, the way dicamba works, it curls and cups the*
25 *leaves, and I saw curled and cupped leaves all over the*

1 *place at Bader Farms peach orchard, and that tells me, that*
2 *confirms for me it's dicamba that's hitting these trees*
3 *because the leaves are curled and cupped.*

4 And you know what? That's true for soybeans. If
5 soybeans are hit with dicamba, the leaves cup up. That's a
6 common symptom on soybeans. It's not the case with peach
7 trees.

8 First of all, as Mr. Mitchem told you, you had
9 terminal death if it's being killed. But let's look at
10 undoubtedly healthy peach trees. These are peach trees in
11 South Carolina. Mr. Mitchem took pictures, these pictures,
12 in July of 2018. Take a look at those leaves. They're
13 curled, they're cupped, they're kind of gnarly. That's the
14 way peach trees look. That's the way peach tree leaves act.
15 These trees that you're looking at here in South Carolina
16 never got a whiff of dicamba. They cup, they curl. That's
17 what peach tree leaves do.

18 When he went to Bader Farms one week later, here's a
19 picture of one of the -- just one of the peach trees at
20 Bader Farms. You see the same thing. Actually -- I submit
21 to you, you can tell by yourself, but actually, these leaves
22 look a little flatter and straighter than the ones in
23 South Carolina.

24 But, in any event, they're showing the type of curling
25 and cupping, the same thing that you see on perfectly

1 healthy peach trees that have never been exposed to dicamba.
2 You can't look at leaves on a peach tree -- you might be
3 able to do it on soybeans; you can't do it on a peach tree.
4 And, so, the leaves are curled up and, therefore, it's
5 dicamba. That's normal. That's not dicamba.

6 So if there's no terminal death and if the curled
7 leaves are normal for a peach tree, then what exactly is the
8 evidence that the plaintiffs are going to give you to prove
9 that central, key, vital question in this case: Did dicamba
10 sprayed over Xtend seed attack their peach orchard?

11 Well, counsel has already told you, they're going to
12 have one witness to try to prove that. That's Dr. Ford
13 Baldwin. And Dr. Baldwin is going to come here, and he's
14 going to tell you, again, *I went out there several times. I*
15 *saw curled leaves. I saw cupped leaves. That verified, to*
16 *me, that that's dicamba hitting that peach tree, or all of*
17 *those peach trees.*

18 Now, I agree, Dr. Baldwin has a very impressive
19 resume. He is a well-known weed scientist. As counsel
20 said, he's been doing it for over 40 years. He is something
21 called a Fellow of the Weed Science Society of America.
22 He's a member of the Arkansas Agricultural Hall of Fame.
23 He's a lot of things, Dr. Baldwin is, there's no doubt about
24 it.

25 But there's one thing he's not, and he'll admit that

1 to you himself: He's not an expert on peach trees. He's
2 not an expert on peaches. In fact, what you're going to
3 find out is this case, it's the first time ever in his
4 career that Dr. Baldwin has ever worked with peach trees,
5 ever. And he will admit to you that the same herbicide can
6 have different effects on different plants. It's not
7 necessarily true that if you spray this herbicide on this
8 plant, it's going to show the same symptomatology on this
9 plant.

10 And he's going to admit to you that he knows there are
11 a variety of things that can cause peach tree leaves to
12 curl. In fact, he's going to admit there's something called
13 peach tree -- peach leaf curl. That's a thing. It has
14 nothing to do with dicamba. And he's going to tell you he
15 knows there are other things -- he doesn't know what they
16 all are, but he does know there are other things that can
17 cause peach tree leaves to curl.

18 So what evidence is he going to give you? Well,
19 Dr. Baldwin is a weed scientist, and so you would expect, as
20 a scientist, he's going to give you science. He's going to
21 do some tests, something to give you objective data because,
22 again, I agree with counsel, they're going to say one thing,
23 we're going to say another. What do you want to know as the
24 independent, unbiased finders of fact in this case? Show me
25 something irrefutable. Plaintiffs, you got a burden of

1 proof to prove to me that dicamba's hitting those trees from
2 Xtend crops. Show it to me. Don't argue about it; show it
3 to me.

4 Well, the evidence is going to show Dr. Baldwin
5 doesn't have anything like that. He didn't take a single
6 sample of anything at the Bader peach orchard. He didn't
7 run a single test of anything at the Bader peach orchard.
8 He didn't run any experiments out there. In fact, he didn't
9 take any measurements of any kind of anything at the Bader
10 peach orchard.

11 And here's what you're going to hear, and I'm going to
12 get to it in another moment about in another context, but
13 you're going to hear that the State of Missouri, in 2015,
14 went out and tested the Bader peach trees because at that
15 time -- and, again, I'm getting a little ahead of myself --
16 Mr. Bader claimed that he was hit by a drift from a
17 herbicide from a crop duster having nothing to do with being
18 sprayed over dicamba -- over Xtend seed. It was sprayed in
19 a burn-down. As Mr. Randles said, that's perfectly legal,
20 nothing to do with this case. And they found some dicamba
21 on his trees there. So you can test for the presence of
22 dicamba on peach trees. Dr. Baldwin never even tried to do
23 that. Nothing. No evidence whatsoever.

24 So what's his evidence going to go down to? And I
25 don't mean to be glib about this and I don't mean to be

1 disrespectful, but, ladies and gentlemen, you're going to
2 hear the evidence yourself, the testimony yourself, from
3 Dr. Baldwin. I'll submit to you that essentially what it's
4 going to come down to is, *Look, I know it when I see it.*
5 *I've been doing this for enough years. Even though I've*
6 *never worked on a peach tree before, I know it when I see*
7 *it. It's dicamba. Take my word for it.*

8 Putting aside whether that's sufficient to show proof
9 of really anything, there is a problem with that. This is
10 an affidavit that Dr. Baldwin signed and submitted in this
11 case early on, in 2017. And you can see he signed this
12 affidavit under the penalty of perjury on April 27th, 2017.
13 And this affidavit in this case was submitted to the Court.

14 And in this affidavit Dr. Baldwin told what he had
15 done -- at that point, told the Court what he did. And here
16 it is. He told the Court that on February 14th of 2017, he
17 visited Bader Farms and he conducted an inspection of its
18 peach trees and he inspected row crops and he inspected
19 other vegetation, and that as a -- presumably as a result of
20 that inspection, "In my opinion," he says, "Bader Farms has
21 suffered extensive injury from dicamba exposure." And then
22 again he says, "The peach trees and other crops at Bader
23 Farms show clear signs of dicamba damage."

24 Well, that sounds pretty solid. But there's a
25 problem. In February, in the Bootheel, there aren't any

1 leaves on the peach trees to look at. In February in the
2 Bootheel, there aren't any row crops to look at and there
3 isn't any other vegetation to look at. It's dead.

4 And Dr. Baldwin is going to admit to you, he's going
5 to have to admit to you, on the stand, that although he
6 signed this under penalty of perjury and submitted it to
7 this Court early on in this case, when he went there on
8 Valentine's Day in 2017, despite what it says in here, he
9 didn't inspect any row crops because there weren't any to
10 inspect. He didn't inspect any other vegetation, it wasn't
11 there. And he didn't look at a single peach tree leaf
12 because there were no leaves on the peach trees because it
13 was February.

14 As counsel said, you will be the determiners -- the
15 people to determine the credibility, the reliability of
16 anybody's testimony, so you'll be left with that
17 responsibility, but I submit that's what the evidence is
18 going to show you.

19 Now, there is going to be evidence that in 2015, 2016,
20 2017, and 2018, events occurred. There were damages. There
21 were losses of the peach crop at Bader Farms. But the
22 evidence is also going to show that those losses had nothing
23 to do with dicamba sprayed over Xtend seed.

24 And, again, that evidence isn't going to be based on
25 what Monsanto or the lawyers are saying; that's going to be

1 coming from Mr. Bader himself. For example, in 2009
2 Mr. Bader's farm -- well, the whole Bootheel was hit with an
3 ice storm, and Mr. Bader's going to tell you that that ice
4 storm damaged every acre of his peach orchard.

5 But, more importantly, the Baders will tell you that
6 they were still recovering from the damage of the 2009 ice
7 storm all the way up through 2015. That damage was still
8 affecting their peach orchard in 2015. Now they're saying,
9 no, in 2015, it's all dicamba sprayed over Xtend seed.

