

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

3   BADER FARMS, INC.,                    )  
  )  
4                                    Plaintiff,                    )  
  )  
5                    vs.                    )   No. 1:16-cv-299-SNLJ  
  )  
6   MONSANTO CO. and BASF                )  
  CORPORATION,                         )  
7   )   January 28, 2020  
  )  
8                                    Defendants.                    )

9                   **TRANSCRIPT OF TRIAL DAY #2 - VOLUME 2B**  
10                  **BEFORE THE HONORABLE STEPHEN N. LIMBAUGH, JR.**  
                    **UNITED STATES DISTRICT COURT JUDGE**

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1           *(Proceedings convened in open court at 1:10 p.m.)*

2           *(Following conducted outside presence of jury:)*

3           **THE COURT:** Preliminary matters?

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

5           **THE COURT:** I'm going to listen to all the testimony,  
6 too. I don't want to make any mistakes in this trial, so  
7 I'm going to listen to that. I advise you once again,  
8 suggested it many times -- you can bring them in -- that  
9 limiting instructions can cure a lot of problems in this  
10 trial, and I've not received any suggestions about that from  
11 anybody, so --

12           *(Jury in)*

13           **THE COURT:** Call your next witness.

14           **MR. RANGLES:** Thank you, Your Honor. Plaintiffs call  
15 Dr. Boyd Carey from Monsanto.

16                   **DR. BOYD CAREY, PLAINTIFF'S WITNESS, SWORN**

17                           **DIRECT EXAMINATION**

18                                   **QUESTIONS BY MR. RANGLES:**

19           **COURTROOM DEPUTY:** Please state your full name for the  
20 court reporter over there, and speak into the microphone.

21           **THE WITNESS:** J. Boyd Carey. First name initial is J.

22           **COURTROOM DEPUTY:** You can have a seat in the witness  
23 stand.

24           **THE COURT:** You may proceed.

25           **MR. RANGLES:** Thank you, Your Honor.

1 Q. (By Mr. Randles) Good afternoon, Dr. Carey.

2 A. Good afternoon.

3 Q. We've met before, haven't we?

4 A. We have.

5 Q. I took your deposition a few months back, didn't I?

6 A. Yes.

7 Q. And we -- you've already stated your name. Would you  
8 tell the jurors when you started working at Monsanto?

9 A. I started working at Monsanto in 1996, October.

10 Q. And, if I recall correctly, you had done some work  
11 that was related to Monsanto a little bit before that, is  
12 that correct?

13 A. No, not really. That was my first engagement at all  
14 with the company.

15 Q. So, you began in 1996. Now, you have a Ph.D., don't  
16 you?

17 A. I do.

18 Q. Would you please tell the jurors what your Ph.D. is in  
19 and where you got it from?

20 A. Yes. My Ph.D. is in agriculture with a specialization  
21 in weed science, and I received that from Michigan State  
22 University.

23 Q. Dr. Carey, you are a scientist?

24 A. Yes, sir.

25 Q. I want to ask you some questions about science as a

1 general matter, and then we'll get into some specifics as we  
2 go, all right?

3 Science is a search for the truth, right?

4 A. I think that's a good way to characterize it, yes.

5 Q. And it's important in scientific research to let the  
6 chips fall where they may, isn't it?

7 A. That's correct.

8 Q. And science should be unbiased, shouldn't it?

9 A. It should absolutely be unbiased.

10 Q. And science should be objective as to the results,  
11 correct?

12 A. That's correct.

13 Q. Studies should not be designed to yield certain  
14 desired results, correct?

15 A. That's correct.

16 Q. Studies should avoid biases?

17 A. I'm sorry. Can you repeat?

18 Q. Studies should avoid biases?

19 A. Studies should absolutely avoid bias.

20 Q. And one bias is attempting to serve legal purposes,  
21 correct?

22 A. If the research is biased, that's incorrect, and  
23 that's not appropriate. If research is conducted for  
24 whatever purpose, as long as it's sound science, I think  
25 it's appropriate.

1 Q. But one kind of bias could be attempting to serve a  
2 particular legal purpose, correct?

3 A. I don't -- I don't know. I don't -- I don't  
4 appreciate that, understand that question.

5 Q. Okay. Well, Dr. Carey, I want to show you a portion  
6 of the transcript in which I deposed you a few months ago,  
7 all right?

8 **MR. RANGLES:** And, Your Honor, this is a video clip,  
9 No. 7, of Dr. Boyd Carey's deposition, and I would like the  
10 Court's permission to show it to the jury as impeachment.

11 **THE COURT:** Okay. It's not been admitted into  
12 evidence then?

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

14 **THE COURT:** Just for impeachment purposes only?

15 **MR. RANGLES:** Yes, sir.

16 **THE COURT:** Any objections?

17 **MR. MILLER:** No, Your Honor. No objections.

18 **THE COURT:** You may proceed then.

19 **MR. RANGLES:** All right.

20 Q. (By Mr. Randles) Dr. Carey, if you would look at your  
21 screen.

22 **(A clip of the witness's videotaped deposition was**  
23 **played for the jury as follows:)**

24 "Q. Biases could include attempting to serve legal  
25 purposes, correct?"

1 "A. It could."

2 **(End of videotaped deposition clip)**

3 Q. (By Mr. Randles) You recall giving that answer at the  
4 time?

5 A. I do.

6 Q. Research should not be avoided because of fear of  
7 undesirable results, correct?

8 A. I agree.

9 Q. And -- but you would agree that certain scientific  
10 proposals at Monsanto with regard to the dicamba-tolerant  
11 system were evaluated on the potential risk for the product  
12 release, correct?

