

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,
Plaintiffs,

vs.

Cause No. 1:16CV299 SNLJ

MONSANTO CO., AND BASF CORPORATION,
Defendants.

=====

TRIAL DAY 2
VOLUME 2A PAGES 235 - 358

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

JANUARY 28, 2020

=====

Reported by:

Alison M. Garagnani, CCR #475, CSR, RMR, CRR
Official Court Reporter
United States District Court
555 Independence, Room 3100
Cape Girardeau, MO 63703
(573) 331-8832

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

APPEARANCES:

For Plaintiffs Bader Farms:

Billy R. Randles
Beverly Turina Randles
Angela Marie Splittgerber
RANGLES AND SPLITTGERBER, LLP
5823 N. Cypress Ave.
Kansas City, MO 64119

Tracey F. George
Lawrence Benjamin Mook
DAVIS AND GEORGE LLC
1600 Genessee St.
Suite 328
Kansas City, MO 64102

For Defendant Monsanto Company:

Jan Miller
Sharon Rosenberg
David Dukes
THOMPSON COBURN, LLP
One US Bank Plaza
505 N. 7th Street
Suite 2700
St. Louis, MO 63101

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

I N D E X

Page

JANUARY 28, 2020

Volume 2A

Trial :

STEVEN SMITH:	
DIRECT EXAMINATION BY MR. RANGLES	241
CROSS-EXAMINATION BY MR. DUKES	273
CROSS-EXAMINATION BY MR. BOZARTH	303
REDIRECT EXAMINATION BY MR. RANGLES	329

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

EXHIBIT INDEX

Plaintiffs'

<u>Exhibit</u>	<u>Description</u>	<u>Id</u>	<u>Rec'd</u>
611	Dicamba Advisory Council Member Survey	255	256
621	Discussion Summary	247	247

Deft's

<u>Exhibit</u>	<u>Description</u>	<u>Id</u>	<u>Rec'd</u>
M-346	Pink Sticker for Cotton 2015	298	298
M-348	Pink Sticker for Cotton 2016	300	300
919	Letter dated 10-2-2012	282	282
B-1031	E-mail Exchange Between Paul Rae and Steve Smith	306	306
B-1032	E-mail String Between Mr. Smith and Mr. Rae	312	312
B-1033	E-mail Chain Between Steven Smith and Max Safarpour	316	318
B-1035	E-mail Exchange between Steven Smith and Max Safarpour	323	324
B-1036	E-mail Exchange Christmas Eve of 2016	325	325
B-1039			326
B-1039	E-mail Exchange January 12, 2017	326	

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

APPEARANCES CONTINUED:

For Defendant BASF Corporation:

John P. Mandler
Anthony Finnell
Shane Anderson
Tarifa Laddon
FAEGRE AND BAKER LLP
2200 Wells Fargo Center
90 S. Seventh St.
Minneapolis, MN 55402

Troy A. Bozarth
HEPLER BROOM
130 N. Main Street
P.O. Box 510
Edwardsville, IL 62025-0510

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

T R I A L

The trial resumed on Tuesday, the 28th day of January, 2020, before the Honorable Stephen N. Limbaugh, Jr., United States District Judge, of the Eastern District of Missouri, Southeastern Division, before a jury and two alternate jurors, who were impaneled, selected and sworn.

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

THE COURT: Good morning. Any preliminary matters for Plaintiff?

MR. RANGLES: No. We have a matter that can be taken up at a break or at the end of the day.

THE COURT: For the Defendants?

MR. MILLER: No, Your Honor. Thank you.

MR. MANDLER: None, Your Honor.

THE COURT: So you'll know our new judge, District Judge Pitlyk, is going to come in and watch. She'll be over here with my other law clerk Shane Blank who you met. I had to call in reinforcements.

All right. Are you ready for the jury?

MR. RANGLES: Yes, Your Honor.

MR. MILLER: Yes, Your Honor.

1 THE COURT: We have moved the one juror from your
2 hotel to a different hotel undisclosed. But she's the one
3 from Ripley County so we can go a little bit longer, because
4 she'll be staying here for the rest of the week.

5 (Proceedings resumed in open court.)

6 THE COURT: Be seated, please.

7 Good morning, ladies and gentlemen.

8 Mr. Randles, call your first witness.

9 MR. RANGLES: Thank you, Your Honor. Good
10 morning. The Plaintiff calls as the first witness Mr. Steve
11 Smith.

12 (A discussion was held off the record.)

13 THE CLERK: Come forward and be sworn, please,
14 Mr. Smith.

15 STEVEN SMITH,
16 being produced and sworn, testified as follows:

17 THE COURT: You may proceed.

18 MR. RANGLES: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. RANGLES:

21 Q. Good morning, Mr. Smith.

22 A. Good morning.

23 Q. Can you tell us -- state your name for the record.

24 A. Steven Smith.

25 Q. Okay. And who do you work for?

1 A. I'm the Senior Director of Agriculture for Red Gold,
2 Incorporated.

3 Q. And that's a tomato canning company?

4 A. That's correct.

5 Q. And can you just tell us very briefly what your job
6 entails.

7 A. My job in simple terms would be everything it takes to
8 go from breeding through delivering tomatoes to the factory
9 and then paying the growers.

10 THE COURT: Would you pull the microphone up.

11 Yeah, that's better.

12 BY MR. RANGLES:

13 Q. Mr. Smith, I just want to get a little bit of your
14 background. Have you farmed throughout your life?

15 A. I grew up on a farm, and I have never really left that
16 way of life.

17 Q. And you maintain your own personal farm?

18 A. That's correct.

19 Q. Now, you handle a number of public policy issues for Red
20 Gold Tomato; is that right?

21 A. That's correct.

22 Q. And one of the issues that came to your attention
23 several years ago was the coming dicamba tolerant system;
24 right?

25 A. That's correct.

1 Q. Okay. Can you tell us how -- and there came a point
2 when you heard about something called the Dicamba Advisory
3 Council; correct?

4 A. That's correct.

5 Q. Could you tell the jurors how you first heard about the
6 Dicamba Advisory Council.

7 A. Previous to knowing about that I had been involved in a
8 lot of off-target movement cases and had become involved in
9 some ways to try to limit off-target movement and was making
10 a presentation at the Sysco Corporation, the food service
11 business that supplies restaurants and hotels and things.

12 And I was making a presentation there, and there was
13 a Monsanto representative at that meeting that heard me
14 making a presentation. And during one of the breaks, he
15 caught me and asked if -- and told me that there was going to
16 be one of these and asked if I might be interested in
17 participating.

18 Q. Okay. And we're going to get into the details in a
19 moment. One preliminary matter I want to mention to you. Is
20 anyone paying you to be here today?

21 A. No.

22 Q. Has anyone subpoenaed you to be here today?

23 A. No.

24 Q. So you're here of your own volition?

25 A. Yes, sir.

1 Q. So after you heard about the Dicamba Advisory Council,
2 did there come a point in time when you decided to join?

3 A. They asked me to, and I readily agreed.

4 Q. And did you receive any information about the council
5 other than what you've said before the first meeting?

6 A. We got some notifications about travel and things like
7 that, but prior to getting, I think, the first agenda I
8 really didn't know too much about what it was going to
9 entail, just that they want to get people from different
10 backgrounds and different segments of the agriculture
11 industry to represent what was going on in their part of this
12 matter.

13 Q. And did anyone from Monsanto ever explain to you why
14 they picked you, what your role was to be?

15 A. I think it was probably because I was becoming kind of a
16 spokesman for the specialty crop industry. And I am
17 assuming that they needed someone from that segment to speak
18 about those issues. And maybe my work on some other things
19 might have brought them to the fact that I might be a good
20 representative on that.

21 Q. You know the jurors have heard the term specialty
22 product. Would you give us a definition of what you mean
23 when you use that term?

24 A. Well, generally I would refer to any crop that's not the
25 traditional commodity crops. So it would corn, soybeans,

1 cotton, those would all be what I would term the commodity
2 crops. And so specialty crops would be in our case
3 tomatoes, processing tomatoes, but vineyards, pumpkins,
4 melons, just anything outside of the regular commodity world.

5 Q. Would peaches be in the category of specialty crops as
6 you use the term?

7 A. Peaches, orchards, all those types of plants.

8 Q. And did there come a time when you had your first
9 meeting of the Dicamba Advisory Council?

10 A. Yes.

11 Q. And where was that?

12 A. It was held in St. Louis.

13 Q. At Monsanto headquarters?

14 A. The first meeting was at the Hilton downtown.

15 Q. Did you understand Monsanto to be your host at that
16 meeting?

17 A. Yes.

18 Q. Did you know whether anyone from BASF was present at
19 that first meeting?

20 A. I didn't make any acquaintance with BASF, but I would
21 assume that probably somebody was there from BASF.

22 Q. Did there come a time when you discovered that BASF also
23 participated in the Dicamba Advisory Council?

24 A. When I saw the names of the people.

25 Q. At that first meeting -- Mr. Smith, I want to show you

1 Plaintiff's Exhibit 621. Do you see that on your screen?

2 A. No, sir.

3 Q. Okay.

4 THE CLERK: Has it been admitted?

5 MR. DUKE: Your Honor, no further objections for
6 the Defendant on behalf of Monsanto.

7 MS. GEORGE: It's not showing up.

8 THE CLERK: Has it been admitted? I'm sorry.

9 MR. RANGLES: I was trying to show the witness, so
10 he could identify it for the Court.

11 THE COURT: Right. That's fine. It's just not
12 for the jury.

13 MS. GEORGE: Yeah, just for the witness and --

14 THE CLERK: Hopefully this will work.

15 MR. MANDLER: I don't have an objection, Your
16 Honor, but I assume he still has to move to admit exhibits
17 that haven't been admitted.

18 THE COURT: Right.

19 MR. RANGLES: I was just showing it to the witness.

20 MR. MANDLER: All right. Thank you.

21 (A discussion was held off the record.)

22 BY MR. RANGLES:

23 Q. Mr. Smith, do you see what's been marked as Plaintiff's
24 Exhibit 621?

25 A. Yes, sir.

1 Q. And this is a document you provided to us; correct?

2 A. That's correct.

3 Q. And how did you receive this document?

4 A. It would have come from the Adayana Group that was
5 facilitating that first meeting.

6 Q. Okay. So this was the group facilitating it for
7 Monsanto?

8 A. That's correct.

9 Q. And you were sent this discussion summary of what
10 occurred; correct?

11 A. That's correct.

12 (Plaintiff's Exhibit No. 621, Discussion Summary,
13 was identified.)

14 MR. RANGLES: Your Honor, I move to admit
15 Plaintiff's Exhibit 621.

16 THE COURT: Any objection?

17 MR. DUKES: No additional objections, Your Honor.

18 THE COURT: It's admitted.

19 MR. MANDLER: No objection.

20 (Plaintiff's Exhibit No. 621, Discussion Summary,
21 was received.)

22 MR. RANGLES: May we publish it?

23 THE COURT: Yes.

24 MR. RANGLES: Thank you.

25 BY MR. RANGLES:

1 Q. If you take a look at this document, the first page
2 lists attendees; correct?

3 A. That's correct.

4 Q. And you are listed in the first column. Do you see
5 that?

6 A. Yes.

7 Q. And then toward the bottom we have -- we have Phil
8 Miller from Monsanto, Kim Magin from Monsanto.

9 A. Yes.

10 Q. And then there's some other folks from Monsanto in the
11 second column. Do you see that?

12 A. Yes.

13 Q. And I won't ask you if you remember everyone by name or
14 anything, but I'd like to turn to the second page of this
15 document. And I'd like to go to -- no, it's actually page 2
16 at the bottom is what I'm looking for. It has discussion
17 summary at the top.

18 I'd like to start with number three, which says,
19 "Overview and Expectations of the Dicamba Advisory Council."
20 Do you see that?

21 A. Yes.

22 Q. And we pulled out a little bit of language here that
23 says, "Proactively identify potential issues and
24 opportunities that might arise with the launch of dicamba
25 tolerant soybeans." Was that what you were told and your

1 understanding that was one of the purposes at the time?

2 A. Yes.

3 Q. The second part there says, "Engage industry
4 stakeholders from a variety of fields involved with the
5 dicamba tolerant technology to gain insights and
6 perspectives." And is that also what you were told?

7 A. Yes. Yes.

8 Q. And I assume you were -- you regard yourself as one of
9 the industry stakeholders?

10 A. That's correct.

11 Q. And, three, "Equip stakeholders with information,
12 resources, tools and best management practices necessary to
13 ensure responsible usage of the product, which will" it says
14 'untimely' but when I read this, I believe it actually
15 probably means "ultimately will provide benefits to all
16 parties." Was that your general understanding --

17 A. Yes.

18 Q. -- that they were -- and then it goes on to say,
19 "Expectations of the Council" right below that. "Provide
20 candid input and perspectives on the dicamba tolerant
21 technology as it is being developed."

22 And I want to pause there. Did you attempt to
23 provide candid input?

24 A. Yes, sir, I did, at every opportunity.

25 Q. And we're going to go into more detail here, but as a

1 general matter what reception did your input receive?

2 A. It was always cordial. There was -- I never felt like
3 I couldn't speak up. And so, yeah, I would generally say it
4 was cordial in listening to what I said.

5 Q. Did you feel your advice -- did it seem like your advice
6 was taken to heart?

7 A. No, sir.

8 Q. And we will deal with it a little bit more. I want to
9 turn to what's marked as page 3 at the bottom of this
10 document. And there are a number of things in here, but I
11 actually want to go basically to the bottom of the third of
12 the page. Do you see where it says collectively figure out
13 how to make dicamba land on the target area and stay in the
14 target area?

15 A. Yes.

16 Q. Was that a subject of discussions?

17 A. It was most definitely a subject of -- the latter part
18 of that was my discussions. And then they spent a little
19 time with people on the committee that were applicators and
20 those types of people that -- from the science ratification
21 of how to get it to where they wanted it and then lots of
22 discussion about how to make it stay there.

23 Q. And so from the very first meeting this was a concern
24 that was being discussed --

25 A. Yes.

1 Q. -- about dicamba, how to make it stay put?

2 A. Yes.

3 Q. Was there a particular perspective about staying put the
4 Monsanto representatives communicated to you?

5 A. They were pretty convinced it was going to stay put.

6 Q. And this was back in 2009 was this first meeting;
7 correct?

8 A. That's correct.

9 Q. So you were talking at that time about older dicamba, is
10 that correct, or are you talking about prospective products
11 that hadn't been developed yet?

12 A. At that time it was the DJA formula formulation.

13 Q. Used in what brand?

14 A. Clarity was the brand name that was used even though
15 there was discussion about all the generic versions, but
16 Clarity was the brand name.

17 Q. So you were receiving input from the Monsanto people
18 that they believed Clarity could be made to stay put?

19 A. That's correct.

20 Q. And I take it -- did you express skepticism about that?

21 A. Absolutely.

22 Q. Did anyone else on the committee address skepticism
23 about that?

24 A. Yeah. I don't remember too many others. When you look
25 at the list on there, most of the other people did not have

1 as many reasons to talk about that as what I did.

2 Q. I want to turn page 4 of this document. And I want
3 to -- the fourth bullet point down says, "Address fears both
4 real and unfounded." Did I read that correctly?

5 A. Yes.

6 Q. And then underneath it actually talks about "Develop the
7 ability to have appropriate candid discussions," and that's
8 what you-all talked about.

9 And then you gave an example about damage Red Gold
10 suffered from drift in the past?

11 A. That's correct.

12 Q. Then there's a bullet point that says, "Determine plan
13 for supporting specialty growers through minimizing drift, et
14 cetera." Do you see that?

