

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC., ET AL,,)
)
 Plaintiffs,)
)
 v.) No. 1:16-CV-00299 SNLJ
)
 MONSANTO COMPANY AND BASF)
 CORPORATION,)
)
 Defendants.)

=====

JURY TRIAL - VOLUME 4A

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

JANUARY 30, 2020

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JANUARY 30, 2020

(The proceedings commenced at 8:40 a.m.)

(The following proceedings were held in the courtroom out of the presence of the jury:)

THE COURT: Good morning. So what do we have?

MR. DEMORET: Good morning, Your Honor. Martin Demoret representing BASF Corporation. We asked for an opportunity to meet with you this morning, Your Honor, to deal with a couple of outstanding issues with the video deposition that Plaintiffs plan to play later this week of Dr. Jeffrey Birk.

Dr. Birk is BASF's product registration manager. He was the primary person at BASF responsible for interfacing with EPA on the Engenia registration. Now, we notified plaintiffs' counsel, and Mr. Mandler mentioned in his opening, that Dr. Birk is actually going to appear live later in the case to testify. However, plaintiffs' have decided to play portions of his video deposition.

Now, I have some good news --

THE COURT: Part of their case-in-chief as an adverse witness?

MR. DEMORET: Exactly. Yes, Your Honor. So I have good news this morning, which is initially we started off with disputes around 25 different documents that they intended to introduce through Dr. Birk. We have it down to four now. We

1 have resolved the other 21. We are going to preserve our
2 objections. We are not going to raise those to you except for
3 preserving our objections and putting it in a proposed order.

4 **THE COURT:** Okay.

5 **MR. DEMORET:** We have been listening closely to the
6 guidance that you have given us and have tried to cut it down.

7 **THE COURT:** When I yelled yesterday morning?

8 **MR. DEMORET:** May I approach the bench, Your Honor?

9 **THE COURT:** Yes.

10 **MR. DEMORET:** Your Honor, we prepared a binder for
11 our discussion this morning. It has the four exhibits at
12 issue. We have highlighted the relevant portions that we
13 would like to discuss. You will also see in the binder that
14 there's a yellow divider sheet. Behind that is the deposition
15 testimony pertaining to the exhibit.

16 Based on our discussions with counsel, we met a
17 couple of times on this, we are in agreement that if the
18 exhibit comes in, we will -- the testimony will come in as
19 well and if the exhibit is excluded, the testimony will be
20 excluded. So we think that will simplify things this morning.

21 The first one I would like to look at, Your Honor,
22 is Exhibit 1141.

23 **THE COURT:** Yes.

24 **MR. DEMORET:** This is an e-mail that was written by
25 Dr. Birk in October of 2012, so this would be several years

1 before the Engenia and XtendiMax products were launched. And
2 to be blunt, the purpose of the e-mail is disparaging a
3 testing method that's discussed in an attached presentation to
4 that document.

5 Now, originally this document was subject to a
6 motion *in limine* presented by the defendants' motion
7 *in limine* 20 which dealt with inflammatory documents. And the
8 Court during those proceedings expressed concern about the
9 colorful language and the remoteness in time of the document,
10 but the Court decided not to exclude it, at least at the
11 motion *in limine* stage.

12 But we believe, Your Honor, what has changed is the
13 manner in which Plaintiffs' counsel characterized this
14 document during opening statements actually rendered or
15 demonstrates that it's inadmissible.

16 You will see the highlighted portion of the
17 document. Your Honor, we would take the position that that's
18 not a business record, Your Honor, under 803(6). To show
19 that, they would have to demonstrate that the record was kept
20 in the regular course --

21 **THE COURT:** Go a little bit slower for the court
22 reporter.

23 **MR. DEMORET:** I'm sorry.

24 They would have to demonstrate that the record was
25 kept in the course of a regularly conducted activity at BASF

1 and that making this type of record was a regular practice of
2 that activity and that a witness has demonstrated that
3 foundation. And we would submit to Your Honor that again
4 making disparaging comments about a competitor's testing does
5 not fit within this exception.

6 This also doesn't go to notice, Your Honor. We are
7 not talking about Engenia here; we are not talking about any
8 testing methods that BASF did; so we are not talking about a
9 notice of any deficiencies with BASF's product or testing
10 methods.

11 Finally, we would submit, Your Honor --

12 **THE COURT:** I thought we are talking about
13 low-volatility dicamba, the experimentation on it or the plans
14 for it or the --

15 **MR. DEMORET:** Correct, Your Honor. But as
16 Mr. Randles stated during open, he's talking about testing
17 that Monsanto was doing, not BASF. Dr. Birk is not talking
18 about a BASF test. He is not talking about a BASF -- testing
19 of BASF low volatility, a product that was going to be
20 registered with EPA.

21 **THE COURT:** I thought that BASF was working more on
22 the herbicide and Monsanto was working on the seeds. I know
23 there was --

24 **MR. DEMORET:** It's not exactly correct, Your Honor.
25 Both were attempting to register products with the EPA; so

1 this pertained to testing that Monsanto was doing in the
2 process of its registration of the product that it wanted to
3 register and get a label from for EPA.

4 So the point we are getting at, Your Honor, is this
5 is presumably being offered against Monsanto, not BASF, and so
6 this would not fit within a nonhearsay exception or a business
7 record exception as to BASF.

8 So our position, Your Honor, is given these
9 admissibility issues coupled with the concerns that were
10 raised about the colorful language as well as the remoteness
11 in time, that this would be one -- that at this point in time
12 at least we would represent should be excluded.

13 **THE COURT:** First of all, I am going to stay with my
14 ruling. I don't think it's too inflammatory. It's certainly
15 not as inflammatory in -- some of the other things are
16 downright scandalous. So do you want to address --

17 **MS. GEORGE:** I agree with your ruling, Your Honor.

18 **THE COURT:** I know but that was just -- he raised
19 like five different grounds.

20 **MS. GEORGE:** To not waste the Court's time, I'll
21 just say --

22 **THE COURT:** Let me say, too, I do think it's
23 relevant. So what about business records or the foundation or
24 what?

25 **MS. GEORGE:** So the testimony is that that gentleman

1 who is writing that e-mail is on the development work group --
2 this is in 2012 -- the development work group with Monsanto.
3 He testified it is his job to draft those attached slides
4 which are a presentation to the AMT. That AMT is the
5 oversight approval of both of these companies' development
6 activities. And the individual in that e-mail, that we are
7 asking him about his own e-mail, is referring to the science
8 presented to their joint work group --

9 **THE COURT:** It sounds like it was probably more like
10 a joke than anything --

11 **MS. GEORGE:** They do cross him. We cross him and
12 then they redirect him in the video, so it's fully vetted.

13 **THE COURT:** I am not -- I understand -- I don't know
14 that I understand your argument about foundation. I mean, if
15 it's e-mail -- something you disclosed, too, I know. You
16 disclosed it. It' an e-mail from your expert to this group,
17 so what more foundation is necessary?

18 **MR. DEMORET:** It's not an e-mail from the expert to
19 the group. It's an internal e-mail to an internal colleague
20 who is not participating in the group. It is a joke, Your
21 Honor.

22 **THE COURT:** Well, yeah, that's -- I will overrule
23 your objection.

24 **MR. DEMORET:** Understood. Understood. Thank you,
25 Your Honor.

1 The next document we would like to discuss is
2 plaintiffs' 1150. It's the next tab.

3 **THE COURT:** Okay.

4 **MR. DEMORET:** This document, Your Honor, is a
5 document entitled Dicamba Project Update and this was actually
6 discussed with Mr. Birk during his deposition. He said he
7 didn't recognize the document, he didn't recall participating
8 and contributing to it.

9 Now, what Plaintiffs have offered this for, Your
10 Honor, is actually on page 5 of the document. This is where
11 there's a reference to a scale-up and eventually use of
12 Clarity production in April of 2015. And our foundational
13 concerns with this document, Your Honor, are it's not clear
14 exactly what it is. There's dates. It's unclear who was
15 adding stuff when, if these statements were being made before
16 or after BASF was even aware that dicamba-tolerant seed was
17 going to be released.

18 Again, we are not taking the position, Your Honor,
19 that foundation cannot be established for this document. Our
20 position is it hasn't been done yet and Plaintiffs should do
21 it with Dr. Birk when he is here testifying live to see if
22 they can lay the foundation for the document.

23 **MS. GEORGE:** Sorry, Marty. We laid the foundation
24 in the deposition. We asked -- if you look at the bottom left
25 corner of page 1, he drafted this. See the bottom where it

1 says Jeff Birk? He drafted this document. This is a document
2 that's a dicamba project update to BASF SE letting them know
3 what's going on and he drafted it. And we asked him about
4 that and he said, yes, he did prepare this.

5 **THE COURT:** Do you agree with that?

6 **MR. DEMORET:** I do not. I don't think that's an
7 accurate characterization of the testimony, Your Honor.
8 Dr. Birk recognized his name was on it. He recognized others
9 names were on it as well. What he said was, I can't recall
10 actually drafting or which portions of the document I would
11 have contributed to.

12 And what I would also note, Your Honor, is the
13 section of the testimony --

14 **THE COURT:** Why is his name on it?

15 **MR. DEMORET:** At some point in time he may have
16 contributed to it, Your Honor. If I may, though, the portions
17 that they want to talk about in this document were not even
18 asked of Mr. Birk during his deposition. They did not ask him
19 did he participate in drafting the portions related --

20 **THE COURT:** They are not obligated to do that.

21 **MS. GEORGE:** He actually says, Your Honor, when the
22 question is asked: "Are you familiar with this document?"

23 "ANSWER: I don't remember it specifically, but it
24 appears that Rodrigo and I put this together."

25 **THE COURT:** Okay. All right. I will overrule that

1 objection.

2 **MR. DEMORET:** Understood, Your Honor. Thank you.

3 **THE COURT:** 1158?

4 **MR. DEMORET:** 1158 and 1159 actually go together, so
5 I will speak about them at once.

6 Your Honor, the easiest way to explain the
7 background of this document is actually if you go to the
8 second page of it. You may recall that a couple of days ago,
9 plaintiffs' first witness in the case, Steve Smith, discussed
10 at length that he asked BASF and Monsanto to conduct residue
11 testing related to specialty crops. And essentially what
12 residue testing is, if there's an accidental exposure to
13 dicamba, the residue tests allow them to know whether they can
14 market the product, you know, despite the accidental exposure.

15 And Mr. Smith had said that he asked them to do this
16 for the benefit of his growers. And so what this is, is BASF
17 and Monsanto listened to Mr. Smith and they conducted the
18 testing. As you can see from this document, it's a fairly
19 expensive process and so they agreed to split the cost of
20 this.

21 That brings us back to the first page of the
22 document, which is what they are attempting to use it for,
23 Your Honor. An individual named Heidi Pittner at BASF was
24 talking about this two-page contract and referred to it in an
25 e-mail as a joint venture, Your Honor. And what Plaintiffs

1 are attempting to characterize this as is BASF and Monsanto
2 somehow having an admission, a binding admission that the
3 entire business relationship between the parties was somehow a
4 joint venture.

5 It's clearly incorrect from the contents of the
6 document. And as Dr. Birk testified during his deposition,
7 Ms. Pittner was a low-level employee who was helping with
8 billing. It wasn't within the scope of her employment to be
9 deciding or defining the nature of the business relationship
10 between BASF and Monsanto.

11 **THE COURT:** Now, is she going to testify?

12 **MR. DEMORET:** Dr. Birk will testify, though, about
13 Ms. Pittner's position, yes.

14 **MS. GEORGE:** Your Honor, this is evidence of shared
15 cost and invoicing between these individuals for this product.
16 That's the heart of joint venture and conspiracy.

17 **THE COURT:** I will overrule the objection on that
18 because I think it's admissible for that purpose.

19 **MR. DEMORET:** If I may -- I -- just one additional
20 point. We have submitted briefing, Your Honor, noting that
21 sharing costs is not the same thing as sharing losses or
22 profits. So sharing cost --

23 **THE COURT:** I will have more to say about that later
24 and I disagree respectfully.

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

1 **MR. HOHN:** Your Honor, one quick point while we are
2 on that deposition of Dr. Birk. There's two questions that
3 were asked by plaintiffs' counsel of this witness and then the
4 answer goes into both Monsanto- and BASF-related materials, so
5 we have an interest in these two questions.

6 The two questions are specifically directed to you
7 tried to trick the EPA into thinking volatility was a myth.

8 **THE COURT:** Can you --

9 **MS. GEORGE:** Can you tell me where?

10 **MR. HOHN:** I can tell you exactly where. If you
11 look at -- let me give you an example.

12 **THE COURT:** Which exhibit again?

13 **MR. HOHN:** It's not an exhibit, Your Honor. It's
14 deposition testimony. So I can -- if you have the transcript,
15 I can tell you the page.

16 **THE COURT:** Have you talked with them about that?
17 Sounds like something that they might agree on.

18 **MR. HOHN:** Apparently they had not agreed on.

19 **MR. MOOK:** Your Honor, I understood from our
20 meet-and-confer last night that the problems that Monsanto had
21 with the testimony we were planning to play was going to be
22 submitted pursuant to their objection, and so I am not even
23 sure what piece of testimony we are talking about. They
24 were -- my understanding was --

25 **THE COURT:** Well, he said --

1 **MR. MOOK:** -- objections were being preserved in the
2 way they have been doing so on other video depositions.

3 **MR. HOHN:** They are preserved objections. This
4 relates directly to the fraud of the agency that the Court has
5 already ruled is impermissible. And so these are questions
6 that say, you were trying to convince EPA this was a myth of
7 volatility and that's --

8 **MR. MOOK:** Your Honor, this wasn't discussed last
9 night, and I don't know what piece of testimony you are
10 talking about.

11 **THE COURT:** Well, surely you wouldn't use something
12 like that because that would be a direct violation of the
13 ruling.

14 **MS. GEORGE:** We have removed a ton of EPA stuff; so
15 I don't know what this is. But you can -- I mean, we are
16 planning on playing this by the end of tomorrow, so we can
17 talk by lunch.

18 **MR. HOHN:** We can talk, but these are the direct --
19 "you are trying to trick EPA that volatility was a myth" goes
20 directly to your ruling, Your Honor.

21 **THE COURT:** Sounds like this will be resolved.

22 **MR. HOHN:** Yep.

23 **THE COURT:** Okay. What else?

24 **MR. HOHN:** I think we have one other item that
25 Mr. Shaw would like to address, Your Honor.

1 **THE COURT:** Okay.

2 **MR. SHAW:** Good morning, Judge. So first thing,
3 Your Honor, we would like to present you with our proposed
4 limiting instruction.

5 **THE COURT:** Okay. I've been kind of waiting for
6 this. Give me a minute.

7 You don't want me to read the footnotes, do you?

8 **MR. SHAW:** No, sir.

9 **THE COURT:** Looks good to me. I will let Plaintiffs
10 read it over.

11 **MR. RANGLES:** We haven't seen this before either,
12 Your Honor; so we need a minute to read it. We haven't been
13 given this.

14 **THE COURT:** Sure. Sure.

15 **MR. SHAW:** And of course by submitting this, Your
16 Honor, we don't intend to waive any objections we have to the
17 admissibility of the evidence.

18 **THE COURT:** Otherwise, yeah.

19 **MR. RANGLES:** It's fine as long as the footnotes are
20 just for the Court.