13 A. I'm sorry. Could you repeat that question.

14 Q. Certain scientific proposals related to the  
15 dicamba-tolerant system were evaluated on the potential risk  
16 for the product release at Monsanto?

17 A. That's correct.

18 Q. I would like to show you Plaintiff's Exhibit 1108. It  
19 should come up on your screen in a moment.

20 You see the document there?

21 A. I do see the document, yes.

22 Q. You see that this is an email from Ron Repage at BASF?  
23 You see that?

24 A. I do.

25 Q. We're going to blow it up a little bit so you could

1 see.

2 A. Thank you.

3 Q. To Shea Murdock at Monsanto. You see that?

4 A. Yes.

5 Q. And it's dated May 23rd, 2012?

6 A. Yes.

7 Q. Up at the top there?

8 A. I see it, yes.

9 Q. I've got -- okay. And it says, "DT System Agreement  
10 Overview, May 3rd," and then has some letters, correct?

11 A. Correct.

12 Q. All right. So this is a Monsanto document -- a  
13 document received by Monsanto from BASF. You see that?

14 A. I do.

15 **MR. RANGLES:** All right. Your Honor, I would like to  
16 offer this document into evidence at this time.

17 **MR. MILLER:** Your Honor, we object. It's not -- it  
18 was not on the list that counsel submitted as to exhibits  
19 that would be used with this witness, so I haven't had a  
20 chance to review it and make any objection to it.

21 **MR. MANDLER:** We join, Your Honor. We'd also make a  
22 parol evidence rule as it summarizes a signed agreement.

23 **THE COURT:** Counsel, come up.

24 \* \* \* \*

25 **(Discussion held at sidebar between the Court and**



1           *counsel as follows:)*

2           **MR. RANGLES:** This is an email from BASF to Monsanto.  
3 I don't know why it wasn't sent to them. It was used in my  
4 opening, so they have received it.

5           **MS. GEORGE:** It's on our exhibit list.

6           **MR. MANDLER:** But we had an agreement 24 hours in  
7 advance so you could tell what exhibits would be with which  
8 witnesses, and it's not on there.

9           **MR. MILLER:** We were given a list of exhibits that  
10 were going to be used with Dr. Carey, and it's not on this  
11 list. I mean that's -- the idea was so we could prepare for  
12 things like this.

13           **MS. GEORGE:** I apologize if it didn't make it on the  
14 list with Boyd Carey. It was in our opening and it was on  
15 our exhibit list. I apologize if it didn't make it on the  
16 list -- evidence in the case if --

17           **MR. RANGLES:** It was an oversight. It should have  
18 been on there. I thought it was disclosed on this list,  
19 too.

20           **THE COURT:** So how important is it?

21           **MR. RANGLES:** Well, for --

22           **MS. GEORGE:** Foundation.

23           **MR. RANGLES:** It's a foundational document that I  
24 cited in opening. Is it critical? No. But I may need to  
25 offer it up separately from the witness later if they want

1 to stand on this for now.

2 **MS. GEORGE:** It's just a finding system.

3 **MR. MILLER:** It's what?

4 **MS. GEORGE:** It's just a finding system. It's not a  
5 controversial --

6 **MR. MANDLER:** That's why it's parol evidence.  
7 (Intelligible) -- it was reduced to a contract.

8 **THE COURT:** Why don't we get to it later on.

9 **MR. RANGLES:** We can do it later.

10 **(End of discussion at sidebar)**

11 \* \* \* \*

12 Q. (By Mr. Randles) Dr. Carey, I want to show you an  
13 exhibit marked No. 3 -- Plaintiff's 311. Do you see it on  
14 your screen -- well, do you see it on your screen?

15 A. I do.

16 Q. You see, down at the bottom of the page, "MON3,"  
17 Monsanto Bates number at the bottom, down at the very  
18 bottom?

19 A. Oh, in the corner, yes.

20 Q. You see that?

21 A. I do.

22 Q. All right. And this is talking about academic  
23 surveys, correct?

24 A. That's the title.

25 **MR. RANGLES:** All right. Your Honor, I'd like to

1 offer this Monsanto document into evidence.

2 **MR. MILLER:** We've got the same problem, Your Honor.  
3 It's not on the list.

4 **MR. RANGLES:** Can we approach?

5 **THE COURT:** Okay.

6 \* \* \* \*

7 *(Discussion held at sidebar between the Court and*  
8 *counsel as follows:)*

9 **MS. GEORGE:** I'm assuming that when we sent over our  
10 opening list of exhibits and our Boyd Carey list of exhibits  
11 that some of these were -- ended up on the opening list as  
12 opposed to the Boyd Carey list, and they all went over. We  
13 sent these all over on the same time. And that's the only  
14 thing I can imagine happened because we disclosed all of  
15 these exhibits to you guys.

16 **MR. MILLER:** I'm not saying that you didn't -- it  
17 wasn't on the exhibit list as a whole for the case.

18 **MS. GEORGE:** Not just as a whole.

19 **MR. MILLER:** All I'm saying is, we agreed to exchange  
20 lists for at least direct of four witnesses, and it's not on  
21 that list, so I haven't looked at it for this witness. I  
22 haven't determined if -- you know, what the objections are I  
23 might make for this witness. It's not in the list that I've  
24 given, Your Honor. That's the trouble.

25 **MS. GEORGE:** We argued objections for every single one

1 of these exhibits already.

2 **THE COURT:** How many more of them?

3 **MR. RANGLES:** I don't know the exact match-up,  
4 Your Honor, because, like I said, it may be some of my  
5 opening exhibits --

6 *(Unintelligible - voices talking at the same time)*

7 **THE COURT:** -- examination by using these exhibits or  
8 come back to these others then?

9 **MR. RANGLES:** I guess I can start and then come back  
10 to them later in the day or tomorrow with this guy.