15 A. Yes.

16 Q. Do you recall discussing that at the time?

17 A. No.

18 Q. And then as you go down to the bullet point about a
19 third of the way from the bottom it says, "Develop two-way
20 communication between Monsanto and council and between
21 council and stakeholders."

22 And then it says, "Monsanto wants to hear the good,
23 the bad, the ugly." Did I read that correctly?

24 A. Yes.

25 Q. Over the course of your time on the committee when you

1 provided Monsanto with the bad and the ugly, how was that
2 received?

3 A. Again, the appearance was cordial. Did I ever get the
4 feeling that they were really hearing what I was saying? I
5 would say, No. That it was more of, okay, we want to hear
6 what you have to say. Thank you for saying it. And in a
7 way that I actually felt a little bit of a condescension
8 about the way they handled that.

9 Q. Did they ever convey to you any intention to act on any
10 of the things -- any of the issues you raised about concerns
11 about specialty crops?

12 A. Well, they would -- they would say we hear you and
13 that's something we'll talk about. But did I ever get the
14 feeling that really anything was going to happen with that?
15 No.

16 Q. And since you were discussing what's known as the brand
17 name Clarity, although it sold under other names, at this
18 meeting in 2009, how did they characterize the volatility of
19 Clarity at that time?

20 A. They always characterized it as low volatile.

21 Q. So they called Clarity a low volatility formula in 2009?

22 A. That's correct.

23 Q. Was there a second in-person meeting in 2010?

24 A. Yes.

25 Q. And you attended that as well?

1 A. Yes.

2 Q. Were the topics similar that were discussed then?

3 A. Very similar.

4 Q. Was there any material difference in the discussion that
5 you recall between the second in-person meeting and the first
6 one?

7 A. No.

8 Q. Okay. So you again were raising your special crop
9 concerns?

10 A. Yes. I made sure that any time that subject came up
11 that I was faithful to give the input that I was invited to
12 join for.

13 Q. And you talked about volatility again?

14 A. I talked about volatility. I talked about drift,
15 regular off-target movement by drift, but certainly
16 volatility. And I talked about two other things. I talked
17 about residue tolerance and an indemnity fund.

18 Q. Now, there were further meetings of the Dicamba Advisory
19 Council, but they were all by phone; is that correct?

20 A. That's correct.

21 Q. Okay. And do you recall how many of those you
22 participated in by phone?

23 A. I don't remember how many there were.

24 Q. Okay. More than one, but --

25 A. Yes.

1 Q. Okay.

2 MR. RANGLES: So, Your Honor, I would like to show
3 the witness and the Court Plaintiff's Exhibit 611.

4 MR. DUKE: No further objection, Your Honor.

5 MR. RANGLES: We move for the admission of this
6 document, Your Honor.

7 THE COURT: It ought to be identified first.

8 MR. RANGLES: Oh, I guess that would be useful.

9 BY MR. RANGLES:

10 Q. Mr. Smith, do you see this document?

11 A. Yes.

12 Q. We actually managed to have mistakenly have the pages
13 out of order, but if you look at the second page of the
14 document, it says, "Dicamba Advisory Council member survey."
15 Do you see that?

16 A. Yes.

17 (Plaintiff's Exhibit No. 611, Dicamba Advisory
18 Council Member Survey, was identified.)

19 BY MR. RANGLES:

20 Q. Do you recall receiving this from the Adayana Group?

21 A. Yes.

22 Q. Okay. And they were still facilitating this process for
23 Monsanto; correct?

24 A. Correct.

25 MR. RANGLES: Your Honor, I move for the admission

1 of Plaintiff's Exhibit 611.

2 THE COURT: There being no objection, it's
3 admitted.

4 (Plaintiff's Exhibit No. 611, Dicamba Advisory
5 Council Member Survey, was received.)

6 MR. RANGLES: If we may publish it to the jury,
7 Your Honor.

8 THE COURT: You may.

9 MR. RANGLES: Thank you.

10 BY MR. RANGLES:

11 Q. I want to turn to -- yes, that second -- that page
12 that's up right now, and it says. "Dicamba Advisory Council
13 member survey." Do you see that?

14 A. Yes.

15 Q. And I want to look at the -- did you receive this as a
16 member of the Dicamba Advisory Council?

17 A. Yes.

18 Q. And question two says, "How would you improve the
19 dicamba council -- Dicamba Advisory Council experience?" Did
20 I read that correctly?

21 A. Yes.

22 Q. And underneath is actually your answer to this question
23 that you sent back in; is that correct?

24 A. That's correct.

25 Q. And I want to look at the last three sentences or so

1 that you say in your answer starting with the word
2 "certainly." "Certainly from my standpoint discussions
3 about research and how best to implement your program seems
4 way more important. We are beyond hearing the benefits of
5 the program. I would think that is what you would most want
6 from us at this point." Is that what you wrote at the time?

7 A. Yes.

8 Q. And so you were -- was this the only time you expressed
9 this concern that they were more interested in implementing
10 the program than listening?

11 A. That's probably the only time it was written, but I -- I
12 could say that I most likely said it in person too.

13 Q. Then question three says, "As we prepare for the next
14 year, what two or three focus areas/topics would be most
15 valuable to you as a participant?" And then below this is
16 your written answer; is that correct?

17 A. That's correct.

18 Q. You said "grower education;" correct?

19 A. Correct.

20 Q. Then you said, "Research on off-target movement;"
21 correct?

22 A. Yes.

23 Q. Why did you say that?

24 A. Because I got the distinct impression that really no one
25 would believe the fact that this stuff would regularly move

1 off-target. And I wanted more research about what that
2 meant.

3 I can remember they gave an example of one time of
4 some of their research, and I raised the issue. It was out
5 in the middle of an 80-acre soybean field, and they were
6 really proud of the fact that they -- out in the middle of
7 that field they took an area that was 50-foot by 50-foot and
8 applied dicamba and then set up puffer units around the
9 outside edge to measure what had gone away.

10 And I asked the question at the time, But do we
11 really know how many parts per million that you're getting in
12 that puffer unit actually makes a difference on the plants?
13 I said I wanted to know how the plants responded and not the
14 actual data of parts per million or parts per billion that
15 you were gathering from that and that a 50-foot by 50-foot
16 research plot was not anything like in the real world if that
17 were an 80-acre field might be sprayed, because the total
18 amount of active ingredient in that little plot by the time
19 it got infiltrated up into the area would be so diluted that
20 the amount captured off of that would not be anything like in
21 the real world like if you were spraying an 80-acre field or
22 if you were spraying 2 or 300 acres in one spot.

23 Q. So when you conveyed those concerns to the Monsanto
24 folks, how did they respond?

25 A. I don't remember the exact response to that, but I can

1 characterize the responses I regularly got about those types
2 of things.

3 MR. DUKES: Your Honor, I object, lack of foundation
4 by which he stated that did not remember the exact response.

5 THE COURT: Overruled.

6 MR. RANGLES: You may go ahead.

7 THE WITNESS: I did not remember the exact
8 response, but it was the typical response of thank you, we
9 appreciate what you're saying, and we'll look into that.

10 BY MR. RANGLES:

11 Q. Let's turn to page 3 of this survey that you filled out,
12 question number 7 there at the top. And it says, "Any
13 general comments on the Dicamba Advisory Council?" And I
14 want to focus on part of your answer here.

15 While I know you are hearing -- you know what, I'm
16 just going to read your whole thing. Let's just do that. "I
17 understand the difficult position I have placed you into with
18 my opposition to the release of dicamba tolerant traits, but
19 at the same time we commend you for allowing full and
20 complete freedom to express our concerns." And you said
21 that to them; right?

22 A. That's correct.

23 Q. And you did appreciate the chance to talk; correct?

24 A. I did appreciate that.

25 Q. And you said that's probably been uncomfortable at

1 times?

2 A. Yes.

3 Q. And then you went on to say, "While I know you are
4 hearing the comments I and others are making, I'm not sure
5 you are really "HEARING" -- and then you put it in caps and
6 in quotes; right?

7 A. That's correct.

8 Q. -- "us to the extent that it is going to make a
9 difference in plans and procedures beyond what was the
10 original plans. I would ask the question reversely, has our
11 message changed your course of action?" That's what you
12 wrote, wasn't it?

13 A. That's correct.

14 Q. And was this a concern that you had that while being
15 heard there wasn't really going to be any responsive action
16 to what you were saying?

17 A. Absolutely that was my concern. And I had seen no
18 movement towards making any of the changes that I felt that
19 needed to be made, particularly between the first and second
20 meeting or at any time thereafter.

21 Q. Did you ever hear a response back from Monsanto folks
22 about your concerns they were not really hearing in a way to
23 show any intention to change any action?

24 A. No, sir.

25 Q. Did you ever see a change in action from the Monsanto

1 folks or the BASF folks that were on the committee that
2 indicated to you they were willing to change their course?

3 A. Not during the time of the Dicamba Advisory Council.

4 Q. Now, did there come a time that you actually testified
5 before Congress?

6 A. That's correct.

7 Q. And can you tell us just in a few sentences what your
8 message to Congress was.

9 A. I had been contacted by Congressman Dennis Kucinich to
10 make a presentation to the subcommittee, the oversight
11 subcommittee, about my concerns where they were doing a
12 series of hearings about some of the GMO concerns that was
13 present at the time.

14 And my name was given to them by another witness that
15 had been at one of the previous hearings and said I might
16 have something to add to that. So they contacted me, and I
17 prepared a statement and delivered it to Congress on
18 September 30th, 2010.

19 Q. And could you give the jurors in a few sentences the
20 gist of what you provided to Congress.

21 A. Sure. There was several statements I made in there.
22 Several I bolded to make the emphasis on it. One of the
23 ones was that I felt the widespread use of dicamba was
24 inconsistent with Midwestern agriculture.

25 I also said that the widespread use of dicamba was

1 the most serious threat to specialty crops of anything I had
2 seen during my time working with specialty crops.

3 I had discussed -- I consider myself an
4 agriculturalist, not just a tomato guy. And I also
5 considered myself as a spokesman for an entire specialty and
6 vegetable crop industry.

7 And so I went into more than just about tomatoes. I
8 went into some of the problems I saw about this technology
9 system to the rural communities.

10 And so I talked about rural acrimony. I talked
11 about what I coined at that time that has been picked up by a
12 lot of people since is the black eye of agriculture, meaning
13 that over the path we were going down was going to cause harm
14 to people outside of agriculture because of the rural home
15 landscapes and the off-target movement into non-agriculture
16 areas that would give all of us in the agriculture world a
17 problem as people became concerned. And let's face it there
18 are a lot of people out in the world that doesn't like what
19 agriculture does all the time.

20 Q. So when you talk about movement into non-agriculture
21 areas, what did you mean by that?

22 A. Well, particularly in our part of the Midwest there are
23 rural homes in almost every field. What used to be an
24 80-acre field is now a 70-acre field with homes along one
25 whole side of it.

1 And I had witnessed and had people tell me about
2 damages to the gardens with regular chemistries being used at
3 that time even before dicamba. And I knew that once -- from
4 my whole upbringing I saw how dicamba would move off-target.
5 And if we were getting that kind of damage with say
6 glyphosate onto rural gardens by -- for example, my tax
7 preparer told me, I haven't had a garden in for three years.

8 MR. DUKES: I object, hearsay.

9 THE COURT: I'll sustain it.

10 BY MR. RANGLES:

11 Q. So you were just talking about damage to homes and lawns
12 and basically non-crops?

13 A. That is correct. And rural acrimony.

14 Q. And what did you mean by rural acrimony?

15 A. The problems that happen when one neighbor hits another
16 neighbor, and they're sitting on a school board together or
17 they're on a church together or sitting next to each other in
18 a pew on Sunday morning.

19 When margins are thin in agriculture and a guy loses
20 his money on his crop because of off-target damage, that's
21 really a stress on the rural community. And I know that's
22 been a problem.

23 Q. So you addressed these issues in your testimony to
24 Congress?

25 A. That's correct.

1 Q. Did you ever receive any reaction from Monsanto or BASF
2 to your congressional testimony?

3 A. No.

4 Q. Now, during the time that you were on the Dicamba
5 Advisory Council -- we're going to break this into while you
6 were on and after. We talked a lot about Monsanto. Did you
7 have interactions with people from BASF during this same time
8 period?

9 A. There was one interaction in November of 2010.

10 Q. Can you describe that for the jury?

11 A. Sure. There were a group of four people from BASF
12 that -- well, the person who contacted me was Paul Rae and
13 said that they would like to come visit with me about the --
14 they no doubt had heard about my congressional testimony and
15 knew some of my opposition to this. And so they asked if
16 they could come and sit down and talk, and four people came.

17 Q. Yeah. That's where I was headed. Do you remember who
18 the four people were?

19 A. Paul Rae, Dan Pepitone, Steve Bowe and I guess I don't
20 remember the fourth person.

21 Q. And what -- what did they tell you from their
22 perspective was the purpose of the meeting?

23 A. Well, they wanted -- they wanted just to allay my fears
24 about the volatility issue in particular with Clarity, that
25 it was a low volatile product and that they really wanted

1 to -- to make me feel better about what the technology was
2 going to bring in terms of how it's going to affect specialty
3 crops.

4 Q. What did you convey back to them from your perspective?

5 A. I told them that I wasn't buying into what they were
6 saying in terms of off-target movement, particularly
7 volatility and also the fact that there was no residue
8 tolerance, so there's an additional threat that not only if
9 we get hit with an off-target movement it would not just be a
10 yield loss but it would be a crop destruct situation.

11 Q. Was there anything else about this meeting with BASF
12 that you remember that we haven't talked about?

13 A. I remember that I was impressed that they made the
14 effort to come. It was the day before Thanksgiving, and it
15 was not very good weather, and everybody was kind of
16 concerned if they were even going to get home.

17 Q. Did the folks from BASF indicate any intention to change
18 their course of conduct based on your conversation?

19 A. No, sir.

20 Q. During this period, did you form or help form something
21 called Save Our Crops Coalition?

22 A. That actually occurred in 2011.

23 Q. And in brief what is Save our Crops Coalition?

24 A. Well, the problems of what I envisioned was way beyond
25 just my own company, and it appeared to me that there were a

1 lot of people that were going to be affected that really had
2 no voice.

3 And so it was kind of people knew that I was really
4 interested in this and had been a part of some things, and so
5 through a lot of discussions with a lot of contemporaries, we
6 came to the conclusion that we needed to do something a
7 little bit more formal, to hire some professional legal help
8 and to do some things to try to make a change, because it
9 became quite apparent that the changes we were asking for
10 through the dicamba council and through individual meetings
11 didn't seem to be happening.

12 Q. Okay. Now, I don't want to go into detail at the
13 moment. It may come up later. But did you also during this
14 period do some consulting with Dow Chemical Company about one
15 of their products?

16 MR. DUKE: Objection, relevance and Rule 403.

17 THE COURT: Do you want to address that?

18 MR. RANGLES: We discussed this in a motion in
19 limine. I thought it was an issue they wanted to address.
20 I'm raising it. I don't have any interest in it myself.

21 THE COURT: Okay.

22 BY MR. RANGLES:

23 Q. Did there come a time when you were removed from the
24 Dicamba Advisory Council?

25 A. That's correct.

1 Q. Can you tell us how that came about?

2 A. I got a call from Kim Magin that she wanted to have a
3 meeting with me. And she drove -- actually, drove all the
4 way from St. Louis to our offices in Indiana to come have a
5 meeting and wanted to discuss some things. She did not
6 indicate what that was at the time, but she wanted to have
7 some discussions.

8 Q. Okay. So she came to you in Indiana?

9 A. That's correct.

10 Q. And at this in-person meeting what did she tell you?

11 A. Well, she first asked if I wanted to stay on the
12 committee. She knew that I had given the congressional
13 testimony in opposition and that we had started the Save
14 Our Crops Coalition, and she asked if I -- knowing that if I
15 wanted to stay on the committee.