21 **MR. SHAW:** They are.

22 **THE COURT:** I've already asked about that.

23 **MR. RANGLES:** Okay. I'm sorry. I was reading. I
24 can't dual track.

25 **THE COURT:** I think it's right on point. So when do

1 you want me to give it? Maybe at the start of all the
2 testimony today?

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

4 **MR. SHAW:** Yes. Thank you, Your Honor.

5 And one other housekeeping thing, Your Honor. As we
6 discussed yesterday, we appreciate that the Court has given us
7 a continuing objection on this and other matters that will be
8 discussed in the evidence today. And Your Honor has also
9 allowed us, rather than going through all of the objections
10 that we spent days discussing in our pretrial matters, we can
11 preserve those objections with the Court by simply saying
12 "same objection."

13 And so that it's clear that the Court and parties
14 understand that by "same objection," we mean the same
15 objection as we have already discussed in our pretrial motions
16 and the basis for them.

17 So --

18 **THE COURT:** I think that's the common understanding.
19 I agree with you on that.

20 **MR. SHAW:** Then I believe that Your Honor will allow
21 us to submit proposed orders for your signature at the end of
22 witnesses' testimony, again memorializing and preserving
23 the --

24 **THE COURT:** That's fine. That's a good idea.

25 **MR. SHAW:** Thank you, Judge.

1 **THE COURT:** Any preliminary matters for the
2 Plaintiff of for Defendants? I don't know if the jury is
3 ready. Why don't we take a five- or ten-minute break and we
4 will bring the jury in and start.

5 (At this time, the Court declares a recess.)

6 **THE COURT:** Mr. Mandler, I did get the motion on the
7 other matter. Do you want to file a written response to that?

8 **MR. MANDLER:** No, Your Honor, because our position
9 was stated in the motion, and I know what your ruling is,
10 so --

11 **THE COURT:** So you are ready for me to rule on it
12 then?

13 **MR. MANDLER:** We are ready for you to rule. Thank
14 you.

15 (The following proceedings were held in the
16 courtroom in the presence of the jury:)

17 **THE COURT:** Good morning, ladies and gentlemen.
18 All right. Where were we?

19 **MR. MILLER:** I am still up, Your Honor.

20 **THE COURT:** Mr. Miller.

21 **CROSS-EXAMINATION CONTINUED**

22 **BY MR. MILLER:**

23 Q. May it please the Court. Good morning, ladies and
24 gentlemen.

25 Good morning, Dr. Carey.

1 A. Good morning.

2 Q. Welcome back.

3 Dr. Carey, I want to go over just a couple things we
4 touched on yesterday to clarify a couple of things. We talked
5 about burndown and what burndown is. And you said that
6 dicamba is used in burndown applications; correct?

7 A. That's correct.

8 Q. I want to make clear the time period of that. Is that
9 something recent; that dicamba has only recently been legal to
10 use over burndown application?

11 A. No, dicamba products for decades have been used
12 effectively in burndown applications and are approved for
13 that, yes.

14 Q. And legally?

15 A. That's correct.

16 Q. And you mentioned yesterday at some point, and I think it
17 might have come up through a previous witness as well, one can
18 also spray dicamba over the top of corn?

19 A. Yes.

20 Q. And before we go further with that, that's a term that I
21 believe the jury has heard a few times in this case, "over the
22 top" or "in-crop" and that hasn't been explained yet.

23 Could you explain to the ladies and gentlemen of the
24 jury what over-the-top or in-crop application means when you
25 are talking about a herbicide?

1 A. Yeah, the situation is that if you are using a herbicide
2 before the crop is planted, we usually call that a burndown or
3 a preplant. It's exactly what it says. It's before the
4 soybeans or the corn is planted. We use terms like "over the
5 top" or "in-crop" to distinguish that herbicides that are used
6 over the top is over the top of an emerged crop. Once the
7 soybeans emerge, the leaves are up above the ground. We refer
8 to that as "over the top" or a lot of times people refer to
9 that as in-crop.

10 Q. Okay. So if you are spraying the herbicide on the bare
11 field before anything comes up through the ground, that could
12 be a burndown or a preemergence. It's also called
13 preemergence; is that right?

14 A. That's correct.

15 Q. Once you have sprouts coming up, it's over the top or
16 in-crop?

17 A. That's correct.

18 Q. Okay. Thank you for that clarification.

19 And it was suggested I think in openings that there
20 is no over the top -- putting aside Xtend seed, prior to Xtend
21 seed, prior to Xtend cotton and soybean, that there was no
22 legal over-the-top use of the old dicambas. Is that accurate?

23 A. That's correct.

24 Q. For soy and cotton?

25 A. For soy and cotton at least, yeah.

1 Q. What about for other crops?

2 A. Well, for other crops, as I mentioned, dicamba products
3 for decades have been used postemergence to corn or cereal
4 crops like wheat and some of those crops.

5 Q. And it was suggested in opening statement that it was
6 only starting once Xtend crops were introduced, Xtend cotton
7 and Xtend soy, it was only then that dicamba would be used
8 later in the growing season; that it was only used previously
9 in burndowns earlier in the growing season, years before Xtend
10 crops. Is that accurate?

11 A. Can you repeat that one more time?

12 Q. Sure. The over-the-top use or the use of dicamba prior
13 to Xtend seed, okay, in the years coming up to Xtend seed, is
14 it true or not true that dicamba would be used during the time
15 of year that soybeans and cotton were emerging?

16 A. Yeah. Yes. That's -- that did happen. Postemergence
17 applications to corn, for instance, could happen after
18 soybeans, neighboring soybeans, for instance, could have been
19 emerged.

20 Applications in wheat and another example is that
21 what we call double-crop soybeans, which is a situation where
22 a grower would plant wheat in the winter or it would -- over
23 winter they would harvest their wheat in late June/July time
24 frame and then they want to plant a second crop or a double
25 crop on that cropping year. They may have used dicamba in

1 that time period for burndown in those cases for those
2 double-crop soybeans, as an example.

3 Q. And that would be right in the middle of the growing
4 season for the other crops like soybean and cotton and that
5 sort of thing?

6 A. It could be, yes.

7 Q. And that's been going on for years before Xtend crops?

8 A. Yes.

9 Q. I want to clarify another thing that came up yesterday,
10 2,4-D. We talked a little bit about 2,4-D, which is a
11 different herbicide; correct?

12 A. It is a different herbicide, yes.

13 Q. From dicamba?

14 A. Correct.

15 Q. They are in the same family; they're both auxin
16 herbicides?

17 A. Yes. Auxins or growth regulators they are commonly
18 referred to.

19 Q. I just want to make clear for the ladies and gentlemen of
20 the jury, has Monsanto manufactured or sold 2,4-D of any sort
21 in the last 10, 15 years?

22 A. Not for many, many years.

23 Q. Okay. Is there any 2,4-D in XtendiMax with VaporGrip?

24 A. No. If there were 2,4-D in that product, it would kill
25 the XtendFlex cotton or soybeans.

1 Q. Another thing I want to touch on, a term that you used
2 yesterday and I think other witnesses have used but has not, I
3 don't think, been defined yet, that is "yield." You talked
4 about the Xtend soy and the Xtend cotton seeds having the
5 highest yield per acre. Remember that?

6 A. Yes.

7 Q. What does that mean, yield per acre, and why is that
8 important to the farmer?

9 A. Well, farmers growing crops like cotton or soybeans or
10 corn, those are commodities; so they don't get a chance to
11 charge a price that they want for that crop. They take what
12 is available to them and they are commodities.

13 So for a farmer to be profitable, they have to be
14 able to produce as much as possible and that's what we call
15 yield. Greater yields means producing more bolls per acre for
16 cotton or bushels per acre for corn or soybeans. More bushels
17 you produce, the more money you take in.

18 Q. So in other words, when you say a particular seed like an
19 Xtend cotton seed has higher yield, that means that because of
20 the particular germplasm they call it, that you are going to
21 get more bolls per cotton per acre, the farmer is going to get
22 more bolls per cotton per acre than they would using a
23 different cotton seed. Is that fair?

24 A. That's correct.

25 Q. The same thing with Xtend soy, because it's a higher

1 yield, the farmer on the same acre of land is going to get
2 more bushels of soybeans from the Xtend soy seed than a
3 different soy seed?

4 A. If it yields more, that's correct.

5 Q. And that means more money in the pocket of the farmer; is
6 that correct?

7 A. Correct.

8 Q. Okay. I want to go on -- I want to go on to a couple
9 of -- continue on some other exhibits that you went through
10 with Mr. Randles yesterday.

11 Could we have Exhibit plaintiffs' 481 up, please?

12 That's already in evidence, Your Honor.

13 And if we could blow up the middle e-mail there.

14 Thank you.

15 Now, Mr. Randles directed your attention to the
16 line that says, "I've alerted key regulatory team members. We
17 plan to address this"; correct?

18 A. Yes.

19 Q. And he also brought your attention to the line that says
20 above that, "This is something that we have kept tightly
21 confidential within Monsanto and to my knowledge this is the
22 first external communication about it."

23 I just want to be clear. What were you talking
24 about there that had been kept tightly confidential within
25 Monsanto?

1 A. Well, as I mentioned yesterday, this was a memo that was
2 referring to a presentation. And the presentation, the
3 slides, had been given by Dr. Stanley Culpepper at the
4 University of Georgia at a meeting or a training event, a
5 public event. When those slides came to me, of course I
6 looked through them, and one thing I noticed on one of the
7 slides was a box that was red to be bolded and stand out. And
8 what it said is what I've recounted here as a direct quote in
9 my e-mail: "Injury and EPA may be the driver; very possible
10 EPA could prohibit tank mixes."

11 Q. Is that the information that was being kept tightly
12 confidential within Monsanto?

13 A. It is.

14 Q. When you say "tightly confidential within Monsanto," are
15 you talking about everybody in Monsanto knew about it but we
16 are not letting the public know, or was it more than that?

17 A. No, it was really the team of people that were directly
18 coordinating with EPA and the launch team basically. A small
19 team of people. We didn't know if the situation would or
20 would not end up preventing the launch of our XtendiMax with
21 VaporGrip herbicide for that following year. And since it was
22 an EPA issue, we don't talk about something we are
23 interpreting in EPA broadly. That's only kept on a small
24 group.

25 Q. So the remainder of that sentence, "remaining slides go

1 into significant information about volatility, drift and
2 injury," was information about volatility, drift and injury
3 being kept confidential -- tightly confidential within
4 Monsanto?

5 A. No, I just -- the way I wrote that sentence, I basically
6 put that as an add-on to also notify them that there was good
7 information Dr. Culpepper had also in the presentation.

8 Q. And you said that the quoted language that you were
9 referring to, "the injury and EPA may be the driver, very
10 possible EPA could prohibit tank information" was in a red box
11 in the presentation?

12 A. It was. Otherwise I may not have even seen it, skimming
13 through that presentation.

14 Q. Could we have up, please, just for the witness and
15 counsel, Exhibit 609, plaintiffs' 609.

16 Do you recognize this, Dr. Carey?

17 A. It -- yes. Yes.

18 Q. Is this the presentation from Dr. Culpepper that you were
19 talking about?

20 A. I believe that it is, yes.

21 **MR. MILLER:** I move for the admission of 609, Your
22 Honor. It's the one that goes along with the e-mail.

23 **MR. RANGLES:** I have no objection.

24 **THE COURT:** It is admitted. And that's plaintiffs'
25 exhibit?

1 **MR. MILLER:** It's plaintiffs' 609, Your Honor, yes.
2 And if we could go -- if we could publish that to
3 the jury, Your Honor. Thank you.

4 **THE COURT:** Yes.

5 Q. (By Mr. Miller) That's the front page; right?

6 A. I believe so.

7 Q. Do you have it on the screen?

8 A. I do see the screen.

9 Q. Let's go to the page you were talking about. Can we go
10 to page 23, please. If you could blow that up a little bit,
11 please, Ms. Bedard.

12 What are we looking at there?

13 A. So this slide, Dr. Culpepper -- and Dr. Steckel was the
14 coauthor on this evidently. They are talking about possible
15 weed control programs for either our Xtend technology, the
16 Xtend varieties and the XtendiMax herbicide, or I believe they
17 are also including in their general term "auxin" the Enlist
18 technology that is now part of Corteva and previously Dow.

19 Q. And the red box at the bottom, is that the red box you
20 were referring to that you were quoting in your letter as
21 being held tightly confidential?

22 A. That's the one.

23 Q. Okay. Thank you very much. Let's move on to a different
24 exhibit and topic that Mr. Randles went over with you
25 yesterday. Could we have up, please, Exhibit Plaintiff 175

1 already in evidence.

2 And if we could blow up the middle of the top
3 section where it says, "Do not" -- yeah, right through there.

4 A little lower. "Do not visit a driftee inquiry."

5 And Mr. Randles pointed out this language to you,
6 "Do not visit a driftee inquiry if a driftee is not a Monsanto
7 customer"; correct?

8 A. That's correct.

9 Q. You testified yesterday that was Monsanto's policy
10 initially; is that right?

11 A. That's correct.

12 Q. What's the date on this document?

13 Can you show him the date in the upper left-hand
14 corner.

15 A. I can see it. It's July 24, '17.

16 Q. So July 24, 2017?

17 A. Yes.

18 Q. Did the policy -- did Monsanto's policy of only visiting
19 people who had an inquiry regarding a possible dicamba damage
20 only if they were Monsanto's customers, did that change at any
21 point in time?

22 A. Yes, it did change.

23 Q. When?

24 A. Well, my memory says August of 2017, in that time frame.

25 Q. So the very next month after this memo?

1 A. Yes.

2 Q. What did the policy change to?

3 A. The decision was made that we would respond to anyone who
4 called our call-in number. If they were, in our terminology,
5 a driftee or someone who had applied the product and had a
6 concern, either way, and, in fact, the -- an effort was
7 made -- and I believe all of the people who had called in
8 earlier, people that we had termed "driftees," we went back to
9 them if we had their information and tried to follow up with
10 them as well.

11 Q. Now, are you talking about the ones who we contacted in
12 2017?

13 A. Yes, 2017.

14 Q. Now, Mr. Bader had already filed his lawsuit by that
15 time; correct? Counsel told you yesterday it was November of
16 2016.

17 A. That would be correct.

18 Q. Okay. So could Monsanto just have gone back to
19 Mr. Bader's field at that point once this suit was ongoing
20 without --

21 A. Well, that would obviously change the situation.

22 Q. Okay. Let me go on to a different topic that Mr. Randles
23 brought up with you yesterday.

24 And this is -- well, let's continue with the
25 investigating. Could we have Plaintiffs' Exhibit 173, please.

1 And this is already in evidence.

2 You remember seeing this yesterday, Dr. Carey?

3 A. Yes.

4 Q. Could we go to page 3, please. Could you blow that up,
5 please, Ms. Bedard?

6 Now, one of the things that Mr. Randles had you
7 testify about yesterday was that he said that, well, in 2015
8 and '16, Monsanto was not doing any investigations of
9 complaints of potential off-target movement; correct?

10 A. That's correct.

11 Q. Again, did Monsanto have any dicamba product out on the
12 market at that point in '15 and '16?

13 A. No.

14 Q. And then Mr. Randles asked you whether EPA started
15 requiring Monsanto in 2017 to report certain events. Do you
16 recall that?