11 **MS. GEORGE:** Okay. We already -- but the thing is,  
12 we've already resolved objections to these exhibits.

13 **MR. RANGLES:** You've already ruled on all of these,  
14 either for opening or for -- these are not unrulled on and  
15 they're not unknown.

16 **MS. GEORGE:** And they got these at the exact same time  
17 we sent the same list over.

18 **MR. MILLER:** All right. I understand that and I'm  
19 not --

20 **THE COURT:** Also used in opening statement.

21 *(Unintelligible - voices talking at the same time)*

22 **COURT REPORTER:** One at a time, please.

23 **MS. GEORGE:** The only document you're going to hear  
24 were either on this list or used in opening and disclosed in  
25 opening, and already all of the objections have been fought

1 over.

2 **MR. MILLER:** And, Your Honor, one of the reasons, I  
3 presume, for providing lists for specific witnesses ahead of  
4 time is so that we can consider them vis-a-vis that  
5 particular witness.

6 **THE COURT:** Okay. Okay. Well, just hold off on  
7 these.

8 **MS. GEORGE:** I don't know what list he's looking at  
9 and if it's even the same one we sent over.

10 **MR. MILLER:** It is the same one you sent over.

11 **MR. RANGLES:** My list is not in the same order as this  
12 list, so I'm going to need to chop it up quite a bit. If  
13 that's the case, I mean --

14 **MS. GEORGE:** There's no prejudice here.

15 **THE COURT:** Well, they're saying that they've prepared  
16 to examine this witness based on these exhibits and so I'm  
17 going to give them additional time for that purpose.

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

19 **MR. RANGLES:** It may be that we recess this witness at  
20 a certain point today and he comes back tomorrow while we  
21 fix this issue. I apologize for this. They were meant to  
22 make both lists.

23 **MS. GEORGE:** My understanding was that we were  
24 disclosing all of these to sort out objections ahead of  
25 time, not because they're entitled to see our whole exam

1 ahead of time.

2 **THE COURT:** But I understand the position that is  
3 considered, these exhibits and no others for this witness.

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

5 **MS. GEORGE:** Okay. Well, I'm going to need to -- I  
6 don't even know what the next -- I don't know what list  
7 they're working off of to see if it's the same.

8 **MR. MILLER:** Let me see if I've got an extra copy at  
9 the desk.

10 **MS. GEORGE:** I'm sorry. I don't know what list --

11 *(End of discussion at sidebar)*

12 \* \* \* \*

13 **MR. RANGLES:** Your Honor, given the discussion we had  
14 at sidebar, can we have a brief recess? Can we have a brief  
15 recess given the discussion we had at sidebar? I apologize.

16 **THE COURT:** We'll need a five-minute recess, no longer  
17 than that. Go back to the jury room. Remember the  
18 admonition I've given you repeatedly. We'll call you back  
19 in very shortly.

20 *(Jury out)*

21 *(Following was conducted outside presence of jury:)*

22 **THE COURT:** Counsel, I think we can plan on three  
23 weeks at this point.

24 **MR. RANGLES:** Your Honor, I have no excuse on this  
25 matter. I have no excuse.

1           **THE COURT:** It's complicated and we'll just deal with  
2 these kind of problems as they arise.

3           **MR. RANGLES:** There was no intent, but I have no  
4 excuse.

5           **THE COURT:** I'm going to be here. You can extend your  
6 hotel reservations.

7           **MR. MILLER:** And, Mr. Randles, I'm not implying that  
8 there was intent. Things happen, you know.

9           **MR. RANGLES:** I know you don't.

10          **THE COURT:** Chris, did you want -- have something that  
11 you wanted to --

12          **MR. HOHN:** We can do it now, Your Honor, or we can do  
13 it at the end of the day. We just -- we made a proposal to  
14 eliminate --

15          **THE COURT:** They're kind of preoccupied.

16          **MR. HOHN:** We can do it at the end of the day.

17          **MR. RANGLES:** Your Honor, I propose, while we fix this  
18 prop, so we waste no time, that we play the Kim Magin video  
19 deposition. And my understanding is all the issues on that  
20 are resolved, and that's three-and-a-half hours.

21          **MS. GEORGE:** No. Not quite two-and-a-half hours.

22          **MR. RANGLES:** Two-and-a-half hours, and then we will  
23 circle back.

24          **THE COURT:** Well, that kind of makes sense. What do  
25 you guys think, and ladies?

1           **MR. MILLER:** I'm okay with that, Your Honor.

2           **MR. MANDLER:** That's okay, Your Honor.

3           **THE COURT:** Okay.

4           **(Court recessed)**

5           **THE COURT:** While we're waiting for the technical  
6 things, I think we're going to get snow, and so we may give  
7 them an extra 30 minutes to get here tomorrow. They've  
8 already expressed a concern about that, so we'll just  
9 monitor that hour-by-hour. I'm just talking about the jury  
10 only.

11           **MR. RANGLES:** There are a lot of moving parts. There  
12 have been a lot of rulings and documents.

13           The video's a little tricky. I think we're real  
14 close, but I will check. I don't like the Court sitting up  
15 there waiting. May I step out for a moment?

16           **THE COURT:** Well, sure. Sure.

17           **(Off the record)**

18           **MR. RANGLES:** Why don't I bring Boyd Carey up. I  
19 think I can do 30, 45 minutes without documents, and then on  
20 matters that I'm pretty sure he has made concessions on and  
21 will concede, lay some foundation, and then hopefully the  
22 technological problems with the Magin transcript will be  
23 fixed and we'll finish out the day with that.

24           Would that be all right with the Court?

25           **THE COURT:** Fine with me.



1           **MR. RANGLES:** Why don't we do that, and then we will  
2 return to Boyd Carey in the morning.