10 What else happened in 2015? Well, there was a
11 hailstorm in March, I believe -- I might have that date
12 wrong -- but there was a hailstorm in 2015, and Mr. Bader
13 filed an insurance claim for something that he called
14 "significant hail damage," and, in fact, he claimed that
15 230 acres of his peach orchard -- that's roughly a quarter,
16 because he has about a thousand acres worth of peaches,
17 peach trees -- 230 acres were destroyed by hail, and he
18 claimed that 100 percent of the loss was due to hail.

19 There's the insurance claim form and there's where it
20 says, "Cause of loss: Hail, 100 percent. Cause of loss:
21 Hail, 100 percent. Cause of loss: Hail, 100 percent." And
22 by the way, notice that damage date is April 19 of 2015.
23 Xtend seed didn't come out, cotton, until 2015. April,
24 nobody's spraying anything over cotton in April. It's too
25 early.

1 So this hailstorm, when counsel says, "Oh, the reason
2 they didn't recover from hail is because they'd already been
3 damaged by dicamba," impossible on this one, impossible.
4 And Mr. Bader signed this, swearing that everything in this
5 claim was true, and acknowledging that if it's not true,
6 he's facing civil and criminal penalties.

7 So when the insurance claim is sent in in April of
8 2015, the claim is, "I lost all these trees, a quarter of my
9 acreage, because of hail." And now, in front of you,
10 they're claiming, no, wasn't hail; it was dicamba sprayed
11 over Xtend seed.

12 What else happened in 2015? I made a little reference
13 to this before. Well, Mr. Bader filed another complaint in
14 2015 with the State of Missouri and he told the State of
15 Missouri that a neighbor had his crops sprayed with a crop
16 duster and that the herbicides that were being used drifted
17 over -- you can imagine that can happen with a crop duster
18 if they don't fly low enough and that sort of thing --
19 drifted over and hurt his peach orchard, and he claimed that
20 they lost 450 acres.

21 This is another 450 acres, still in 2015, and that it
22 took out 7,000 trees. And he submitted that claim to the
23 State of Missouri. And this is where I was talking about
24 the testing before. The State of Missouri went out there
25 and they tested. And what did they find? They found 2,4-D

1 in the trees. That's a different herbicide not at issue in
2 this case. They found glyphosate in the trees. That's
3 another herbicide not at issue in this case.

4 And they did find a small amount of dicamba in the
5 trees, but Mr. Bader himself admits this dicamba was sprayed
6 in what's called a burn-down application before anything
7 would have been sprayed over any Xtend seeds. And,
8 remember, their claim here is limited to dicamba sprayed
9 over Xtend seed because it's all about the Xtend seed in
10 this case.

11 So, again, by their own admission, none of this damage
12 of the 7,000 trees has anything to do with dicamba sprayed
13 over Xtend crops, but now they're claiming that's what the
14 problem was, Dicamba sprayed over Xtend crops.

15 2016, the same thing. This time Mr. Bader says that
16 one of his neighbors sprayed old dicamba, something called
17 Banvel -- and I'll get to that in a little while because not
18 all dicambas are created equal -- sprayed old dicamba over
19 corn. Well, again, counsel told you that's been done with
20 dicamba for years and years and years. Nothing wrong with
21 that. And there is no Xtend corn. So they said, in 2016,
22 neighbor sprayed dicamba over corn, not over Xtend seed, but
23 now they're saying, *No. The damage from that was not from*
24 *that, it was from dicamba sprayed over Xtend seed.*

25 2017, Mr. Bader will tell you that he lost 30 percent

1 of his peach crop to a freeze. That's 30 percent of their
2 peach crop that they now want Monsanto to pay for.

3 In 2018, another freeze comes through the Bootheel.
4 This was in March definitely. And Mr. Bader makes another
5 claim, another insurance claim, stating that it really
6 affected all of his acres to some extent, that specifically
7 231 acres, another quarter of his -- roughly, of his peach
8 acreage was damaged, and again, claimed under -- signing
9 under the threat of civil and criminal penalty if it's not
10 accurate, that 100 percent of his loss was due to freeze.

11 And there's the claim form again. Cause of loss:
12 Freeze, 100 percent. Cause of loss: Freeze, 100 percent.
13 Cause of loss: Freeze, 100 percent. There's the signature
14 certifying that this is all true. And now the story is, no,
15 it wasn't because of freeze; it was because of dicamba
16 sprayed over Xtend seed.

17 You know, there's going to be a lot of testimony in
18 this case, I would think, about something that we all know,
19 and that is, farming is not easy. Farming is hard. We all
20 know that. You don't need a trial for that. And, frankly,
21 it's a shame that Bader Farms, or any other farm, has to
22 deal with things like hail and ice storms and freezes.

23 But you can't say on one day, *My losses were caused by*
24 *hail and ice storms and freezes*, and then come into court to
25 say, *No, my losses were caused by dicamba sprayed over Xtend*

1 seed.

2 Now, counsel talked about armillaria, and I want to
3 talk more about that because you're going to be hearing
4 about that as well. And you're going to hear from Dr. Phil
5 Brannen. Dr. Brannen is what's called a peach
6 pathologist -- excuse me, a plant pathologist, and that
7 means he's an expert in diseases that attack various types
8 of vegetation. And he's going to tell you about armillaria.
9 Armillaria is a root rot, and it goes through the ground
10 obviously, and even Mr. Bader will admit to you, over time,
11 armillaria will kill a peach orchard. That's what it does.

12 And Dr. Brannen is going to explain to you how
13 armillaria works. It generally starts in one area in the
14 peach orchard and it travels and grows underground, going
15 tree to tree to tree. And the death circle, if you will,
16 sort of spreads out over the orchard, killing trees as it
17 goes. It takes a number of years, but it does that.

18 And he's going to tell you that he went out to Bader
19 Farms on a couple of different occasions and he took samples
20 from all over the peach orchard, and all those samples he
21 sent in for testing because he wanted to have the scientific
22 proof. He sent it in for testing and every test came back
23 positive for armillaria in that peach orchard.

24 But more importantly than that even, you're going to
25 be able to see with your own eyes that armillaria was

1 killing the trees out at Bader Farms years before, years
2 before the first Xtend seed was ever even sold. Here's a
3 satellite picture of one portion of Bader Farms, Bader Farms
4 peach orchard to be precise, taken in 1996. And I put those
5 red boxes around a couple areas because I want to draw your
6 attention to those areas in particular.

7 And if you can see -- I'm not sure how good the
8 monitors are -- I can see it here because I'm pretty close
9 to it -- in those red blocks and, frankly, all throughout
10 there, you see all those little dots in nice neat rows.
11 Those are all nice, young, healthy peach trees. There's not
12 a blank spot, a dead spot anywhere in those fields. That's
13 1996.

14 What happens? And you'll hear, by the way, early on,
15 peach trees, they don't really produce fruit for the first
16 few years that you can sell. And Mr. Bader says that his
17 peach trees last for 20 years or more and he gets fruit off
18 of them.

19 Well, let's just jump ahead seven years. Here's the
20 same part of the Bader peach orchard seven years later,
21 2003. Now, this is 12 years before the first Xtend seed
22 ever hits the market. Take a look at the areas in those two
23 red blocks again. You can see the blank areas of trees.
24 Now the trees are more mature. The ones that are still
25 there, you can see they're bigger, you can see they're

1 green.

2 But look at all the green patches where the trees are
3 gone. It's beginning to go. And look especially at the one
4 down in the lower right. You see how it starts in the
5 middle and then you got like a circular almost area where
6 the death is growing. That's armillaria's pattern. That's
7 what it does. And you notice bald spots beginning to show
8 up in the large area I haven't circled. Okay. That's 2003.

9 Up in the upper left-hand corner of this, the left
10 part of that square area, you notice there are hardly any
11 trees left there at all already. So two years later, 2005,
12 they plowed that over. There are so few live trees left
13 there anymore, they've just gotten rid of that section. And
14 notice the rest. More dead trees. In fact, far more area
15 of no trees than peach trees. Same thing in the lower
16 right-hand area. You can see more and more of the trees are
17 dying out. This is ten years before the first Xtend seed is
18 ever sold.