17 A. I do.

18 Q. He linked that in with Monsanto starting up
19 investigations of inquiries of off-target movement in 2017?

20 A. Yes.

21 Q. Did EPA require Monsanto in 2017 to investigate claims of
22 off-target movement?

23 A. No. The requirement was related to what their approval,
24 they call the conditions of the registration and that
25 requirement was specifically for concerns about if the

1 herbicide didn't kill the weeds it should have. And that
2 related back to wanting to steward the product and make sure
3 that we weren't creating another weed resistance problem.
4 That was the requirement.

5 Q. So in 2017, you were -- Monsanto was required to report
6 any inquiries regarding not killing all the weeds, weed
7 efficacy?

8 A. That is correct, yes.

9 Q. It was not required by EPA to report or investigate
10 off-target movement?

11 A. Not to my knowledge.

12 Q. But you did anyway?

13 A. Yes. Yes.

14 Q. I want to talk some more about these investigations and
15 the purpose thereof. Mr. Randles asked you about that
16 yesterday.

17 Can we have Exhibit 518 up, please?

18 You remember Mr. Randles asking you about this one?

19 A. Yes.

20 Q. Okay. And just to put this in context, could we go to
21 page 5?

22 So this PowerPoint is talking about things that were
23 being done in 2015; is that right?

24 A. For the 2015 season, yes.

25 Q. 2015 season.

1 And we've gone over this list before, so I am not
2 going to bore everybody with going over it again. Mr. Randles
3 took you to page 14 of this document. Could we go to page 14?

4 And he pointed out the bottom line which said that
5 the dicamba inquiry form was "developed to gather data that
6 you could defend Monsanto."

7 Do you see that?

8 A. I do.

9 Q. And you said, I believe, that was not your understanding
10 of what the marching orders ultimately were for the FESs; is
11 that correct?

12 A. Correct.

13 Q. Let's look at a later document. Let's go to plaintiffs'
14 Exhibit 178 that Mr. Randles showed you yesterday.

15 And what's the date of this one?

16 A. August 11, 2017.

17 Q. Okay. And let's go to -- so this is when the
18 investigations were actually ongoing; correct?

19 A. Yes. We would have been investigating at this point in
20 time, yes.

21 Q. Let's go to the last page of this one, please, page 4.
22 And could you highlight No. 2, which is bold and underlined.

23 Are those the instructions that were given to the
24 FESs as to what they were supposed to do when they were out
25 there investigating, "You are there to collect information and

1 document facts only"?

2 A. That's correct.

3 Q. Let's go on to another document about that period of
4 time, Plaintiffs' Exhibit 197.

5 This was another one Mr. Randles showed you
6 yesterday and I believe he stated that the metadata, the
7 electronic data behind this, shows that this was dated
8 October 31, 2017.

9 And could we go to page .0006 on that one, please.

10 And you recall Mr. Randles went over the numbers in
11 here about the 80 percent and the 20 percent?

12 A. I do.

13 Q. What does the line right above there say, "Objective
14 was"?

15 A. "Objective was to gather information as to the nature of
16 the inquiry and offer opportunity to educate during field
17 visit."

18 Q. Were those the marching orders that were ultimately given
19 to the field inspection or field engagement specialists?

20 A. Yes.

21 Q. Thank you. I want to go to another document.

22 Mr. Randles talked to you about whether warnings
23 were given about potential damage to your neighbors if
24 somebody sprayed old illegal dicamba over Xtend crop.
25 Remember that?

1 A. Yes.

2 Q. Okay. Let's go to Exhibit 608, please, which you were
3 shown yesterday. And if we could go to the first page, just
4 so Dr. Carey can orient himself.

5 Is this document a PowerPoint from Dr. Culpepper?

6 A. Yes, it is.

7 Q. And that's his name down in the lower left-hand corner;
8 correct?

9 A. Correct.

10 Q. Who is Dr. Culpepper?

11 A. He is an extension weed scientist at the University of
12 Georgia.

13 Q. One of the independent academics that plaintiffs' counsel
14 has talked about?

15 A. Yes, he would be.

16 Q. Does he work for Monsanto?

17 A. No.

18 Q. Let's go to page 33 of this document -- and by the way,
19 is your understanding this is a document that Dr. Culpepper
20 used for public training of people, farmers, et cetera; this
21 was not a private in-house document?

22 A. That's correct. These are his training slides, as I
23 understand what I'm looking at.

24 Q. Can we go to page 33, please? If we can go down to the
25 paragraph down below where it's underlined.

1 In his materials, what is Dr. Culpepper telling
2 everybody in the underlined area? Well, it says right there,
3 "Quickly see that an off-label application" -- little
4 misspelled -- "of Banvel will destroy you and your neighbors,
5 plus it will likely destroy the ability to use the technology
6 in Georgia."

7 Is that something Dr. Culpepper was letting
8 everybody know?

9 A. Yes.

10 Q. In fact, if we go up to the blow-up on the top of that
11 page, that lays out why. Now, this one is for Engenia, the
12 other low-volatility dicamba in this case; correct?

13 A. Yes.

14 Q. And this is from Dr. Culpepper, the independent weed
15 scientist from the University of Georgia; correct?

16 A. This is part of his presentation, yes.

17 Q. And in this slide Dr. Culpepper is showing everybody,
18 Banvel, the original formulation of dicamba, has volatility --
19 his relative volatility is way up at 100 percent. Then when
20 you get down to Clarity, which has been discussed, the sort of
21 second generation, that's below 30 percent; right?

22 A. Correct.

23 Q. But then when you get down to Engenia, you are down below
24 10 percent; correct?

25 A. That's correct.

1 Q. That's 70 percent lower than even Clarity; right?

2 A. Correct.

3 Q. And this is Dr. Culpepper saying this?

4 A. Well, this is Dr. Culpepper's presentation. This is a
5 BASF slide and data --

6 Q. Right.

7 A. -- that he is using to say that.

8 Q. But Dr. Culpepper is basically verifying, yeah, this is
9 what I am telling everybody?

10 A. He is using this in his training, yes.

11 Q. Okay. Could we go to page 60, please.

12 This is another page from Dr. Culpepper's
13 presentation; correct?

14 A. Yes.

15 Q. And here -- and I think Mr. Smith talked about tolerances
16 and testing for tolerances. Is that what's being discussed on
17 this slide by Dr. Culpepper?

18 A. That's what he is referring to here, the residue levels
19 must be below levels approved by EPA. That's what he is
20 referring to.

21 Q. Let's go down to the text, please. The paragraph down
22 below. See what Dr. Culpepper says there.

23 Could you blow that up? Well, I guess that's big
24 enough for everybody to see. Thank you.

25 He says, "We must make sure there is a tolerance

1 established for the crop and the level found is at acceptable
2 limits as determined by the EPA. For 2015, we do not have
3 tolerances established for peanuts and most vegetables.
4 Hopefully by 2016, these tolerances will be established."

5 Dr. Culpepper is telling everybody that; correct?

6 A. Correct.

7 Q. And then Dr. Culpepper, the independent academic, goes on
8 to say, quote, "Monsanto and BASF should be commended for
9 addressing the issue aggressively and quickly." Is that
10 right?

11 A. That's what it says.

12 Q. Thank you.

13 Now, we talked a little bit about Dr. Culpepper's
14 training and warnings that he sent out. Let's talk a little
15 bit more about what Monsanto did.

16 I believe on your first day of testimony, a couple
17 days ago, in the afternoon, you talked about that part of your
18 job was preparing training materials in the stewardship
19 program; is that right?

20 A. That's correct.

21 Q. And I will apologize if this has been explained already.
22 I don't remember if it has or not. So out of an abundance of
23 caution, I'm going to ask you: Can you tell the ladies and
24 gentlemen of the jury what the term "stewardship" means?

25 A. Stewardship obviously is used in a lot of different

1 industries, but for our industry and our products, we refer to
2 stewardship as, first of all, it would apply to any product
3 that we research, in early research all the way through the
4 research and development, commercialization and literally all
5 the way until that product is terminated and no longer sold.
6 So stewardship is critical through the entire lifeline of a
7 product or technology that we would sell.

8 It has multiple components. The key components I
9 typically think of are regulatory compliance. We have to be
10 absolutely 100 percent sure that we are following all the
11 regulatory requirements as we develop and seek approvals. Any
12 legal requirements, of course.

13 And then the other major component of stewardship --
14 and we have referred to examples over the last couple of days,
15 but continually training and educating the users, in our case
16 what we refer to in this situation as applicators mostly, on
17 how to appropriately use the product, get the most value out
18 of the product and ensure that there's no -- there's no
19 negative effects possible.

20 Q. And so does stewardship -- I take it from that that part
21 of the thing that stewardship does is deals with warnings and
22 trainings and things of that nature?

23 A. Those would all be components or elements of stewardship.

24 Q. Let's take a look at one example. Could you, just for
25 the witness, because this is not in evidence yet, please bring

1 up M-379.

2 Dr. Carey, if you need to look at a hard copy of any
3 of these -- I know you are only seeing one page at a time. If
4 you need to look at a hard copy to put the whole thing in
5 context, let me know. I have them all here.

6 A. Okay.

7 Q. Do you recognize this document?

8 A. I do.

9 Q. What is that?

10 A. This is a -- this is a presentation that was developed to
11 train our internal organization at least and maybe even
12 brought more broadly into dealers and others. It's an Asgrow
13 branded presentation. So this is developed for our Asgrow
14 soybean business.

15 Q. So Asgrow is one of the brands of the Monsanto developed
16 Xtend seed?

17 A. It's one of our brands, yes.

18 **MR. MILLER:** I move for the admission of M-379, Your
19 Honor.

20 **MR. RANGLES:** I will take a moment to look at it. I
21 don't have it.

22 Oh, that's fine.

23 **THE COURT:** Any objection?

24 **MR. RANGLES:** No objection.

25 **THE COURT:** Admitted.

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

2 Can we bring that up for the jury, please.

3 Q. (By Mr. Miller) And so this is the front sheet. It is a
4 PowerPoint, as many of these things are; correct?

5 A. Yeah, a lot of PowerPoints.

6 Q. This is dated February 3, 2016; is that right?

7 A. That's correct.

8 Q. So at that time was any dicamba approved for over-the-top
9 use in cotton or soy?

10 A. No.

11 Q. Now, this would be -- is Asgrow, do they also do Xtend
12 cotton or do they just do Xtend soybeans?

13 A. They would just be soybeans. Deltapine would be our
14 brand in cotton.

15 Q. Deltapine would be cotton. Well, let's take a look at
16 soy.

17 Could we go to the second page of this document.

18 And this is sort of the leadoff, correct,
19 information that's being given to the internal people and to
20 your agents, the Asgrow dealers; is that right?

21 A. That's correct.

22 Q. And the middle bullet point tells them, "Dicamba
23 herbicides are not currently approved by the EPA for in-crop
24 application in the U.S."; correct?

25 A. Correct.

1 Q. So this training tells them that right up front; is that
2 right?

3 A. Yes.

4 Q. And then it also goes on in the next bullet point to tell
5 them, "It's our responsibility to ensure that appropriate
6 stewardship around the weed management is being communicated
7 to growers"; correct?

8 A. That's correct.

9 Q. So our folks are being told, you need go out there and
10 tell the growers this?

11 A. Yes.

12 Q. Let's go on to page 6.

13 Again, the first bullet point says, "The use of
14 dicamba herbicides is not currently approved for in-crop use
15 in Roundup Ready 2 Xtend soybeans"; correct?

16 A. Yes.

17 Q. So that's the second time at least that they're told that
18 in this presentation; right?

19 A. Yes.

20 Q. And then the second bullet point, "We are pleased to
21 announce an introductory offer of \$5 off each unit of Asgrow
22 brand Roundup Ready 2 Xtend soybeans purchased for the 2016
23 season."

24 What's that about, do you know?

25 A. I do. Again, this was obviously 2016 leading into the

1 season, and we did not have one of the components that we
2 would like to -- we didn't have the herbicide product
3 registered. So to account for that, they discounted the cost
4 of the soybeans, recognizing that one of the pieces of value
5 of that soybean was the option to use dicamba. But they
6 didn't have that option; so they discounted the soybeans to
7 account for that.

8 Q. So in other words, if a farmer is buying Xtend soybeans
9 in 2016, Monsanto is not charging them for the
10 dicamba-tolerant portion of that bean?

11 A. Yeah, they were less expensive than they otherwise would
12 have been.

13 Q. Was the same thing done for Xtend cotton in 2015 and
14 2016, they weren't charged for that trait?

15 A. That's correct.

16 Q. Let's go on to page 7 of this, please. I think the third
17 time now -- well, first of all, it says it at the top,
18 "Dicamba herbicides are not currently approved for in-crop
19 application by the U.S. EPA"; correct?

20 A. Correct.

21 Q. It says it again in the next bullet point in different
22 wording, "At this time, no dicamba formulation is registered
23 for in-crop use in Bollgard II XtendFlex cotton" -- so they
24 are talking about cotton there as well; right?

25 A. That's correct.

1 Q. "Or Roundup Ready 2 Xtend soybeans;" right?

2 A. Correct.

3 Q. The next bullet point makes it a little more clear: It's
4 a violation of federal and state law to apply a registered
5 herbicide in any manner inconsistent with its labeling.

6 So if it's not labeled for that product, it's a
7 violation of federal or state law to use it. Everybody is
8 being advised of that?

9 A. Correct.

10 Q. And then just to make sure they get the point, the last
11 bullet point says: Monsanto Company personnel must comply
12 with the law and cannot make any off-label recommendations or
13 encourage any off-label use. Is that correct?

14 A. That's correct. This is a good example of the
15 presentation that would be used when we talked yesterday about
16 all of our winter meetings with the different brands. This is
17 the type of tools we provided to our people to use at these
18 meetings.

19 Q. So you are using these tools internally to tell your
20 internal people, your employees and your agents, look, this
21 can't be done, you have to make sure as best you can, you have
22 to tell everybody this can't be done. And then the same
23 message is being given in the actual presentations being given
24 to the applicators or farmers.

25 Is that what you're saying?

1 A. Yes, our people in the field would use this exact
2 presentation in their subsequent presentations to farmers,
3 dealers, etc.

4 Q. Okay. Thank you.

5 Now, that's just one example, I'm assuming. You
6 said there were many, many, many. I don't want to suggest
7 that's the only training packet of any of these things.

8 A. No. No, that's not the only one.

9 Q. But I am not going to spend time going through all of
10 them.

11 Now, were there other things besides just warning
12 both the folks in-house and the farmers and applicators, look,
13 you can't use any dicamba over Xtend seed in 2015 and 2016?
14 Was there any training set up as part of stewardship on how to
15 use XtendiMax once it was approved?

16 A. Yes, absolutely. We had a very extensive training effort
17 through the winter and spring.

18 Q. Could you show the witness, please -- this is not in
19 evidence quite yet, Your Honor, Exhibit M-373.

20 Do you recognize that, Dr. Carey?

21 A. Yes.

22 Q. What is this?

23 A. This is another PowerPoint, but it is the training on the
24 label requirements, application requirements. This is
25 November 2016. That's the same month that we actually

1 received an approval for the registration and the first time
2 we actually had a final label with the final use instructions
3 available to do training.

