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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION

BADER FARMS, INC.,  
Plaintiffs,

vs.

Cause No. 1:16CV299 SNLJ

MONSANTO CO., AND BASF CORPORATION,  
Defendants.

=====

TRIAL DAY 5  
VOLUME 5B - Pages 807 - 844

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

JANUARY 31, 2020

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Reported by:

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Official Court Reporter  
United States District Court  
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1 (Proceedings reconvened in open court at 1:15 p.m.)

2 (Jury in)

3 THE COURT: Please be seated.

4 All right. You may continue.

5 (Playing excerpts of the videotaped deposition of  
6 Greg Starling resumed.)

7 THE COURT: Is that the end of that video?

8 MS. GEORGE: That's all we have for that  
9 individual.

10 (Playing excerpts of the videotaped deposition of  
11 Greg Starling concluded.)

12 \* \* \* \*

13 THE COURT: We'll take a recess for 10 or 15  
14 minutes.

15 Remember the admonition I've given you not to  
16 discuss the case. Go to the jury room, and we'll call you  
17 back in shortly.

18 (Jury out.)

19 (The following was conducted outside the presence  
20 of the jury:)

21 THE COURT: Anything we need?

22 MS. GEORGE: No.

23 THE COURT: Who's next?

24 MS. GEORGE: Orr. Mr. Orr.

25 THE COURT: That's a long one.

1 MS. GEORGE: It will take the rest of the day until  
2 we -- obviously, we will need to break for procedural  
3 matters, Your Honor.

4 THE COURT: Will we finish that tomorrow?

5 MS. GEORGE: Monday, yeah.

6 THE COURT: So we can't finish Orr today?

7 MS. GEORGE: We can't.

8 THE COURT: Do you want to go to like 5:00 o'clock  
9 and maybe another break too?

10 MS. GEORGE: Yeah. Whatever. It's a lot of video  
11 for a day. So whatever you want to do.

12 THE COURT: Okay. That's fine. How much do you  
13 want to do, an hour and take another break, or do an hour and  
14 a half?

15 MS. GEORGE: If you sense that there's a need for a  
16 break, we trust you to break, I mean, if you want to.

17 And we'll have 30 minutes at the end of the day  
18 that we need to resolve some issues, and I'm going to read  
19 the exhibit numbers after the jury is gone.

20 THE COURT: Not including BASF?

21 MS. GEORGE: Just that. So whatever Your Honor  
22 wants to do on breaks is fine with us.

23 (Court recessed.)

24 (The following was conducted outside the presence  
25 of the jury:)

1           MR. HOHN: Can we have one minute for procedural  
2 matters?

3           THE COURT: Yeah.

4           MR. HOHN: We have a stipulation regarding an  
5 exhibit that's going to be used in this forthcoming Tom Orr  
6 video that everyone is fine with. It's basically just  
7 preserving our -- saying we don't waive our  
8 fraud-on-the-agency issue.

9           And then, Your Honor, I have proposed orders for  
10 the Travers and Starling's depositions that were just  
11 played --

12          THE COURT: Okay.

13          MR. HOHN: -- obviously preserving our objections,  
14 but noting your rulings.

15          THE COURT: Okay. Good.

16          MR. HOHN: Thank you, Judge.

17          (A discussion was held off the record.)

18          (Jury in.)

19          THE COURT: Before we start, I'd like to do an hour  
20 and take another break and then do another hour and a half  
21 and get out about 5:15. However, if you'd rather to try to  
22 go maybe an hour and a half and then be done with the day we  
23 can do that too.

24          JUROR: That sounds good.

25          THE COURT: It looks like it's unanimous. That's

1 what we'll do then.

2 Okay. All right. Thank you again for your  
3 patience and attentiveness. All right.

4 MS. GEORGE: Your Honor, the Plaintiffs will play  
5 the deposition of Mr. Orr.

6 (Excerpts of the videotaped deposition of Thomas  
7 Orr taken on August 28, 2019, were played for the jury, and  
8 those excerpts are to be filed with this Court.)

9 THE COURT: Is this a good time?

10 MS. GEORGE: Yes, Your Honor.

11 \* \* \* \*

12 THE COURT: 4:30 like I promised. So now you're  
13 going to have a weekend free to rest and catch up with  
14 everything else.

15 I want to commend you again for your attentiveness  
16 and your patience. It's a very complicated case.

17 But, again, please remember you're under an oath  
18 not to discuss the case among yourselves or with any other  
19 person, and do not allow anyone else to discuss it in your  
20 presence. Again, do not form or express any opinion about  
21 the case until it's given to you to decide.