19 2006, more trees dead. And here, in particular, if
20 you notice above in the upper right quadrant, you got a lot
21 of trees dying up there. And you can see the blank spaces,
22 just grass is growing. The trees are all gone.

23 And, finally, one year later, 2007, in the two areas I
24 circled, so few live trees left, they've just gotten rid of
25 those orchards. They're gone. Gone from armillaria,

1 eight years before the first Xtend seed is sold. And you
2 can see, frankly, what's happened in the rest of the
3 orchard, too. Up there in the upper right, those areas of
4 dead space are growing and growing and growing. So the idea
5 that, Oh, the armillaria was there but it never did anything
6 until dicamba came along, your own eyes can tell you, that's
7 just not true.

8 There's something else I want to mention along these
9 lines. Plaintiff's case -- and you can tell from what
10 counsel told you -- is based on the following assertion:
11 They're telling you that before 2015, everything was fine at
12 the peach orchard. The trees were healthy, the crops were
13 large. They might have gone up and down but they were
14 always recovered. Everything was fine. And then after
15 2015, everything started going downhill.

16 That's not what the evidence is going to show. First
17 of all, you saw that in these pictures yourself. They were
18 having trouble way before Xtend seeds ever hit the market.
19 But, you know, Bader peach orchard, they keep track of how
20 many peaches they grow and process every year. And counsel
21 told you, you know, there were things in the past where
22 something would happen at the peach orchard but the trees
23 would recover, but now they can't recover because of
24 dicamba.

25 Well, here's what you're going to find out: Back in

1 the early 2000s, in 2002, '3, '4, '5, and '6, every year
2 they harvested way over 100,000 bushels of peaches at the
3 Bader Farm peach orchard. Their highest year was 2003, when
4 they harvested over 140,000 bushels of peaches. If you want
5 to know what the pounds are, it's about 50 pounds a bushel.
6 We'll leave it at bushels for now.

7 Then, in 2007, an ice storm hit, a freeze, a hard
8 freeze hit, and Mr. Bader will tell you they lost their
9 entire crop that year. They harvested no peaches at all in
10 2007. That's eight years before the first Xtend seed was
11 sold.

12 Well, if counsel's right, that within a year or two,
13 at least, you should be back up to 100,000 or more, 110,
14 hundred and -- up to 140,000 bushels of peaches. They never
15 broke 100,000 again, ever in a given year. In fact, by
16 2014, the year before the first Xtend seed was ever sold,
17 their harvest was less than half of what it had been back in
18 2004.

19 So this idea that everything was fine and everything
20 was humming along without any problem and the first time
21 that there was ever any issue at the Bader peach farm was
22 after 2015 when the Xtend seeds were sold, the evidence is
23 going to tell you, that's just not true.

24 Now, when you get to the end of it and you put
25 together all the things I've been talking about, here's what

1 you got: This is an overhead view, and the yellow areas are
2 all the fields that make up the Bader Farms peach orchard,
3 okay? And just put together a few of the things that I've
4 talked about. They're not all going to be on here. But
5 when you put together the fields that were damaged,
6 according to their insurance claim in 2018, from the freeze,
7 those are the ones that are in blue.

8 And then you add in the 2015 hail damage. Those are
9 the ones that are in purple. The 2015 aerial application,
10 which had nothing to do with herbicides in this case, the
11 one that was glyphosate and 2,4-D and dicamba sprayed in a
12 burn-down, which is not at issue in this case, the entire
13 northern part, according to Mr. Bader, was hit.

14 And then, of course, again, the 2009 ice storm. They
15 will tell you it affected their entire orchard and they were
16 still recovering from that in 2015.

17 These are not claims of causes for loss that Monsanto
18 is making. These are coming from the Baders themselves.
19 They're the ones who signed the forms swearing that this is
20 what caused their loss, and now there's a different cause
21 being put forward in front of you ladies and gentlemen.

22 And, of course, all through this period of time
23 starting almost a decade, at least a decade before the first
24 Xtend seed was sold, armillaria was ravaging that peach
25 orchard and killing off the trees. That's what the whole

1 story is.

2 Now, what -- I want to touch on a few things that
3 counsel talked about. I talked a little bit about the
4 academic testing. There was a stop of academic testing in
5 2015, and, yes, it was because the EPA requires something
6 called good laboratory practices.

7 For any herbicide that's going to be approved, they
8 have to have studies that are done under GLP, good
9 laboratory practices, before they will approve the sale of
10 that herbicide. And GLP is the highest standard that there
11 is for scientific testing, and so Monsanto wanted to make
12 sure that the things going there were only GLP standard.

13 And academics can't do GLP. They don't have the
14 resources. It's takes a lot of resources to do it. But
15 again, ladies and gentlemen, the evidence is going to show
16 this is much ado about nothing because after EPA approved
17 XtendiMax with VaporGrip and found that it was low
18 volatility enough in 2016, all the academics who wanted to
19 were able to test it for volatility. All those results were
20 sent in to the EPA, and the EPA approved XtendiMax again in
21 2018.

22 Now, Mr. Randles talks about, well, Monsanto knew,
23 they knew they were on notice that in 2015 and 2016, when
24 they released the Xtend seed, when no dicamba was approved
25 to use over top of it, they knew there were going to be

1 problems. And it is absolutely true that Monsanto was aware
2 some people were probably going to break the law.
3 Unfortunately, that's the way it is. Sometimes people try
4 to cut corners and they break the law. We all know that.
5 It's, unfortunately, human nature.

6 But by -- Monsanto didn't sit back, release the seed
7 and hope for the best. They went on a mission to send out
8 warnings -- this is not working now. I must have turned it
9 off -- to send out warnings any way they could to all the
10 farmers to warn them that they were not allowed to use any
11 dicamba over Xtend seed in 2015 and 2016.

12 They had notices in marketing materials. They had
13 notices in training materials. They had notices on the
14 internet notifying everyone, it is illegal. And, yes, we
15 did put pink stickers on every single bag of Xtend seed that
16 was sold in 2015 and 2016, warning farmers they could not
17 use dicamba. It says, in all bold caps, "Notice: Do not
18 apply dicamba herbicide in crop to Bollgard XtendFlex cotton
19 in 2015." Same types of stickers were put on the soybean
20 bags. So everyone was told, *You're not allowed to do this.*

21 Now, can Monsanto guarantee that everybody's going to
22 follow the law when they use their products? No. No
23 company can do that. But you're going to see, through the
24 evidence, Monsanto acted reasonably and put out the warning
25 as far and wide as they possibly could.

1 Now, why did we sell the seed if the dicamba was not
2 approved yet? Well, there are a lot of other benefits to
3 these seeds. First of all, with Xtend cotton, it had higher
4 yields than any other type of seed out there, and it's all
5 about yield for farmers. The more cotton bolls you get per
6 acre, the more money in the farmer's pocket.

7 It was also resistant to glufosinate and glyphosate,
8 other herbicides, and it was the first time that you could
9 use glufosinate over cotton. So the suggestion that these
10 seeds were put out there and there were no other herbicides,
11 there were no legal herbicides to use over the top, again,
12 the evidence is going to show that's not true.

13 You couldn't use dicamba yet but you could use
14 glufosinate and glyphosate. It had better insect control
15 and it had better quality fiber of the cotton. And, again,
16 better quality of the fiber, the more expensive the cotton,
17 the more money in the farmers' pockets.

18 So Monsanto, on its own -- this is not an agreement
19 between us and BASF -- we decided the farmers should get the
20 other benefits of this seed as soon as possible. Same thing
21 in 2016 with Xtend soy. It produced higher yields, more
22 soybeans per acre, more money for the farmers. You could
23 also use glyphosate over it.

24 So, again, there is a legal herbicide that can be used
25 there. It had improved pest resistance and, again,

1 Monsanto, on its own, decided, *We need to get the farmers*
2 *this seed now. We will warn them. We will put a sticker on*
3 *every bag: You cannot use dicamba.*

4 And it was more than that. The farmers wanted this
5 seed. The American Soybean Association sent in a letter
6 saying, "Please release Xtend seed." The National Cotton
7 Council wanted Xtend seed. The Missouri Farm Bureau
8 Federation wanted Xtend seed. These are organizations
9 composed of and representing farmers. They needed the other
10 benefits of these seeds, and so Monsanto decided to release
11 the seeds in 2015 and 2016, and we stand by that decision.