16 I said I absolutely did, because I felt so strongly
17 that if this was going to come about, I at least wanted to be
18 able to give all the input that I could possibly give and try
19 to effect as many changes as I could effect. So I said I'd
20 definitely wanted to stay on.

21 Q. And then what was her response to your desire to stay
22 on?

23 A. We need to go a different direction.

24 Q. Did she give you any more detail than that?

25 A. She said that in the different direction that they would

1 like to maintain some dialog with me to continue to hear some
2 of my concerns, but it needed to be in a different way than
3 on the advisory council.

4 Q. And did she say anything else about why Monsanto was
5 going to remove you from the Dicamba Advisory Council?

6 A. Not that I recall.

7 Q. So after your removal from the Dicamba Advisory Council,
8 had you continued to have interactions with people from
9 Monsanto and people from BASF?

10 MR. BOZARTH: Objection, compound question.

11 THE COURT: I still didn't hear you.

12 MR. BOZARTH: Compound question.

13 THE COURT: What was the question again?

14 MR. RANGLES: Did he continue to have interactions
15 with the folks from Monsanto and BASF?

16 THE COURT: Overruled.

17 MR. RANGLES: Okay.

18 THE WITNESS: Yes. In different forms at
19 different times.

20 BY MR. RANGLES:

21 Q. Could you generally characterize the interactions with
22 the folks from Monsanto first?

23 A. Yes. Following my removal from the advisory council
24 in -- that was in February of '12. In June of '12 I received
25 correspondence from Kim Magin following up that they did want

1 to continue discussions with me.

2 And at that time -- before that time -- after my
3 removal, it came to my attention that they had told the other
4 members of the advisory council that I had resigned from the
5 council, and I did not resign. I very made it quite clear I
6 wanted to maintain my position on that, but they had told the
7 people that I had resigned.

8 So when Kim contacted me in June, I said, yes, I
9 agreed that I would want to talk with you guys, but there's
10 one thing that had to happen first, and that is that you had
11 to set the record straight that I did not resign from the
12 advisory council.

13 Q. And what was her reaction?

14 A. She didn't understand why that was a concern for me.

15 Q. What -- do you know whether it was eventually corrected?

16 A. It took a while. She wrote again in July again wanting
17 to set that up. And I said I -- I told you that I would be
18 glad to do that, but we had to set the record straight about
19 my resignation or lack of resignation.

20 I got a call from somebody, and I forget who it was,
21 in August again wanting to start some dialogue, and I said I
22 made that pretty clear I'd be glad to do that, but we have to
23 set the record straight about the resignation.

24 In September as I -- it was actually September 12th I
25 remember because on September 11th we had signed an agreement

1 with Dow Agrosciences agreeing to several --

2 MR. DUKES: Your Honor.

3 MR. RANGLES: Let's not really go into Dow if you
4 don't mind. Let me just ask you -- I'm sorry.

5 THE COURT: Okay.

6 MR. RANGLES: Okay?

7 MR. DUKES: Can I just move to strike that?

8 THE COURT: It's stricken.

9 BY MR. RANGLES:

10 Q. Okay. So September 12th were you informed in some way
11 the record had been corrected about you not resigning from
12 the council?

13 A. No. They called again and said, We would like to
14 discuss what you did. And I said, That's good, and we've
15 had this discussion, but I'm not going to do anything until
16 we fix the situation about me resigning from the council.
17 And their response was at that time is, We've been told we
18 can't do that.

19 Q. Did they say who told them they couldn't fix the -- the
20 record?

21 A. No. The exact quote was, We've been told we can't do
22 that.

23 Q. So to your knowledge was the Dicamba Advisory Council
24 ever apprised of the fact that you were removed and did not
25 resign?

1 A. Yes. A couple of weeks later I got another call and
2 said, Okay. We will do that. And I said, Okay, I'd like
3 that in writing. And their response was, What are you going
4 to do post it on your website? I said, No. I just want it
5 in writing of the situation. And they said, Well, we'll see
6 what we can do.

7 And four or five days later a letter came in the mail
8 that did indicate that I was removed for conflict of
9 interest.

10 Q. So when -- after that did you resume some conversations
11 with Monsanto people about the dicamba system?

12 A. Yes. That fulfilled my requirement that the record was
13 made straight. They did not send general -- a general
14 notice to the rest of the Dicamba Advisory Council. They
15 called each one individually. And I did check and make sure
16 that that did happen.

17 And so we did arrange for another meeting. And I
18 believe it was early December of '12. And Kim and I forget
19 who else came again to our office, and we had discussions
20 about where we were now with the -- with the technology and
21 what was happening.

22 Q. Okay. And so just to generally summarize the
23 conversation from Monsanto from the beginning to the end were
24 you consistent in your message you were providing your
25 concerns about specialty crops and off-target movement?

1 A. I absolutely was consistent. I am of the opinion that
2 when all this was done, if I had to look at myself in the
3 mirror, I wanted to make sure I had no regrets, that I did
4 not leave anything undone.

5 Q. And did you ever see any indication or have any
6 indication from the folks at Monsanto that any of your
7 discussion and concerns about volatilization, off-target
8 movement and harm to sensitive crops had any impact on their
9 course of conduct?

10 A. I did not see any changes.

11 Q. Now, after your removal from the Dicamba Advisory
12 Council, did you have some ongoing communications with the
13 folks from BASF?

14 A. Not until December of '14.

15 Q. And how did that come about?

16 A. I received a phone call from one of their lead technical
17 people, Max Safarpour, saying that he had heard that I had
18 given testimony at the Arkansas Plant Board and he had not
19 under -- he had not understood that there was a group that I
20 was involved in with that and he was a little bit dismayed
21 that we had never had any discussions.

22 MR. RANGLES: Your Honor, I'm going to leave for a
23 couple questions to avoid the motion in limine ruling.

24 THE COURT: Okay.

25 BY MR. RANGLES:

1 Q. In terms of these conversations with Mr. Safarpour of
2 BASF, did you discuss things like the potential safe use of
3 the product, safety buffers and other elements whereby the
4 product might be safely used?

5 A. Yes. That was always part of my discussion.

6 Q. And you had more than one conversation with him around
7 these subject matters, didn't you?

8 A. Yes.

9 Q. Okay. How would you characterize your reception
10 from -- by Max Safarpour and BASF?

11 A. It was refreshing actually.

12 Q. What do you mean by that?

13 A. I never felt the condescension of previous meetings.

14 Q. And on those subjects we've discussed did Max actually
15 take some of your ideas on behalf of BASF and implement them?

16 A. Yes.

17 Q. Mr. Smith, I thank you for your time and your
18 testimony, and I hand the witness over.

19 MR. DUKES: Thank you, Your Honor.

20 May it please the Court?

21 THE COURT: Yes.

22 CROSS-EXAMINATION

23 BY MR. DUKES:

24 Q. Good morning, Mr. Smith.

25 A. Yes.

1 Q. My name is David Dukes. I'm one of the lawyers
2 representing Monsanto. We have never met, have we?

3 A. No.

4 Q. So the jury kind of understands what the range of your
5 testimony is I have a few preliminary questions. You've
6 never visited Bader Farms, have you?

7 A. That's correct.

8 Q. And you've not even looked on the map to see where Bader
9 Farms is located; correct?

10 A. That's correct.

11 Q. As far as you know you don't know anyone in Dunklin
12 County, Missouri, do you?

13 A. No.

14 Q. And, as I understand it, you're a lifelong resident of
15 Indiana?

16 A. That's correct.

17 Q. And you also do not know which fields in Dunklin County
18 were planted with Xtend crops, do you?

19 A. No.

20 Q. And you do not know any fields in Dunklin County that
21 were treated with dicamba specifically, do you?

22 A. No.

23 Q. And you personally have no evidence that the dicamba was
24 ever on Mr. Bader's farm, do you?

25 A. Not personally.

1 Q. And you do not have any evidence of a single peach tree
2 on Bader Farms dying because of dicamba, do you?

3 A. No.

4 Q. Now, let's go back to your background. You've got a
5 general degree in agriculture; correct?

6 A. That's correct.

7 Q. But you do not have a degree in weed science, do you?

8 A. No. It was a general agriculture with distinction.

9 Q. And you do not have a degree in plant pathology;
10 correct?

11 A. That's correct.

12 Q. And you do not have a degree in plant physiology; is
13 that right?

14 A. That's correct.

15 Q. And you do not have a degree in chemistry?

16 A. That's correct.

17 Q. And you do not have a masters or a Ph.D.; right?

18 A. That's correct.

19 Q. Now, you agree that you're not an expert in peach
20 production; correct?

21 A. That's correct.

22 Q. And your background other than your personal farm it
23 really has been you work with tomatoes; is that fair?

24 A. Professionally, yes.

25 Q. Now, you talked about dicamba on your Direct, but isn't

1 it true that from a chemical standpoint you do not know the
2 chemical differences between the various versions of dicamba;
3 is that right?

4 A. Well, only to the extent from research I've read about
5 the differences.

6 Q. Okay. And you've not personally conducted any peer
7 review research related to dicamba, have you?

8 A. I participated in a study with Purdue, but it was a
9 study Purdue did.

10 Q. In other words, it wasn't a peer review you published in
11 the literature?

12 A. That's correct.

13 Q. Now, let's go back to your employment. So Red Gold is a
14 large canner of tomato products; correct?

15 A. Correct.

16 Q. And they purchase from contract tomato farmers the
17 tomatoes: Is that how the operation works?

18 A. Yes.

19 Q. And in 2003 Red Gold, a company that you work for, had a
20 situation where there was glyphosate drift to some of the
21 tomatoes being grown by some of the farmers; is that right?

22 A. That's correct.

23 Q. And then again in 2009 Red Gold experienced I guess
24 through some of its contract farmers another glyphosate drift
25 on those tomatoes; right?

1 A. It was actually 2008. We had experiences in '07 and
2 '08.

3 Q. So isn't it true that since 2008 after those experiences
4 that you've been on a path to stop the production of Xtend
5 crops?

6 A. There was to my knowledge not an Xtend crop system that
7 I knew about then. But I can tell you that once I found out
8 that dicamba was likely to be sprayed in the midst of every
9 other crop in our part of the world that, bothered me a lot.

10 Q. And because of that bother you tried to prevent the
11 deregulation of Xtend seed, didn't you?

12 A. We did not do anything with the deregulation of the
13 seed.

14 Q. And just so the jury understands, unless the seed is
15 deregulated it cannot be sold; correct?

16 A. That's correct.

17 Q. Now, your testimony is that you did not try to prevent
18 the deregulation of Xtend seed?

19 A. Not that I remember. We did some other things. We
20 petitioned about residue tolerances. We petitioned for an
21 environmental impact study. We petitioned for a scientific
22 advisory panel.

23 Q. And were those things actually conducted?

24 A. Yeah. The EIS was conducted. I don't recall for sure
25 about the scientific advisory panel. And the residue

1 tolerance petition is still sitting at the EPA.

2 Q. Is it fair to say that you were frustrated about the
3 fact that Xtend seed was allowed to be sold?

4 A. Well, it's a concern. You know, whether frustrated is
5 the right word. As a person that's very concerned about the
6 way agriculture is viewed in the world and all the other
7 concerns, yes, it's definitely a concern.

8 Do I get frustrated? No, I don't think I would say
9 I'm frustrated about it, but it's a -- professionally as a
10 business representative for our company it could wipe us out
11 if the wrong thing happened.

12 Q. And let's talk about your time on the dicamba advisory
13 committee. As I understand it, you were invited to
14 participate on the dicamba advisory committee or council in
15 2009; is that correct?

16 A. That's correct.

17 Q. And when Monsanto invited you to participate on the
18 Dicamba Advisory Council, they were aware that you had
19 concerns about off-target movement, weren't they?

20 A. They should have been, yes.

21 Q. I mean, you were outspoken about that, and that's
22 something they would have known when they invited you to be
23 on the council?

24 A. Yes. I had made a couple of presentations already to
25 the Indiana Pesticide Review Board saying that this is

1 something that we're going to have to address in the future.

2 Q. And you served on the Dicamba Advisory Council until
3 February 9, 2012; is that right?

4 A. That's correct.

5 Q. And in 2010 you mentioned this in your direct testimony
6 when you were a member of the Dicamba Advisory Council, you
7 provided testimony to Congress that was adverse to Monsanto,
8 wasn't it?

9 A. I guess I wouldn't characterize it that way. I
10 presented testimony to Congress about what I believed was a
11 problem with the widespread use of dicamba.

12 MR. DUKES: Could I have Mr. Smith's deposition?

13 Your Honor, may I approach the witness?

14 THE COURT: You may.

15 BY MR. DUKES:

16 Q. Mr. Smith, you recall having your deposition taken last
17 week; correct?

18 A. Yes.

19 Q. And a deposition, for the benefit of the jury, is a
20 situation like this when you're under oath and a lawyer asks
21 you questions, but you were in a conference room somewhere in
22 Indiana; is that right?

23 A. That's correct.

24 Q. But you understood at the time you were under same oath
25 that you're under today to tell the truth?

1 A. That's correct.

2 Q. Now, if we would turn to page 36 of your deposition.
3 Just let me know when you get there.

4 A. I've got it.

5 Q. And I'll direct your attention to lines 15 through 18,
6 and you were asked a question. "And you then in 2010 you
7 testified before Congress that it was adverse to Monsanto;
8 isn't that correct?" And your answer was, "That's correct."
9 Did I read that correctly?

10 A. Yes.

11 Q. Now, the subject of your testimony before Congress was
12 that you did not believe that dicamba tolerant crops should
13 be approved for sale; isn't that fair?

14 A. Absolutely. That's fair.

15 Q. And everything you discussed in your testimony with
16 Congress occurred before the commercialization of the Xtend
17 seed, didn't it?

18 A. Yes.

19 Q. And everything you said to Congress was prior to the
20 discovery of XtendiMax with VaporGrip, wasn't it?

21 A. Yes.

22 Q. Now, even after that testimony to Congress, which was
23 adverse to Monsanto, you stayed on the Dicamba Advisory
24 Council for almost two years after you testified before
25 Congress; is that correct?

1 A. About a year and a half.

2 Q. And Monsanto was aware of your testimony?

3 A. Correct.

4 Q. And they didn't kick you off of the Dicamba Advisory
5 Council, did they?

6 A. Not at that time.

7 Q. Now, in 2011 you began to form the Save Our Crops
8 Coalition; is that right?

9 A. That's correct.

10 Q. And in 2012 you publicly announced the formation of the
11 Save Our Crops Coalition?

12 A. Correct.

13 Q. As part of that announcement you stated that one of your
14 goals was to stop Xtend crops from being commercialized;
15 correct?

16 A. That's correct.

17 Q. Now, after you announced the formation of the Save Our
18 Crops Coalition, whose stated goal was to stop the sale of
19 the Xtend crops, you were asked by Monsanto at that time to
20 no longer serve on the Dicamba Advisory Council; is that
21 correct?

22 A. That's correct.

23 Q. Now, there was some conversation on Direct about receipt
24 of a termination letter, a letter reflecting that you were
25 asked to leave the Dicamba Advisory Council; correct?

1 A. That's correct.

2 Q. And let me give you a copy of Defendants' Exhibit 919.

3 MR. DUKES: May I approach, Your Honor?

4 THE COURT: Yes.

5 BY MR. DUKES:

6 Q. Now, if you take a look at Defendants' Exhibit 919,
7 you've seen that before; correct?

8 A. Yes.

9 Q. And this is the letter from Monsanto dated October 2,
10 2012, to you that confirms that you had been asked because of
11 a conflict of interest to be terminated from -- I'm sorry,
12 you had been terminated from the Dicamba Advisory Council;
13 correct?