22 So thank you again. We'll be recessed until  
23 9:00 o'clock on Monday morning. And get some rest, like I  
24 said.

25 So we'll be in recess until that time. Thank you.

1 (Jury out.)

2 (The following proceedings were conducted outside  
3 of the presence of the jury:)

4 THE COURT: Why don't we take a five-minute recess  
5 and come back and handle all the extracurricular matters.

6 (A discussion was held off the record.)

7 (Court recessed.)

8 (The following proceedings were conducted outside  
9 the presence of the jury:)

10 THE COURT: Okay. What do you have?

11 MR. MANDLER: Good afternoon, Your Honor.

12 THE COURT: Yes.

13 MR. MANDLER: John Mandler representing BASF.

14 THE COURT: I knew that.

15 MR. MANDLER: We have -- well, we've narrowed it  
16 down to three main categories. There's a little bit in each  
17 category, but I'll go one at a time for the three categories.

18 The first one should be fairly straightforward  
19 since you've already ruled on it. You ruled on it in Motion  
20 in Limine Number 13 and Motion in Limine Number 3. And what  
21 you ruled is the -- there can't be any reference to German  
22 parents or Germany or the fact that some employees reside in  
23 Germany with one exception -- with one exception that you  
24 said that the Umbrella Agreement can come in and testimony  
25 about the Umbrella Agreement.



1 THE COURT: That's right. I reaffirmed those  
2 rulings.

3 MR. MANDLER: Yes, you did.

4 Please don't interrupt while I'm talking. You'll  
5 get your turn.

6 THE COURT: Well, let's do them one at a time.

7 MS. GEORGE: He just mentioned that, so --

8 MR. MANDLER: None of these have to do with the  
9 Umbrella Agreement. So what I'm saying, Your Honor, is  
10 you've ruled on these. You've ruled on both these motions in  
11 limine, and you granted them with the exception of the  
12 Umbrella Agreement.

13 So with three clips with Mr. Birk and five clips  
14 with Mr. Repage they have designated testimony that referred  
15 to Germany and whatnot that are unrelated to the Umbrella  
16 Agreement. So this falls within what you ruled on what  
17 should be taken out and not what should come in.

18 THE COURT: Okay.

19 MR. MANDLER: So what I'm asking you to rule on,  
20 that's number one.

21 THE COURT: So then let me hear you on number one,  
22 on Germany.

23 MS. GEORGE: Sure. Your Honor, we're only offering  
24 these clips when we mention Germany it's to establish which  
25 employer this individual works for, to establish the

1 difference whether SE is involved or corporate is involved,  
2 identify where that employee is located or refreshing the  
3 witness's recollection about that might be an SE employee  
4 telling them to do something associated with the --

5 THE COURT: Well, I understand, but can't you just  
6 delete that reference? I mean, that's not a question that  
7 matters hardly a hoot.

8 MS. GEORGE: Well, except that they're going to  
9 bring witnesses to say SE wasn't involved. And so when  
10 they're giving reports to SE individuals -- we are not  
11 bashing Germany. We're trying to establish SE's involvement.

12 MR. MANDLER: But, Your Honor, SE isn't involved.  
13 They're not a Defendant.

14 MS. GEORGE: Oh, my God.

15 MR. MANDLER: While they were named in the MDL two  
16 and a half years ago, they have never been served. They are  
17 not a party.

18 So if they want to argue the Umbrella Agreement  
19 applies, you will allow them to do it, but that doesn't make  
20 SE a party or relevant under anything other than the Umbrella  
21 Agreement.

22 MS. GEORGE: These employees are acting under the  
23 auspices of the Umbrella Agreement.

24 THE COURT: That's right.

25 MS. GEORGE: And in order to establish that,

1 because the Court has agreed that what we're arguing is an  
2 implied agreement, course of conduct is relevant.

3 THE COURT: Right.

4 MS. GEORGE: We need to say that this person is  
5 from BASF SE to establish that the acts that they are doing  
6 are pursuant to the Umbrella Agreement.

7 THE COURT: Well, that's fine. I mean --

8 MS. GEORGE: Well, that's what he's saying he can't  
9 do.

10 MR. MANDLER: No, it's not, Your Honor.

11 If they were testifying about the Umbrella  
12 Agreement, if any -- I have the transcript. I'll hand it  
13 off. If any of the testimony had anything to do with the  
14 Umbrella Agreement, I understood your ruling, but it doesn't.