12 One last area of counsel's argument that I want to
13 talk about. Counsel said, *Well, you know, in 2017 the*
14 *complaints just exploded, and that shows that XtendiMax,*
15 *it's not really low volatility. And there were thousands of*
16 *complaints.*

17 Well, complaints are just that, they're complaints.
18 They're allegations. The question is, what happened with
19 those complaints and allegations? And here's what counsel
20 didn't tell you. The states, Missouri, Arkansas, wherever
21 the complaints went, the state investigators investigated
22 those complaints of supposed off-target movement of dicamba
23 from over the top of Xtend seed, and in case after case
24 after case after case after case, the state investigators
25 found no dicamba, no dicamba, no dicamba, no dicamba, no

1 dicamba.

2 You know, complaints are fine, allegations are fine,
3 but you got to have the evidence to back it up. It doesn't
4 matter how many complaints there are. The results are what
5 matters. That's the other side of the story there. The
6 evidence will show --

7 May I have three more minutes, Your Honor? I know I'm
8 running late.

9 **THE COURT:** You're running late.

10 **MR. MILLER:** The evidence will show that there's a
11 significant drop in volatility from the first generation
12 dicamba, Banvel, to the second generation, Clarity, and then
13 finally to Monsanto's only dicamba, XtendiMax with
14 VaporGrip. In fact, what you'll see is all the testing, and
15 there was plenty of it, showed that there was a -- over a
16 90 percent drop in volatility from the original dicamba,
17 Banvel on the top, down to Clarity, and then from Clarity
18 down to XtendiMax, even further drop.

19 All the testing was presented to the EPA. They
20 reviewed it, not once, but twice. They also reviewed all
21 the complaints that came in about alleged dicamba movement
22 from over Xtend crops. And the EPA, after getting all of
23 that information, approved XtendiMax with VaporGrip for sale
24 for use over Xtend seed in 2016, did it again in 2017.

25 Ladies and gentlemen, at the end of the day, the

1 evidence in this case is going to show that, number one, our
2 products are safe when you use them as intended, when you
3 follow the label. And you're going to hear, the label is
4 the law. You've got to follow the instructions.

5 Number two, it's going to show that Monsanto, when
6 these issues came up, acted reasonably.

7 But, number three, and most critically, there's going
8 to be a complete lack of reliable independent evidence to
9 show that what's going on at Bader Farms, any of it, is
10 caused by dicamba sprayed over Xtend seeds.

11 And, as a result of that, at the end of this case, I'm
12 going to be back up in front of you and I'm going to ask you
13 to bring back the only verdict that the evidence is going to
14 support, and that's a verdict in favor of the men and women
15 of Monsanto.

16 Thank you for your time.

17 **THE COURT:** Mr. Mandler?

18 **DEFENDANT BASF'S OPENING STATEMENT**

19 **MR. MANDLER:** Ladies and gentlemen of the jury,
20 counsel, Judge Limbaugh.

21 I am proud to represent, along with my team, BASF
22 Corporation. This is an important case, and we very much
23 appreciate your service. It's an important case because
24 it's about an important product that is a critical tool for
25 the farmers of Missouri and the mid-south and the Midwest,

1 and that product is Engenia.

2 You've heard a lot about seed. You've heard a lot
3 about dicamba. I'm going to concentrate my remarks this
4 morning on one product, and that's Engenia herbicide,
5 because BASF Corporation is only involved in this case
6 because of one product, and that's Engenia. Dicamba is a
7 generic term. There are many, many, many, as you'll see,
8 dicamba products, but the only product that we sold for
9 which the claims are against BASF is Engenia herbicide.

10 I'm going to, this morning, spend a little bit of
11 time -- or this afternoon, talking about three areas. I'm
12 going to talk a little bit about the company, BASF, and the
13 history of the testing and the development of that one
14 product, Engenia herbicide. I'm going to talk a little bit
15 about the relationship between the two defendants. As I
16 think Mr. Miller said, there's actually three sides to this
17 litigation: The plaintiffs and then the two companies. And
18 I'm going to talk about why, and why it's important what the
19 relationship is between the two companies. And then,
20 finally, like Mr. Miller, I'm going to spend a little bit of
21 time about what caused the damage on Bader Farms.

22 So let's start with the history of Engenia and the
23 development of Engenia. Spend a little bit of time telling
24 you about BASF Corporation. Maybe in Missouri, Monsanto is
25 a little bit better known, I suspect, and some of you may

1 not have heard of BASF. It was a company that was formed
2 150 years ago. It's headquartered in New Jersey, but the
3 agricultural division and the place where all of the
4 witnesses that you'll hear from come from is Research
5 Triangle Park, North Carolina, and it not only sells
6 Engenia, but it sells hundreds of other products that are
7 meant to help farmers across the country.

8 Dicamba is a product that's been around. It's been
9 around for a while. Like I said, there is no product named
10 dicamba. Dicamba's, in fact, the active ingredient. It can
11 be combined in different ways with different salts, in
12 different formulations, and made into different -- different
13 types of products.

14 The first real commercial use -- it was discovered in
15 1958. The first real commercial use was in 1964, a product
16 called Banvel, and eventually there was another product
17 called Clarity that was introduced in 1962, and then,
18 finally, Engenia. Those are the products are on the top.
19 Each of these products is primarily dicamba.

20 There are additional products called Marksman,
21 Distinct, Status, which is dicamba that's mixed with yet
22 another herbicide. And the reason I'm showing you sort of
23 the number of different dicamba products is to demonstrate
24 that there are many, many different sources and types of
25 dicamba and potential sources of dicamba that may move off

1 site, but the only product for which BASF is in the case is
2 Engenia herbicide.

3 The other thing to remember is that, not just BASF and
4 not just Monsanto sell dicamba. As you can see, discovered
5 in 1958, the first commercial product in 1964, which means
6 it was off patent, as they say, by the end of the '70s.
7 Patents in the United States generally last about 20 years.
8 So, by the end of the '70s, any other manufacturer of
9 herbicides could sell dicamba, and they do. The evidence
10 will show that there are thousands of registrations at EPA
11 for dicamba products and hundreds and hundreds of other
12 dicamba products that are sold and on the market.

13 The need for the dicamba technology in the system of
14 dicamba-tolerant seeds is a critical tool for the farmers in
15 Missouri, the farmers in the Midwest, and that's because
16 there's been a number of weed varieties that have developed
17 resistance to other herbicides, including to a famous
18 herbicide called glyphosate that many of you heard of as
19 Roundup.

20 These weeds, over time, become resistant to those
21 herbicides. And, in particular, weeds like palmer amaranth,
22 or water hemp that's shown in this example, also known as
23 pigweed, can be very destructive to soybean farmers and
24 outcompete the crop. And so for this reason, the technology
25 is important. It was developed in a way where the seeds --

1 the soybean and cottonseeds were changed so that when you
2 put Engenia over the top, it doesn't hurt the crops but it
3 kills the weeds. And you can see -- this is a research in
4 Kansas where it was -- the product was applied, the dicamba
5 product, Engenia, was applied and has very great weed
6 control. That's a very big benefit to the farmers.

7 Now, I heard the term "rush to the market" this
8 morning, and I want to spend a little bit of time talking
9 about BASF's development of its Engenia product. It was
10 anything but rushed. It was an eight-year testing period
11 from 2018 to 2016, multiple different types of testing.
12 First, the formulation had to be found. Like I said, the
13 dicamba active ingredient existed way back in '58, but
14 combining it with a particular salt, a batma [phonetic]
15 salt, went a long way in reducing the problem we've all been
16 talking about, volatility.

17 Second, you'd have to test -- you had to do testing to
18 see if it actually did kill weeds.

19 And, third, you had to do testing to see that it
20 stayed on site, it didn't have this off-site movement, it
21 wouldn't have the physical drift that other counsel have
22 talked about.

23 And, fourth, you have to do testing to make sure it
24 didn't volatilize, it wouldn't come up into a gas, it
25 wouldn't move off-site and go where it wasn't supposed to

1 go.