14 A. Correct.

15 (Defendants' Exhibit No. 919, Letter dated
16 10-2-2012, was identified.)

17 MR. DUKES: And, Your Honor, I move to admit
18 Defendants' Exhibit 919 in evidence.

19 MR. RANGLES: No objection.

20 MR. BOZARTH: No objection, Judge.

21 THE COURT: It's admitted.

22 (Defendants' Exhibit No. 919, Letter dated
23 10-2-2012, was received.)

24 MR. DUKES: If we can publish that.

25 THE COURT: Yes.

1 BY MR. DUKES:

2 Q. So this is a letter dated October 2, 2012, to you from
3 Kim Magin; correct?

4 A. Yes.

5 Q. And this is the letter that you had requested several
6 times; right?

7 A. It was -- I only requested the letter in one instance,
8 but this is the letter that I did request.

9 Q. Got it. And it says, "Dear Steve: Thank you for your
10 service to our Dicamba Advisory Council. Due to a conflict
11 of interest, we have asked that you no longer serve on our
12 advisory council."

13 The next paragraph, "We want to continue to talk to
14 you and other stakeholders as we prepare the successful
15 launch of this new tool for farmers. Sincerely, Kim Magin."
16 Did I read that correctly?

17 A. Yes.

18 Q. And once you got that letter, that satisfied your
19 concern about communication from Monsanto that reflected that
20 you'd been asked to leave the Dicamba Advisory Council;
21 correct?

22 A. Yes.

23 Q. Now, if we could pull up Plaintiff's 621, which is
24 already into evidence, Your Honor.

25 These were the discussions -- Exhibit 621 was

1 discussions that you had about the notes from the Dicamba
2 Advisory Committee. And this is the first page of that which
3 we published.

4 And if we look at that, also on the Dicamba Advisory
5 Committee was Dr. Stanley Culpepper from the University of
6 Georgia; correct?

7 A. Correct.

8 Q. And Scott Ridenour from the University of Illinois?

9 A. Correct, yes.

10 Q. Culpepper. And Laura Jesse from Iowa State University?

11 A. Yes.

12 Q. And Bryan Young from Southern Illinois University?

13 A. Yes.

14 Q. And then there were also participants on the Dicamba
15 Advisory Council from various agriculture associations,
16 weren't there?

17 A. Yes.

18 Q. And there was an attendee from the Agribusiness Council
19 of Indiana; right?

20 A. Yes.

21 Q. That's your home state?

22 A. Yes.

23 Q. There was an attendee from the Iowa Soybean Association;
24 correct?

25 A. Yes.

1 Q. And there was also an attendee from the Illinois Farm
2 Bureau?

3 A. Yes.

4 Q. And all these people had the opportunity like you to
5 present information to Monsanto as it related to the Dicamba
6 Advisory Council, didn't they?

7 A. That's correct.

8 Q. Now, we can take that exhibit down.

9 Now, during the time that you served on the Dicamba
10 Advisory Committee, you were asked for your opinions, weren't
11 you?

12 A. Yes.

13 Q. And Monsanto wanted to know what you saw as far as the
14 issues. I mean, that was one of the primary reasons that
15 you'd been asked to serve on that Dicamba Advisory Council,
16 wasn't it?

17 A. That's correct.

18 Q. And you mentioned that survey that you responded to.

19 A. Yes.

20 Q. And was that something that you responded to annually
21 while you were on the Dicamba Advisory Committee?

22 A. That was the only survey I remember taking.

23 Q. Okay. And you would characterize responding to that in
24 a positive way, wouldn't you?

25 A. Yeah. I tried to be helpful. I viewed my place in

1 the committee actually as a means of trying to make a
2 difference in what I saw was a problem that was upcoming.
3 So I did view it positively. And I actually felt like I had
4 a responsibility to Monsanto to try to make things better.

5 Q. And this Exhibit 611 Plaintiff's Exhibit is in evidence.
6 If I could pull out DXM 905.1.1, which is an excerpt.

7 Now this was question number one, and these are your
8 responses; right?

9 A. That's correct.

10 Q. "How would you rate your experience on the Dicamba
11 Advisory Council to date?" And you checked four. And on
12 this scale one was not positive or valuable. Five was very
13 positive or valuable. So you were four out of five as far
14 as positive or valuable; right?

15 A. Yeah. I felt like an honored member of the committee,
16 yes.

17 Q. And you mentioned -- your general comments there were
18 actually read for the record during your Direct. Is it fair
19 to say that the summary of those -- I don't want to read them
20 again, but the summary was you've invited everything that
21 I -- all the issues that I was aware of. You've listened to
22 them. You've been cordial and collegial, but I'm not sure
23 that they're influencing your actions; is that fair?

24 A. That's fair.

25 Q. Now, you would agree that Monsanto used some of the

1 recommendations that you made to the Dicamba Advisory
2 Council, wouldn't you?

3 A. Eventually.

4 Q. Okay. So if I understand -- well, if you said on
5 direct that Monsanto did not use any of the recommendations
6 you made to the Dicamba Advisory Council, that would have
7 been a misstatement; correct?

8 A. No. Because, during my time on the Dicamba Advisory
9 Council, the recommendations I had made had not been adopted
10 at that time. They were still not adopted all the way up
11 until 2015, long after my Dicamba Advisory Council service.

12 Q. I understand. So your point is while you were on the
13 council they were not adopted; right?

14 A. That's correct.

15 Q. Now, that's at a time when XtendiMax with VaporGrip
16 hadn't even been discovered yet; right?

17 A. That's correct. We were told while we were on the
18 council that the potential launch date for the technology was
19 2013.

20 Q. But I understand it didn't happen?

21 A. But it did not happen. And the reason it did not
22 happen is because of the delay because of the environmental
23 impact study that was requested by Save Our Crops.

24 Q. So your point is that while you were on the Dicamba
25 Advisory Council you don't think they adopted any of your

1 recommendations then; right?

2 A. That's correct.

3 Q. They were adopted later when the product was actually
4 unregulated and commercialized; fair?

5 A. Yes.

6 Q. Now --

7 A. Well, let me say not all of them, but some of them.

8 Q. That's a fair point. For example, let's talk about one
9 of them. While you were on the Dicamba Advisory Council,
10 you recommended that the dicamba labels say, and I'm quoting,
11 "Do not apply when the wind is blowing toward a sensitive
12 crop," unquote; correct?

13 A. Correct.

14 Q. And the XtendiMax with VaporGrip label contains that
15 language, doesn't it?

16 A. Yes.

17 MR. RANGLES: Your Honor, objection, label
18 language, motion in limine, prior ruling. I stayed away
19 from that on purpose.

20 THE COURT: I'll overrule the objection at this
21 time.

22 MR. RANGLES: Okay.

23 BY MR. DUKES:

24 Q. And of a list of all of the concerns that you expressed
25 to the Dicamba Advisory Council that was your priority --

1 that was your motion for concern, wasn't it?

2 A. That was the most important one because that involves
3 both direct drift and potential volatility.

4 Q. And Monsanto addressed your recommendation relating to
5 that concern after you went off the Dicamba Advisory Council
6 and went -- XtendiMax with VaporGrip was actually
7 commercialized; correct?

8 A. When we had our meeting in February of 2015, that
9 subject was broached again, and at that point in time it was
10 still not done, but through the cooperation with -- after our
11 Dow agreement BASF was committed to doing that, and then
12 Monsanto did agree to do that.

13 Q. So at the end of the day it was done?

14 A. Yes.

15 Q. Now, while you were on the Dicamba Advisory Council, you
16 also talked a lot about Drift Watch; correct?

17 A. Correct.

18 Q. And Drift Watch is a program that you helped start, and
19 it allows special crop growers like tomato growers to
20 register their crops so anyone spraying dicamba knows where
21 those crops are planted and can avoid damaging them through
22 drift: Is that generally correct?

23 A. Yeah. It's for everything, not just dicamba.

24 Q. And Monsanto was a good supporter of Drift Watch,
25 weren't they?

1 A. Monsanto has been a strong supporter of Drift Watch.

2 Q. Now, after you were asked to step down from the Dicamba
3 Advisory Council, Monsanto continued to have dialogue with
4 you, didn't they?

5 A. Yes.

6 Q. They just said it needs to be in a different way. If
7 you're opposing our trying to commercialize Xtend seeds, we
8 think you've got a conflict on the Dicamba Advisory Council.
9 We appreciate your input, and we want to keep talking to you;
10 right?

11 A. That's correct.

12 Q. Now, you continued to have a relationship with Monsanto
13 until sometime in 2015; is that right?

14 A. Actually, after the -- we had two meetings following the
15 letter that you gave me about the being removed from the
16 committee. We had two meetings. And then I did not have
17 any more discussions until 2015.

18 Q. And is it your recollection that the last discussion
19 would have been in 2015 with Monsanto? If you don't know,
20 that's fair.

21 A. I'm trying to think if any of them would have extend
22 into '16, but I think probably they were finished in '15.

23 Q. Now, Xtend cotton and soybeans were not approved for use
24 in the United States by the USDA, the United States
25 Department of Agriculture, until after you left the Dicamba

1 Advisory Council; right?

2 A. Yes.

3 Q. And during your entire time on the Dicamba Advisory
4 Council, you believed that Monsanto was planning to register
5 an older form of dicamba called Clarity; is that right?

6 A. I not only believed that, they said that.

7 Q. Okay. Fair enough. I didn't mean to suggest they
8 didn't. I just wanted to make sure that we were talking
9 about Clarity back then when you were on the advisory
10 council; right?

11 A. That's correct.

12 Q. Now DGA -- all capitals DGA -- is a specific type of
13 dicamba formulation, isn't it?

14 A. Yes.

15 Q. And the DGA formulation you thought Monsanto was going
16 to register with the Xtend crops was Clarity; right?

17 A. Yes.

18 Q. And Clarity is not the product that was ultimately
19 registered with the Xtend crops, was it?

20 A. That's correct.

21 Q. In fact, the product that was registered, XtendiMax with
22 VaporGrip, wasn't even invented until after you left the
23 Dicamba Advisory Council; right?

24 A. Correct.

25 Q. And you know that the United States patent trademark

1 office issued a patent on that as a unique invention;
2 correct?

3 A. I do not know the patent history. I believe that
4 sounds right.

5 Q. Now, so it's true that XtendiMax with VaporGrip is what
6 the Environmental Protection Agency, the EPA, approved for
7 use with Xtend crops; right?

8 A. It was my understanding they approved Monsanto's 1691
9 and did not ever actually have XtendiMax and the technology
10 approved as XtendiMax. They transferred it from the -- from
11 the DGA to the 16 -- from 1691 to XtendiMax.

12 Q. So at the end of the day XtendiMax has been approved to
13 spray over the top of the Xtend crops; correct?

14 A. Yes.

15 Q. And none of the concerns -- none of the concerns that
16 you raised while you were on the Dicamba Advisory Council
17 related to XtendiMax with VaporGrip, because it had not been
18 even invented; correct?

19 A. Right. I mean, they all related to dicamba, but was
20 not the XtendiMax formulation yet at that time. And I'll
21 take a little bit of credit for that, because the delay from
22 the EIS is what allowed XtendiMax to have time to be
23 formulated.

24 Q. So that's a great point. So you deserved some credit
25 because of the feedback you were giving to Monsanto that

1 resulted in in part the approval of XtendiMax with VaporGrip;
2 right?

3 A. Yeah. I never had a chance to really give them feedback
4 about XtendiMax. What I always heard was that it was a low
5 volatility formulation, but low volatility is not volatility.
6 And I never got the chance really in a formal way to comment
7 about XtendiMax.

8 Q. Understood. Let's change topics just a little bit.
9 You've heard the phrase a label is the law, haven't you?

10 A. Yes.

11 Q. And you agree with that statement, don't you?

12 A. Yes.

13 Q. And here we're talking about the label that is approved
14 to go with the herbicide; right?

15 A. Yes.

16 Q. And every herbicide has to have an approved label before
17 it can be used?

18 A. That's correct.

19 Q. And the herbicide applicator, the person who sprays it
20 or applies it, is required to follow that label; right?

21 A. That's correct.

22 Q. And you agree that it is a violation of federal law to
23 use any herbicide that is inconsistent with the label, don't
24 you?

25 A. Yes.

1 Q. And you personally have been through herbicide
2 applicator training, haven't you?

3 A. Yes.

4 Q. And they teach you that the label is the law in
5 applicator training; right?

6 A. Yes.

7 Q. So all applicators that get an applicator's license know
8 that the label is the law? It's like a bumper sticker for
9 applicators; right?

10 A. Yes.

11 Q. When you plant Xtend seed, it's the applicator's
12 responsibility to follow the label for any herbicide that
13 they use with Xtend seed, isn't it?

14 A. That's correct.

15 Q. And you agree that the label says how a herbicide can be
16 used; right?

17 A. Yes.

18 Q. And so if a use of a herbicide is not in the label, then
19 the herbicide is not allowed to be used in that way; correct?

20 A. That's correct.

21 Q. Now, you're familiar with Banvel, which is an older
22 formulation of dicamba; right?

23 A. Yes.

24 Q. And you know that the Banvel label does not say that it
25 can be applied over the top of Xtend crops, does it?

1 A. That's correct.

2 Q. And you're familiar with the Clarity Label; correct?

3 A. Yes.

4 MR. RANGLES: Objection to scope. We're moving
5 very deeply into labels.

6 THE COURT: Counsel, come up.

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

9 THE COURT: What's your objection?

10 MR. RANGLES: My objection is to scope, first of
11 all. And then I am saying the word label because of the
12 motion in limine. You have overruled my objections, and now
13 he's getting into Banvel, which is pre Clarity, and we're
14 getting into where the labels were the law and whose
15 responsible --

16 THE COURT: Here's what I am thinking. We can
17 either put this kind of information on now or he's going to
18 have to wait and come back and make --

19 MR. RANGLES: He's a notice witness. They're
20 asking him about the contents of the label. If you want to
21 do that, that's fine, but I will have plenty to say on
22 redirect about it.

23 MR. DUKES: This may help -- he's the one that got
24 into Clarity. And it's the same -- Clarity is the -- Banvel
25 and -- Clarity is not approved for over the top, and it's

1 relevant because if he was on the council -- and I'm almost
2 done --

3 THE COURT: You say you're done then?

4 MR. DUKES: I am not quite -- I'm done with
5 Clarity.

6 MR. RANGLES: The other issue is --

7 MR. BOZARTH: Mr. Randles made the point that
8 Monsanto said that Clarity was low volatility, and it
9 certainly is low volatility compared to Banvel, which is I
10 think is also another point that the Court has made.

11 THE COURT: So --

12 MR. RANGLES: I'm willing to roll with it and go
13 with the punches. They're done with their motions. I'll
14 just go with it.

15 THE COURT: I mean, I agree that he's opened the
16 door for that.

17 MR. RANGLES: I'm going to go to into labels.
18 It's outside the scope. It violates the Court's order on the
19 motion in time.

20 THE COURT: Except that he can ask those questions
21 of him in his own case and chief.

22 MR. RANGLES: Well, if he wants to qualify him as
23 an expert, I suppose he could, because this is really expert
24 testimony, but as I said, I'll roll with the punches. I just
25 want to have --

1 MR. DUKES: It does not violate the motion in
2 limine, because he was on the council, and he claims that
3 Monsanto didn't do anything. I'm just -- I'm going to state
4 the old dicamba and the new -- I'm trying to move to the
5 new --

6 MR. RANGLES: Here's where we get into formulation
7 and label -- approved labels is legal authority, how it is
8 used by applicators, who's responsible for the label, and now
9 we're getting into the label and Banvel and Clarity that's
10 all -- I'm happy to walk through this door. I just wanted
11 to raise it given we had a lengthy discussion on the motion
12 in limine, and I said I wouldn't.