15 MS. GEORGE: Can I read you an example of this?

16 MR. MANDLER: I'm going to hand it up to the court;  
17 all right?

18 MS. GEORGE: I don't think you're handing up this  
19 part, which says --

20 MR. MANDLER: Well, you've got to have a page and  
21 line -- well, you don't know which one we're objecting to, so  
22 which page and line are you referring to?

23 MS. GEORGE: I'm referring to Birk's deposition at  
24 page 147, line 5, and this is the Exhibit 152.

25 "Mr. Birk, have you had an opportunity to look" --

1 MR. MANDLER: Why don't we let the Court get there  
2 first.

3 MS. GEORGE: Mr. Birk.

4 THE COURT: Wait. What is it?

5 MS. GEORGE: It's at 147, line 8.

6 MR. MANDLER: That's not what we're objecting to.

7 MS. GEORGE: So you withdraw your objections to  
8 152?

9 MR. MANDLER: Our objection starts at line 15 and  
10 ends at line 18 --

11 MS. GEORGE: Right. But, I mean --

12 THE COURT: What page?

13 MS. GEORGE: 147.

14 THE COURT: Okay.

15 MS. GEORGE: I'm going to give him a little context  
16 to understand. And when Your Honor is there, let me know.

17 THE COURT: I can already see. Maybe I can help  
18 short circuit this. I see that a form was sent to you from  
19 some BASF folks in Germany. Why can't you just say some BASF  
20 folks?

21 MS. GEORGE: Because what we're ultimately doing --  
22 if you continue to scroll down, we're establishing that this  
23 person is a BASF SE employee. And when the witness says, he  
24 doesn't know, I asked him to look at the signature block,  
25 because this is a BASF SE employee in German, and it lists

1 the Board of Executive Directors.

2 THE COURT: Why do you have to say in Germany? Why  
3 can't you just bleep that out?

4 MR. MANDLER: Well, if the --

5 MS. GEORGE: He's objecting to the whole exhibit.

6 MR. MANDLER: Well, the fundamental -- not the  
7 exhibit. I'm objecting to the testimony.

8 The fundamental issue, Your Honor, is this  
9 testimony has nothing to do with the Umbrella Agreement.  
10 That's not the exception to your ruling. They're trying to  
11 drag in a parent company that isn't in this case.

12 If the umbrella -- and the only reason they're  
13 using the Umbrella Agreement is to say that corporate is  
14 under the Umbrella Agreement. If any of this had to do with  
15 discussions of the Umbrella Agreement, I would not be  
16 objecting.

17 MS. GEORGE: His Honor has said, "With the  
18 expansion of acreage use of dicamba and the dicamba tolerant  
19 system the potential for spray drift complaints may  
20 increase." This was being provided to the Executive Board of  
21 Directors for BASF SE in July. And the only way I can  
22 establish that is that it went to this employee and that the  
23 employee was there.

24 MR. MANDLER: But that's unrelated to the Umbrella  
25 Agreement.

1 THE COURT: Yeah. What does that have to do with  
2 the Umbrella Agreement?

3 MS. GEORGE: Because this brought -- the Umbrella  
4 Agreement was with BASF SE.

5 THE COURT: I know.

6 MS. GEORGE: And so in order for me to establish  
7 SE's involvement and that this was not an isolated BASF corp  
8 project I have to establish that BASF SE was pulling the  
9 strings here.

10 THE COURT: Well, I know that, but so I'm kind of  
11 lost. I mean, you've got to make that connection, but why do  
12 you have to say Germany is -- that BASF SE is in Germany?

13 MS. GEORGE: Well, I -- it wouldn't be -- if we  
14 were just deleting the word Germany, that would be fine.

15 THE COURT: I think that's all he's asking.

16 MR. MANDLER: Well, no, I'm asking for --

17 MS. GEORGE: No, it's not. No, he's not.

18 THE COURT: Well, that was the first thing he was  
19 asking about.

20 MR. MANDLER: Right. It has to do with Germany as  
21 to SE is unrelated to the Umbrella Agreement. Your order  
22 also says the parent companies are all unrelated to the  
23 Umbrella Agreement.

24 Your Honor, the only reason they want the Umbrella  
25 Agreement in is to try to make their JV, joint venture,

1 argument. And these discussions with Germany unrelated to  
2 the Umbrella Agreement doesn't make that more or less likely.