2 These four types of testing involved thousands of
3 tests, and we'll put in the evidence, and we'll have the
4 scientists come in who are responsible for the main
5 categories of these testing.

6 One thing that plaintiff's counsel said over and over
7 was, there's not much that we'll agree on. Here's a fact
8 that everyone agrees on: BASF, when it did its testing,
9 cooperated with the university cooperators.

10 Another thing that plaintiff's counsel did is he used
11 the word "they" a lot. He liked to use the word "they"
12 rather than say what Monsanto did and what BASF did. This
13 is one area where it's clear that -- I'm sorry, where
14 specifically BASF did all its testing along with the
15 university cooperators, and there's no disagreement in the
16 evidence there.

17 You're going to hear from a fellow named Steve Bowe
18 from BASF. Mr. Bowe has a BS degree from Cal Polytech. He
19 has an MS in plant protection from University of California
20 Davis, and he's the group leader of the biology group at
21 BASF. He's going to explain to you those types of testings
22 that I just showed. He's going to say the testing of
23 Engenia was extensive, thousands of tests. He's going to
24 say that BASF cooperated with the university on these
25 testings -- tests that were -- ultimately supported the

1 registration of the product.

2 He's going to say that the testing of Engenia did not
3 show any problems with volatility. In fact, just like Xtend
4 herbicide, it was 90 percent less volatile than Clarity,
5 which was 90 percent less volatile than the original Banvel
6 product.

7 And, finally, he will testify that BASF's relationship
8 with Monsanto, as far as testing goes, was one as a
9 competitor. They had competing herbicide products. And
10 that happens all the time in the marketplace. They're the
11 Coke and the Pepsi of the herbicide world. Our product was
12 Engenia, Monsanto's product was Xtend, and they were
13 competitors.

14 Specifically as to volatility, there were five types
15 of testing you'll hear from Mr. Bowe. First type was
16 thermogravimetric testing. It's a screening tool.

17 Second type is a lab incubator.

18 Third type is greenhouse humidome bioassay.

19 The fourth type is a C14 contained system.

20 And the fifth type is actually field assessment.

21 So I'll tell you a little bit about each of these.

22 You'll hear much more detail when we get to the trial.

23 The first type is actually a screening, so you can
24 compare different formulations to see which type is the
25 least volatile. It allows you to make decisions of what

1 formula you want to go with. In that tool you actually end
2 up boiling the product, so it's a very extreme test. You
3 boil it and that allows you to see how different
4 formulations react.

5 The second type, the lab incubator, has more climate
6 control, and it's meant to mirror field conditions. For
7 example, it's often set at 104 degrees, so very harsh field
8 conditions, and there's a whole series of controls of air
9 temperatures, humidity, air flow, and it's left in for a
10 number of days to measure volatility over a number of days.

11 Third is a greenhouse humidome bioassay. This has the
12 benefit of actually using live real plants rather than just
13 the machines. All of these have different strengths to add
14 to the scientific knowledge.

15 The fourth system, C14, is actually radioactive
16 isotopes so you can measure on a molecule-by-molecule basis
17 where the product ends up. So it's very precise.

18 And then the last one is a field assessment where you
19 actually take the product out the field to verify what you
20 see in the lab is actually tracking.

21 All of these types of tests had resulted in thousands
22 of different tests.

23 You'll also hear from Dr. Jeff Birk. He's the product
24 regulatory manager at BASF. He's got a BA in agronomy from
25 Ohio State and a Ph.D. in weed science, so another weed

1 scientist.

2 Dr. Birk will talk about two types of larger scale
3 tests: First, large-scale drift tests, and second,
4 large-scale field flux studies. Flux studies are the type
5 of out-in-the-field studies to measure volatility to see
6 where the product goes.

7 All of the materials from these large-scale drift
8 studies and the flux studies were submitted to EPA. They
9 were all done under protocols that were designed and
10 approved by EPA, and the EPA concluded there was not risk of
11 yield loss from drift or volatility if the Engenia label and
12 the instructions on the label were followed.

13 University studies confirm this. Now, BASF cooperated
14 with the university studies before the original
15 regulation -- or registration, but like Monsanto, they did
16 it again after the registration. And there were large-scale
17 university studies following the same protocols and came up
18 with the same results.

19 Let's talk a little bit in a little more detail about
20 the large-scale drift studies. These are studies, again,
21 that followed the EPA protocol, and they were done with
22 leading outside experts. They measured physical drifts
23 that -- under both high wind and low wind conditions. This
24 is the sort of data that allows BASF to know what wind speed
25 limits to put on the label when they ultimately sell the

1 product. They capture infield movement, they capture
2 movement on the edge of the field, and they capture movement
3 up 400 feet from the field. And all of this information
4 goes into, like I said, wind speed developing, the buffers
5 that ultimately went on the label, and developing the
6 recommendation of what type of nozzles the applicator has to
7 use for a safe application.

8 Flux studies, there were four -- BASF conducted four
9 full-scale field-level flux studies. Again, this mechanism
10 was designed and approved by EPA in order to measure
11 potential volatilization. And what's interesting is, it
12 would measure it -- you see how it was set up here. There
13 would be -- sorry about that.

14 There would be monitors on each edge of the area of
15 the application. These type of monitors that came up from
16 the ground here and you could measure it at multiple levels,
17 and so what they would do is measure in the middle of the
18 field, but most importantly, they measured on each of the
19 edges of the field to see how much of the products was
20 leaving the field. It combined both infield, in the middle
21 of the field, edge of the field, and modeling to develop
22 what type of risk there could be to adjacent crops.

23 All of that material was sent to EPA. EPA evaluated
24 it, and the conclusion was, at the edge of the fields, the
25 studies show that the amounts there were below effects end

1 points. Effects end points would be if it would affect the
2 crops. Right on the edge of the fields, these large-scale
3 volatility studies showed all of it was below the end
4 points.

5 What's interesting, these are the very university
6 studies that plaintiff's counsel referenced. In fact, he
7 mentioned Dr. Norsworthy. So these are large-scale
8 university studies, independent studies that were done after
9 2017 up until the decision in 2018. They were done by
10 Dr. Norsworthy at the University of Arkansas, Dr. Young at
11 the University of Wisconsin, Dr. Sprague at Michigan State,
12 and Dr. Kruger at the University of Nevada.

13 EPA, in addition to looking at the Monsanto data, in
14 addition to looking at the BASF data, they looked at the
15 data from these four independent universities' studies and
16 concluded and reregistered Engenia herbicide as well as
17 Xtend herbicide.

18 All right. You're going to hear from
19 Dr. Dan Westberg, who is here with us and will be throughout
20 the trial. He will talk to you about how BASF cooperated
21 with the universities in the testing of Engenia. He'll tell
22 you about the warnings that BASF gave on its labeling, both
23 before its product was registered and available, and then
24 the instructions of use on the labeling afterwards. He will
25 talk about the training of BASF employees for the safe use

1 of the product.

2 And, finally, Dr. Westberg visited the Bader Farms.
3 You heard that the Bader Farms first had injury in 2015.
4 BASF wasn't called in 2015. You heard they had problems in
5 2016. BASF wasn't called in 2016. You heard they had
6 problems in 2017. BASF wasn't called in 2017. This is
7 another time where plaintiff's counsel say "they" and don't
8 distinguish between the two companies.

9 The first time they called BASF about Engenia
10 herbicide and allowed us to investigate would have been
11 2018. The first time we had the opportunity, we sent
12 Dr. Westberg and another outside expert I'll talk about in a
13 minute.

14 Dr. Westberg is also a weed scientist. He will
15 testify he did not find any evidence, when he was finally
16 invited in 2018, of injury to peach trees from dicamba.

17 Engenia herbicide has a very specific label.
18 Dr. Westberg will talk about the training that comes from
19 that label. You've heard other counsel say the label is the
20 law, and when using a pesticide, that's true, and it's
21 important. It's the way that companies can tell users how
22 to use it safely. It's a way that EPA, when it looks at the
23 label and looks at the product, evaluates to see if the
24 product can be used safely.