3           **MR. MILLER:** We've talked.

4           **MR. RANGLES:** Mr. Miller's been gracious.

5           **THE COURT:** That's fine.

6 You want to bring the jury back in.

7           *(Jury in)*

8           **THE COURT:** You may proceed.

9           **MR. RANGLES:** Thank you, Your Honor.

10          **THE COURT:** You're still under oath.

11 Q.       *(By Mr. Randles)* Thank you, Dr. Carey. We're altering  
12 the plan a little bit. Technology's a wonderful thing. And  
13 we're going to take a little bit to cover some ground that  
14 you and I covered before, and I think we'll find a lot of  
15 agreement. All right?

16 A.       Okay.

17 Q.       So, why don't we do that.

18           Dr. Carey, there came a time when Monsanto did not  
19 allow academic testing of off-target movement of the new  
20 formulation of dicamba, isn't that correct?

21 A.       That's correct.

22 Q.       And at that same time Monsanto was allowing academic  
23 testing of that formula for weed control for efficacy,  
24 correct?

25 A.       That's correct.

1 Q. And the only other time you can remember academics  
2 being restricted in their access to a new technology was --  
3 in your nearly 30 years of experience, was one prior  
4 incident, isn't that correct?

5 A. Yeah. To the best of my recollection, that's the  
6 case.

7 Q. I believe you talked about, it was a cotton  
8 technology?

9 A. That's correct.

10 Q. Okay. Now, the fact is, Monsanto did not want to  
11 conduct research that could jeopardize its registration, did  
12 it?

13 A. It's correct that we didn't want to conduct research  
14 that would put the registration at risk.

15 Q. And protocols that had the potential to compromise  
16 registration were terminated, weren't they?

17 A. There was a review process to understand what  
18 protocols might pose a risk to the registration, and those  
19 protocols were evaluated, and some of those we didn't do.

20 Q. And part of the evaluation process was whether or not  
21 they would pose a risk to registration, correct?

22 A. That's correct.

23 Q. And one of the key protocol objectives that did  
24 trigger additional review was volatility, wasn't it?

25 A. Volatility was one that did. It's a unique type of

1 study, yes.

2 Q. Now, in terms of testing for volatility, if you do  
3 testing on bare soil, that reduces the risk of volatility,  
4 doesn't it?

5 A. Not necessarily. We've done studies. The  
6 organization has done studies on bare soil and on foliage,  
7 in both situations.

8 Q. And when you add foliage, it increases the risk of  
9 volatility, doesn't it?

10 A. Honestly, I'm not sure. I'd have to look at the  
11 results of the studies to know that, but conducting a study  
12 on bare ground, the fact that it's on bare ground itself  
13 doesn't mean that it's more or less volatile necessarily.

14 Q. Let's play impeachment clip 17. Well, we would like  
15 to play impeachment clip 17 from his deposition, Your Honor.

16 **MR. MILLER:** No objection.

17 **MR. RANGLES:** Your Honor, I will hum some appropriate  
18 elevator music while we wait for the clip to load.

19 **THE COURT:** That's okay. You want to go on to your  
20 next question, then come back to this?

21 *(Impeachment clip 17 from the videotaped deposition of*  
22 *Dr. Boyd Carey was played as follows:)*

23 "Q. When you say 'less risk,' what risk are you talking  
24 about being reduced?

25 "A. Less risk of a potential mistake being made in the

1           *research that might lead to off-target movement that*  
2           *would not otherwise happen."*

3           ***(End of videotaped deposition clip)***

4       Q.     *(By Mr. Randles) We've played the tail end of where you*  
5       *and I were talking about bare ground. Does that refresh*  
6       *your recollection or would you like for us to go back a*  
7       *little bit?*

8       A.     That refreshes my recollection.

9       Q.     Okay. So, there is less risk of it moving to a  
10      neighboring area if it's sprayed over bare ground rather  
11      than crops, correct?

12      A.     That's not what I said, and that's not -- that's not  
13      accurate.

14      Q.     Okay. And, so, are you testifying that the addition  
15      of plants as opposed to bare ground does not increase  
16      volatility?

17      A.     I'm saying that I haven't researched that to answer  
18      that question definitively here.

19      Q.     Okay. Okay. And it is true, the smaller trials and  
20      demonstration pose less risk of off-target movement to  
21      someone else's crop, correct?

22      A.     Smaller trials, and especially smaller trials  
23      conducted on bare ground, reduce the risk of a compliance  
24      violation and could also reduce the risk of a mistake being  
25      made, which could result in an off-target movement.

1 Q. And the converse is true, correct? If you have a  
2 larger amount of trials, you increase that risk, correct?

3 A. In a larger trial, with a crop, for instance, there's  
4 a crop involved with which increases the number of  
5 regulatory compliance requirements that need to be followed.  
6 And any time you have a larger trial, the larger trial may,  
7 in fact, be somewhere other than a research station, which  
8 brings in multiple people, and those things could  
9 potentially increase the risk of a mistake being made.

10 Q. Okay. So, from what I said -- let's unpack your  
11 answer a little bit. Risks of a mistake or -- that could  
12 lead to off-target movement include the size of the amount  
13 sprayed, correct?

14 A. I'm not clear about your question. I apologize.

15 Q. I'm trying to break down what you just said and just  
16 underline it, but you tell me if I've got something wrong.

17 If you increase the size of the area being sprayed,  
18 you increase the risk that something can happen, whatever it  
19 is, that would create off-target movement as opposed to a  
20 smaller amount of spraying, correct?

21 A. In general, I think that's correct.

22 Q. Likewise, the more people you involve, I think you  
23 just said, you increase the risk of something happening that  
24 creates more off-target movement, correct?