4 Q. So by the time this training is coming out now,
5 November 2016, that's the month that the EPA approved for the
6 first time low-volatility dicamba, XtendiMax and Engenia
7 specifically, to be used over Xtend crops in-crop; correct?

8 A. That's correct.

9 **MR. MILLER:** I move for the admission -- it's just
10 this package.

11 **MR. RANGLES:** I have no objection.

12 **MR. MILLER:** Move for the admission of M-373.

13 **THE COURT:** It's admitted.

14 Q. (By Mr. Miller) Let's take a look at the front page so
15 the ladies and gentlemen can see. And I want to go through
16 several pages here. Again, we are just going to hit some
17 points in here.

18 This is about 40 pages long, 40 slides long. Does
19 that sound about right?

20 A. That sounds right.

21 Q. Okay. Let's go to page 14. And that's the -- basically
22 the subtitle page for the next section of the training; right?

23 A. Yes.

24 Q. And what is "application requirements education," what
25 does that mean?

1 A. Well, a number of requirements with any herbicide,
2 certainly with XtendiMax with VaporGrip technology, are
3 required by the label and this is training designed to help
4 people understand what those requirements are that are on the
5 label.

6 Q. You've heard the term "the label is the law." I think
7 the jury has heard that.

8 A. Yes.

9 Q. And what does that mean?

10 A. Well, the label is a federal agency approved document; so
11 in the industry, we always refer to the label as the law. And
12 if you do not follow the label, that's a violation of a
13 federal law.

14 Q. And so Monsanto, part of the stewardship for any of these
15 products, including Xtend and XtendiMax -- well, XtendiMax, go
16 out and train on the label?

17 A. That's correct.

18 Q. All right. Let's take a look at the next page, page 15,
19 please.

20 Now, the start of this section tells the applicators
21 and farmers that are listening to this training, "The
22 information in this training deck is not a substitute for
23 product labeling or any federal, state and local
24 requirements." Is that right?

25 A. That's correct.

1 Q. Why do you tell them that?

2 A. Because individual states may have their own
3 requirements, additional to any requirement on the federal
4 label. And it's also to make sure people understand that
5 going through this training isn't the only requirement. The
6 requirement is they have and understand the label themselves.

7 Q. And, in fact, it says at the bottom in red, "Avoiding
8 spray drift at the application site is the responsibility of
9 the applicator"; correct?

10 A. Correct.

11 Q. Did we discuss that yesterday why that is?

12 A. We did.

13 Q. Is that just Monsanto's position or is that how it is in
14 the industry with herbicides in general?

15 A. That is an accepted industry standard. Many different
16 manufacturers and products have that position, exact same
17 language or a variation of it.

18 Q. And then at the bottom of the page it says, "This
19 presentation on application requirements is not a substitute
20 for the product labeling. Always read and follow all product
21 labeling." Correct?

22 A. Correct.

23 Q. Just a reminder that's up at the top of that; correct?

24 A. That's correct.

25 Q. And I think we are going to see that ends up on every

1 single slide, that little thing down there is every slide.

2 Let's go to the next page, 16.

3 Again, very next slide, the farmer applicator is
4 told again: Always read and follow directions for use on
5 pesticide labeling. It's a violation of federal and state
6 laws if you don't. Right?

7 A. Correct.

8 Q. And again, that reminder at the bottom, "This
9 presentation is not a substitute for the product labeling.
10 Always read and follow the instructions." Correct?

11 A. Correct.

12 Q. Let's go to the next page, 17. We are not going to go
13 through every page through 40. Don't worry.

14 What do we have here?

15 A. Well, this is an outline of the training. And it has
16 different categories of information and requirements and
17 directions that are on the label. So -- and it's not all on
18 the label, but it's a majority that's on the label. There's
19 some additional information to the label requirements. And
20 this is the outline for the training itself.

21 Q. And off-target movement, let's look at the next slide,
22 18. And we talked about this yesterday, right, the different
23 types of off-target movement?

24 A. We did.

25 Q. Physical drift, sprayer contamination and volatility;

1 right?

2 A. Yes.

3 Q. So that's something again that you are training the --
4 Monsanto is training the farmers and applicators on; correct?

5 A. Correct.

6 Q. Let's go to another page. Let's go to 20. And again, I
7 am just picking out some examples here.

8 Supplemental label restriction, what is that?

9 A. Well, these are additional restrictions. And
10 specifically they are you cannot apply this product aerially
11 because some of the older dicamba products can be applied
12 aerially but these cannot be. And it instructs that you
13 cannot make an application of the product if rain is expected
14 within the next 24 hours.

15 Q. And that could be for water runoff; right?

16 A. That's actually what it was for. It's another
17 restriction to limit the potential for water carrying off soil
18 that might have been treated with dicamba into an off-target
19 location.

20 Q. Let's go to page 26, please. "Protection of sensitive
21 areas: Buffer requirement." What is a buffer?

22 A. So a buffer is a -- it's a very descriptive term in this
23 case. If you are spraying in a field, you may be required to
24 have a buffer between where you actually spray and some other
25 area. In this case we are talking about sensitive areas.

1 So the buffer is an area you have to leave and you
2 cannot treat that to ensure that you've got, you know, a
3 distance of protection between the last point you are spraying
4 and the neighboring sensitive area.

5 Q. So if there's a neighbor sensitive area -- neighboring
6 sensitive area, you are not supposed to spray right up to the
7 line -- your property line?

8 A. Correct.

9 Q. Okay. And, in fact, it lists exactly what the buffer --
10 how big the buffers have to be, how wide they have to be;
11 correct?

12 A. It does. It also lists exceptions where you don't have
13 to use a buffer.

14 Q. Okay.

15 A. Not on this slide, but --

16 Q. Well, that would be the next slide; right? Well, no.
17 Yeah, the next slide.

18 "If any of the following are directly adjacent to
19 the treated field," they basically can be considered part of
20 the buffer. So if you are next to a road, that's part of the
21 110 or 220 feet buffer; right?

22 A. That's correct.

23 Q. Okay. Just to make sure people understand it, let's go
24 to the next slide, page 28. They are given a graphic of what
25 you are talking about with the buffer; correct?

1 A. That's correct.

2 Q. And what about the wind there where it says 3 to 10 miles
3 per hour?

4 A. Well, the XtendiMax label prohibits any application to be
5 made if the wind isn't in that range of wind speed. It has to
6 be between 3 and 10 mile per hour.

7 Q. And if we go to the next page, 29, here they are again
8 talking about nontarget susceptible crops. That would be
9 crops that could be damaged by dicamba; correct?

10 A. Correct.

11 Q. And it says here, "Do not apply under circumstances where
12 off-target movement may occur to food, forage or other
13 plantings that might be damaged"; right?

14 A. Correct.

15 Q. And it explicitly says, "Do not apply when the wind is
16 blowing toward adjacent dicamba sensitive crops, including but
17 not limited to"; correct?

18 A. Correct.

19 Q. This is all in the label, all in the instructions that
20 the applicator has to follow?

21 A. Yeah, all of this wording is on the label, yes.

22 Q. There are various other -- it goes -- this training goes
23 through virtually all of the stuff on the label. Is that fair
24 to say?

25 A. It's fair to say.

1 Q. Then if you go to page 40, what are we looking at here?

2 A. So this is -- this appears near the end of the training.

3 And this is a summary of some of the very key application
4 requirements, including some that might be different than
5 other labels. Most of these are on almost every label, but
6 it's a key summary of the key requirements to prevent the
7 potential for off-target movement through drift.

8 And we actually presented this so it will be one
9 more way for people to internalize and have a short summary
10 available with them.

11 Q. But again they are warned at the top, "This summary is
12 not a substitute for reading and following all product
13 labeling"; correct?

14 A. Correct.

15 Q. What else was done with this summary besides having it in
16 this PowerPoint presentation?

17 A. Well, I can't remember all of the versions of this that
18 were distributed, but it was distributed in a lot of different
19 pamphlets and physical materials. One example that was --
20 seemed to be very well received was a -- these window clings,
21 you know.

22 Q. A window cling?

23 A. Yes.

24 Q. What is a window cling?

25 A. You know, like a sticker basically that you put on the

1 windshield of your car. A window cling of that summary was
2 made so that sprayers or applicators or farmers, if they were
3 applying their own, could put it on the window of their
4 sprayer, one more reminder of the requirements.

5 Q. So they were given -- when they were getting the
6 XtendiMax with VaporGrip, they were given this in a sticker
7 form they could put right on it so it's right there in front
8 of them when they are actually applying the herbicide?

9 A. Yes, and I believe we also made Spanish versions as well.

10 Q. Now, the training on how to properly use XtendiMax with
11 VaporGrip that we saw started in November of 2016 when it was
12 approved by the EPA; right?

13 A. Well, as soon thereafter as we could. Take into account
14 that was the first time we had the final label, but very soon
15 after, yes.

16 Q. And so the first time it would likely to start being used
17 over the top would be like May or so, May or June of 2017?
18 Yeah, 2017?

19 A. Certainly in this geography, yes. Now, there are some
20 situations like in south Texas in areas where they might have
21 used it earlier.

22 Q. Okay. Let's talk about around here.

23 A. Yes.

24 Q. Not until May or June; right?

25 A. That's correct.

1 Q. Of '17?

2 A. That's correct.

3 Q. Between November of 2016 when XtendiMax with VaporGrip
4 was approved by the EPA and May/June of 2017 when it first
5 potentially started being used in this area, roughly how many
6 applicators -- and I'm not just talking about applicators
7 around here but anywhere -- roughly how many applicators
8 received training from Monsanto regarding the proper report
9 use of this herbicide?

10 A. So a national number in all of the states that the label
11 was approved for, we -- it was over 50,000.

12 Q. 50,000, 5-0?

13 A. Correct.

14 Q. Was Monsanto charging for this training?

15 A. No. No.

16 Q. I want to talk to you a little bit about academic
17 testing. Mr. Randles talked with you yesterday about that.
18 And he said -- he pointed out that in 2015, Monsanto stopped
19 having any academics tests, the then-not-approved XtendiMax
20 with VaporGrip for volatility; correct?

21 A. Correct.

22 Q. And you were not in favor of that decision; is that
23 right?

24 A. That's true.

25 Q. Could you tell the ladies and gentlemen of the jury why

1 you were not in favor of that decision?

2 A. Well, my background and my entire professional career has
3 been in roles like what we call technology development. So I
4 work -- have always worked at the interface from where the
5 researchers and the plant breeders develop something new and,
6 you know, introduce it into the marketplace.

7 So I've been involved in a lot of different product
8 launches over the years with this company and even the
9 previous company I had worked at. And from a business
10 standpoint, it's always beneficial to have a collaborative
11 relationship with universities. They -- if they have
12 experience with, have confidence and are comfortable with a
13 product, they can potentially convey that to farmers and the
14 rest of the industry.

15 That's always been a beneficial relationship, I
16 believe, for not only the company but for farmers and for the
17 university scientists and universities.

18 Q. So when you say from a business perspective, it -- I am
19 not saying that academics are going to go out and sell the
20 product for you.

21 A. No.

22 Q. I don't want to suggest that. But from the company's
23 business perspective, it's a better idea to have them
24 basically on board with you before you launch the new product?

25 A. Absolutely.

1 Q. So was that your objection that you had?

2 A. Yes.

3 Q. Was your opposition to not having the academics do
4 volatility testing in 2015 and 2016, was that based at all on
5 any concern you had regarding the science that was being done
6 under GLP to test for volatility?

7 A. No, I -- no. In fact, I wanted -- I want to translate
8 the same level of confidence and understanding of the testing
9 that I was privy to, to the public and most certainly
10 university scientists. I felt that would have been
11 beneficial.

12 Q. Were you given an opportunity within the company to voice
13 your opposition to this decision?

14 A. Yes, I -- I definitely voiced my opposition.

15 Q. Were you ever told or implied or suggested, keep your
16 mouth shut, we don't want to hear that?

17 A. No. It's never been my experience in the 23 or so years
18 that I've been at the company that anyone has ever done that.
19 The way we have always operated, and consistent with this, is
20 that we take multiple opinions and considerations into
21 decisions like this. And this is one where it did not go my
22 way, but it's not the first one that didn't go my way. And --
23 but the good -- the good part of that is we are taking into
24 all of the considerations to make decisions like that.

25 Q. Do you feel in any respect at all that you were

1 retaliated against or punished in any way by the company for
2 raising your objection to this policy?

3 A. No. No.

4 Q. I want to ask you about a couple other documents that
5 Mr. Randles showed you. Could we get Plaintiffs' Exhibit 90,
6 please, which is already in evidence. 9-0. Thank you.

7 Let's go down to the bottom e-mail.

8 Mr. Randles showed you the last line of this e-mail,
9 not the -- forgetting the headline of the newspaper article,
10 but he showed you the sentence that says, "I am not sure how
11 we will be able to separate the two, but we need to make sure
12 disease impact is not overlooked in the conversation around
13 drift."

14 Do you recall him showing you that?

15 A. I do.

16 Q. Let's take a look at the sentence before that. Could you
17 blow that up, please. Or highlight it, whichever.

18 Right before that Mr. Ganann says, "Given the yield
19 losses attributable to very high disease pressures in some
20 areas, it will be very easy for the drift impact story to be
21 confounded with the disease issues."

22 What is Mr. Ganann saying there?

23 A. Well, he is saying he is observing high disease pressures
24 in some areas. And he doesn't say it explicitly, but it's
25 clearly that I understand he's probably talking about soybeans

1 and he is saying that if there are drift impacts, some people
2 might confuse one for the other, a disease for drift impact or
3 the opposite.

4 Q. And "high disease pressures," in agriculture when the
5 term "pressure" is used, what does that mean?

6 A. That means especially for diseases, you know, the
7 environment may be favorable for a disease or not favorable
8 for a disease. Some years it's not favorable for the disease,
9 so you don't see much pressure or you don't see it commonly.
10 You don't see very many instances of it or you don't see a
11 real heavy severity of the disease; so it takes in severity
12 and instance.

13 So high disease pressure is when you have probably a
14 lot of instances and lot of severity.

15 Q. Can we blow back out on the first whole page, please,
16 here, Ms. Bedard.

17 Now, in opening statement, Mr. Randles said that
18 this was a message that was sent from John Chambers out around
19 the company. Is that what this document shows?

20 A. This shows that this message was sent to one person.

21 Q. Let's blow up the top.

22 So it's forwarded through a couple of people to
23 Mr. Chambers eventually; right?

24 A. Yes.

25 Q. How many people does Mr. Chambers send this to?

1 A. One person, Jennifer Ozimkiewicz.

2 Q. Was this information contained in here by Mr. Ganann, was
3 that something that was spread around Monsanto by Mr. Chambers
4 or anybody else to your knowledge?

5 A. No, I don't believe so. I don't recall ever seeing this
6 myself, until now.

7 Q. Let me ask you about another document counsel showed you
8 yesterday. Can I have Plaintiffs' 190, please.

9 Mr. Randles showed this document to you yesterday;
10 correct?

11 A. Yes.

12 Q. And let's go to a section -- let's go to the beginning of
13 this e-mail chain, which is on the last page. Like many
14 e-mail chains, this goes backwards, right, chronologically?

15 Let's start with the first e-mail chronologically.

16 Do you know who Kim Mudd is?

17 A. I don't believe I know Kim.

18 Q. But apparently -- well, you can see she has a Monsanto
19 e-mail address down in the CC. She CC'ed herself, which some
20 people I know do. She is somebody with Monsanto; correct?