3 THE COURT: Well, how do -- I think she's saying  
4 they're directly related.

5 MR. MANDLER: They're not. Just the fact that she  
6 says it doesn't make it true. She hasn't pointed to anything  
7 where they're discussing the Umbrella Agreement, the Umbrella  
8 Agreement application. It's unrelated to the Umbrella  
9 Agreement.

10 THE COURT: How am I supposed to know? I mean, I  
11 haven't looked at this.

12 MR. MANDLER: Because they're not talking about the  
13 Umbrella Agreement. They're not talking about the DTSA.  
14 They're not talking about any elements that would make it  
15 more or less likely that somehow the Umbrella Agreement  
16 created a joint venture.

17 MS. GEORGE: What they're doing here is carrying  
18 out the conduct that goes to the agreement. And Mr. Mandler  
19 is over extrapolating your Court's ruling to say I can't talk  
20 about BASF SE at all unless I am mentioning the word Umbrella  
21 Agreement with it and not to be taken --

22 MR. MANDLER: Well, first, let me claim that  
23 they're under extrapolating your ruling.

24 THE COURT: First of all, you can excise any  
25 reference to Germany. That should be -- and that will help

1 him a little bit.

2 MS. GEORGE: And the only time -- the only time --  
3 the only time we ever asked for it to be in is if the witness  
4 doesn't know where -- if the employee is an SE employee or  
5 corp, and we use it to say, Well, where are they located? We  
6 don't -- we can delete Germany.

7 THE COURT: Well, there's necessarily got to be  
8 some interaction between SE and the corporation.

9 MR. MANDLER: Right. But the fact that the SE is  
10 interacting with its subsidiary doesn't make the operation of  
11 the Umbrella Agreement any more or less likely.

12 THE COURT: I disagree with that.

13 MR. MANDLER: Right. I understand.

14 THE COURT: I disagree with that part.

15 MR. MANDLER: Okay.

16 THE COURT: But we can get rid of the Germany, but  
17 I think the interaction between SE and the corporation --

18 MS. GEORGE: Yes, Your Honor.

19 THE COURT: -- is relevant to the joint venture.

20 So to that extent that --

21 MR. MANDLER: All right.

22 THE COURT: -- your motion will be overruled then.

23 MR. MANDLER: We'll go on to Number two, Your  
24 Honor.

25 THE COURT: Okay.



1           MR. MANDLER: You've heard reference to the DTSA  
2 and the Amended DTSA.

3           THE COURT: Tell me again the acronym.

4           MR. MANDLER: Dicamba Tolerant System Agreement.

5           THE COURT: I have.

6           MR. MANDLER: So Dicamba Tolerant System Agreement,  
7 which by the time they got around to commercializing  
8 wasn't -- was no longer in effect. It was the Amended  
9 Dicamba Tolerance System Agreement. They are documents that  
10 were negotiated and signed between the parties.

11           The Plaintiffs have a series of documents -- and  
12 once I get your general ruling, we can put those documents  
13 into the record -- that are not those agreements, but are  
14 just descriptions of the agreements, people saying what they  
15 mean or what's in them.

16           Okay. And so they should be inadmissible for four  
17 reasons, and I'd like to go through them first and then tell  
18 you what the controlling case law is.

19           First, they're not relevant. Especially the ones  
20 for the DTSA aren't relevant because no dicamba was ever sold  
21 under the DTSA, because it was --

22           THE COURT: Are you talking about anecdotal  
23 comments from employees that this is a joint venture?

24           MR. MANDLER: No, that has nothing to do with the  
25 joint venture. It has to do with describing how it's going

1 to work.

2 THE COURT: Oh.

3 MR. MANDLER: So it's description -- written  
4 description of how a written contract -- what it means, how  
5 it's going to work. The bottom line premise is you have to  
6 go to the source document. You have to go to the contract  
7 itself.

8 Admitting all of these other descriptions of --  
9 that describe the contract is inadmissible for four reasons.  
10 First, it's not relevant because we can go to the contract  
11 itself.

12 Second, it's cumulative. It's cumulative of the  
13 agreement itself. That's 403.

14 Third, it's confusing under 403, because if there's  
15 any difference between the description and the contract  
16 itself, the contract governs.

17 And, fourth, it's inadmissible under Eighth Circuit  
18 precedent in the Rosemann case, which says, "Under Missouri  
19 law, Extrinsic evidence of a prior or contemporaneous written  
20 agreement is generally not admissible to vary, add to or  
21 contradict the terms of an unambiguous and complete written  
22 document."