25 A. I think that's correct.

1 Q. So, in real world farming conditions you're often  
2 talking about very large areas being sprayed, aren't you?

3 A. Yes.

4 Q. Are you aware that the -- according to the USDA, the  
5 average crop size in Dunklin County, Missouri, where Bader  
6 Farms is located, is a thousand acres?

7 A. I'm not aware of that but I trust that's the case.

8 Q. That's a big area to spray, isn't it?

9 A. Absolutely.

10 Q. And, likewise, you're likely to have a lot of people  
11 involved in that spraying, aren't you?

12 A. More than a small research trial, yes.

13 Q. Harder to control, correct?

14 A. In this situation you're talking about a commercial  
15 application under a situation where a product's been  
16 registered by the EPA already. When you're talking about  
17 small plot research, typically there's regulatory compliance  
18 and the label isn't necessarily defined, so there are a lot  
19 more precautions to take when you're using the research  
20 trials in terms of regulatory compliance. So, that's what I  
21 can say.

22 Q. Oh, I understand. But I was just talking about, in  
23 general, when you increase these factors, you increase the  
24 chance that something's going to happen that's going to lead  
25 to off-target movement, right?

1 A. Depends on the situation.

2 Q. Likewise, if you -- the time of year can affect the  
3 likelihood of off-target movement, can't it?

4 A. It could play a role.

5 Q. Hot summer months like we have in the Bootheel of  
6 Missouri are conditions that can increase the risk of  
7 off-target movement, aren't they?

8 A. The research shows that if a compound is volatilizing,  
9 that increased heat would increase that rate of  
10 volatilization if it's volatilizing to begin with.

11 Q. So, you got an increased risk at 95 degrees as opposed  
12 to 70 degrees, right?

13 A. If there's volatilization to begin with, that's  
14 correct.

15 Q. And, likewise, temperature inversions can increase  
16 volatilization and move volatiles for long distances,  
17 correct?

18 A. Temperature inversions may not necessarily increase  
19 volatility. Temperature inversions can absolutely increase  
20 the risk of off-target movement, whether it's physical drift  
21 in spray droplets or in the form of a volatile compound.

22 Q. And it can -- it can move a great distance in a  
23 temperature inversion, correct?

24 A. That's correct. Temperature inversions can move long  
25 distances.

1 Q. You mentioned registration. I want to talk about that  
2 just for a moment, all right? There's a process you go  
3 through with the EPA for a herbicide called registration,  
4 right? And if you get your registration, you can sell it?

5 A. That's correct.

6 Q. Okay. Now, a typical registration for a herbicide --  
7 the ordinary registration is a 20-year registration,  
8 correct?

9 A. That may have been the case in previous years,  
10 previous decades. That number has gone down substantially  
11 in general over the last several registrations.

12 Q. Now, there's a difference between an ordinary  
13 registration and a conditional registration, correct?

14 A. Well, I'm not a regulatory person but I believe that's  
15 correct.

16 Q. And XtendiMax with VaporGrip and Engenia were given a  
17 conditional registration for a two-year period for the '17  
18 and '18 growing seasons, isn't that correct?

19 A. That is correct.

20 Q. Okay. And then Mr. Miller, in his opening, told the  
21 jury after all the events of '17 and '18, the EPA gave the  
22 product a new registration. And they did, didn't they?

23 A. They did.

24 Q. But they didn't give it an ordinary registration, did  
25 they?



1 A. I don't know what the definition of "ordinary" is, but  
2 they gave it a two-year registration.

3 Q. It's another conditional registration, right?

4 A. Correct.

5 Q. For the '19 and '20 growing season, correct?

6 A. Correct.

7 Q. So this registration, this conditional registration,  
8 expires in the fall of this year, correct?

9 A. I believe that's correct.

10 Q. And as we sit here today, none of us know whether the  
11 EPA's going to continue to allow either XtendiMax with  
12 VaporGrip or Engenia to be sold after the fall of 2020, do  
13 we?

14 A. There's no guarantees.

15 Q. No one knows but the EPA, and they haven't said yet,  
16 correct?

17 A. That's correct.

18 Q. And, likewise, that conditional registration that was  
19 given to these products for the '19 and '20 growing season  
20 had some requirements and conditions the EPA applied to it,  
21 didn't they?

22 A. That's correct.

23 Q. There were some use restrictions, correct?

24 A. I honestly don't remember the exact restrictions.

25 Q. I'm not asking for the exact; I'm just asking for

1 categories. We'll get into the exact a little bit later.  
2 We're just laying a little foundation here.

3 A. I need to know the exact to know what category it  
4 falls into.

5 Q. Fair enough. Do you know whether there were any use  
6 restrictions?

7 A. Yes, I believe there were.

8 Q. Okay. Likewise, the EPA requested additional research  
9 and findings, didn't it?

10 A. I can't -- I don't know that.

11 Q. Okay. Just out of your field?

12 A. It is.

13 Q. Okay. Now, when Monsanto decided to not allow  
14 academic testing for off-target movement of these products,  
15 that directive came from the regulatory department, didn't  
16 it?

17 A. My understanding is that's where the primary decision  
18 was made.

19 Q. And you personally disagreed with that decision,  
20 didn't you?

21 A. I did.

22 Q. And you thought that academics should be allowed to  
23 test the product for off-target movement volatility, pretty  
24 much whatever they wanted to, correct?

25 A. Well, in general, I'm always a proponent of having our

1 university research partners do testing with new products.

2 Q. But your view didn't prevail, correct?

3 A. That's correct.

4 Q. Okay. Now, Mr. Miller said that after registration  
5 that academics were allowed to test the product, but after  
6 registration and sale began, there's no way for Monsanto to  
7 prevent them from testing the product, is there?