21 A. Yeah, that's a Monsanto e-mail.

22 Q. And then it's sent around to a variety of other people
23 within Monsanto; correct?

24 A. Yes, I do recognize some of those people.

25 Q. And here -- so this whole e-mail chain started with

1 Ms. Kim alerting these other people, "CPS South Purchasing
2 called me to give me a heads up on BASF allowing Engenia
3 product to ship without a surcharge."

4 Do you see that?

5 A. Yes.

6 Q. Then she goes on, "BASF is allowing 1 pallet, 1 cube and
7 500-gram bulk orders to ship without a surcharge"; right?

8 A. Yes.

9 Q. "Purchasing feels that this will hurt us in the
10 marketplace and business will move to BASF"; right?

11 A. Yes.

12 Q. And then she finally says, "I wanted to pass on the
13 information and see if we would waive surcharges on below
14 minimum XtendiMax orders." Do you see that?

15 A. Correct.

16 Q. And then you've looked through this e-mail and through
17 most of this e-mail chain, people are discussing back and
18 forth should we waive the surcharge or shouldn't we; correct?

19 A. That's correct.

20 Q. Essentially is it fair to say that what Ms. Kim is
21 bringing up here is, look, we have a competitor on the market
22 that might be undercutting us in price, we need to do
23 something so we don't lose market share to our competitor;
24 correct?

25 A. That's essentially what it's saying.

1 Q. Who is the competitor?

2 A. Well, BASF.

3 Q. Dr. Carey, in one of the questions that Mr. Randles has
4 asked you yesterday, he asked you if Monsanto would be
5 financially injured at all by -- if the Bader Farms peach
6 orchard was wiped out. Do you remember those questions?

7 A. Yes.

8 Q. You said, "In the short term it would not have an
9 economic impact on Monsanto"; correct?

10 A. Yes.

11 Q. Could you explain to the ladies and gentlemen of the jury
12 what do you mean by in the short term it wouldn't do that, and
13 how does that compare to the long term?

14 A. Well, in the context of the way the question was asked,
15 there is really no other answer than to say yes, we might lose
16 a sale from someone who was actually buying from us if we had
17 made the decisions that we did.

18 What I mean by short term versus long term is simply
19 that if you lose a sale today from doing the right thing, the
20 intent is you gain trust and you gain long-term business
21 trust. So we're always trying to focus on not worrying about
22 a lost sale today but by doing the types of things that lead
23 to long-term trust. And it's not a revolutionary idea to know
24 that trust leads to a better business relationship in the long
25 term.

1 Q. Monsanto is a for-profit corporation; correct?

2 A. Correct.

3 Q. Trying to make a profit on your products?

4 A. Yes, we do.

5 Q. How does Monsanto succeed ultimately long term
6 financially?

7 A. Well, we've always -- again, a lot of iterations of the
8 company over -- again, I've been here 23 years or more. But
9 the core is always about innovation through technology. We
10 look for, search for and try to find solutions and new
11 technologies that solve problems or make farmers more
12 profitable. And if we do that, we've created a value. And if
13 we create a value, we have the opportunity to sell that and
14 share that value and that's -- that's really the core of our
15 business.

16 Q. And finding a value for the farmers to put -- so that the
17 farmers benefit?

18 A. Yes. If you don't do that, they are not going to buy
19 your product. It's a pretty simple business equation. You
20 won't be successful.

21 Q. Thank you, Dr. Carey.

22 **MR. MILLER:** I have no further questions, Your
23 Honor.

24 **THE COURT:** Mr. Mandler.

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

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CROSS-EXAMINATION

BY MR. MANDLER:

Q. Good morning, Dr. Carey.

A. Good morning.

Q. We've met in passing. My name is John Mandler. I'm representing BASF Corporation.

I just have a -- I know you have been with us for a day and a half, so I have very few questions for you.

One follow-up from something this morning, if we can look at Exhibit 608 that I think has been admitted. And if we can go to the slide that Mr. Miller asked you a few questions about.

We were moving pretty quickly through this. I think Mr. Miller may have made a misstatement. I want to make sure that we are clear on this.

MR. MILLER: I apologize if I did.

Q. (By Mr. Mandler) To be clear, this is not a slide where I guess it was Dr. Culpepper is measuring the actual amount of volatility. In other words, when Mr. Miller said that Banvel was 100 percent volatile, that's not correct, is it? It's measuring the relative volatility between these products?

A. It is the relative volatility, you're correct.

Q. So Clarity is 70-plus percent less volatile than Banvel and Engenia is 70 percent less volatile than Clarity, whatever that number is; correct?

1 A. Relative to Banvel, yes.

2 Q. And there are similar slides that show the same
3 difference between Banvel and Clarity and XtendiMax, for
4 example?

5 A. That's right, there are.

6 Q. And in those slides they are not showing the actual
7 amount of volatility but the relative amount; correct?

8 A. That's a very good point to clarify.

9 Q. Thank you. Just a few other questions.

10 You may recall that both Mr. Randles and Mr. Miller
11 asked you a series of questions about Monsanto's decision to
12 release Xtend cotton seed in 2015 and then the Xtend soybean
13 seed in 2016. Do you recall those questions?

14 A. Yes.

15 Q. And I believe your testimony was that that was Monsanto's
16 decision; correct?

17 A. Yes.

18 Q. To your knowledge, did BASF have any role at all in
19 Monsanto's decision to release Xtend cotton seed in 2015?

20 A. No.

21 Q. Did BASF have any role in Monsanto's decision to release
22 Xtend soybean seed in 2016?

23 A. No.

24 Q. Plaintiffs' counsel asked you a series of questions about
25 Monsanto's policy for investigating claims -- we spent quite a

1 bit of time on that, you will recall -- both in 2015, 2016 and
2 2017; correct?

3 A. Correct.

4 Q. Did BASF have any role at all in Monsanto's policies or
5 decisions about how Monsanto was going to investigate
6 off-target claims in any of those years, 2015, 2016 or 2017?

7 A. Not to my knowledge, no.

8 **MR. MANDLER:** Thank you, Dr. Carey.

9 **THE COURT:** Counsel, why don't you come up, please.

10 (Counsel approached the bench and the following
11 proceedings were held:)

12 **THE COURT:** Okay. I forgot to read the limiting
13 instruction. The more I thought about it, it would be better
14 to read it before he comes up again because it's really
15 talking about that and it might have been confusing.

16 **MR. RANGLES:** That's true.

17 **THE COURT:** So I thought I would read it now before
18 you start -- should we take a break now or --

19 **MR. RANGLES:** Whatever you think, Your Honor. I can
20 go a few minutes or I can take a break, whatever you would
21 like to do.

22 **THE COURT:** How long do you think you will be?

23 **MR. RANGLES:** Oh, I will be a while. Probably an
24 hour.

25 **THE COURT:** So maybe we ought to take a break.

1 **MR. RANGLES:** Sure.

2 (The proceedings returned to open court.)

3 **THE COURT:** All right. We will take a break for
4 about 10 or 12 minutes. Remember the admonition I have given
5 you not to discuss the case. We will call you back in.

6 Shortly. You may step down.

7 (At this time, the Court declares a recess.)

8 **THE COURT:** Sorry for the delay.

9 Mr. Randles, redirect?

10 And before you do that, I am going to read an
11 instruction to you. And that is:

12 Plaintiff has introduced certain documents that it
13 contends are evidence that Monsanto was given notice of
14 certain claimed and unconfirmed incidents of off-target
15 movement and illegal use of dicamba.

16 I instruct you that those documents are not evidence
17 of, and you should not consider them evidence of, the truth of
18 the information contained in those documents.

19 You may consider those documents and testimony
20 related to those documents only for the limited purpose of
21 determining whether or not Monsanto had notice of what was
22 being reported, but not as evidence of the accuracy or truth
23 of what was being reported.

24 And with that, you may do your redirect examination.

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

1 Good morning.

2 **REDIRECT EXAMINATION**

3 **BY MR. RANGLES:**

4 Q. Good morning, Doctor.

5 A. Good morning.

6 Q. Hopefully we will get you out of here by lunch.

7 A. Thanks.

8 Q. Doctor, I'm going to try to group some of the things you
9 did; so I won't necessarily go in the exact order of
10 Mr. Miller, but I will try to be close, okay.

11 Now, I would like to put back up Plaintiff 608,
12 which is in evidence. Let's just put up the cover page first
13 to refresh the jurors what we are talking about.

14 Okay. Can we blow up that top part so everyone can
15 see what the cover sheet says.

16 Using dicamba wisely, Stanley Culpepper, UGA
17 extension, Tifton campus. UGA is University of Georgia;
18 right?

19 A. Yes.

20 Q. Now, I may have misheard or you may have misspoke, I
21 don't know, so I don't want to hold you but things move
22 quickly in court. But I want to be clear.

23 Monsanto is not trying to take credit for the
24 content of this excellent presentation, are they?

25 A. No.

1 Q. Monsanto had -- Monsanto did not draft this, did
2 Monsanto?

3 A. No, not to my knowledge, no.

4 Q. And Stanley Culpepper drafted this, or at least along
5 with his staff because he lists himself as the author;
6 correct?

7 A. Yes.

8 Q. And he put in it what he chose to put in it; correct?

9 A. I would agree.

10 Q. And he's an independent scientist at the University of
11 Georgia?

12 A. Yes.

13 Q. He is in charge of the Georgia training program for
14 applicators; correct?

15 A. Yes.

16 Q. So if you want to be certified in Georgia, you are going
17 to be trained by Stanley Culpepper or one of the people that
18 works for him basically; right?

19 A. Well, I don't know the details of that for sure, but I
20 absolutely know Dr. Culpepper does a very extensive training
21 certainly on the dicamba and the other auxin herbicides.

22 Q. I just want to be clear. The content of this is not from
23 Monsanto; this is from Dr. Culpepper. Correct?

24 A. That's correct.

25 Q. Now, are you aware that some folks at Monsanto tried to

1 edit part of this program?

2 A. Edit in what way?

3 Q. Make comments about it or to it?

4 A. I don't know. That's possible, but I don't know for
5 sure.

6 Q. We'll get to some of that in a minute. Let's look at
7 some of the things that we have already seen out of this
8 program. Page 33. Thirty-three.

9 And I believe this is what -- what your attorney --
10 I'm sorry, I'm a little sleepy.

11 Your attorney asked you about one of the slides.
12 Mr. Mandler asked you, as did Mr. Miller. Correct?

13 A. Yes.

14 Q. Any herbicide? Reinvented and the volatility and it
15 lists all of that. Do you see that?

16 A. I see the slide, yes.

17 Q. Okay. Now, this is, again, his slide, not Monsanto's;
18 correct?

19 A. This is not Monsanto's slide. My understanding, it is a
20 BASF slide.

21 Q. Okay. Let's go to page 60. And this was the residue
22 tolerance that you were shown during your examination;
23 correct?

24 A. Yes. It relates to -- refers to residue tolerances.

25 Q. Once again, this is Stanley Culpepper's analysis;

1 correct?

2 A. That's my understanding, yes.

3 Q. Okay. Let's go to page 56. Now, this is the M&M slide.
4 Do you see that, that you talked about yesterday?

5 A. I do.

6 Q. How many Clarity per acre do you need?

7 A. Yes.

8 Q. And you called this an excellent slide, I think,
9 yesterday?

10 A. I did.

11 Q. Yes. And you also said, and I wrote this quote down
12 exactly, see if I'm correct here, "relatively small amounts
13 will cause symptomology." Does that sound familiar?

14 A. That's correct.

15 Q. Okay. And the fact is, amounts too small to measure of
16 dicamba will cause symptomology; correct?

17 A. I don't know for sure on that.

18 Q. You don't know one way or the other?

19 A. I don't know.

20 Q. Now, Mr. Miller asked you some questions about this
21 amount of Clarity and what a small amount it is and direct
22 applications. We are going to return to that in a few
23 minutes. There are two other slides I want to show you out of
24 this presentation.

25 This is page 36. "Proper formulation. Lab work and

1 small plot work results with new formulations are
2 impressive" -- ellipses -- "but what happens when we treat
3 huge areas during the same time and in the same area," a whole
4 bunch of question marks.

5 Did I read that correctly?

6 A. Yes.

7 Q. Then he has a picture there. Let's see if we can get the
8 picture even bigger and then we will return to the slide.

9 That's the picture that Dr. Stanley Culpepper added
10 after his question mark of what happens if you treat large
11 numbers of acres at the same time; correct?

12 A. That's the picture on the slide.

13 Q. And the issue of the amount of acres you treat is a
14 critical issue in determining the risk for off-target movement
15 and volatility, isn't it?

16 A. It's an issue that needs to be considered for sure.

17 Q. Because the more acres you treat, the more chance you
18 have of a problem; correct?

19 A. I think the context is important, but in general, the
20 more times you do anything, the more time -- the greater the
21 potential for something to happen.

22 Q. Okay. Let's shrink that down. I want to look at the
23 text at the bottom of the slide.

24 It says, "It is important to note the volatility
25 data presented is from labs or very small research studies."

1 Did I read that correctly?

2 A. Yes.

3 Q. "But we do not know what happens when we treat a larger
4 number of acres in a short period of time."

5 Did I read that correctly?

6 A. Yes.

7 Q. And then in line marked out said, "We have been trying
8 for years to generate this data but until we can get the
9 product, we simply can't do the work."

10 Did I read that correctly?

11 A. Yes.

12 Q. And again, this is independent academic, Dr. Stanley
13 Culpepper, talking about the state of knowledge at the time of
14 this presentation, isn't it?

15 A. At the time of the presentation, yes.

16 Q. Now, the fact is he talks about when we treat a large
17 number of acres in a short period of time. Now, that's an
18 exact description of what happens during the growing season,
19 isn't it?

20 A. Very well could be, yes.

21 Q. Especially in an area like Dunklin County where the
22 average farm size is a thousand acres?

23 A. It could be.

24 Q. It could be. All right.

25 And then it goes on to say, "We have been trying to

1 conduct this work but have been unable to do so until we
2 receive the final formulation that Monsanto intended to
3 commercialize." I read that correctly; right?

4 A. Correct.

5 Q. And then there's an actual comment that says, "Travers."
6 And our metadata says that's Jeff Travers from Monsanto. You
7 know Jeff Travers; right?

8 A. I know who he is, yes.

9 Q. It says, "One reason you couldn't do this is because of
10 EPA regulations," and then it goes on to cite the rule. "I
11 agree with Joe, you are blaming us for EPA rules and regs."

12 That's what Travers said here; right?

13 A. Yes.

14 Q. But that was only one reason academics weren't being
15 allowed to test was EPA rules; right?

16 A. Well, the reason is because EPA requires specific types
17 of trials and specific types of data for approvals.

18 Q. And we are going to return to that, but I want -- let's
19 just nail this down.

20 Are you telling the jury the sole reason Monsanto
21 stopped testing of academics was EPA rules?

22 A. That's my understanding, yes.

23 Q. We are going to return to that in a few minutes.

24 Now, we can go back to the cover sheet on this one
25 or take it down.

1 This excellent presentation by Stanley Culpepper,
2 University of Georgia, that he authored, this information
3 could have been spread by Monsanto to all potential users,
4 couldn't it?