25 You'll hear evidence, and the evidence will show that

1 BASF applied employee training, and it had a pesticide label
2 that covered a lot of detail and a lot of instructions on
3 how to safely use the product so it can stay on-site. That
4 includes which nozzle to use, how high -- when you're
5 driving down the rows of the soybeans, how high the booms
6 can be, what speed restrictions, how fast the wind can be
7 blowing so it doesn't blow off-site, how to clean out your
8 sprayer, a lot of detail. All of that was both trained and
9 covered in the label, and it worked.

10 You will not hear any evidence from Mr. Bader or any
11 of his experts that claim that his dicamba injury came from
12 Engenia. None. This is not an area where there's a
13 dispute. They will say it came from dicamba. There's
14 not -- there will be no testimony that that dicamba came
15 from Engenia. Dr. Baldwin will not give that testimony.
16 There's no evidence that it came from Engenia. It's
17 undisputed in this case.

18 So claims of the lawyers don't matter. Allegations of
19 the lawyers don't matter. It's what the evidence will show.
20 And so the evidence will show Engenia was very, very well
21 tested and did its job, and the Baders can't show that their
22 damage came from Engenia.

23 Which brings us to the second issue. Because they
24 can't show it, the plaintiffs tend to lump BASF and Monsanto
25 together. That's why they say there was a conspiracy,

1 that's why they say there's a joint venture, because they
2 can't show that the one product that BASF sold caused injury
3 on Bader Farms.

4 What will the evidence show about the relationship
5 from BASF and Monsanto? They were fierce competitors.
6 They're both in the same industry. They both want to help
7 farmers. There's, you know, a lot of commonalities, but
8 they are competitors. There's no evidence of a joint
9 venture, and there's no evidence of a conspiracy.

10 I want to talk about those a little bit separately.
11 Joint venture -- conspiracy, most of us know generally what
12 it means. "Joint venture" is more of a legal term, and
13 again, we'll -- at the end of the case, the Court will
14 instruct you on exactly what you're to find for a joint
15 venture, but I'd like to give you the idea of what to look
16 for in the evidence as you're listening throughout the
17 trial.

18 There's two ways you can show a joint venture. First,
19 you can do that either through a written contract. And, in
20 fact, the law in Missouri says the best evidence of the
21 companies' intent of whether they want to form the joint
22 venture is the written contract. Or it can be implied, and
23 if it's implied, you have to show three things: You have to
24 show that they jointly controlled all their decision-making;
25 you have to show that they shared all their profits; and you

1 have to show that they shared losses. So it's each of those
2 three. So let's look at those quickly one at a time.

3 You're going to hear from Alyson Emanuel from BASF.
4 She was the Vice-President of Business Solutions. She was
5 the primary person who negotiated the contracts between BASF
6 and Monsanto. She will tell you that they were competitors.
7 She will tell you that there wasn't a joint venture and
8 there wasn't a conspiracy. And she will explain to you some
9 rather dense legal contracts. And I'm not going to spend
10 too much time this afternoon talking about them, but there
11 were a number of contracts between BASF and Monsanto.

12 And one thing you may ask yourself: *Well, if they*
13 *were competitors, why are they signing contracts back and*
14 *forth?* The reason is, just that: They were competing over
15 the same market and they each thought they owned some
16 technology that the other wanted or needed.

17 In fact, their relationship started in a different
18 lawsuit. There was a lawsuit between BASF and Monsanto
19 about who owned what's called the intellectual property, and
20 that lawsuit ultimately was settled, but it resulted in the
21 need for them to give licenses to each other and the need
22 for them to have a contractual relationship.

23 What those contracts and the key contracts all say is
24 that BASF and Monsanto are independent contractors. They
25 say, "Nothing in this agreement is intended to implicitly or

1 is to be construed to constitute Monsanto or BASF as
2 partners in the legal sense."

3 Now, that's a kind of legal mouthful, but what it
4 comes down to is, there was no intention for a joint
5 venture. Plaintiffs will not claim there was a written
6 contract. There was no evidence of a contract that both
7 parties signed that there was a joint venture. So the
8 plaintiffs have to go with Option B, which is an implied
9 agreement. So they have to show the three things, each of
10 the three things.

11 Let's look at the first one quickly: Joint control of
12 decision-making. What the contracts will say when we show
13 them to you is, there was no joint control. Monsanto had
14 sole responsibility. They were in charge of the seed. They
15 were in charge of their own herbicide, XtendiMax. And BASF,
16 on the other hand, had sole responsibility for Engenia.
17 They were competitors. And so there was not joint control
18 over each other's products.

19 This is another way of looking at it: As the system
20 was described to you, it involved both seed and herbicide
21 for the seed. Monsanto sold the seed, developed the seed,
22 went to the regulators with the seed. It's undisputed that
23 BASF had no role or decision in creating or going to the
24 regulators about the seed or the decision ultimately of when
25 to release it.

1 Monsanto had its own responsibility for XtendiMax
2 herbicide while BASF had responsibility for Engenia.
3 Two separate products, separate responsibilities. This is
4 critical when it relates to the Bader Farms timeline because
5 the DT cotton was released in 2015, which is when Baders
6 claim that their injuries began. The DT soybeans was
7 released in 2016. Baders claim that they continued in 2016.
8 BASF did not start selling its Engenia herbicide until 2017,
9 two years after Bader Farms claimed to have begun to see
10 dicamba injury.

11 There's no evidence of joint control of
12 decision-making over the products in this issue. Each
13 company had its own products, each company competed.

14 Likewise, shared profits. Now, there are some
15 licenses, and you'll hear maybe some -- I know plaintiff's
16 counsel mentioned you'll see something about profit-sharing.
17 You will not. What you may hear is royalties, and I'll try
18 to give you a little example of the difference between what
19 royalties are and what profits are.

20 If I'm -- let's say I'm a young artist, a musician --
21 I'm neither, and you don't want to hear me sing. So I
22 invent a song, I take it to the radio. Radio likes it and
23 begins to play it. So for every time they play it, I get,
24 you know, 50 cents. And then I take it to Spotify or one of
25 the other streamers, and they put it on and I get two cents

1 each time they stream it. But that doesn't make me sharing
2 profits with the radio station. I'm certainly not sharing
3 profits with Spotify. It's a royalty. What BASF got in
4 this case for the sale of each bag of seed is a royalty:
5 Fifty cents on a \$62 bag of seed. It's not shared profits.

6 I didn't hear anything this morning about evidence of
7 shared losses and I don't think you'll see any evidence of
8 shared losses in the case. And, remember, they have to show
9 all three: Joint control, which there is none, there's
10 competitors; shared profits, which there is none; and shared
11 losses. No evidence of that. There is no joint venture.
12 Likewise, there's no evidence of conspiracy.

13 They worked together because they had to. There were
14 contracts. But, Scott Kay, who's the Vice-President of
15 Crops in BASF, the highest level a person who's involved in
16 Engenia herbicide, you'll hear his testimony by videotape.
17 He will say that BASF had no role in Monsanto's decision to
18 release the dicamba seeds. He will say there's no
19 conspiracy between Monsanto and BASF Corp.

20 Now, the evidence I heard this morning from the
21 plaintiffs to support conspiracy is, somehow BASF knew that
22 when the DT seed for cotton was released in '15 and for
23 soybeans was released in 2016, some people might break the
24 law, as Monsanto counsel said, and decide to spray older
25 formula dicamba over this seed. It's illegal. It's a

1 violation of federal law. They said BASF knew about that
2 and somehow that means there's a conspiracy.

3 Mr. Kay will say any Clarity sales were not intended
4 and never were intended to be used on DT seed. In fact, you
5 will see the evidence of BASF warning all of its employees
6 and all of its customers that it's illegal and not to do it.

7 So here's a memo sent in February of 2016, before the
8 soybean season, when the soybean seed was released. It
9 says, "All BASF employees must recommend and follow the
10 current label directions. Do not show or hint any off-label
11 applications of Clarity."

12 In fact, you will hear Mr. Kay testify, and this is
13 the highest level a person in charge of Engenia herbicide,
14 that said if he had heard of any BASF employee making that
15 recommendation for illegal use, that person would have been
16 terminated.

17 BASF also, through their stewardship reminder,
18 reminded all of their customers that this is an illegal use.
19 They said, "Clarity herbicide is not labeled for use with
20 dicamba-tolerant cotton or dicamba-tolerant soybeans. Uses
21 of these herbicides must be consistent with the current EPA
22 and state-approved product labels." So they warned their
23 own employees, they warned their own customers.