8 A. Well, they were enabled, let's -- yes. They were  
9 enabled to test after the registration.

10 Q. Let me put it in simpler terms. Once it's in the  
11 store, they can just go buy it and test it?

12 A. Sure, sure. To do the type of testing that they want  
13 to do is more than just buying it in the store, but  
14 absolutely, the access was absolutely available.

15 Q. Now, are you aware of an academic conference that --  
16 where this issue was addressed with academics about their  
17 discomfort with Monsanto's decision to prevent the  
18 off-target testing?

19 A. Well, there are multiple weed science meetings. Can  
20 you be specific?

21 Q. Well, I could be very specific except for a technical  
22 problem, so let me try to be specific.

23 Do you recall John Chambers telling academics in 2017  
24 at a conference at Monsanto that he believed it was a  
25 mistake to stop the academic testing for off-target

1 movement?

2 A. That helps me understand which meeting you're  
3 referring to. And I don't know Dr. Chambers' -- well,  
4 Mr. Chambers' direct statements, but I do know he committed  
5 to that group of university researchers that we would enable  
6 testing.

7 Q. Well, we will circle back to that a bit later. How  
8 about that, all right?

9 Do you recall a conference in San Juan, Puerto Rico,  
10 prior to the 2016 growing season, between Monsanto and BASF?

11 A. Well, I recall that conference. It was actually  
12 sponsored by the Cotton Council, but, yes, I definitely was  
13 there.

14 Q. And Monsanto and BASF were there?

15 A. That's correct.

16 Q. And you were there?

17 A. I was there.

18 Q. And you took notes?

19 A. I took notes.

20 Q. Which we talked about in your deposition?

21 A. We did.

22 Q. And Dr. Westberg was there. You remember that?

23 A. I do.

24 Q. As a matter of fact, Dr. Westberg said at the  
25 conference, "Off-label use of dicamba in cotton last year."

1 There was off-label use of dicamba last year and that it  
2 would be rampant in 2016. And you actually wrote "rampant  
3 in 2016" in your notes. Do you recall that?

4 A. I was capturing Dr. Westberg's comments, that's  
5 correct.

6 Q. And we will look at your notes in more detail, but I  
7 think you recall them pretty well. There was no  
8 disagreement registered with his statement in your notes  
9 about that conference, was there?

10 A. My notes were just capturing what the participants and  
11 the speakers at that conference had expressed. I wasn't  
12 expressing any other alternative comments.

13 Q. Yes. And that's well put. Let me ask my question  
14 more narrowly. You didn't record anyone disagreeing at that  
15 conference with Dr. Westberg, did you?

16 A. I don't recall that, no.

17 Q. Now, there came a time -- well, let me back up.

18 You've worn a number of hats over your long career at  
19 Monsanto, correct?

20 A. That's true.

21 Q. And there came a time in, I believe you told me -- and  
22 I may have the date a little bit off, late 2015, it may have  
23 been early 2016, when you were moved into responsibility for  
24 claims for off-target movement for the dicamba for the  
25 upcoming '16 season, is that correct?

1 A. Yes. The role you're referring to is, I would have  
2 started in the -- basically December of 2015, and I was in  
3 that role for about a year, to December of 2016.

4 Q. And we loosely talked about two of your duties, and if  
5 I'm missing something important, you can correct me here.  
6 But one of your duties was to oversee the claims process for  
7 2016, correct?

8 A. Well, to be clear, there was no claims process for  
9 2016. We did prepare for a claims process because at the  
10 time I took the role we still expected we could potentially  
11 get a registration for the XtendiMax with VaporGrip  
12 technology, so we prepared a proposal for a claims process  
13 but it was never implemented.

14 Q. The '16 process was never implemented, so as the year  
15 went on, you refined that to prepare for the claims process  
16 for '17 forward, didn't you?

17 A. That's correct.

18 Q. And you oversaw the preparation of numerous training  
19 materials, forms, and that sort of thing, didn't you?

20 A. That's correct.

21 Q. And we're going to get into more detail as we go but I  
22 just want to talk at the general level now. And you got a  
23 little ahead of me, so let me catch up to you.

24 In 2015, the cotton system was sold, correct? The  
25 dicamba-tolerant cottonseed, I should say. The cottonseed

1 was sold in 2015?

2 A. Yeah. To be clear, XtendFlex cotton varieties, which  
3 are the varieties that have the trait that make them able to  
4 withstand the herbicide, that was sold, but that's all that  
5 was sold. It wasn't a system.

6 Q. And, fair designation. I actually misspoke. So the  
7 seed was sold in '15. No herbicide was sold with it?

8 A. Correct.

9 Q. And then in 2016, you launched the soybean seed, but  
10 no herbicide was sold with it either, correct?

11 A. That is correct.

12 Q. So, all that was on the market, if a person decided to  
13 spray dicamba, was old dicamba, correct?

14 A. If a person decided to spray dicamba -- of course,  
15 that was illegal, but if they decided to spray dicamba, that  
16 would have been the only available dicamba.

17 Q. And Monsanto received information that in 2015 people  
18 did indeed spray old dicamba over the cottonseed. Monsanto  
19 received that information, didn't it?

20 A. I believe that's correct.

21 Q. And, so, going into the '16 season with the soybean  
22 launch, Monsanto received information that the spraying had  
23 occurred in '15. Dr. Westberg had warned that the spraying  
24 would be rampant in 2016 as well, correct?

25 A. That's what he said.

1 Q. But during 2015 and 2016, it was Monsanto's corporate  
2 policy not to investigate any injury, correct?

3 A. It's correct that we did not investigate reports of  
4 illegal use. That's correct.

5 Q. So, when people called you to say, *hey, I've got*  
6 *injury because of dicamba sprayed over the top of the*  
7 *dicamba-tolerant seeds in '15 and '16*, Monsanto's corporate  
8 policy was not to let anybody go look at it, correct?