5 A. That presentation, I assume so. Of course we would have
6 to have Dr. Culpepper's permission.

7 Q. But the science in it is science Monsanto knew; correct?

8 A. Could you be more specific?

9 Q. Dr. Culpepper wasn't coming up with new science about
10 dicamba that Monsanto didn't already know, was he?

11 A. I can't say that without going through the entire
12 presentation and reviewing every piece of information and
13 checking that.

14 Q. Well, fair enough. Okay. Let's assume Dr. Culpepper did
15 know more science about dicamba than Monsanto. You could have
16 asked him for permission to say, this would be great for
17 farmers in Missouri or Arkansas to know, can we use it? You
18 could have asked him that, couldn't you?

19 A. We could have.

20 Q. But the only folks getting access to this excellent
21 information were the folks being trained in Georgia by Stanley
22 Culpepper's group; correct?

23 A. Well, I'm pretty certain that even today we use some of
24 Dr. Culpepper's information in our training yet today. We
25 didn't use the entire presentation as he prepared it, but

1 we -- we've used some of his work.

2 Q. But you describe this presentation to your lawyer as an
3 excellent presentation; correct?

4 A. Well, I remember saying the slide was excellent.

5 Q. All right. So is it maybe just an okay presentation now?

6 A. I think Dr. Culpepper does excellent work in general.

7 Q. And this information that's detailed information about
8 the dangers of dicamba, the lack of knowledge about what
9 happens if you spray large acres over in a short period of
10 time, that was not in Monsanto's training materials to
11 farmers, was it?

12 A. The studies done for EPA approval take into account and
13 model the effects that you would or wouldn't have by spraying
14 large amounts of acres at the same time. That's taking into
15 account to the EPA testing. So I don't know if Dr. Culpepper
16 was as familiar with that testing at the time he prepared this
17 presentation or not.

18 Q. Oh, so the presentation wasn't so excellent when it said,
19 we don't know the harms that are going to occur once you start
20 doing this on a large scale? That is a carve-out that wasn't
21 so excellent. Is that right?

22 A. That's not a way I would characterize that in any way,
23 shape or form.

24 Q. Let's go to the very next exhibit your lawyer showed you,
25 which was M-379 in evidence, Your Honor.

1 This says, "Asgrow Brand Roundup Ready 2 Xtend
2 Soybean commercialization. February 3, 2016." Do you see
3 that?

4 A. I do.

5 Q. Do you know where that presentation was given?

6 A. Not specifically.

7 Q. Okay. And you don't know whether it was given in
8 Missouri at all, do you?

9 A. I can't verify that.

10 Q. All right. Let's go to Plaintiffs' 180.

11 You remember our discussion about the Frey Farms,
12 the watermelon farm down in Kennett yesterday; right?

13 A. I do.

14 Q. And your lawyer also showed you this Exhibit 180, which I
15 showed you about Frey Farms; correct?

16 A. Correct.

17 Q. Now, then he asked you a series of questions about, well,
18 Frey Farms actually withdrew its claim about dicamba and then
19 he made a point that I didn't tell the jury that. Do you
20 remember those questions?

21 A. Yes.

22 Q. Now, you and your lawyer aren't suggesting that the claim
23 Frey Farms withdrew had anything to do with this e-mail, are
24 you?

25 A. I'm not suggesting that. I don't know.

1 Q. Let's look at the date of this e-mail. Let's blow up the
2 date of this e-mail.

3 Read the date of the e-mail to the jury.

4 A. August 18, 2017.

5 Q. And this e-mail is talking about an August 18 incident --
6 a summer of 2017 incident at Frey Farms regarding volatility,
7 correct, or what they said was volatility, let's put it that
8 way?

9 A. I would have to read it to know exactly what they
10 claimed, but it was related to a concern about off-target
11 movement.

12 Q. Okay. That summer, that growing summer?

13 A. My understanding.

14 Q. You are aware that the complaint that was filed by Frey
15 Farms with the Missouri Department of Agriculture and
16 withdrawn was an April 12th, 2016 claim, aren't you, regarding
17 burndown. You are aware of that, aren't you?

18 A. I haven't seen -- I can't see the document, so I can't
19 verify that.

20 Q. Okay. But your lawyer was asking you about this
21 withdrawn claim yesterday. I assumed you were familiar with
22 it.

23 A. Well, the document demonstrated that a claim was
24 withdrawn.

25 Q. Okay. That -- that claim, if I am correct, that was

1 filed on April 12, 2016, was not what's being discussed here;
2 correct?

3 A. I can't -- I can't say that.

4 Q. Because what happened here was -- you can't say that? I
5 am puzzled. If there was a claim filed and withdrawn on
6 April 12, 2016, tell our jury how that claim could have
7 anything to do with what's here.

8 Let's go to the text of this in 2017. This last
9 paragraph.

10 Do you see this? We read all this yesterday.
11 Watermelon, liberty soybeans, sweet corn hit pretty hard by
12 dicamba use. Do you see that?

13 A. Yes.

14 Q. It says, "I want you to acquire marketing opportunities
15 to transition them to our program and also look at hosting an
16 Xtend program training session for growers and applicators."

17 **THE COURT:** Go a little slower for the court
18 reporter.

19 **MR. RANGLES:** I'm very sorry, Your Honor.

20 I apologize.

21 Q. (By Mr. Randles) Last sentence. You know what, the jury
22 can see it. They can just read it. It's talking about
23 marketing opportunities and a training program for growers and
24 applicators around Kennett, isn't it?

25 A. Yes.

1 Q. And that's exactly what Monsanto did, didn't it? It held
2 an additional training program for growers near Frey Farms?

3 A. I don't know.

4 Q. Okay. And likewise, I suppose you don't know that
5 Monsanto actually personally visited some of the farmers who
6 were spraying over Xtend seeds near Frey Farms to help protect
7 Frey Farms. Did you know that?

8 A. I don't know that.

9 Q. Do you know Greg Starling?

10 A. I don't believe so.

11 Q. I'll represent to you he is a Monsanto field salesman --
12 I don't know his exact title -- for the bootheel. He will be
13 testifying about that a little bit later.

14 But I want to be clear. You weren't testifying
15 yesterday that this matter I asked you about has somehow been
16 withdrawn, were you?

17 A. I don't know. And if I suggested that the two things
18 were linked and they aren't, that's a mistake on my part.

19 Q. Fair enough.

20 A. I don't know.

21 Q. Let's go -- well, you remember we had a lot of discussion
22 about the Sandbrink document yesterday and him talking about
23 Bill Bader's legislative testimony. The jury saw that
24 document twice yesterday. Do you remember that?

25 A. I do.

1 Q. To your knowledge is Sandbrink a scientist?

2 A. Yes.

3 Q. What kind of scientist is he?

4 A. Well, he worked in our formulations and our technology
5 development program for probably 30-plus years working on all
6 kinds of formulations, herbicides and programs.

7 Q. PhD?

8 A. I honestly don't know.

9 Q. And we talked about yesterday you have no knowledge of
10 Mr. Sandbrink visiting Bader Farms; correct?

11 A. I have no knowledge of that.

12 Q. And in the article -- in the e-mail he sent you, he was
13 talking about a St. Louis Post Dispatch article that quoted
14 Bill Bader about some of the symptoms. Do you remember that?

15 A. I do.

16 Q. And then he talked to -- he relayed a conversation from
17 an unnamed Monsanto extension specialist about what might be
18 going on at Bader Farms. Do you remember that?

19 A. I do.

20 Q. But you didn't need to rely on all the second- and
21 third-hand speculation about what was going on at Bader Farms,
22 did you?

23 A. I'm not sure I understand the point of your question.

24 Q. Well, I mean, if you wanted first-hand information, you
25 had numerous opportunities to obtain it, didn't you?

1 A. Mr. Bader made it clear that we were welcome to come
2 investigate his peaches and we chose not to because we didn't
3 sell a dicamba product and that was the allegation that he was
4 making, that a dicamba product was injuring his crop.

5 Q. But if you were interested enough to be gathering second-
6 and third-hand information on Bill Bader and calling him twice
7 at the direction of your lawyers, wouldn't it have been far
8 more practical to just go look?

9 A. Well, I think it should be clarified that the e-mail
10 that's been multiple times demonstrated to the jury, that that
11 section that recounted Mr. Bader's comments and other comments
12 regarding his situation was just one of multiple different
13 pieces on that document. It wasn't necessarily a document
14 investigating Mr. Bader.

15 Q. And you not only had the invitations from Bill Bader to
16 come to his farm, you were at the Portageville meeting with
17 Bill Bader?

18 A. I was.

19 Q. And you could have, if you were interested, just gone up
20 to Mr. Bader and said, why don't you tell me what's going on.
21 You could have done that, couldn't you?

22 A. I could have and I chose not to because after the
23 conversation I had with him, it was apparent that he was
24 considering litigation against us and I didn't think it wise
25 to do that.

1 Q. But he was still inviting you to come; right? He invited
2 you in the second conversation to come --

3 A. Correct.

4 Q. -- didn't he?

5 Does that sound like a person who's trying to hide
6 something from you?

7 A. I'm not making that judgment.

8 Q. Matter of fact, in those conversations with Bill Bader,
9 he was totally forthcoming with you, wasn't he?

10 A. Well, he told me a lot of things, for sure.

11 Q. And he answered any question you asked, didn't he, to the
12 best of his ability?

13 A. To the best of my knowledge, yes.

14 Q. And he poured his heart out to you about his concerns
15 about his orchard, didn't he?

16 A. He shared a lot of things with me about his orchard, yes.

17 Q. And he asked you repeatedly to come take a look, didn't
18 he?

19 A. I don't recall repeated questions. He made it really
20 clear that I was welcome.

21 Q. So you didn't sense Bill Bader was trying to hide
22 something from you, did you?

23 A. I don't have a basis to make a judgment like that.

24 Q. And you've already testified, you did not tell Bill Bader
25 that you were calling him at the direction of Monsanto's

1 lawyers, did you?

2 A. I didn't tell him that, that I recall.

3 Q. And you didn't tell Bill Bader you were taking notes to
4 help defend Monsanto in case there was a lawsuit, did you?

5 A. I take notes of every conversation and every meeting I'm
6 in.

7 Q. Well, is it just a coincidence then that the lawyers were
8 using your notes in court?

9 A. Well, those notes seemed to be pretty relevant to this
10 whole issue.

11 Q. And you did -- and so if you -- I want to turn it around.

12 If you were suffering from a problem and you call
13 someone asking them for help and they didn't tell you that
14 they were actually taking notes of the call and on the call at
15 the direction of lawyers and had no intention of coming down
16 to help you, would you feel you've been treated fairly?

17 A. That depends on a lot of context, what the issue is, and
18 why I called in and a lot of other things.

19 Q. So you can't say to the jury with this fact pattern
20 reversed whether you would feel you were treated fairly?

21 A. I wouldn't have any problem if I called someone and they
22 took notes of that conversation. That's what I do with every
23 conversation.

24 Q. That wasn't what -- the entirety of what I asked you, was
25 it? Let's be clear. You call someone for help, you pour your

1 heart out to them, you ask them for help, they don't tell you,
2 well, I'm actually on this call because the lawyers wanted me
3 on the call and I'm taking careful notes of everything you say
4 and I have no intention of coming down to give you the help
5 you want, would you feel you've been treated fairly?

6 A. What our lawyers told me is that Mr. Bader wanted to talk
7 to someone other than --

8 **MR. RANGLES:** I don't want to know. Stop. Stop.

9 **MR. MILLER:** Objection.

10 **THE COURT:** Wait, wait.

11 **MR. MILLER:** I want the witness to be allowed to
12 answer the question, Your Honor.

13 **MR. RANGLES:** Oh, you -- well, there was a motion
14 *in limine* on this. That's why I tried to stop it. If you
15 want --

16 **MR. MILLER:** Oh, I see. No objection.

17 **MR. RANGLES:** I'm sorry?

18 **MR. MILLER:** No objection.

19 **MR. RANGLES:** No objection to him telling what the
20 lawyer said?

21 **MR. MILLER:** No, no, no. I agree with counsel. He
22 shouldn't go into what the lawyers told him.

23 **MR. RANGLES:** Okay. Your Honor, out of courtesy to
24 counsel, I would like to strike the part that -- of this
25 answer that starts with "What my lawyers told me."

1 **THE COURT:** You know, it was all so fast, I don't
2 even remember it, but we will strike that part of it.

3 **MR. RANGLES:** Okay.

4 Q. (By Mr. Randles) Well, now that we have just about
5 tripped over something, we are going to move on. All right?

6 Now, you were asked yesterday as part of the
7 Sandbrink discussion some questions and I believe in regard to
8 the Bill Bader notes about sampling of his peach orchard,
9 testing and sampling. Do you recall those questions?

10 A. Yes.

11 Q. Okay. Now, do you know who Doug Doohan is?

12 A. I don't recognize that name.

13 Q. Scientist at the University of Ohio?

14 A. I don't recognize the name.

15 Q. Okay. I want to ask you, while we are talking about
16 sampling of dicamba and volatilized dicamba on plants, if you
17 agree with the following statement. "We do not take samples
18 of plants for off-target because you cannot detect it at these
19 rates; it's pointless."

20 Do you agree with that statement?

21 A. Well, I don't know. I don't -- I am not a scientist in
22 that area; so I'm not sure if I can agree with it or not.

23 Q. Okay. Fair enough.

24 Do you know who said it?

25 A. Who said it?

1 Q. Do you know who said that?

2 A. Well, I assumed Mr. Doohan.

3 Q. No, you said you didn't know him, so I moved on.

4 Would it surprise you BASF says that in their
5 training materials?

6 A. I will take you at your word for that.

7 Q. So I guess you are not aware of the scientific research
8 about sampling, testing and how difficult it is with
9 volatilized dicamba. That's just not an area you've looked
10 into?

11 A. Well, you are using the term "volatilized dicamba." I am
12 not an expert in the area of tissue sampling for dicamba;
13 that's fair.

14 Q. Fair enough. Then we will just move it along.

15 Now, Mr. Miller asked you a series of questions
16 yesterday about the steps required to do a proper
17 investigation. Do you remember those?

18 A. I do.

19 Q. And they included visit the field impacted as quickly as
20 possible, look at the surrounding fields, and eliminate
21 ultimate causes; right?

22 A. Yes.

23 Q. And without doing those things, you can't really say what
24 happened in a given field, can you?

25 A. I think it's accurate to say that the more of those

1 things you do, the more accurate your potential diagnosis has
2 the chance to be.

3 Q. And you were invited to do all those things at Bader
4 Farms, Monsanto was, in '15 and '16, weren't you?

5 A. I was invited to -- I knew that it was clear that I was
6 welcome to investigate his farm.

7 Q. And you choose not to?

8 A. I chose not to.

9 Q. And even though Bill Bader called in the middle of the
10 growing season in 2016 and 2015, but we will focus on '16, and
11 you talked to him twice, no one from Monsanto went to Bader
12 Farms until the winter of 2017 after a lawsuit was filed; is
13 that right?

14 A. I don't know when we did or did not go to his farms. I
15 don't know.

16 Q. But you know you didn't go in '16 because you --

17 A. I know I didn't go in '16. I've never visited his farm;
18 that's correct.

19 Q. And you remember a series of questions Mr. Miller asked
20 you about the motivation for restricting the academic testing.
21 Do you remember that?