13 THE COURT: But you don't have a problem at this
14 point about it?

15 MR. DUKES: No, I don't.

16 (Proceedings resumed in open court.)

17 BY MR. DUKES:

18 Q. Mr. Smith, Clarity is an older form of dicamba that was
19 available at the time that Xtend crops for cotton and
20 soybeans were put on the market; right?

21 A. Yes.

22 Q. But it was not approved and is not approved to be
23 sprayed over the top of Xtend crops; correct?

24 A. Correct.

25 Q. And you know that from, you know, your experience with

1 your tomato operation; correct?

2 A. Yes. But, I mean, Clarity has no basis with anything
3 we do with tomatoes.

4 Q. I understand. Understood. If I could have Exhibit
5 M-346.

6 Mr. Smith, I've handed you what's been marked as
7 Exhibit M-346, and you were shown this document at your
8 deposition last week; correct?

9 A. Correct.

10 Q. And you agree that this is an image of the sticker that
11 is placed on the XtendFlex cotton seed bags that were sold in
12 2015; correct?

13 A. Correct.

14 (Defendants' Exhibit No. M-346, Pink Sticker for
15 Cotton 2015, was identified.)

16 MR. DUKES: Your Honor, I move into evidence
17 Defendants' Exhibit M-346.

18 MR. RANGLES: No objection.

19 THE COURT: It's admitted.

20 (Defendant's Exhibit No. M-346, Pink Sticker for
21 Cotton 2015, was received.)

22 MR. DUKES: And I request that it be published to
23 the jury.

24 THE COURT: You may.

25 BY MR. DUKES:

1 Q. Now, you agree that 2015 was the first year that
2 XtendFlex cotton seeds were sold for commercial use; right?

3 A. Yes.

4 Q. And if we could call out M-346.1.1. If you look at the
5 first sentence of that sticker, it states in all caps,
6 "NOTICE: Do not apply dicamba herbicide to Bollgard II
7 XtendFlex cotton 2015." Is that correct? Did I read that
8 correctly?

9 A. Yes.

10 Q. And then I'll call out 1.2. I'm just going out to the
11 next sentence. It says, "It is a violation of federal and
12 state law to make an in-crop application of any dicamba
13 herbicide on Bollgard II XtendFlex cotton unless the product
14 label specifically authorizes that use." That's what the
15 label says; correct?

16 A. Correct.

17 Q. So the applicators were prohibited from using dicamba in
18 XtendFlex cotton in 2015 no matter what the dicamba
19 formulation was; right?

20 A. Yes.

21 Q. And, as I understand it, before your deposition you had
22 not read that sticker; correct?

23 A. That's correct.

24 Q. And any concerns that you raised about dicamba on the
25 advisory council were before you were aware of the contents

1 of this label; right?

2 A. That's correct.

3 Q. Okay. If I could see Defendants' Exhibit M-348.

4 Mr. Smith, I've handed you what's been marked as M --
5 as Exhibit M-348. And you were also shown this at your
6 deposition last week; correct?

7 A. Yes.

8 (Defendants' Exhibit No. M-348, Pink Sticker for
9 Cotton 2016, was identified.)

10 BY MR. DUKES:

11 Q. And you agree that this is an image of the sticker that
12 was placed on Xtend soybean bags sold in 2016; correct?

13 A. Yes.

14 MR. DUKES: Your Honor, I move into evidence
15 Defendants' Exhibit M-348.

16 MR. RANGLES: No objection.

17 THE COURT: It's admitted.

18 (Defendants' Exhibit No. M-348, Pink Sticker for
19 Cotton 2016, was received.)

20 BY MR. DUKES:

21 Q. And you agree that 2016 was the first year that Xtend
22 soybeans were sold for commercial use, don't you?

23 A. Yes.

24 Q. I call out 1.3. If you read the first sentence of text,
25 it says, "As of November 1, 2015, no dicamba herbicide

1 product has been approved for commercial in-crop use with
2 Roundup Ready 2 Xtend soybeans;" correct?

3 A. Correct.

4 Q. If we look at 1.4, it goes on to say, "Do not apply
5 dicamba herbicide in-crop to Roundup Ready 2 Xtend soybeans
6 in 2015 unless you use a dicamba herbicide product that's
7 specifically labeled for use in that location where you
8 intend to make that application;" correct?

9 A. Correct.

10 Q. If we could look at 1.5. The sticker goes on to say,
11 "It is a violation of federal and state law to make an
12 in-crop application of any dicamba herbicide product or
13 Roundup Ready 2 Xtend soybeans unless the product labeling
14 specifically authorizes that use." Did I read that
15 correctly?

16 A. Yes.

17 Q. Now, you understand after reading that sticker that
18 applicators were prohibited from applying dicamba over Xtend
19 soybeans in 2016; correct?

20 A. Yes.

21 Q. And you had not seen that sticker during your time with
22 the Dicamba Advisory Committee, had you?

23 A. That's correct.

24 Q. Sitting here today, do you know that when Xtend cotton
25 was launched in 2015 and Xtend soybeans were launched in

1 2016, that every single bag of seed had these labels on it,
2 didn't it?

3 A. I've been told that, yes.

4 Q. Mr. Smith, that's all the questions I have at this time.
5 Thank you.

6 THE COURT: Counsel, do you want to take a short
7 recess now or what?

8 MR. BOZARTH: Whatever you want is fine with me.

9 THE COURT: Why don't we take a 10-minute recess.

10 And remember the admonition I gave you not to
11 discuss the case among yourselves or with others or permit
12 anyone to discuss it in your presence. Do not form or
13 express any opinion about the case until it's finally given
14 to you to decide.

15 Go with the clerk to the jury room, and we'll call
16 you back in 10 or 12 minutes.

17 Court is in recess.

18 Counsel remain in the courtroom.

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

21 THE COURT: All I wanted to say is that, as I
22 mentioned, our new United States District Judge Sarah Pitlyk
23 has come. So if you have time, make sure and go up and
24 introduce yourselves, and she's part of my reinforcements.

25 So we're in recess.

1 (Proceedings stood in temporary recess.)

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

4 THE COURT: Any preliminary matters?

5 I know you have one we'll take up later you said,
6 but --

7 MR. RANGLES: I think we may as well finish the
8 witness, and then I have a procedural question, Your Honor,
9 we can take up at sidebar off the record.

10 THE COURT: Okay.

11 (Proceedings resumed in open court.)

12 THE COURT: Please be seated.

13 Mr. Bozarth, you may proceed.

14 MR. BOZARTH: Thank you, Your Honor. Ladies and
15 gentlemen.

16 CROSS-EXAMINATION

17 BY MR. BOZARTH:

18 Q. Good morning, Mr. Smith. Good to see you.

19 A. Good morning.

20 Q. My name is Troy Bozarth. I represent BASF Corporation.

21 A. Yes.

22 Q. You and I met about exactly a week ago; right --

23 A. That's correct.

24 Q. -- at your deposition. I've got a couple of questions
25 for you about the Dicamba Advisory Council. And I believe

1 one of the things that you stated initially was that you
2 assumed someone from BASF was involved with the council;
3 right?

4 A. That's correct.

5 Q. You don't have any facts that BASF was a member of the
6 council; isn't that true?

7 A. If it wasn't on the list, I don't.

8 Q. All right. Well, let's pull up 621, Plaintiff's 621.
9 And this is the Plaintiff's exhibit that they showed you.
10 This is already in evidence, Judge.

11 THE CLERK: Yeah.

12 BY MR. BOZARTH:

13 Q. And can you point out the BASF members on that list?

14 A. There's not one on that list.

15 Q. So your assumption was not correct in this case that
16 there was somebody from BASF on the -- on the Dicamba
17 Advisory Council?

18 A. I don't have a list for the second meeting.

19 Q. Do you have an independent recollection of someone being
20 there from BASF?

21 A. No.

22 Q. And this was a group that Monsanto invited you to
23 join --

24 A. Correct.

25 Q. -- right?

1 And then there was -- I believe most of the questions
2 by Mr. Randles were about your communication with Monsanto
3 during that time; correct?

4 A. Correct.

5 Q. But you may have asked one or two questions about
6 Monsanto and BASF collectively? You don't have any
7 recollection of communications with BASF during the time on
8 the Dicamba Advisory Council; correct?

9 A. Not during those meetings themselves.

10 Q. Correct. That was Monsanto?

11 A. Yes.

12 Q. Okay. And Mr. Dukes showed you Exhibit 919, which was
13 the letter from Ms. Magin; correct?

14 A. Yes.

15 MR. BOZARTH: Can we pull that up as well.

16 BY MR. BOZARTH:

17 Q. And BASF is not -- it's on your screen, sir. And BASF
18 is nowhere on that document either?

19 A. Correct.

20 Q. So that was Monsanto. I want to talk to you about your
21 communications with BASF; okay?

22 A. Okay.

23 Q. All right. So in 2010 you said you had a meeting with
24 Mr. Paul Rae and several other people from BASF; right?

25 A. Correct.

1 Q. You actually had some communications before that, before
2 the actual meeting, didn't you?

3 A. To set up a meeting, yes.

4 Q. Right. You had a phone call from Mr. Rae about the week
5 before?

6 A. That seems reasonable to me. I don't recall the exact
7 phone call.

8 Q. Can we please put up for the witness and parties B-1031.
9 Go to the second page.

10 Do you recognize this as an e-mail exchange between
11 you and Mr. Paul Rae from BASF?

12 A. Yes.

13 (Defendants' Exhibit No. B-1031, E-mail Exchange
14 Between Paul Rae and Steve Smith, was identified.)

15 MR. BOZARTH: Your Honor, I would move for
16 admission of Exhibit 1031.

17 THE COURT: Any objection?

18 MR. RANGLES: No. No objection.

19 THE COURT: Admitted.

20 (Defendant's Exhibit No. B-1031, E-mail Exchange
21 Between Paul Rae and Steve Smith, was received.)

22 MR. BOZARTH: May I publish to the jury, Your
23 Honor?

24 THE COURT: Yes.

25 BY MR. BOZARTH:

1 Q. What was Mr. Rae's position with BASF when he contacted
2 you?

3 A. I believe he was the vice president, but, yeah, it says
4 Vice President of U.S. Crop Protection.

5 Q. He was an executive with the company; right?

6 A. Yes.

7 Q. And when he contacted you, you can see in this e-mail in
8 the paragraph, this was basically thanking you for the
9 pleasure of a phone call that he had with you the week
10 before; correct?

11 A. Yes.

12 Q. Yeah. And you stated I believe under Direct that this
13 meeting that was being set up was in your words to allay your
14 fears. Do you remember that testimony?

15 A. Yes.

16 Q. Right. Well, it looks like from Mr. Rae's e-mail to
17 you it was more than just to allay your fears. They were
18 looking for your perspective. Do you see that in the second
19 line?

20 A. Yes.

21 Q. And they were also wanting to continue a dialogue to
22 share your collective viewpoints, your viewpoint and their
23 viewpoint; correct?

24 A. That's what it says, yes.

25 Q. And to discuss it in more details the challenges and

1 opportunities for the dicamba tolerant system technology;
2 correct?

3 A. Yes.

4 Q. So it wasn't just to allay your fears, they were trying
5 to get with you and trying to get information that you had
6 too; right?

7 A. Yeah, I think that would be fair to say.

8 Q. And then if we can look at your response. You are
9 available the 24th at 1:00 p.m.; right?

10 A. Yes.

11 Q. So per your schedule we have a meeting with BASF
12 executives the afternoon before Thanksgiving?

13 A. That's correct.

14 Q. So this day before Thanksgiving meeting did take place;
15 correct?

16 A. Yes.

17 Q. And I think you said Paul Rae, Vice President of U.S.
18 Crop, was the one who spearheaded the meeting?

19 A. Yes.

20 Q. And he reached out proactively to you; correct?

21 A. Yes. It was in response to an inquiry from one of our
22 growers, Kip Tom.

23 Q. Okay.

24 A. And he and Kip were good acquaintances, and that's how
25 that meeting came about.

1 Q. So between Mr. Tom and in connection with you and
2 Mr. Tom's connection to Mr. Rae he coordinated the meeting
3 and got it started with Mr. Rae from BASF?

4 A. That's correct.

5 Q. So we had Mr. Rae, who's the Vice President of U.S. Crop
6 for BASF. I think you said Steve Bowe in his position as
7 the head of biology for BASF; correct?

8 A. Yes.

9 Q. We had Dan Pepitone, and he's the regulatory Government
10 affairs person for BASF?

11 A. Yes.

12 Q. And we have Dr. Dan Westberg. He's the one that you
13 didn't recall, but Dr. Dan Westberg, he was the Regional
14 Director For Technical Services, and he was there as well;
15 correct?

16 A. Yes.

17 Q. Now, this meeting lasted a couple of hours into the
18 afternoon?

19 A. Yes.

20 Q. And what we're looking at here -- and this happened
21 basically three weeks later. We have within a matter of
22 three weeks four senior level executives from BASF making a
23 trip to you, because this happened at your office; right?

24 A. Correct.

25 Q. The day before Thanksgiving to discuss your issues and

1 concerns about dicamba in general; is that accurate?

2 A. It was that. And, as I said earlier, too, I think it
3 was to allay some of my fears.

4 Q. And you didn't travel for this meeting?

5 A. No.

6 Q. How far did the gentlemen from BASF travel?

7 A. All the way from Research Triangle Park.

8 Q. So they traveled from North Carolina to go to this
9 meeting --

10 A. Yes.

11 Q. -- to meet with you?

12 A. Yes.

13 Q. Is it fair to say that BASF was taking the issues that
14 you were raising fairly seriously?

15 A. I've always considered that a very serious piece of -- I
16 don't want to say piece of -- I considered it a good omen
17 that they would do that.

18 Q. Okay. And you had the meeting?

19 A. Yes.

20 Q. You had an opportunity to tell them all of your
21 concerns?

22 A. Yes.

23 Q. And anything at the meeting that you didn't get a chance
24 to say that you wanted to say?

25 A. No.

1 Q. You were satisfied with BASF's approach at this meeting?

2 A. Yes. It was very cordial.

3 Q. And you had a chance to speak your concerns and give
4 them any information you wanted to give them?

5 A. Yes.

6 Q. And now you had no trouble making it back for your
7 Thanksgiving holiday, I take it?

8 A. No.

9 Q. About 10 minutes, 15-minute drive?

10 A. Ten minutes, yes.

11 Q. Do you know if Mr. Rae and Mr. Bowe, Mr. Pepitone and
12 Dr. Westberg made it back for their Thanksgiving?

13 A. I think they all made it back.

14 Q. There was a little bit of a concern there for a while;
15 right?

16 A. Yes.

17 Q. So at this point in 2010 it's fair to say that BASF was
18 going to great lengths to seek out someone who had some
19 fairly strong opinions about dicamba in general; is that
20 correct?

21 A. That would indicate that, yes.

22 Q. And then you had another discussion with Mr. Rae in
23 2011 -- July of 2011. Do you remember that?

24 A. Yes.

25 Q. Can we pull up for the Court and the witness B-1032,

1 please.

2 Do you recognize this e-mail exchange between you and
3 Mr. Rae?

4 A. Yes.

5 Q. And that is an e-mail over the course of -- an e-mail
6 string over the course of a couple of days between yourself
7 and Mr. Rae at BASF; correct?

8 A. Yes.

9 (Defendants' Exhibit No. B-1032, E-mail String
10 Between Mr. Smith and Mr. Rae, was identified.)

11 MR. BOZARTH: Your Honor, I would move for
12 admission of 1032.

13 MR. RANGLES: No objection.

14 THE COURT: Admitted.

15 (Defendant's Exhibit No. B-1032, E-mail String
16 Between Mr. Smith and Mr. Rae, was received.)