24 Plaintiff's counsel said Clarity sales went up. He
25 picked one district, one small district in Oklahoma, and

1 showed you a document and said, *Clarity sales went up.*
2 *Therefore, BASF must have knew about it and somehow*
3 *supported this illegal use. Not true.*

4 We got all the Clarity sales for these years in
5 question for the State of Missouri. This is the year, in
6 2014, when there was no dicamba-tolerant seed available.
7 The following year when the cottonseed went out, it went
8 down, less sales. That's the facts. That's the evidence.
9 In 2016, still below the level from 2014.

10 Same thing if we look at the ten-state region that
11 surrounds Missouri: 2014 sales when there was no DT seed,
12 Clarity sales went down in '15. And, 2016, still below the
13 level from 2014 when there was no DT seed available.
14 Plaintiffs may claim somehow, *Well, it wasn't Clarity that*
15 *BASF sold but it was something called private label Clarity,*
16 *which is a product that BASF doesn't sell. In fact, there*
17 *is no product named private label Clarity; it's multiple*
18 *different -- different products.*

19 BASF sells the active ingredient or the formulated
20 ingredient to what's called re-labelers. It's the same
21 thing as if you go to the grocery store. Sometimes there'll
22 be, you know, the store brand which the regular brand may be
23 producing and selling to the re-labeler. In this case,
24 there were all of these different companies -- Loveland,
25 WinField Solution, Innvictis -- selling all of these

1 different products -- Strut, Clarifier, Sterling -- that are
2 also Clarity formulations. Plaintiffs somehow indicated
3 that those sales might have gone up. They did not.

4 In Missouri, this is the level of sales in 2014 prior
5 to when DT seed was released. The years after are both
6 lower. Private label Clarity sales actually went down.
7 This is showing that those warnings that BASF gave actually
8 worked. Ten state regions, private label Clarity sales
9 actually went down. There's no evidence whatsoever that
10 BASF was intending to or profited from Monsanto's release of
11 the DT seed in 2015 and 2016. And, remember, Engenia did
12 not come on the market until 2017.

13 So the evidence will show BASF had no role whatsoever
14 in Monsanto's decision of when to sell its seed. It will
15 show that there was no joint venture, and there's no
16 conspiracy. There's not a witness that will say that, and
17 there's no evidence.

18 Finally, I want to get a little bit back to Bader
19 Farms itself and the causes of damages. You heard a little
20 bit about Dr. Ford Baldwin, the fact that he doesn't have
21 experience with peaches. What that means is Dr. Baldwin --
22 and he said this, he really only ever looked for one thing,
23 he only ever looked for dicamba.

24 And it's sort of like if you have a telescope and
25 you're, you know, looking at something a long way away, the

1 only thing you're going to see is what the telescope is
2 pointed at as opposed to the big picture, because he only
3 looked at one thing. That's all he ever saw.

4 You'll hear from Dr. Guido Schnabel. He has 25 years
5 of experience studying peaches. He will be BASF's expert.
6 And when we finally got the chance, when we were finally
7 invited out in 2018 to do the inspection, Dr. Schnabel went
8 along with Dr. Westberg, and he's been back several times
9 since. He's on Clemson's Peach Team. In fact, Mr. Mitchem,
10 who is the expert from Monsanto, was also on that same Peach
11 Team. He's published dozens of different scientific
12 articles on peach diseases, including specifically on
13 armillaria root rot. He is an expert on that. He -- unlike
14 Dr. Baldwin, he looked at the big picture. He looked at all
15 the different causes.

16 I'm not going to spend any more time on the hail and
17 frost because I think that's been covered. I'd like to talk
18 about some of these other factors, including armillaria root
19 rot over time. The idea that armillaria root rot never
20 existed until the plants were somehow exposed to dicamba
21 starting in 2015 is just -- the evidence will show is flat
22 wrong. Mr. Bader's own photos will be examined by
23 Dr. Schnabel. And he'll tell you that they're consistent
24 with patterns of armillaria root rot prior to 2015.

25 There are satellite images over time that we'll look

1 at as well. And Bader Farms, you heard counsel say that he
2 replaced thousands of trees. He's been replacing thousands
3 of trees as long as he farms. It's a natural cycle. The
4 trees last so long and they get replaced.

5 So armillaria root rot spreads through the root
6 systems. It spreads down the rows of the trees. And you'll
7 see here that once it gets into a field, it develops
8 something called disease centers. And so you'll see, for
9 example, if it's here, it will spread down. And this tree's
10 already got half of it on this side, and you can see it's
11 spread to trees on the other side. Same with this row here,
12 it spread down the row. And then eventually it will jump
13 rows and start spreading down rows, and that is how it
14 spreads over time.

15 The way that you test for it is you dig down to the
16 base of the trees, and you see the telltale sign is this
17 white fungus-looking thing. And so both Dr. Schnabel and
18 Dr. Brannen from Monsanto dug down to the base of the trees
19 and they pulled samples. From the trip in 2018,
20 Dr. Schnabel had 43 of 43 positive samples for armillaria
21 root rot.

22 In 2019, he realized there were a couple of the
23 different fields of the orchards he may not have pulled a
24 sample from, so it took a few more. Six out of six in 2019.
25 Every sample submitted that had -- that was tested had

1 positive armillaria root rot.

2 Here's another picture that shows how it spreads
3 through the fields, both down the rows, and then when it
4 skips a row, it will start spreading laterally, and the
5 circles just get bigger and bigger over time. And, again,
6 this is the satellite photographic evidence to show that it
7 didn't just start happening in 2015 as Mr. Miller said.

8 So here's a photo in 2010. What's interesting in
9 these set of photos is you can see there's a disease center
10 here, there's a disease center here. Down in this area
11 there's a disease center. That led -- and this is a little
12 later in time than the photos that Mr. Miller was showing
13 that led to a replanting in 2014. You see all new trees.

14 So here's 2018, and what Dr. Schnabel will say is you
15 start seeing tree loss in 2018 in the same places you were
16 seeing it in 2010. Remember, 2010 is five years before it
17 was introduced. And you start seeing those same patterns of
18 tree loss in 2018. And there's a reason for that. When
19 they pull the trees out and they bulldoze them out and then
20 they plow it, little bits of the roots are going to stay,
21 and they're going to get even more spread around. And the
22 armillaria stays and lives in the roots. And so the fact
23 that you see the same patterns developing as the areas where
24 trees were lost in the years before 2014 just shows it's
25 happening again. What happens actually is it accelerates.

1 The second or the third time you plant the same field, it
2 comes back quicker than it did before.

3 Another example of the exact same thing where there
4 was significant tree loss in 2010, five years before the
5 dicamba seed was available, here it is replanted, 2014, the
6 year before. And then by 2018, you can see patterns match
7 up. Same tree loss, same spots.

8 Here are fields that weren't replanted, and you can
9 see that it just continues to spread. Again, 2010, before
10 any dicamba seed; five years, and you can see there's
11 starting to be little areas of opening.

12 In 2014, the year before the dicamba seed was first
13 sold, those areas have expanded quite a bit, and then by
14 2015, the year after, this whole section of the field had to
15 be plowed up.

16 Same pattern with these trees. These were not
17 replanted. You can see in 2010, big areas here starting to
18 open. By 2014, that had grown, and then by 2018, those same
19 patterns had expanded.

20 You heard from plaintiff's counsel that there'll be an
21 economics expert called Dr. Joseph Guenthner who will
22 testify for the plaintiffs. Dr. Guenthner, in coming up
23 with his 21 million, was asked to assume by plaintiff's
24 counsel that Bader Farms was out of business starting in
25 2019, last year, functionally out of business.

1 Dr. Baldwin said beyond -- the same thing, beyond a
2 shadow of the doubt, dicamba put Bill Bader out of the peach
3 business. He said that in May of 2019. There were
4 inspections again in 2019.

5 Now, while there are areas of the farm that have
6 armillaria and those are growing, the trees that were there
7 were not out of the business. The trees that were there
8 were still healthy, still producing peaches. This is the
9 peach crop from 2019. There was a good fruit set there.

10 Now, there are other things that are impacting yield.
11 Like I said, it's not one simple explanation. There are
12 multiple things. Armillaria's a big one, but there are a
13 lot of other things that are going on.