22 A. Yes.

23 Q. We talked about GLP and that sort of thing. Yes. Okay.

24 I want to go to -- let me find it in my notes.

25 There are a lot of notes here.

1 Let's go to the exhibit of mine he showed you, 151,
2 Plaintiff 151. These are the protocols that we talked about
3 yesterday. Do you remember these, the dicamba research
4 protocol review? Do you see it up at the top? It's
5 Plaintiffs' 151.

6 A. Yes, I see it.

7 Q. Okay. We talked about portions of that. Do you remember
8 that?

9 A. I do.

10 Q. I want to go -- start with B here and go to the bottom of
11 the page. And we covered most of this yesterday, you will
12 recall. Right?

13 A. Yes.

14 Q. And I want you to look -- this is talking about how
15 you -- what matters have to have additional review or will not
16 be permitted. And one of them is, of course, volatility and
17 herbicide impacts to sensitive areas.

18 Don't highlight it. I just want to look at the
19 whole thing.

20 Under "key protocol objectives or elements," do you
21 see that?

22 A. I do.

23 Q. Okay. So I want you to look at this document and tell me
24 anywhere in it where it says good laboratory practices are the
25 reason for restricting this.

1 A. This document wouldn't outline that.

2 Q. I want to -- I want to show you another document, but
3 this will just go to the witness, Court and counsel.

4 Plaintiff Exhibit 293. It is not in evidence. I
5 want you to look at the top of this document.

6 This is an e-mail from Martha Smith, Monsanto
7 employee; correct?

8 A. Yes.

9 Q. To Duane Simpson?

10 A. Yes.

11 Q. And Tina Bhakta?

12 A. Yes.

13 Q. Right?

14 A. Correct.

15 Q. And others and the date is 2/5/15; right?

16 A. Correct.

17 Q. And the subject line is "Re: state level academic testing
18 requirement."

19 Did I read that correctly?

20 A. Yes.

21 **MR. RANGLES:** Your Honor, I offer 293 into evidence.

22 **MR. MILLER:** Same objection, Your Honor. He's not
23 on it.

24 **THE COURT:** I'm sorry?

25 **MR. MILLER:** Same objection, Your Honor.

1 **THE COURT:** It's overruled and admitted.

2 Q. (By Mr. Randles) I would like to call your attention to
3 the section at the bottom of this right below the word "all."
4 This photograph.

5 Now, I don't know if we moved too quickly, but this
6 section is from Tina Bhakta. If we can move the box slightly
7 so we can see that.

8 Do you see there where it says from Tina Bhakta?

9 A. Yes.

10 Q. Okay. I want to read this to you. The re: line is
11 "state level academic testing requirement."

12 "You are all aware of the things the EPA has been
13 hearing from academics at the state level with regards to
14 dicamba and M1691."

15 Did I read that part correctly?

16 A. Yes.

17 Q. "With this having such an impact at the federal level,
18 our leadership has decided to pull back some of this academic
19 testing with Xtend and XtendiMax formulations to ensure that
20 these formulations keep a 'clean' slate."

21 Did I read that correctly?

22 A. Yes.

23 Q. Do you stand by your testimony yesterday that the
24 restriction of academic testing had nothing to do with fear of
25 bad results?

1 A. I do.

2 Q. Fair enough. We will move on.

3 Now, I would like to return to Plaintiffs'
4 Exhibit in evidence, Your Honor, 523.

5 You will recall these are the notes from the
6 academic summit in 2017 that we discussed yesterday. Do you
7 recall that?

8 A. I don't know if it was the same notes. This
9 page isn't --

10 Q. We are going to turn to Mr. Chambers' discussion to see
11 if that refreshes your recollection.

12 Do you see the very last paragraph?

13 "John Chambers: The timing of regulatory reviews
14 was so delayed that it prevented the ability to offer
15 extension specialists the opportunity to conduct tests. In
16 retrospect, it was not the right call to not allow extension
17 specialists to test the product prior to commercial launch."

18 Did I read that correctly?

19 A. You did.

20 Q. Yesterday you told me on this issue Mr. Chambers speaks
21 for Monsanto and that's Monsanto's position, didn't you?

22 A. At this point in time, yes.

23 Q. But Mr. Miller got up and asked you a series of questions
24 about good laboratory practices and other things to justify
25 this decision not to conduct academic testing, didn't he?

1 A. Yes.

2 Q. So I am asking you to tell our jury as of today, does --
3 is Monsanto's position what John Chambers said, which is the
4 cutting off of academic testing was a mistake, or what
5 Mr. Miller was insinuating that it was the right thing to do?
6 Which is Monsanto's position?

7 A. My understanding is what Mr. Miller did was help clarify
8 what the reason was. The decision of it, if it was the right
9 decision or the wrong decision, is a separate question.

10 Q. Okay. So your reconciliation is these were the reasons,
11 but the reasons were wrong and the decision should not have
12 been made; is that right?

13 A. That's not what I'm saying. What I am saying is that the
14 reasons were provided and those were the reasons. A judgment
15 is being made at a later point that says it was not the right
16 reason or it wasn't -- let me be clear -- was not the right
17 call is the words that are evidently used in this document.

18 Q. Okay. Fair enough. So where we are today is: The
19 reasons were really good but the decision was wrong? Is that
20 where we are?

21 A. According to John Chambers' statement.

22 Q. Well, you said yesterday he speaks for Monsanto on this?

23 A. Well, he did at this meeting, yes.

24 Q. And is that Monsanto's current position?

25 A. I can't say.

1 Q. Okay. So as you sit here today, you don't know whether
2 Mr. Chambers' position is Monsanto's position or Mr. Miller's
3 position is Monsanto's position, do you?

4 A. You are asking a question that isn't consistent.

5 Q. That's for the jury to decide.

6 A. Well --

7 Q. Can you tell us -- let me simplify my question. Is what
8 John Chambers said about it being a mistake still Monsanto's
9 position?

10 **MR. MILLER:** Objection; asked and answered, Your
11 Honor.

12 **THE COURT:** Overruled.

13 A. I don't know our official position at this point in time
14 whether that was the right call or the wrong call.

15 Q. (By Mr. Randles) So you just don't know?

16 A. I don't know.

17 Q. Okay. I want to go back to 293 because I wanted to ask
18 you a question about that that I missed.

19 This is 293 in evidence, Your Honor.

20 Again, blow up that section at the bottom.

21 In this discussion to ensure that the formulations
22 keep a clean slate, do you see good laboratory practices
23 mentioned in any of this?

24 A. I don't see it mentioned here, but I believe fully that
25 that's what it's referring to.

1 Q. Do you believe the phrase, this last sentence, "decided
2 to pull back some of this academic testing with Xtend and
3 XtendiMax formulation to ensure that these formulations keep a
4 'clean' slate" is just a reference to good laboratory
5 practices?

6 A. Regardless of the language used, my understanding is that
7 EPA requires solid, reliable, highest quality data and a
8 judgment was made and the understanding was that that's going
9 to require good laboratory practices data. So that will
10 reduce the chance of unreliable data mistakes and other types
11 of data that would be potentially misrepresented or lead to
12 false results.

13 Q. I remember that explanation from yesterday. My question
14 was: Is it your testimony to this jury ensuring that these
15 formulations keep a clean slate is nothing more than a
16 reference to good laboratory practices?

17 A. It is a reference to good laboratory practices, ensuring
18 that the research is done in the right way.

19 Q. And you've never seen this document before?

20 A. No.

21 Q. Never talked to Tina Bhakta about it; right?

22 A. No.

23 Q. But you are pretty sure, even though she didn't say good
24 laboratory practices, that's really what she meant; right?

25 A. That's my understanding and my belief.

1 Q. Let's go to Exhibit 510 in evidence, Your Honor. And
2 let's go to the content, the next page.

3 We covered this and Mr. Miller covered this as well
4 with you, the -- well, I guess not the very next page. I want
5 the benefits risk page that I showed in direct.

6 Give us just a second to find the page. There you
7 go. Let's blow that up.

8 And for context again, this is the decision -- this
9 is the discussion of the decision that both Mr. Miller and I
10 talked to you about yesterday to launch cotton in 2015 without
11 a legal accompanying dicamba herbicide. Isn't that correct?

12 A. That's correct.

13 Q. And it reconfirms support to launch without dicamba
14 label; right?

15 A. That's what it says.

16 Q. And then it lists benefits and risks. And Mr. Miller
17 walked through the benefits and I walked through the risks.
18 And the conclusion was, the plan at the very bottom was to
19 "launch XtendFlex and implement a robust communication plan
20 that dicamba cannot be used"; right?

21 A. That's correct.

22 Q. So Monsanto weighed the risks and the benefits. And
23 let's be clear, among the risks were off-target movement of
24 dicamba, growers making off-label applications of dicamba.
25 And the only reason you care from a public safety perspective

1 if they are making off-label applications is it can damage
2 sensitive plants; correct?

3 A. The question or statement that you just made contains
4 some things that I don't agree with.

5 Q. Let me break it down. One of the dangers, one of the
6 risks of off-label applications of dicamba is that these older
7 supposedly more volatile dicamba herbicides would be used and
8 move over to damage other people's crops; right?

9 A. That's possible.

10 Q. But Monsanto internally analyzed the risks and benefits
11 and decided we will go ahead and launch; right?

12 A. The decision was made that we would go ahead and launch.

13 Q. But innocent third-party landowners who might be the
14 target of off-target movement weren't allowed a voice in the
15 discussion about potential risks and benefits, were they?

16 A. I can't say that. I know that we had a Dicamba Advisory
17 Council and we had a lot of input on a lot of decisions.

18 Q. I am going to resist the urge to talk about the response
19 of the Dicamba Advisory Council and rotate back. Let me ask
20 the question even more precisely.

21 Did the potential targets of this off-target
22 movement get any vote in whether Monsanto launched the seed in
23 '15?

24 A. I don't know for sure, because I wasn't involved in that
25 decision. And to make that statement that they had no -- no

1 consideration, I can't say that.

2 Q. Well, so you think it's possible that third parties were
3 sitting with the U.S. leadership team that had the final
4 authority and having a vote at the table as, yeah, we are
5 willing to be exposed to the risk of off-target movement? Do
6 you think that happened?

7 A. I would be confident in saying that we didn't ask a
8 grower to come in and sit down at the table and vote.

9 Q. When this presentation was made at the U.S. leadership
10 team, it was Monsanto executives sitting at the table and
11 making the decision whether the benefits outweighed the risk,
12 wasn't it?

13 A. Can you repeat it one more time?

14 Q. When this presentation was made to the U.S. leadership
15 team to decide whether the benefits of launching outweighed
16 the risks, it was Monsanto executives that made that call,
17 wasn't it?

18 A. I think that's accurate.

19 Q. And it was likewise Monsanto executives that made the
20 policy decision that no investigation would occur in '15 or
21 '16, wasn't it?

22 A. I think that's accurate.

23 Q. And it was also Monsanto executives that made the
24 decision that no off-target movement claims would be settled,
25 wasn't it?

1 A. I think that's accurate.

2 Q. So when Mr. Miller asked you about the benefits to the
3 purchasers of the product, none -- the potential risks being
4 borne by third parties is a risk that they were bearing
5 without volunteering to bear it; isn't that correct?

6 A. If -- if a farmer didn't make an illegal application,
7 there wouldn't be an issue.

8 Q. We'll get to that when we start talking about the claims
9 coming forward. But now my question was: On the risk benefit
10 analysis, the farmers who were the potential target didn't get
11 a vote, did they?

12 A. Well, again, you're asking me questions about a decision
13 that I wasn't involved in and wasn't even in part of the
14 organization at the time. The way you framed the questions
15 and the specifics you said, they weren't sitting at the table
16 with the executives at that time. I'm going to make that
17 assumption.

18 Q. So if a farmer has a sensitive crop and he's in the
19 middle of soybean -- well, in '15 we'll say cotton fields.
20 His field is there. He can't move it, can he? He can't say,
21 well, I want to get away from this seed. He is stuck there;
22 right?

23 A. Correct.

24 Q. Okay. Now, the purchasers of the seed get to decide
25 whether they want to use this dicamba-based system or not;

1 correct?

2 A. That's correct.

3 Q. So Monsanto gets to decide and the purchasers get to
4 decide. But the third-party landowner doesn't get to decide
5 whether he's exposed to the system, does he?

6 A. He's not making a choice to purchase our products, that's
7 correct.

8 Q. Put quite simply, he can't just pick up and move his
9 orchard or nondicamba-tolerant soybean field away, can he?

10 A. That's accurate.

11 Q. I want to show 510. And I believe Mr. Miller showed
12 page 8; so let's look at that.

13 510 is in evidence, Your Honor.

14 Recall Mr. Miller asking you about these different
15 ways that Monsanto communicated with its potential customers?

16 A. I do.

17 Q. And you remember him saying it was more than just the
18 pink sticker, it was more than just the pink sticker.

19 Remember him asking you that at least a couple of times?

20 A. I do.

21 Q. Please point out -- does any of this information contain
22 substantive information about the risks of dicamba to third
23 parties that was different or in addition to what was in the
24 pink stickers?

25 A. I'm sorry. Just one more time. I want to make sure I

1 understood your question.

2 Q. I will back up and take the question from the other end.

3 The pink stickers essentially say it's not legal to
4 spray dicamba over these seeds; right?

5 A. That's included in that statement, yes.

6 Q. The pink stickers do not say, you know, if dicamba
7 volatilizes, it can really devastate your neighbors, it could
8 ruin their crop, it can destroy their yields. It doesn't say
9 anything like that, does it?

10 A. No, I don't believe it does.

11 Q. And these communications, these different types, none of
12 them say anything like that either, do they?

13 A. I don't know for sure.

14 Q. Can you point to one that does?

15 A. Well, it's not on this list, no. But of course, this
16 list doesn't contain the actual material that was used in the
17 communication.

18 Q. Okay. So at least as far as this is concerned, we are
19 talking about repetition of the basic message of the pink
20 sticker, aren't we?

21 A. This is a summary of the plans for all of the different
22 tactics for communicating this stewardship information to the
23 industry.

24 Q. And not a one of these -- just like the pink sticker, not
25 a one of these has an "or else" in it, does it?

1 A. Can you be more explicit about what you mean by "or
2 else"?

3 Q. Don't spray dicamba off label or else Monsanto will take
4 X, Y or Z action, not a one of them has that in it?

5 A. We don't threaten customers, no.

6 Q. Well, you do sometimes, don't you?

7 A. We don't threaten customers.

8 Q. I will say this one more time. You are saying you never
9 threaten your customers with consequences if they don't comply
10 with the elements of the license or the TUG. Is that your
11 testimony?

12 A. So that's a different question, isn't it?

13 Q. I didn't think so. I thought it was more -- but that is
14 now the question.

15 A. I'm not an expert in our licenses, but there are certain
16 instances where licensees who don't follow stewardship
17 requirements may be at risk of losing their license, that's
18 fair.

19 Q. And Mr. Miller said to you, you know, you could -- you
20 can't just go walk farmers' fields and see if they are
21 violating your TUG, but actually the TUG gives you broad
22 powers to come and inspect their fields and their records,
23 doesn't it?

24 A. I am not an expert in that area. I don't understand what
25 is or isn't permissible. I think you are referring to save

1 seed and I don't operate in that area. I just -- I can't
2 comment.