17 MR. BOZARTH: Go ahead and publish that.

18 BY MR. BOZARTH:

19 Q. So Mr. Rae contacted you in July of 2010, and in the
20 subject line of that e-mail is what?

21 A. Invitation to the research farm at BASF.

22 Q. So he's reaching out to you about seven months, eight
23 months after your in-person meeting and extending an
24 invitation for you to come and do some research that BASF was
25 doing on dicamba?

1 A. Yes.

2 Q. If you look at the paragraph below, he states, "We'd
3 like to invite you to our research facility in Seymour,
4 Illinois just outside Champaign to view a range of activities
5 we have underway with dicamba, including BMP" -- what's BMP?

6 A. I think that's the Engenia formulation.

7 Q. I think it's best management practices, but I had to ask
8 somebody myself.

9 A. Oh, yeah, that's a common --

10 Q. Does that sound right to you?

11 A. Yeah. Okay.

12 Q. "New formulations, crop sensitivity comparisons and
13 off-target mitigation evaluations we are conducting." Do you
14 see that?

15 A. Yes.

16 Q. And it looked like from that chain that you appreciated
17 that invitation?

18 A. That's correct.

19 Q. But because of some scheduling issue you weren't able to
20 make it?

21 A. That's correct.

22 Q. So this is the type of testing that you would have found
23 informative and helpful?

24 A. I would have definitely found it informative. I'm
25 always into seeing research and what it means.

1 Q. And this is the type of invitation that you would have
2 expected from a company that was actively trying to keep the
3 dialogue with you; correct?

4 A. Yes.

5 Q. And I believe you said that your experiences with BASF
6 were always good ones?

7 A. Yes.

8 Q. Now, you can take that down, please.

9 I'm going to jump forward. I think there may have
10 been some other communications in there, but jump forward to
11 2015 -- actually the end of 2014 where you met a gentleman by
12 the time of Max Safarpour.

13 A. He called me in 2014.

14 Q. So we have at this point another BASF management person
15 proactively contacting and seeking you out?

16 A. Yes.

17 Q. And do you know what Max's position is?

18 A. I think he was the lead technical label writer at that
19 time. I know he was the one person that could have effected
20 some label changes.

21 Q. And I think you described him as the guy in charge of
22 the label?

23 A. That's correct.

24 Q. So had -- from 2014 to present has Max been your primary
25 contact at BASF?

1 A. Yes.

2 Q. You had a meeting, I believe, you said February 25th of
3 2015. Do you remember that?

4 A. February 15th.

5 Q. I'm sorry, February 15th, yes.

6 A. Yes.

7 Q. And your discussions prior to that had been just about
8 dicamba in general, not about BASF's Engenia product;
9 correct?

10 A. Correct.

11 Q. So this is really the first discussions where you're
12 talking about the new formulation and Engenia?

13 A. It was to my mind still talking dicamba, because it was
14 both BASF and Monsanto at the meeting.

15 Q. Okay. So this meeting was set up by BASF?

16 A. Yes.

17 Q. And but it was BASF, Monsanto and you were there?

18 A. Yes.

19 Q. And it was talking about new formulations or both?

20 A. We would have talked about the new formulations that
21 each individual company was doing.

22 Q. Specifically talking about things that you had concerns
23 with and were suggesting being the labels for the Engenia
24 product and the XtendiMax with VaporGrip product?

25 A. That's correct.

1 Q. I'm just going to talk to you about BASF. So this was
2 before Engenia was approved and on the market?

3 A. Correct.

4 Q. And this was before any of the public purchasers saw the
5 label; correct?

6 A. As far as I know.

7 Q. Right. So this is the time when they would want input,
8 and they were asking you for input --

9 A. Yes.

10 Q. -- on how it make the label better from your
11 perspective?

12 A. Yes.

13 Q. And I believe you said you left that meeting with some
14 assurances from BASF about what they would do or intended
15 to do with the label?

16 A. We talked about several things, and there was a general
17 agreement that we needed language about wind direction and
18 speed and also about residue tolerance submission data.

19 Q. And let me pull up for the witness B-1033, please.

20 Do you recognize this as an e-mail exchange between
21 you and Max Safarpour with BASF?

22 A. Yes.

23 (Defendant's Exhibit No. B-1033, E-mail Chain
24 Between Steven Smith and Max Safarpour, was identified.)

25 BY MR. BOZARTH:

1 Q. And this e-mail starts basically the day after that
2 February 21st meeting; correct?

3 A. I thought our meeting was on the 15th. Maybe it was the
4 25th. And that is the day after the 25th, so --

5 Q. And did you reach out to Max and say, Hey, I forgot to
6 ask you about something. I want to talk about this wind
7 blowing away; right?

8 A. Yes.

9 Q. Now, I want to walk through a little bit about this
10 e-mail, but this e-mail, in essence, is about a week long,
11 this e-mail chain; right?

12 A. It was over a course of time, yes.

13 Q. So it's from February 26th to March 3rd?

14 A. Yes.

15 Q. And the general gist of this exchange is over that
16 course of several days you seek some assurances about this
17 wind direction issue, and BASF through Max confirmed that
18 we're going to do the label the way you suggest; correct?

19 A. Yes.

20 Q. And this -- I think it was clear that Max made it clear
21 in this e-mail that he was only speaking for BASF, and if you
22 wanted to have discussions with Monsanto, you had to do that
23 with Monsanto; right?

24 A. Except that we did meet together at that meeting.

25 Q. Correct. At the prior meeting, but we're talking about

1 discussions going forward?

2 A. Yes.

3 Q. And we will turn to the March 3rd, 2009. So look on the
4 left-hand side of your screen here.

5 Actually, let me do this. Do you recognize this
6 e-mail? This is your e-mail exchange with Max; correct?

7 A. Yes.

8 MR. BOZARTH: Judge, I would move for admission of
9 1033.

10 MR. RANGLES: No objection.

11 THE COURT: Admitted.

12 (Defendants' Exhibit No. B-1033, E-mail Chain
13 Between Steven Smith and Max Safarpour, was received.)

14 MR. BOZARTH: Publish this to the jury, please.

15 BY MR. BOZARTH:

16 Q. So we see -- and I just want to point out the first line
17 that Max says in the March 3rd e-mail is "I can pose this
18 language only for the BASF products;" right?

19 A. Correct.

20 Q. And then your response, the second paragraph, you ask
21 whether you'll be speaking with Monsanto about this, or do I
22 need to contact Phil and Dan myself? Do you see that?

23 A. Yes.

24 Q. And then the next e-mail above that the last line says,
25 "But you will need to speak with Monsanto directly for their

1 buy-in". Do you see that?

2 A. Can you give me that statement again? I'm not seeing
3 it. Okay. "Well, you will need to speak directly with
4 Monsanto for their buy-in."

5 Q. So during this discussion it was clear to you that if
6 you were going to talk to Monsanto about stuff, you need to
7 go talk to Monsanto. If you want to talk to BASF, you could
8 talk to Max about BASF; correct?

9 A. Correct.

10 Q. Now, this exchange over the course of a week getting
11 commitment and buy-in on the label suggestion, that was very
12 quick, wasn't it?

13 A. I guess that's relative.

14 Q. In your experience with companies getting them to agree
15 to a label change is over the course of a couple of days a
16 quick turnaround?

17 A. Yeah. I was trying to think if we'd had any
18 preliminary discussions between our December call and then to
19 set that up, but, yeah, it was -- it happened pretty
20 reasonable.

21 Q. Okay. And your suggestions ended up being the ultimate
22 label for Engenia that BASF produces; correct?

23 A. That's correct.

24 Q. Now, do you remember when I -- well, let me ask you this
25 question first: Do you have any troubles with Max's approach

1 and how BASF was dealing with you on these issues?

2 A. No. He -- he was very cordial and very friendly, and we
3 had a good relationship.

4 Q. Now, do you remember what you said when I asked you at
5 your deposition if you thought Max was being a good partner
6 trying to come up with solutions for this?

7 A. We talked. I don't remember the exact question, but we
8 did talk about that, yes.

9 Q. All right. I'd like to show you to refresh your
10 recollection 29819 through 2992 from your deposition and it
11 will show up on your screen there.

12 So when I asked you the question, "So you thought he
13 was doing his best to be a good partner with you in coming up
14 with a solution," what was your response?

15 A. "It was more than just a good partner with me. He was
16 trying to figure out how to benefit BASF by correcting errors
17 before they happened."

18 So I think his goal was not only to cooperate with
19 me, but I think his goal was to make his business more
20 correct.

21 Q. Trying to do the right thing?

22 A. That's exactly it.

23 Q. And then that's how you felt in 2015 when you were
24 having these discussions, and that's how you feel today;
25 correct?

1 A. Yes. That's how it is for sure.

2 Q. One of the things that you raised -- you can take that
3 down. One of the things you raised, I believe, with
4 Mr. Dukes was residue testing?

5 A. Yes.

6 Q. And Max has worked with you to get residue testing
7 pushed through the EPA; correct?

8 A. Well, he's -- he has told me that he's gone to EPA to
9 push them to get that. I mean, we haven't met together with
10 EPA to work with each other on that, but he's indicated that
11 he has tried to get residue tolerances established.

12 Q. And you're pushing on your side, and Max is pushing on
13 his side to try get the same thing done; correct?

14 A. Correct.

15 Q. Do you have any complaints about the way that Max is
16 approaching that?

17 A. No. I thought it took a little bit longer to get data
18 submitted than I was hopeful for after our original meeting
19 that it was not until June before all the data finally got
20 submitted.

21 I'd actually had a meeting with EPA and asked them
22 how they were coming along, and then I was quite surprised to
23 find out that it hadn't been submitted yet.

24 Q. And I think the way that we discussed it prior was it
25 wasn't done as aspirationally quickly as they had hoped, but

1 they got it done in June?

2 A. That's correct.

3 Q. And those tests have been sitting for four and a half
4 years, and they have not been approved yet; correct?

5 A. That's correct.

6 Q. Nothing about what Monsanto and BASF has done has
7 hindered that. That's with governmental agency; correct?

8 A. I can't answer whether Monsanto has done anything about
9 that or not. I don't know what's been done to hinder it,
10 but I can't answer whether Monsanto has done anything or not.

11 Q. Now, in 2016 you had an e-mail exchange with Max because
12 your group SOCC was going to send an open letter; correct?

13 A. Correct.

14 Q. And at that time you told Max BASF was not in the letter
15 because of your proactive actions concerning our dialog and
16 searching for answers that worked for both of us?

17 A. Correct.

18 Q. That's how you felt then and that's how you feel today;
19 correct?

20 A. Correct.

21 Q. Now, in November of 2016 you were invited by BASF to
22 attend their annual regulatory meeting in North Carolina. Do
23 you remember that?

24 A. Yes.

25 Q. And you were not just an attendee, you were an invited

1 speaker?

2 A. That's correct.

3 Q. And there were 200 plus BASF personnel at this meeting?

4 A. Yes.

5 Q. And at that time you were speaking on dicamba in
6 general?

7 A. Correct.

8 Q. Not any specific product?

9 A. That's correct.

10 Q. And you were well received and welcomed at that meeting?

11 A. Yes.

12 Q. And got to speak your mind and talk to folks about
13 dicamba?

14 A. I suspect I made a few nervous in that meeting.

15 Q. And but one of the things that you stressed was the
16 importance of BASF's stewardship for their product; correct?

17 A. Certainly.

18 Q. Okay. So let's see, I'm going to show you B-1035.

19 Do you recognize B-1035 as an e-mail exchange between
20 you and Max that starts February 15th of 2016?

21 A. Yes.

22 (Defendants' Exhibit No. B-1035, E-mail Exchange
23 between Steven Smith and Max Safarpour, was identified.)

24 MR. BOZARTH: Judge I would move for admission of
25 B-1035.

1 MR. RANGLES: No objection.

2 THE COURT: It's admitted.

3 (Defendants' Exhibit No. B-1035, E-mail Exchange
4 between Steven Smith and Max Safarpour, was received.)

5 BY MR. BOZARTH:

6 Q. So this is after that meeting, and it's basically a very
7 nice thank you note that Max sent you about your
8 participation in the meeting; correct?

9 A. Correct.

10 Q. All right. And let's go up to the e-mail above. And
11 you respond, "Thanks for the" -- "Thanks for very nice note.
12 Look forward to getting the new stewardship plan for
13 Engenia."

14 A. Correct.

15 Q. So you were going to get and review the stewardship
16 plan, and this is before Engenia was released for sale;
17 correct?

18 A. Yes.

19 Q. And there's some discussion about with holidays coming
20 up and travel, but Max is going to try and get you the
21 stewardship plan?

22 A. Yes.

23 Q. Let's go to 1036. Your next communication with Max
24 appears to be an e-mail exchange on Christmas Eve of 2016:
25 Do you see that?

1 A. Yes.

2 (Defendants' Exhibit No. B-1036, E-mail Exchange
3 Christmas Eve of 2016, was identified.)

4 BY MR. BOZARTH:

5 Q. And do you recognize that as an e-mail exchange between
6 you and Max?

7 MR. BOZARTH: Your Honor, I would move for
8 admission of 1036.

9 MR. RANGLES: No objection.

10 THE COURT: It's admitted.

11 (Defendants' Exhibit No. B-1036, E-mail Exchange
12 Christmas Eve of 2016, was received.)

13 BY MR. BOZARTH:

14 Q. So if you look in the e-mail chain, at the bottom Max
15 said, "I need to talk to you about Engenia stewardship. I
16 also have asked my colleagues through WebEx to go through our
17 program. You can either come down or they can give it to you
18 electronically." Do you see that?

19 A. Yes.

20 Q. And do you remember whether you looked at it -- came
21 down and visited, or where you looked at it?

22 A. I did not go back down. So it would have been
23 electronically.

24 Q. And you did end up looking at their program; correct?

25 A. Yes.

1 Q. So let's look at B-1039. Do you recognize 1039 as an
2 e-mail exchange between you and Max January the 12th, 2017?

3 A. Yes.

4 (Defendants' Exhibit No. B-1039 E-mail Exchange
5 January 12, 2017, was identified.)

6 MR. BOZARTH: Your Honor, I would move for
7 admission of 1039.

8 MR. RANGLES: No objection.

9 THE COURT: Admitted.

10 (Defendants' Exhibit No. B-1039, E-mail Exchange
11 January 12, 2017, was received.)

12 BY MR. BOZARTH:

13 Q. So if you look at the e-mail portion from Max to you, we
14 have Max sending you all the information that you have
15 requested; correct?

16 A. Yes.

17 Q. And then your response to Max after reviewing it,
18 "Training looks good. It does highlight the no wind
19 restriction;" correct?

20 A. Yes.

21 Q. So your concern with wind restriction, stewardship very
22 important as a specialty crop grower; correct?

23 A. Very important. Not only the concerns, but it's an
24 important concern.

25 Q. And then adequately addressed by BASF; correct?

1 A. The wind restriction was, yes.

2 Q. You were also invited -- and you can take this down.

3 You also were invited in 2017 to attend again as a speaker at
4 the regulatory meeting, but you couldn't make it because of
5 other commitments on your part; correct?

6 A. You know, since I didn't go I don't remember whether I
7 was or not.

8 Q. Okay. So after this meeting at BASF in 2016 and after
9 viewing the stewardship program in 2017, did you have any
10 concerns about the stewardship program for BASF and Engenia?

11 A. Yes, because it still didn't include residue tolerance,
12 and one of my specific needs and requests was that it not be
13 made available until there was a residue tolerance.

14 Q. Do you remember I asked you that exact same question at
15 your deposition?

16 A. No.

17 Q. All right.

18 MR. BOZARTH: I'm going to have, Your Honor, the
19 video played at this point if that's all right from his
20 deposition.