14 You'll see evidence from Dr. Schnabel and the other
15 experts that yield was down in some areas because there were
16 so many peaches that they didn't thin the peaches. One of
17 the things that farmers do is take some of the peaches off
18 so they get to be that nice big size that we all want to buy
19 in the grocery store.

20 There was evidence of a 2019 frost. When you cut the
21 little nubbins open and there's a dead embryo in the middle,
22 that's evidence of a frost. There's evidence of something
23 called phytaria [phonetic] root rot. All of this is going
24 on in the fields. Bacterial canker, bacterial spot, this is
25 a disease where you can see the peaches end up oozing and

1 are not marketable. Nobody wants to buy those at the
2 market. There are some fields where Dr. Schnabel will
3 testify, because of the failure to spray for bacterial spot
4 in 2019, Bader Farms lost 50 percent of their crop.

5 So all of these issues are addressed by actual peach
6 experts who will tell you their impact. None of them have
7 anything to do with dicamba. There's evidence of deer
8 damage, peach bores, old trees, new trees that are planted
9 too deep.

10 Farming is a complicated business, and like Mr. Miller
11 said, these are challenging issues, and there's not one
12 simple, easy solution. But even if Mr. Bader is claiming
13 that he had dicamba injury, it's clear there's no evidence
14 of that dicamba. He has zero evidence that it came from
15 Engenia herbicide, the one product that BASF sells in this
16 case. Dr. Baldwin agrees there's no evidence that it came
17 from there. And his damages started in 2015. Engenia
18 herbicide did not come on the market until 2017.

19 And, as we talked about earlier, it wasn't just
20 XtendiMax, it wasn't just Engenia that are possible sources
21 of dicamba. There was a DuPont product that started in 2017
22 for use on dicamba-tolerant seed called FeXapan, and there
23 were a thousand different other dicamba products that could
24 be used in the area.

25 The evidence will show that Engenia herbicide was

1 properly tested, thousands of tests. It was properly
2 labeled. The evidence will show that BASF and Monsanto were
3 fierce competitors, no joint venture, no conspiracy. And,
4 finally, there's no evidence that Engenia herbicide caused
5 the Bader Farms loss.

6 At the end of the day, we will ask you to make that
7 finding that there's no liability by BASF Corporation.

8 Like I said earlier today, we get to go last. You
9 won't hear from me until the end of the case. You won't
10 hear from me personally until closing two to three weeks
11 from now.

12 Thank you very much for your service. Two to three
13 weeks is a long time for any trial. Thank you for paying
14 attention, and I hope you'll wait to hear the whole side of
15 the story 'til I get a chance to present to you again.

16 Thank you, Your Honor.

17 **THE COURT:** Counsel, lead counsel, come up, please.

18 *(Sidebar off the record)*

19 **THE COURT:** I told you over and over again that we
20 were going to go to 5:00 or 5:30. I'm going to let you go
21 early on the first day. The start of the witnesses is going
22 to take more time than we really have left today.

23 So before excusing you, I want to emphasize what I've
24 told you repeatedly now: Do not discuss the case among
25 yourselves or with others or permit anyone to discuss it in

1 your presence. Do not form or express any opinion about the
2 case until it's finally given to you to decide.

3 Now, when you go home tonight, your friends, your
4 family, your spouses, they're all going to want to know
5 what's going on here. You tell them you're under oath, you
6 can't talk about it in any respect whatsoever, and you can't
7 have them talk about it either. And, again, you really need
8 to avoid news reports of any kind, and you all know the
9 reasons why.

10 I want to thank you for your patience. We'll
11 reconvene again at 9:00.

12 Why don't you wait, if you would, and we'll talk about
13 your specific situation since you have so much drive time.

14 But we'll try to reconvene at 9:00, and we'll start
15 the testimony at that time. Each day we'll have court
16 security officers escort you out of the building and to your
17 vehicles. So, with that, thank you again for your patience,
18 and you can go to the jury room with Ms. Schaefer, the court
19 clerk.

20 **(Jury out)**

21 **THE COURT:** So do you want to discuss anything other
22 than you're going to call Mr. Smith first then?

23 **MR. RANGLES:** The plan for tomorrow is to call
24 Mr. Smith first and --

25 **THE COURT:** This can be off the record.

1 ***(Discussion held off the record)***

2 **THE COURT:** Mr. Hohn, you want to come up.

3 We've taken care of everything else on the videos and
4 the others, right?

5 **MR. DUKES:** Yes.

6 **MR. RANGLES:** Your Honor, if I could have 30 seconds.

7 **THE COURT:** Sure. You want to take a quick recess,
8 that's fine, too.

9 **MR. RANGLES:** I don't need it, I really don't.

10 ***(Attorneys have a discussion off the record)***

11 **MR. HOHN:** Judge, I think we can make it real easy.

12 **THE COURT:** Okay.

13 **MR. HOHN:** Your Honor, I've been informed by
14 Mr. Randles that they're only intending to use two exhibits
15 with Mr. Smith tomorrow --

16 **THE COURT:** Instead of six, okay.

17 **MR. RANGLES:** Right. We narrowed it down.

18 **MR. HOHN:** -- which are 611 and 621, as I understand.

19 **THE COURT:** You have a copy to show or would you like
20 to summarize it?

21 **MR. HOHN:** I do. Would you like to see it?

22 **THE COURT:** What are they?

23 **MR. HOHN:** So they're ones that we previously talked
24 about in our informal conferences, Your Honor. So really
25 all I'd like to do is preserve our objections --

1 **THE COURT:** Oh, fine.

2 **MR. HOHN:** -- that Mr. Smith -- obviously, we made
3 motions in limine to exclude him entirely. We've renewed
4 our motion. All I would like to do is make a record that we
5 are renewing those, and I presume you're going to stick with
6 your original rulings --

7 **THE COURT:** Yes.

8 **MR. HOHN:** -- in that regard?

9 **THE COURT:** Yes, that's fine.

10 **MR. HOHN:** And so I do have a form, a table that we
11 made. You tell me if this is good for each witness.

12 **THE COURT:** Sure. Give it to Amy then.

13 **MR. HOHN:** I made it for six of them but it's the only
14 two that I circled.

15 **THE COURT:** So 611 and 621?

16 **MR. HOHN:** That's correct.

17 **THE COURT:** All right. Those objections will -- well,
18 they're both based on relevance, hearsay, and foundation.

19 **MR. HOHN:** Incorporating our prior motions in limine.

20 **THE COURT:** Yes. All part of the earlier written
21 motions?

22 **MR. HOHN:** That's correct.

23 **THE COURT:** And 621 is relevance, hearsay, foundation
24 and FRE403, Federal Rules of Evidence 403.

25 **MR. HOHN:** That's correct.

1 **THE COURT:** Okay. So I'll overrule those objections,
2 consistent with our informal pretrial conference over the
3 weekend and the earlier rulings from the Court.

4 Anything else?

5 **MR. HOHN:** That's it.

6 **MR. DUKES:** Thank you, Your Honor.

7 **THE COURT:** Then I'll sign this, too, and file this
8 particular order.

9 **MR. HOHN:** Great. And if you like, we can do that
10 format going forward for future witnesses.

11 **THE COURT:** That would be very helpful. It will make
12 the whole thing go much more expeditiously.

13 Anything else for plaintiffs then?

14 **MR. RANGLES:** No, sir.

15 **THE COURT:** Do you want to have pretrial say ten 'til
16 nine then, a daily pretrial maybe at ten 'til nine? That's
17 probably good enough for tomorrow, I'm thinking.

18 **MR. RANGLES:** I think that will be fine because I
19 don't think any of us know the issues right now, so --

20 **THE COURT:** Okay. That's fine.

21 All right. We'll reconvene then at ten to nine before
22 the jury comes in then.

23 Okay. Thanks. Court's adjourned for the day.

24 *(Proceedings adjourned at 4:35 p.m.)*

25 * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, Laura A. Esposito, Registered Professional Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter for the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case, that said transcript contains pages 1 through 111, inclusive, and was delivered electronically. This reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 28th day of January 2020.

Laura A. Esposito
Laura A. Esposito, RPR, CRR, CRC
Official Court Reporter