3 Q. Well, whatever the area, Monsanto can go on farmers'
4 property and can look at their records when it falls within
5 the categories Monsanto has drafted for the agreement, and it
6 has. Isn't that right?

7 A. You are asking me questions that I can't offer meaningful
8 input to.

9 Q. I'm sorry. I was just following up on Mr. Miller's
10 question about that. You don't know is the answer?

11 A. Those specifics about the licenses and what requirements
12 and what we are or not able to do, I don't recall that being
13 asked by Mr. Miller, but regardless, I can't answer that.

14 Q. Let's back up. We are talking about Monsanto taking no
15 enforcement action. The truth is Monsanto has never tried to
16 take any enforcement action against any person spraying
17 dicamba over its crops illegally no matter -- no matter the
18 circumstances, has it?

19 A. I don't know of any situation like that. It would -- I
20 don't understand how we could do that. We are not a legal
21 enforcement body.

22 Q. Well, we talked about who writes the license in the TUG,
23 didn't we?

24 A. We did.

25 Q. So I want to just incorporate that line of questions here

1 without repeating it. And say: Monsanto hasn't even
2 attempted to take any steps against violators no matter how
3 egregious the violations, has it?

4 A. Not to my knowledge.

5 Q. Now, Mr. Miller asked you some questions about historical
6 uses of dicamba, burndown over corn and crop preemergence and
7 wheat; right?

8 A. Generally, yes.

9 Q. And you are not suggesting to the jury that those uses of
10 dicamba are any way comparable in scope to the use of dicamba
11 with the dicamba-tolerant system, are you?

12 A. What is your definition of "scope"?

13 Q. The amount of dicamba used.

14 A. Well, I would have to look and see the historical use
15 patterns for dicamba, which I have in years past, but millions
16 of pounds and millions of acres have been treated with dicamba
17 when you consider corn, wheat, and other uses.

18 Q. Under tight restrictions at -- often not during a growing
19 season; correct?

20 A. Some of those applications are made at different times of
21 the year; some are made during the growing season of soybeans
22 and other sensitive crops.

23 Q. Yes. But those -- the scope of that use in season
24 compared to what's happening now is very small, isn't it, in
25 the historical uses?

1 A. Again, I want to make sure -- just to be sure, I just
2 want to understand your definition of "scope."

3 Q. Okay. Let's do some math, shall we. The recommended use
4 rate for burndown for dicamba is a quarter of a pound an acre,
5 isn't it?

6 A. It can vary, but that would be one use rate, yes.

7 Q. And that's the maximum use rate, isn't it?

8 A. For burndown?

9 Q. Yes.

10 A. I can't say that that's the case. I would have to look
11 at the label.

12 Q. Fair enough. Now, the Xtend labeled application rate is
13 a half a pound an acre postemergence and a pound an acre
14 preemergence; isn't that correct?

15 A. The label allows a preemergence application up to that
16 rate.

17 Q. Yes. And the label allows two applications a year for
18 soybeans; correct?

19 A. You are getting into specifics of the label that I don't
20 want to try to recall by memory.

21 Q. Well, I want you to trust me for purposes of this
22 question. Two a year for soybean. Have you heard that
23 number?

24 A. I know that it can be used at least twice.

25 Q. Okay. And you may be thinking it can be used four times

1 a year for cotton. Are you aware of that?

2 A. I am aware there are differences, yes.

3 Q. So let's take the most conservative number possible, all
4 right? Let's just say a half a pound use rate. We'll throw
5 out the one pound. Okay?

6 A. Okay.

7 Q. We will use the most conservative amount of maximum use,
8 the soybean, two uses a year. Okay?

9 A. Okay.

10 Q. So when you add two one-half pounds per acre, you get a
11 very convenient number of one pound per acre; correct?

12 A. Yes.

13 Q. And of course as we said, that understates the use rate,
14 but let's use it as the minimal number for this example, one
15 pound per acre.

16 Are you aware that roughly 60 million acres are
17 currently planted with Xtend system in the United States?

18 A. I am aware of that.

19 Q. Okay. So if we use this lower application rate, we have
20 60 million pounds of dicamba used every growing season in the
21 United States that was not being used before; correct?

22 A. In reality, not all of those acres are being treated with
23 dicamba and the majority of the acres that are treated with
24 dicamba are not receiving that high of a rate. But if you
25 want to be extreme and say theoretically what a maximum is,

1 yes.

2 Q. Well, that's not the maximum because we already talked
3 about -- I didn't use the one-pound-per-acre rate at all;
4 right?

5 A. Okay. That's fair.

6 Q. And I didn't use the four-times-a-year for cotton at all;
7 right?

8 A. You are correct.

9 Q. So I am not calculating the maximum number, am I?

10 A. Well, go ahead.

11 Q. Okay. I don't -- I don't have that math skill. I had to
12 actually write this down before I started.

13 So using this number, which is somewhere in the
14 middle or conservative, you are talking 60 million pounds of
15 dicamba, more or less, being used every year that wasn't being
16 used before?

17 A. That could be used.

18 Q. Could be used. Okay. Maybe I'm off 10 million either
19 way. You are talking tens of millions of pounds of dicamba
20 being used that wasn't being used a few years ago in American
21 agriculture; right?

22 A. Yes.

23 Q. You had indicated -- and I am not going to pull up the
24 document for time purposes -- the do not visit a driftee
25 inquiry changed sometime in August of 2017, noncustomer

1 driftee.

2 I am going to ask that question again because I
3 messed it up.

4 You indicated the policy not to visit a noncustomer
5 who was a driftee changed in August of 2017; correct?

6 A. Correct.

7 Q. Now, August of 2017 was well after dicamba litigation had
8 begun against Monsanto, wasn't it?

9 A. I don't know that.

10 Q. Okay. Well, if you take my word for it, the Bader case
11 was filed in November of 2016. That would be several months
12 later, wouldn't it?

13 A. If that's the case, yes.

14 Q. Well, there's no real controversy as to when the case was
15 filed. You understand that, don't you?

16 A. I do.

17 Q. Okay. All right.

18 Let's go to Plaintiff 578. And I have thoroughly
19 gotten red things on my screen again.

20 This is 578 in evidence, Your Honor.

21 Let's turn to the form. You know, I wrote down the
22 wrong number. I am not going to trouble with looking for the
23 right number. Let me just ask you.

24 Mr. Miller asked you if the dicamba inquiry form may
25 have changed over time. You said you thought it had.

1 A. Had it changed over time, I don't recall that question,
2 but I think that's possible, yes.

3 Q. Well, he was asking you about the document that we saw
4 yesterday and he showed you at the bottom it says, "The
5 purpose of the dicamba inquiry" farm is to protect -- "form is
6 to protect Monsanto." Do you remember those questions?

7 A. I do.

8 Q. You said, I think the form may have changed. Do you
9 recall that answer?

10 A. I don't, but --

11 Q. Well, if you don't recall --

12 A. It's been a couple days.

13 Q. If you don't recall the answer, it sort of makes my
14 questions pointless; so we will move on. Because I may well
15 have misheard you and if I did, I apologize.

16 Plaintiff Exhibit 190, let's put that back up.

17 In evidence, Your Honor.

18 Mr. Miller showed you this document before and I
19 want to go to the portions where we talked about -- you know
20 what, I can ask my questions without bothering with the
21 document. We can get you out of here by lunch.

22 Let me do it this way. You indicated -- Mr. Miller
23 asked you some questions about -- you know what, I am going to
24 go -- I am going to do one thing before I do that.

25 You remember the questions and answers where you

1 talked about the 50,000 farmers -- or 50,000 applicators
2 trained by Monsanto?

3 A. I do.

4 Q. Now, I know not every farmer farms soybeans or cotton,
5 and the 50,000 number sounds like a lot, but you do realize
6 that's approximately 5 percent of the American farm
7 population, don't you?

8 A. I don't know the numbers off the top of my head. I will
9 take your word for that calculation.

10 Q. While we are talking about the effectiveness of that
11 training, it is useful to look at what happens in the real
12 world, isn't it?

13 A. I would agree.

14 Q. Okay. You are aware that the State of Illinois has the
15 strictest training requirements in the country, aren't you?

16 A. I am not aware of that.

17 Q. Okay. Are you aware that in Illinois, over 70 percent of
18 herbicide applications are done by professional applicators?

19 A. From my experience, that sounds reasonable, yes.

20 Q. Are you aware that even the guy who drives the motorized
21 applicator unit has to be a certified applicator?

22 A. I know that Illinois has some different regulations or
23 has had over the years. I am not sure at this point in time
24 whether the actual spray rig driver is or isn't.

25 Q. Okay.

1 A. So I can't say for sure.

2 Q. Mr. Miller indicated that you started in 2016 doing this
3 training for what ultimately added up to 50,000 people
4 trained; right?

5 A. We started in reality probably January of '17.

6 Q. So if you have highly trained applicators and you have an
7 active program of training, you would expect with increased
8 use of the product, the complaints would go down, wouldn't
9 you?

10 A. Complaints would go down from -- that was the initial
11 year of launch, so they would go down from what baseline would
12 you compare to?

13 Q. They would go down over the years. As the training sinks
14 in and the professionals do it more, you would expect the
15 complaints to go down, wouldn't you?

16 A. Yes.

17 Q. Well, let me ask you if you are aware of these numbers.
18 Off-target movement complaints in Illinois were 245 in 2017;
19 330 in 2018; and 724 in 2019. Were you aware of those
20 numbers?

21 A. I don't know those specifics.

22 Q. Are you aware that those are the highest numbers in the
23 nation?

24 A. I will believe that.

25 Q. And does it concern you at all that these highly trained

1 professional applicators cannot keep the product from moving
2 off target and onto neighboring crops?

3 **MR. MILLER:** Objection, assumes facts not in
4 evidence, Your Honor. That's not even notice.

5 **THE COURT:** I will sustain that objection.

6 Q. (By Mr. Randles) Have you even looked into this question
7 at Monsanto of the number of complaints concerning
8 professional applicators and off-target movement?

9 A. Yes, we track the numbers of inquiries and we visit
10 regularly with the state departments of ag and we seek input
11 and their positions on how well our training is going.

12 Q. But you keep selling the products in the same fashion
13 that you sold them from the start, don't you?

14 A. We do. And our inquiries have gone down dramatically
15 overall in the three years that the product has been on the
16 marketplace.

17 Q. And you predicted that in the chart we showed yesterday,
18 didn't you?

19 A. Generally, yes.

20 Q. And we talked about that dynamic. If -- if -- I can't
21 move very far. If this is a nondicamba field that is
22 surrounded by dicamba system and it gets hit in, say, 2017 and
23 registers a claim, calls you with a claim, that would show up;
24 right?

25 A. Correct.

1 Q. Now, if this field plants dicamba-tolerant seeds the next
2 year, even if dicamba volatilizes or drifts and moves onto it,
3 "no harm, no foul"; right?

4 A. There's no injury, that's correct. There's no
5 symptomology.

6 Q. So this fellow is not going to need to call you with a
7 complaint that next year, is he?

8 A. In that example, that's correct.

9 Q. So as your system has spread over 60 million acres
10 through 2019, every one of those acres is a field that no
11 longer has a worry about off-target movement from dicamba;
12 right?

13 A. That's accurate.

14 Q. So there are 60 million acres withdrawn from the pool of
15 potential complaints; right?

16 A. Correct.

17 Q. It would be like saying if there were 60,000 -- if there
18 were -- if there were -- well, I think the point has been
19 made.

20 Let me ask you this: At the end of your examination
21 of Mr. Miller, you gave a short-term/long-term talk about,
22 well, you know, we might endure some short-term loss if we do
23 the right thing, but that's good for the long term. Do you
24 remember that?

25 A. I do.

1 Q. Okay. Now, first of all, let's talk about short-term
2 loss. Monsanto has never taken action against anybody and
3 stopped selling seeds to them no matter what that person has
4 done with regard to spraying; right?

5 A. That's correct.

6 Q. So you are not suffering a loss there. Your seed sales
7 have increased every year since you put the product out;
8 correct?

9 A. That's correct.

10 Q. So you're not suffering a loss there, are you?

11 A. Suffering a loss as opposed to?

12 Q. Making money?

13 A. It's positive for our business because growers want to
14 plant those products.

15 Q. And the corresponding herbicide sales have been going up
16 since 2017 as well as more acres get planted; right?

17 A. To a degree, yes.

18 Q. So Monsanto is not suffering a loss there, is it?

19 A. I'm not claiming that we are.

20 Q. And the fact is, you talked about doing the right thing.
21 There are -- there is no number of off-target movement claims
22 large enough for you to say, if we reach that threshold, we
23 shouldn't sell the product anymore. There is no number high
24 enough for you to say that, is there?

25 A. I don't have -- I don't have a set number to say this is

1 the number that would be appropriate or unappropriate, that's
2 correct.

3 Q. If there were one billion off-target movement claims in a
4 single year, you wouldn't say that's too many?

5 A. We've had this discussion before. And what I told you is
6 and what I will say now is that there's no number that I can
7 give you that you won't misrepresent.

8 Q. Well, that's really for the jury to determine.

9 A. Yes, it is.

10 Q. So if you have a number today that you didn't have in
11 your deposition, please give it to me.

12 A. I don't have a different number. I don't have a
13 different answer today.

14 Q. So there is no number of off-target movement claims that
15 would cause you to say, that's too many, we shouldn't sell the
16 product. Isn't that right?

17 A. That's not what I said. There's no number I can give you
18 that you won't misrepresent.

19 Q. Well, we have eight good citizens sitting there. Why
20 don't you give a number and let them decide?

21 A. They will decide.

22 Q. I'm sorry. Did I miss a number?

23 A. No.

24 Q. Thank you.

25 **THE COURT:** Mr. Miller.

1 **MR. MILLER:** Nothing else, Your Honor. Thank you.

2 **THE COURT:** Mr. Mandler.

3 **MR. MANDLER:** Nothing further, Your Honor. Thank
4 you.

5 **THE COURT:** We will take our lunch break then.

6 Remember the admonition I have given to you. You
7 are on your own again for lunch. I think we can -- can you
8 all be back at 1:00 then? Is that all right? An hour and ten
9 minutes?

10 Okay. Go now then with the clerk to the jury room.
11 Remember the admonition I have given you repeatedly. We will
12 reconvene at 1:00.

13 You may step down.

14 (The following proceedings were held in the
15 courtroom out of the presence of the jury:)

16 **THE COURT:** Do you want to let me know what's next
17 then?

18 **MR. MILLER:** I can tell you, Judge. We have a video
19 of Tina Bhakta. We have a run time of 4 hours and 27 minutes;
20 so it will be very close whether --

21 **THE COURT:** Four hours and how much?

22 **MS. GEORGE:** Twenty-seven minutes. We would
23 obviously want a break in there. So it may just not quite
24 finish up.

25 **THE COURT:** Have we dealt with all the rulings on

1 that?

2 **MS. GEORGE:** Yes.

3 **THE COURT:** All right. We will be in recess until
4 1:00 then.

5 (The proceedings concluded at 11:52 a.m.)

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CERTIFICATE

I, Reagan A. Fiorino, 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 pages 654 through 770 inclusive and was delivered electronically and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this January day of 30, 2020.

/s/ Reagan A. Fiorino
Reagan A. Fiorino, CRR, RMR, CCR, CSR
Official Court Reporter