21 MR. RANGLES: That's fine.

22 THE COURT: Has that been admitted into evidence
23 yet?

24 MR. BOZARTH: His deposition testimony?

25 THE COURT: I mean, the video I thought you said.

1 MR. BOZARTH: It's a video impeachment, Judge.

2 MR. RANGLES: I have no problem with that.

3 THE COURT: Okay.

4 Is there an exhibit to it?

5 MR. BOZARTH: No, Judge. Mike is going to play it
6 for me. It's page 309, line 4 through 8.

7 "Q: So after that meeting at BASF in 2016 and then
8 the stewardship program in 2017, did you have any concerns
9 about the stewardship program at BASF with Engenia?"

10 "A: No. No."

11 BY MR. BOZARTH:

12 Q. So do you remember giving that testimony and telling me
13 a week ago today "no"?

14 A. Well, that's correct.

15 Q. Thank you.

16 A. I didn't have any concerns about that part of the
17 stewardship program.

18 Q. Okay. Thank you. Do you believe that BASF was ever
19 untruthful with you in your discussions with them?

20 A. No.

21 Q. Do you believe that they were honestly wanting to work
22 with you to come to solutions?

23 A. Yes.

24 Q. BASF was trying to listen to your concerns?

25 A. Yes.

1 Q. And you have no knowledge or evidence that BASF agreed
2 to enter into a conspiracy with Monsanto to create an
3 ecological disaster; isn't that true?

4 MR. RANGLES: Objection, beyond the scope and
5 beyond the limiting rulings.

6 THE COURT: I'll overrule the objection.

7 THE WITNESS: Can you ask that again now?

8 BY MR. BOZARTH:

9 Q. You have no knowledge or evidence that BASF agreed to
10 enter into a conspiracy with Monsanto to create an ecological
11 disaster; isn't that true?

12 A. I do not have knowledge of that.

13 MR. BOZARTH: Thank you, Mr. Smith. That's all I
14 have.

15 THE COURT: Mr. Randles, did you say you wanted to
16 come up? Counsel, please come up.

17 MR. RANGLES: No, Your Honor. I'm fine. Oh, do
18 you want us to come up anyway?

19 THE COURT: I thought you said that you wanted to.

20 MR. RANGLES: I said later.

21 THE COURT: Okay. That's fine.

22 MR. RANGLES: Thank you, Your Honor.

23 THE COURT: Redirect.

24 MR. RANGLES: Thank you, Your Honor.

25 REDI RECT EXAMINATION

1 BY MR. RANGLES:

2 Q. Just to reorient ourselves, Mr. Smith. We stopped in
3 my Direct Examination for various reasons before the products
4 came out on the market; right?

5 A. Yes.

6 Q. And now we've had a lot of questions about after the
7 products came out on the market; correct?

8 A. Yes.

9 Q. So we're going to walk through those as well as a few
10 other topics; all right?

11 A. Okay.

12 Q. Okay. First of all, if you wouldn't mind, could you put
13 back up M-919?

14 MR. RANGLES: It's in evidence, Your Honor.

15 BY MR. RANGLES:

16 Q. I want to start with this letter that you -- we had a
17 lot of testimony about. And it refers to a conflict of
18 interest. Now, as it was expressed to you I believe you
19 said the conflict of interest was you didn't agree with this
20 system going on the market; correct?

21 A. You know, I guess I can't address exactly what they were
22 referring to in conflict of interest. There could have been
23 several, I suppose.

24 Q. Well, did you have a business conflict of interest with
25 them?

1 A. No.

2 Q. Did you have some financial interest in the system not
3 coming to market?

4 A. Only to protect my crop.

5 Q. To protect specialty crops in general?

6 A. Yes.

7 Q. But, I mean, you specifically had some special financial
8 interest in it not coming to market?

9 A. No.

10 Q. In your mind this calling your disagreement a conflict
11 of interest, how does that comport with their statement that
12 Monsanto wanted to hear the good, the bad and the ugly? Can
13 you reconcile those?

14 MR. DUKES: Your Honor, objection, foundation.
15 The witness would have to speculate on what conflict of
16 interest means, which is the terminology used by Monsanto.

17 THE COURT: Overruled.

18 BY MR. RANGLES:

19 A. Can you repeat that?

20 Q. Can you reconcile their statement that they wanted to
21 hear the good, the bad and the ugly with them characterizing
22 your expressions of opinion as a conflict of interest?

23 A. No, it doesn't make sense.

24 Q. When you joined the Dicamba Advisory Council, were you
25 told that the fact that your opinions, which they were well

1 aware of, were valuable to them and what they wanted to hear?

2 A. They said that repeatedly.

3 Q. Did they ever explain to you why that changed?

4 A. No.

5 Q. To this day do you know why that changed?

6 A. No.

7 Q. Now, you were asked about -- well, the Dicamba Advisory
8 Council, the congressional testimony were before these new
9 products came out allegedly with lower volatility --
10 XtendiMax, VaporGrip and Engenia. Do you recall being asked
11 that?

12 A. Yes.

13 Q. Would you say anything different in your congressional
14 testimony if you gave it today about the threat of dicamba
15 than you said in 2010?

16 A. The only thing I would --

17 MR. DUKES: Objection, asks for speculation from
18 the witness as to what theoretically he would testify to.

19 THE COURT: Overruled.

20 THE WITNESS: I think the only thing that I would
21 change in my testimony to Congress today was that it actually
22 turned out even worse than what I projected, and I thought I
23 projected pretty strongly that it was not going to be a good
24 thing.

25 BY MR. RANGLES:

1 Q. Now, you -- there was a lot of discussion in both
2 examinations about labels and label language. Do you recall
3 that?

4 A. Yes.

5 Q. And I want to jump ahead here. Could I take another
6 look -- and I don't know who I look to for this -- on BASF's
7 B-1033.

8 MR. RANGLES: It's in evidence, Your Honor.

9 BY MR. RANGLES:

10 Q. Now, this is the lengthy -- well, time period wise
11 lengthy exchange you were having with Max Safarpour about
12 certain aspects of the proposed label; correct?

13 A. Yes.

14 Q. And you were specifically addressing here I believe the
15 amount of wind?

16 A. The wind -- amount of wind in any one direction.

17 Q. And wind direction meaning when you spray you were
18 talking about what the rule should be on wind direction
19 toward sensitive crops, blowing toward them; is that right?

20 A. Yes. Through all of the discussions with the advisory
21 council and all the years up until then it was expressed that
22 wind restrictions might be 3 to 10 miles an hour but with no
23 directional restriction.

24 And I think in one of my correspondences I said that
25 was lunacy that it would -- it's not acceptable to have wind

1 blowing towards a sensitive crop.

2 Q. And this discussion in the document is part of the label
3 making process; correct?

4 A. Yes.

5 Q. So the EPA doesn't sit down and write a labeling, does
6 it?

7 A. You know, I don't know exactly how the labels come
8 about. I know that they get submitted by the -- by them, but
9 I don't know if they're changed, or, you know, if there's a
10 give and take back and forth.

11 Q. Your answer was better than my question.

12 You were discussing with them the part of the label
13 making process where the manufacturers write their proposals,
14 and you would send them to the EPA; correct?

15 MR. DUKES: Your Honor, objection leading. I have
16 been trying to accommodate a lot of leading proficiency, but
17 this one --

18 THE COURT: I'll sustain leading.

19 MR. RANGLES: Okay.

20 BY MR. RANGLES:

21 Q. What was the discussion about?

22 A. Wind direction toward sensitive crops.

23 Q. In a proposed label?

24 A. That's what we were discussing, yes.

25 Q. All right. Let's turn to page 1033.003, the middle

1 page. Do you see where it says, "We are clearly proposing"?

2 A. Yes.

3 Q. "We are clearly proposing using the same language for
4 Engenia with respect to -- with regard to the wind cannot be
5 blowing toward adjacent commercially grown sensitive crops."
6 Do you see that?

7 A. Yes.

8 Q. The next paragraph. "We should leave it the way I have
9 proposed below." Did I read that correctly?

10 A. Yes.

11 Q. "We will let Monsanto know what we have discussed with
12 you, but we will need to speak with Monsanto directly to get
13 their buy-in." Did I read that correctly?

14 A. Yes.

15 MR. BOZARTH: Objection, Your Honor, he said "We
16 will," and it says, "You will."

17 MR. RANGLES: I'm sorry. If I did say that, I'm
18 sorry.

19 MR. BOZARTH: Thank you.

20 MR. RANGLES: I will accept counsel's correction,
21 Your Honor.

22 BY MR. RANGLES:

23 Q. With counsel's correction, did I read that correctly?

24 A. Yes.

25 Q. All right. So what was your understanding of the word

1 "proposed"?

2 A. That it had not been finalized yet.

3 Q. Finalized by whom?

4 A. EPA -- or actually it was still in a proposal that was
5 going to go to EPA as I understood it.

6 Q. And do you know whether Monsanto eventually proposed the
7 language for their label that you suggested?

8 A. It ended up that way, so I don't know how that came
9 about.

10 Q. So in this discussion you were discussing proposals for
11 labels?

12 A. Correct.

13 Q. Do you remember discussions about the pink stickers for
14 2015 and 2016?

15 A. During the deposition, yes.

16 Q. And just now?

17 A. Yes.

18 Q. Yes. Could I see M-346.

19 While you're looking, I'll ask another line of
20 questions. All right. Do you remember being shown this
21 pink sticker in your examination just a few minutes ago?

22 A. Yes.

23 Q. And now this was the 2015 sticker. You can see it says
24 in the middle cotton 2015. Do you see that?

25 A. Correct, yes.

1 Q. Now, anywhere on this sticker attached by Monsanto to
2 their seeds does it say a word about volatility?

3 A. No.

4 Q. Does it say a word about off-target movement?

5 A. No.

6 Q. Does it say a word about the danger dicamba can pose to
7 your neighbors?

8 A. No.

9 Q. Does it say anything about potential crop loss to your
10 neighbors if your dicamba moves?

11 A. No.

12 Q. Does it say anything about potential yield or financial
13 loss to your neighbor if the dicamba moves?

14 A. No.

15 Q. Now -- and let's -- if we could have the very next one,
16 the 2016 pink sticker. I won't go through every question
17 that I just asked you. Do any of the questions I asked you
18 that were not contained in the 2015 sticker would the
19 answers -- are any of those matters addressed in the '16
20 sticker?

21 A. No, they're not.

22 Q. Did you contact the companies after the products came
23 out and expressed concern that they weren't adequately
24 informing the public about what the risks of the product
25 were?

1 A. Yes. I had several e-mail conversations with Dan
2 Jenkins following our February 15th meeting as one of the
3 issues that we talked about then was the education of growers
4 about particularly the use of generic products. That was
5 always a big fear of mine.

6 And when I saw some of their advertisements that came
7 out that just listed using the Xtend system with dicamba, I
8 wrote and expressed real concerns that they missed an
9 opportunity to say only certain types of dicamba in the
10 advertisement.

11 As a farmer, knowing how farmers think, when you read
12 that you can use dicamba, that tells me you can use dicamba,
13 and it was not specific. And I realized they didn't have the
14 exact product yet, but they knew that it was going to be
15 restricted to a certain type of dicamba.

16 And I told them on several occasions that here's
17 another example where you did not take the opportunity to say
18 it must be only certain formulations.

19 Q. Do you remember Mr. Dukes asked you about the fact that
20 you're an applicator, and you have an applicator's license;
21 correct?

22 A. I don't have an applicator's license. I had at some
23 point.

24 Q. And he asked you about the responsibilities of
25 applicators, didn't he?

1 A. Yes.

2 Q. If you renewed applicator license, could you follow the
3 label on either one of those products?

4 MR. DUKES: Your Honor, I object to the relevance.

5 THE COURT: Well, counsel come up.

6 (Proceedings were held at side bar, outside the
7 hearing of the jury.)

8 THE COURT: Now, Plaintiff's counsel objected two
9 or three times about your questions were beyond the scope.
10 What you were getting in -- both of you, especially you --
11 were basically expert testimony about what the labels should
12 require and why and so forth.

13 I think all of those questions that you touched on
14 opened the door for his current examination, so I'm going to
15 overrule the objection.

16 MR. DUKES: May I address that, Your Honor?

17 THE COURT: Yeah.

18 MR. DUKES: That was a credibility cross. And the
19 reason that I used the current labels was because he said
20 Monsanto did not adopt any of those recommendations. And the
21 reality was I was entitled to cross him on that, because, for
22 example, the wind speed recommendation was in there.

23 THE COURT: I understand, but once you start
24 talking about technical recommendations like that, I mean,
25 how do you -- how do you separate that out? I'm just seeing

1 a lot of trouble.

2 MR. DUKES: Well, because it purely goes to the
3 credibility. Its a yes or no. It's in there or is it not in
4 there.

5 THE COURT: I think that your questions and answers
6 went much farther than that actually. And so the whole line
7 of questioning has really gone beyond what we dealt with in
8 the pretrial conference, which is that this testimony is all
9 going to be limited to notice.

10 And I -- that's my --

11 MR. BOZARTH: Your Honor, Troy Bozarth. Just
12 one -- one point on the notice issue. I don't know if you've
13 thought that anything that -- that I put on the record went
14 beyond the notice, but basically the interactions between the
15 parties is what I pointed to. I don't think there was a door
16 open.

17 And I agree with Mr. Dukes about his
18 cross-examination on the credibility. You have to be able to
19 cross on credibility. And that just is laying in the weeds,
20 because we're bringing this person in at a very limited
21 circumstance, but then we can't cross him.

22 MR. RANGLES: I warned about the labels.

23 THE COURT: Well, I'm concerned on
24 cross-examination when you go way over what the subject of
25 the direct examination was. That just opens the door.

1 That's the problem I'm seeing.

2 MR. DUKES: Your Honor, his direct was so broad.
3 Remember he testified to damage to rural America.

4 MR. RANGLES: He said he testified to Congress
5 about that, and the Court already ruled that I could ask him
6 about his Congressional testimony.

7 THE COURT: On notice.

8 MR. RANGLES: On notice, yes, sir.

9 THE COURT: And if you-all had asked for limiting
10 instructions, or anything like that, we could really have
11 shut this down, but I really think all those questions once
12 you started getting into the labeling and why and that kind
13 of thing, you opened the door. He just came up, and he
14 objected twice, and we had that conversation before. And so
15 I think that's where we are.

16 MR. DUKES: Your Honor, can I ask for a continuing
17 objection? Because the witness has not been disclosed as an
18 expert. He's not qualified as an expert. And my questioning
19 was directly related to his credibility and actually got an
20 answer that undermined his credibility by simply using the
21 approved label, not what could have been or what should have
22 been on the label.

23 THE COURT: I think you --

24 MR. RANGLES: With the interactions with the
25 several motions in limine that is why I was so cautious, and

1 that is why I approached.

2 Your Honor, can I ask you a procedural question?

3 THE COURT: Yeah.

4 MR. RANGLES: Your Honor, it has always been my
5 practice when a Court rules on a motion in limine that if I
6 believe the door has been opened to come to the Court
7 separately and ask the Court if the Court agrees with me.
8 Would you like for me to do that practice?

9 THE COURT: Yeah. I think he'd like that --

10 MR. RANGLES: Yes, Your Honor.

11 THE COURT: -- before we have the same kind of
12 dispute.

13 MR. RANGLES: I don't want to just start asking
14 questions that I told you I wouldn't.

15 THE COURT: I'm going to review that testimony too,
16 but in the meantime --

17 MR. RANGLES: Well, I'm done with this subject. I
18 just had the one question on the applicator issue.

19 THE COURT: Okay.

20 MR. BOZARTH: Can the parties have joint objections
21 per the Court's order? And I would just ask for the same
22 continuing objection that Mr. Dukes has asked for.