9 A. We referred people to other sources, like the  
10 university extension and other resources, but we chose not  
11 to investigate those.

12 Q. And that was a corporate decision, wasn't it?

13 A. Yes.

14 Q. And it was a decision made over your head, wasn't it?

15 A. I didn't make that decision, that's correct.

16 Q. And you didn't agree with that decision, did you?

17 A. I wanted to visit some cases, that's correct.

18 Q. And you were prohibited from doing so by the policy,  
19 weren't you?

20 A. I was guided not to do that.

21 Q. Guided by someone specific?

22 A. Not -- no, I don't remember someone specific, but it  
23 was clear that we were not going to do that.

24 Q. And your view was, as a technical development person,  
25 you wanted to learn as much as possible, right?



1 A. That's correct. That's fair.

2 Q. And you thought it would have been helpful learning  
3 for you to be able to go investigate?

4 A. As a technical person, we're always looking for  
5 opportunities to learn, that's correct.

6 Q. I'm sorry. Yes, that's right. And, to your  
7 knowledge, in 2016, the only person from Monsanto that came  
8 close to investigating a claim was, there was a day you  
9 spent driving and looking at damage and sometimes stopping  
10 beside the road and looking, correct?

11 A. There was a day in the summer of 2016 that I was on  
12 a -- with a couple other people driving around looking from  
13 the road.

14 Q. And you didn't walk any fields though or anything like  
15 that?

16 A. We don't walk fields without permission from the  
17 owner.

18 Q. And you didn't ask for permission from owners, did  
19 you?

20 A. No.

21 Q. But you already had permission from one person to  
22 come and look at his fields, didn't you?

23 A. I think I know who you're referring to. Could you be  
24 more specific.

25 Q. I think you do. Bill Bader, he invited you to come

1 and look at his fields, hadn't he?

2 A. He made it very clear that I was welcome to look at  
3 his situation, that's true.

4 Q. And though he wasn't -- I'm sorry.

5 Had you also heard he called in 2015 to invite someone  
6 from Monsanto to come and walk his orchard?

7 A. I honestly don't remember if I was notified about the  
8 2015 call.

9 Q. There came a point in time when you knew about it  
10 though, right?

11 A. Eventually, yes.

12 **MR. RANGLES:** Your Honor, may I approach?

13 \* \* \* \*

14 *(Discussion held at sidebar between the Court and  
15 counsel as follows:)*

16 **MR. RANGLES:** The video is ready and available, so  
17 could we switch gears and just bring him back?

18 **THE COURT:** You want me to ask him to step down?

19 **MR. RANGLES:** Yes, Your Honor.

20 *(End of discussion at sidebar)*

21 \* \* \* \*

22 **THE COURT:** We're going to take your testimony  
23 piecemeal, so you may step down at this point. We'll call  
24 you back up later.

25 *(Witness steps down from the stand)*

1           **MR. RANGLES:** Your Honor, I believe we are now  
2 prepared to play the video deposition of Kim Magin, who is a  
3 Monsanto employee.

4           **THE COURT:** Okay. That's been marked as an exhibit  
5 then, right?

6           **MR. RANGLES:** Are we prepared to mark it? May we mark  
7 it after it's played, Your Honor?

8           **THE COURT:** That's fine.

9           **MR. RANGLES:** Okay. Thank you, Your Honor.

10          **THE COURT:** So you know, I am watching the weather,  
11 too, so we'll deal with that later, too.

12          *(Excerpts of the videotaped deposition of Kim Magin,*  
13          *taken on April 2, 2019, were played for the jury, as*  
14          *reflected in Exhibit A attached to Document 422,*  
15          *Plaintiffs' Notice of Playing Video Deposition of Kim*  
16          *Magin )*

17          **THE COURT:** Can we stop the video for just a minute.

18                                   \* \* \* \*

19          *(Discussion held at sidebar between the Court and*  
20          *counsel as follows:)*

21          **MR. MILLER:** I think that would be a good idea to take  
22 a break.

23           And something else just came up. There was a small  
24 clip in there -- I don't know which one it was, but there  
25 was a small clip in there that was played but it's not in

1 the transcript.

2 **MR. MANDLER:** I saw it, too.

3 **MS. GEORGE:** What is it?

4 **MR. MANDLER:** It was a question about  
5 (unintelligible) -- and then she said, "It's not my area."  
6 That wasn't in the transcript that was sent.

7 **MR. RANGLES:** I'm sorry if that is --

8 **THE COURT:** All she did was --

9 **MR. MILLER:** I'm not talking about that. I'm just  
10 saying, please be careful.

11 *(End of discussion at sidebar)*

12 \* \* \* \*

13 **THE COURT:** Let's take an afternoon break, another ten  
14 or 12 minutes or so.

15 Remember the admonition I've given you not to discuss  
16 the case, permit anyone to discuss it in your presence, and  
17 do not form or express any opinion about the case.

18 So, you can go to the jury room. We'll call you back  
19 out in a little bit.

20 Court's in recess then.

21 *(Jury out)*

22 *(Court recessed)*

23 *(Proceedings reconvened in open court with the jury  
24 present)*

25 **THE COURT:** Sorry for the delay. Thank you for your

1 patience. You may resume the video.

2 *(Playing excerpts of the videotaped deposition of*  
3 *Kim Magin resumed)*

4 **MR. RANGLES:** Your Honor, can we pause and approach?