23 MR. RANGLES: The objection applies to both?

24 MR. BOZARTH: Yes.

25 THE COURT: Okay.

1 MR. DUKES: Thank you, Your Honor.

2 (Proceedings resumed in open court.)

3 BY MR. RANGLES:

4 Q. Now, one thing -- and I want to put these pink stickers
5 into context. Both of these pink stickers that the jury has
6 seen and I'm just going to wave around specifically say, you
7 know, the seed is being sold, but there's no authorized
8 herbicide; right?

9 A. Yes.

10 Q. And so even though -- and that's what you were just
11 talking about regarding the advertising, your concern of
12 confusion with the farmers that you could have the seed out
13 there and say dicamba and the authorized herbicide is not
14 going to be out there: Is that where we were?

15 A. Yes.

16 Q. Okay. Okay. And did you express those views to both
17 companies?

18 A. That was only with Mr. Jenkins of Monsanto.

19 Q. Of Monsanto, not BASF?

20 A. Correct.

21 Q. Now, in respect to your -- if I may summarize your
22 testimony with Mr. Bozarth. You had a good relationship with
23 Max Safarpour?

24 A. Yes.

25 Q. And you felt he was a good listener?

1 A. Yes.

2 Q. But does the fact that you had a good relationship
3 change your view about whether the product itself still was
4 the kind of product you were warning about in your
5 congressional testimony and in your discussions with these
6 Defendants?

7 A. No. It hadn't changed because the basic facts about
8 off-target movement and the risk it poses, particularly with
9 our crop with the no residue tolerance, is drastic.

10 Q. Now, you were asked at the end if you believe BASF is
11 engaged in a -- if you had information whether or not these
12 companies were engaged in a conspiracy to create an
13 ecological disaster. Do you recall that question?

14 A. Yes.

15 Q. I want to break that question down a little bit. You
16 don't have personal knowledge whether they reached some
17 agreement, do you?

18 A. No.

19 Q. Not an area that you are versed in study; correct?

20 A. Correct.

21 Q. But do you believe an ecological disaster has occurred?

22 A. I think that's pretty apparent.

23 Q. And what do you mean by that?

24 A. If you look at the statistics of damages caused
25 throughout the whole Midwest, it's very apparent that those

1 things did not happen in 2010, 2011, 2012, '13, '14, and all
2 of a sudden starting in '15 and '16 everything just blew up,
3 and it continued to even get worse in '17.

4 Yet to this day in even 2019 Indiana had the most
5 complaints that its ever had. And I think those numbers are
6 dwarfed. Most people would tell you that the number of
7 complaints versus the actual problems would probably be
8 tenfold.

9 MR. DUKES: Your Honor, I object. I mean, this is
10 clearly hearsay.

11 THE COURT: I'm going to sustain that objection.

12 MR. RANGLES: To the last part?

13 THE COURT: Yes.

14 Counsel, come back up again.

15 (Proceedings were held at sidebar, outside the
16 hearing of the jury.)

17 THE COURT: Now it seems like you are getting
18 beyond --

19 MR. BOZARTH: Yes.

20 MR. RANGLES: Well, he asked this specific question
21 about do you have any information that they engaged in a
22 conspiracy to create an ecological disaster. I believe I'm
23 entitled to ask about each part of the question, which is
24 what I was doing, but I'm done.

25 THE COURT: Well, why don't we strike that question

1 and answer.

2 MR. BOZARTH: Yes.

3 MR. RANGLES: Then do we strike his?

4 THE COURT: Well, I --

5 MR. BOZARTH: I didn't ask -- I asked him if he had
6 any information. You're asking him for expert testimony.

7 THE COURT: We'll make more of a record later. I
8 think part of the problem is even with all of this
9 information you talked about it's mainly about exchanging of
10 information like what's happened is that exchange of
11 information has gone over the top with expert testimony.

12 MR. RANGLES: Yes, exactly.

13 THE COURT: And that's where you've all put me in a
14 bind on that.

15 MR. RANGLES: I didn't go near expert testimony on
16 my direct.

17 THE COURT: I know.

18 MR. DUKES: I tried not to.

19 MR. BOZARTH: But this last question and answer is
20 clearly expert testimony that should not be allowed, and
21 Defendants move to strike.

22 THE COURT: I know. And that's why I'm going to
23 stop it there, because I think so.

24 MR. RANGLES: I still believe his question and
25 answer must be stricken too then. I mean, I -- I took his

1 question apart and asked about it.

2 THE COURT: Yeah, you did ask about that ecological
3 disaster.

4 MR. RANGLES: I'm fine with them both being struck.

5 THE COURT: What was your question?

6 MR. DUKES: I asked him if he had any evidence of a
7 conspiracy between Monsanto and BASF to create an ecological
8 disaster. And then he asked for expert testimony about an
9 ecological disaster.

10 MR. RANGLES: No. It's part of the question --

11 MR. BOZARTH: About whether one existed.

12 MR. RANGLES: -- about an ecological disaster.

13 It's part of the evidence.

14 THE COURT: And so what has he said? He said, Yes.
15 So why don't we just leave it at that.

16 MR. RANGLES: I'm good with that. I'm good with
17 that.

18 MR. BOZARTH: So his opinion is that an ecological
19 disaster has occurred?

20 MR. RANGLES: You asked him if he had any
21 information. He has information.

22 MR. BOZARTH: That Monsanto and BASF conspired?

23 MR. RANGLES: To create an ecological disaster.

24 That's one element of your question that I asked about.

25 THE COURT: I'll let it go to that point.

1 MR. RANGLES: Okay.

2 THE COURT: So where were we --

3 MR. RANGLES: He asked you if you have any
4 information you. You said an answer of yes is sufficient.
5 And then he doesn't render an expert opinion, and I'm okay
6 with that.

7 MR. BOZARTH: So basically everything after yes is
8 stricken or should be stricken?

9 THE COURT: Well, are you okay with all of this?

10 MR. RANGLES: I'm okay with it. I'm okay with
11 striking after yes.

12 MR. BOZARTH: So just instruct the jury that
13 everything after yes is stricken?

14 MR. RANGLES: Well, I don't want to insinuate he or
15 I have done something wrong here.

16 THE COURT: Correct.

17 MR. RANGLES: So if you want to strike both of the
18 questions by both of us, I think that's the only fair way to
19 fix it.

20 MR. BOZARTH: That's fine.

21 THE COURT: So I'm to instruct the jury that all
22 the questions from Mr. Bozarth and Mr. Randles about an
23 ecological disaster are stricken?

24 MR. BOZARTH: Yes The questions and answers are
25 stricken.

1 MR. RANGLES: No objection. That's fine with me.

2 (Proceedings resumed in open court.)

3 THE COURT: Sorry for the delay.

4 All of the questions and answers from both parties
5 about an ecological disaster from this witness -- both
6 directed to this witness and his answers are stricken from
7 the record.

8 You may proceed.

9 MR. RANGLES: Thank you. Your Honor, I'm finished.

10 THE COURT: Okay.

11 Any recross?

12 MR. DUKES: Your Honor, I understand that recross
13 is generally discouraged; and, therefore, I will not request
14 any at this point.

15 THE COURT: Mr. Bozarth?

16 MR. BOZARTH: No, Your Honor.

17 THE COURT: You may step down.

18 Who is your next witness? Maybe we could take an
19 hour and 15-minute lunch recess now or what?

20 MR. RANGLES: Yes, Your Honor. My next witness is
21 Dr. Boyd Carey from Monsanto. He will be a lengthy witness.
22 If the Court is comfortable starting lunch now, that might be
23 best.

24 Why don't we do that. That will give them a full
25 hour and 15 minutes instead of just an hour today. Let's do

1 that.

2 So, again, you'll be on your own for lunch. And
3 report back to the jury room by 1 o'clock, and we'll start
4 then.

5 Remember the admonition I've given you repeatedly.
6 Do not discuss the case among yourselves or with others or
7 permit anyone to discuss it in your presence. Do not form or
8 express any opinion about the case until it's finally given
9 to you to decide.

10 Thank you for your patience. Go to the jury room
11 now and be back ready to go at 1 o'clock. Thank you.

12 Counsel, remain in the courtroom.

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

15 THE COURT: Okay. Did you have some other --

16 MR. RANGLES: Actually, I asked you what I needed
17 in court. We do have one thing about video we can do either
18 now or at the end of the day.

19 THE COURT: Well, why don't you tell me.

20 Ms. George is going to address it.

21 MS. GEORGE: Your Honor, if you'll recall your
22 ruling on a motion in limine that Defendants moved to exclude
23 any evidence of fraud on the EPA, and we told you we don't
24 have a fraud on the EPA claim. We don't plan to talk about
25 fraud on the EPA.

1 THE COURT: Right.

2 MS. GEORGE: However, what they've done in their
3 opening is what we suggested to the Court was going to
4 happen, and that is that they're going to say that they did
5 the studies, they gave them to the EPA, and the EPA relied on
6 those studies and did a risk assessment based upon the
7 information they gave them and granted an approval.

8 So we have Tina Bhakta is going to testify about
9 information that they gave to the EPA. Mr. Miller asked her
10 if they gave the EPA all of the data from the Georgia field
11 study. Yes. Did the EPA then come back and ask you to do
12 anything different? No.

13 So the flip side of that coin is we believe now we
14 can say, Well, what didn't you give the EPA? You didn't give
15 them this. You didn't give them this. It's just the flip
16 side of the same coin.

17 MR. HOHN: Your Honor, we talked about this on
18 Sunday afternoon. I think you have already resolved this.
19 It was very clear what we could and couldn't do. You said,
20 obviously, we couldn't say because the EPA approved it it was
21 therefore safe. Because the EPA approved, therefore, we're
22 not liable. We didn't say those things.

23 The Plaintiffs are actually trying to open their
24 own door, because Mr. Randles in his opening made the point
25 about you're going to hear from Monsanto that they conducted

1 these tests, you know, in the petri dish and there were 1,200
2 tests.

3 THE COURT: I'm going to stay with my original
4 rulings, because I don't think he opened the door, although
5 you came pretty close. But all you were discussing, I think,
6 was the basic administrative process that the EPA uses to
7 evaluate these products, and so I don't think that opens the
8 door, but it's close.

9 MS. GEORGE: Can I just read you one question to
10 make Your Honor understand?

11 THE COURT: Okay.

12 MS. GEORGE: Mr. Miller asked Ms. Bhakta, "And the
13 EPA were given the information to show the stage the cotton
14 was at when it was sprayed with XtendiMax and VaporGrip?
15 Yes, they were. Did EPA come back after they got that
16 information and say, Well, you should have sprayed it -- we
17 want you to do another one where you're spraying over mature
18 cotton? No, they didn't. Could EPA have done that if they
19 believed it was necessary for the risk assessment?

20 The questions I want to leave in are, But you
21 didn't give them this piece of information? So he is
22 designating testimony where he is going to ask her to play,
23 Well, you gave them this information, and they didn't come
24 back for more. I just want to play the parts that say, Well,
25 you didn't give them other information.

1 MR. HOHN: Your Honor, if she wants us to take out
2 those two questions, we can do it.

3 MS. GEORGE: Well, it's more than two questions if
4 you want to read the eight pages before.

5 MR. HOHN: I don't think that opens the door. I
6 don't think so at all, because I believe we're going back to
7 the simple premise of your ruling, which was not we're not
8 saying that because EPA approved it that somehow gives us the
9 blessing. So if there's specific --

10 THE COURT: What are the eight pages before?

11 MR. HOHN: If there's specific questions that she
12 thinks we ought to deal with, we're happy to sit down and do
13 that.

14 THE COURT: Why don't you see if you can work this
15 out over the lunch hour --

16 MS. GEORGE: Okay.

17 THE COURT: -- and report back.

18 MR. HOHN: We will.

19 THE COURT: But I'm disinclined to allow anything
20 more about any kind of suggestion that there's a claim about
21 fraud on the agency.

22 MS. GEORGE: And that would include their questions
23 about what they did give and that the EPA made a risk
24 assessment based on that?

25 THE COURT: They're entitled to talk in general

1 about the administrative process with the EPA, but that's
2 about it. Now --

3 MR. HOHN: No problem.

4 THE COURT: -- do you want to talk a little bit
5 further? I think I made a sufficient record about all of the
6 objections that were going on about the questioning starting
7 with Monsanto about questions beyond the scope of direct, and
8 I think I made that ruling clear that you-all opened the door
9 even though some of these questions -- well, they were all
10 questions about the sharing of information between Mr. Smith,
11 the witness, and both BASF and Monsanto.

12 But at some point, especially when you started to
13 talk about labels, it appeared to this Court, and he was
14 picking up on it too, this Plaintiffs' counsel, that you were
15 getting into asking him questions about expert testimony, and
16 that's why I'm very concerned about that.

17 And I think that at the same time once we start
18 talking about ecological disaster that's clearly overboard
19 for both lines of questioning.

20 Anyway, if you want to supplement your objections
21 to that further, I'll look at it again, but at this point I
22 think you opened the door sufficiently to allow the redirect
23 questions from Plaintiffs' counsel.

24 MR. DUKES: Your Honor, I understand. As I
25 mentioned at sidebar, those questions were designed to be a

1 credibility cross-examination, which we're always entitled
2 to.

3 And, as I mentioned, it was things such as he said
4 Monsanto didn't adopt any of our recommendations, and I've
5 used the label to show that in the label those are --

6 THE COURT: I understand.

7 MR. DUKES: -- and it was intended to go to
8 credibility.

9 And I think we did preserve the record, but just to
10 reiterate I had objected to that line of questions as
11 improper expert testimony under Rule 702, 401 and 402.

12 THE COURT: I understand all that. Okay.

13 MR. BOZARTH: And, Judge, for BASF I don't believe
14 that anything that I did opened the door on that, because my
15 questioning was directly about communications between the two
16 parties, Mr. Smith and BASF, and I kept it between those two.
17 He was a notice witness to discuss just that. So I don't
18 think that anything I did opened the door.

19 THE COURT: I'm mainly talking about the --

20 (A discussion was held off the record.)

21 THE COURT: I'm mainly talking about the labeling
22 issue.

23 But, anyway, we'll be in recess until 1 o'clock.

24 MR. MILLER: I have the proposed order for
25 objections to Dr. Boyd Carey's exhibits.

1 THE COURT: Oh, yeah, that's fine.

2 MR. MILLER: Thank you, Your Honor. I assume it's
3 okay with counsel. The language isn't on here, but is it
4 still Your Honor's ruling that all of the exhibits listed in
5 this proposed order, which I understand the Court is going to
6 sign, I do not need to pop up in the middle of the direct
7 testimony to reiterate my objections to those particular
8 exhibits?

9 There might be other exhibits, I don't know, but
10 those that are on that list I'm preserving the objection; is
11 that correct?

12 MR. RANGLES: That is the agreement we made before
13 we started.

14 MR. MILLER: Right.

15 MR. RANGLES: That is the continuing agreement for
16 both of us.

17 MR. MILLER: Okay. And I appreciate that,
18 Mr. Randles. I just need to make sure. The Eighth Circuit
19 can be picky, and I just want to make sure probably with
20 everyone I'm going to ask to put that on the record again.

21 MR. RANGLES: Every time you poke me I will repeat
22 that I agree.

23 THE COURT: All right. I already signed off on it.

24 MR. MILLER: Thank you, Your Honor.

25 THE COURT: We're in recess.

(Proceedings stood in temporary recess.)

- 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

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

C E R T I F I C A T E

I, Alison M. Garagnani, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of 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 and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains all pages transcribed by this reporter and takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated Cape Girardeau, Missouri, this 29th day of January 2020.

/s/Alison M. Garagnani
Alison M. Garagnani, CCR, CSR, RMR, CRR
Official Court Reporter