5 \* \* \* \*

6 *(Discussion held at sidebar between the Court and*  
7 *counsel as follows:)*

8 **MR. RANGLES:** Your Honor, this morning when he started  
9 to get into his arrangement with Dow, Monsanto counsel  
10 objected and the Court sustained the objection. So, if he  
11 cannot discuss what his relationship actually was with Dow,  
12 and now this witness gets to characterize it after he's left  
13 the stand, I don't see how that's --

14 **MR. MILLER:** Is that what he's going to talk about?

15 **MR. RANGLES:** (Unintelligible) -- without what meaning  
16 was. She's comparing it to a consulting contract -- he  
17 wasn't paid. He was -- they objected when Dow came out of  
18 his mouth. You sustained it. Now, here --

19 **MR. MILLER:** I haven't been involved in the back and  
20 forth regarding the videos, but this is what was agreed to  
21 previously by the parties. I mean they've been working for  
22 hours and hours -- not me personally, thank goodness, but  
23 other people on the two teams have been, and it was agreed  
24 that this is what will be played.

25 **MR. RANGLES:** Agreed before we had the testimony this

1 morning.

2 **THE COURT:** That's right. If I kept out for Dow, we  
3 can't -- you shouldn't ask.

4 **MR. RANGLES:** Can I skip ahead? I will ask. I'm not  
5 familiar.

6 **THE COURT:** I'll sustain that objection.

7 **(End of discussion at sidebar)**

8 \* \* \* \*

9 **MR. RANGLES:** Just one moment, Your Honor.

10 **THE COURT:** Stand and stretch if you'd like. We're  
11 close.

12 How much more do you have, by the way?

13 **MS. GEORGE:** About 20 minutes.

14 **THE COURT:** While they're working on this, we've been  
15 checking the weather and it looks like we're going to get --  
16 are you ready?

17 **MS. GEORGE:** Yes.

18 **THE COURT:** So, we've been checking the weather. It  
19 looks like there's not going to be any kind of accumulation  
20 of anything. Nobody among you is north of Cape Girardeau  
21 County, and farthest is Dexter. I really don't think we're  
22 going to have any problem with the weather tomorrow, so if  
23 we have a blizzard, call Ms. Schaefer. You've got the  
24 number to call, or we'll call you, but I really think we'll  
25 be okay, so much so that we can probably start at 9:00. Any

1 of you want a little extra time to start at 9:30 or are you  
2 okay with nine?

3 **JUROR:** Nine's fine.

4 **THE COURT:** Okay. Good deal. Thanks for your help.

5 *(Playing excerpts of the videotaped deposition of*  
6 *Kim Magin resumed)*

7 **MR. RANGLES:** Your Honor, that concludes the video.

8 **THE COURT:** Okay. Thanks again for your patience. I  
9 told you once in a while we'll go to 5:30, especially since  
10 you're going to stay in a hotel instead of drive two hours.

11 So, okay. Looks like the weather's not going to be  
12 too bad after all. Is 9:00 still all right with everybody?

13 I'll ask you to come straight to the jury room and  
14 we'll try to start at 9:00 again. Court security officers  
15 will help you to your vehicles.

16 Once again, you'll be asked by your spouses, your  
17 family, your friends, whoever else, what's going on here.  
18 Tell them again you're under oath, you can't talk about it  
19 whatsoever and you can't have them talk about it either.  
20 Please avoid any kind of media attention.

21 Thanks again. You're excused for the night. See you  
22 at 9:00 in the morning. Remember the admonitions.

23 *(Jury out)*

24 **THE COURT:** You want to mark this video now, or how  
25 did we conclude?

1           **MS. GEORGE:** Your Honor, since there was editing on  
2 the fly, in order to make sure that what we put in the  
3 record matches what was played, I'd like to do it in the  
4 morning, if that's okay.

5           **THE COURT:** Is that okay with everybody?

6           **MS. GEORGE:** Same with entry of exhibits. And I'll  
7 send you whatever.

8           **MR. MILLER:** That's fine.

9           **MR. HOHN:** Your Honor, we did put together another  
10 table for the exhibits.

11           **THE COURT:** For tomorrow?

12           **MR. HOHN:** For Ms. Magin. We can do that tomorrow if  
13 you want.

14           **MR. MILLER:** Yeah, let's do it tomorrow.

15           **THE COURT:** Because you might need to amend it because  
16 of what we --

17           **MR. HOHN:** Correct.

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

19           **MR. HOHN:** It sounds like Ms. George and I are going  
20 to have a conversation on the other issue that we deferred,  
21 so --

22           **THE COURT:** What's the plan tomorrow? We'll get your  
23 witness back up?

24           **MR. RANGLES:** We'll get him back up. I understand  
25 things have been communicated and -- by email, and I think



1 we have smoothed all that out. He will be up -- I expect it  
2 will take a fair portion of the day, and -- between us all,  
3 and then to the extent some day is left, we have the video  
4 deposition of Ms. Bhakta that we can start or finish,  
5 however long it goes.

6 **THE COURT:** Anything else you want to bring up?

7 **MR. MANDLER:** Yes, Your Honor. We've agreed with  
8 plaintiff's counsel to start working on some of the BASF  
9 transcripts of video that will come next. I think we're not  
10 not going to meet tonight but maybe tomorrow night, so we  
11 want to at least put on the Court's radar the possibility,  
12 if we have a few remaining issues that aren't negotiated  
13 out -- and we hope to negotiate most of them, if we could  
14 have some of your time before the beginning of court on  
15 Thursday. So, maybe meet at 8:30 on Thursday.

16 **THE COURT:** That's fine.

17 **MR. MANDLER:** Thank you, Your Honor.

18 **THE COURT:** Okay. We'll be adjourned until 9:00  
19 tomorrow then. Thanks.

20 *(Proceedings adjourned at 5:34 p.m.)*

21 \* \* \* \*

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**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 41, 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