23 THE COURT: The parol evidence rule. I know. I  
24 know that's the general rule.

25 MR. MANDLER: So for those four reasons all of

1 these descriptions of a written contract -- the written  
2 contract can come into evidence. We're not fighting about  
3 that, but the descriptions of it and characterizations of it  
4 and restating of it shouldn't. To me, Your Honor, this is a  
5 complete --

6 THE COURT: Well, it could come in if it's not  
7 inconsistent with --

8 MR. MANDLER: But then that's unnecessary,  
9 confusing redundant, cumulative.

10 THE COURT: Well, I --

11 MR. MANDLER: And, Your Honor, this is the complete  
12 analogy to what you kept out from the Plaintiffs' own  
13 documents. You kept out their financial statement even  
14 though they produced it, it was a business record. It was  
15 done by their contract, because it possibly could be  
16 confusing.

17 To let in -- we're not trying to keep our own  
18 contract out, but to have five different people describing  
19 what it means is confusing to the jury when they could go  
20 right to the source.

21 THE COURT: The main reason I overruled your  
22 objection to -- or your -- sustained their motion in limine  
23 about the tax returns was that the prejudicial effect  
24 outweighs the probative value in addition to confusion.

25 MR. MANDLER: I'm talking about the financial

1 statements, not the tax returns.

2 THE COURT: But so the first thing I brought up  
3 with you is that if the testimony is consistent with the  
4 written provisions, how can it be confusing? It can only be  
5 explanatory that everybody ought to be help --

6 MR. MANDLER: There are instances where it's not  
7 one and the same. And not only that, as the document -- and  
8 the particular document I'm thinking about, which is 1108.  
9 I'll show you, Your Honor. Right in the document itself it  
10 says -- right in the document itself it offers the knowledge  
11 that it may not be accurate, and in that sense it is not it  
12 has to be controlled by the document itself.

13 It says under "DTSA" it is very comprehensive and  
14 complex and should not be assumed that it can be distilled in  
15 the bullet points. If there's a discrepancy between this and  
16 the DTSA, the DTSA controls.

17 So, again, they have somebody going through and  
18 summarizing and paraphrasing what is an actual complex  
19 document, Your Honor.

20 THE COURT: Well, I mean, it says what it says. It  
21 speaks for itself. I mean, what's the problem?

22 MR. MANDLER: Exactly. It speaks for itself, so we  
23 don't need five other people trying to say what it says.

24 THE COURT: Well, is what they're going to say  
25 consistent?

1 MR. MANDLER: In some places, yes.

2 MS. GEORGE: No.

3 MR. MANDLER: If it's not inconsistent, then they  
4 don't need it. Why not just go to the actual source  
5 document. There's no reason to let it in. It doesn't  
6 advance the case at all.

7 I mean, from the chart I gave you last night we're  
8 already a half a day beyond that chart. To put in extra  
9 stuff over and above the source document just compounds and  
10 confuses the record.

11 THE COURT: This case is complex enough that I can  
12 see why several different witnesses might have to say this is  
13 how I understood this legal disclaimer if there's a  
14 discrepancy. I don't see any problem.

15 MR. MANDLER: How different witnesses understood it  
16 is irrelevant. It's what the document itself says, Your  
17 Honor.

18 THE COURT: Well, I agree with that.

19 MR. MANDLER: Right. And so different witnesses  
20 have different understandings. That's exactly the reason  
21 that you --

22 THE COURT: Here's my ruling. If the testimony is  
23 not inconsistent with this text, I'm going to let it in.

24 MR. MANDLER: Okay. All right. Let me turn to the  
25 fourth argument.

1 THE COURT: Okay.

2 MR. MANDLER: Which is documents and materials that  
3 relate to an expansion at BASF's Beaumont plant. Their  
4 Beaumont plant is where they make the active ingredient --  
5 Beaumont, Texas is where they make the active ingredient for  
6 dicamba, Your Honor.

7 THE COURT: Okay.

8 MR. MANDLER: They make dicamba there for at least  
9 four different purposes. They sell the AI -- the active  
10 ingredient -- to other companies to use in their products.  
11 And, remember, dicamba generally is now -- you've heard the  
12 testimony that there's a lot of formulations that use that.  
13 So they sell the AI for that.

14 They formulate it for their three products that are  
15 still on the market: Clarity, Status and Distinct, which  
16 have all kinds of uses unrelated to this litigation.

17 They sell the AI to Monsanto for Monsanto's own  
18 production of its Xtend products, and then I think by  
19 definition now DuPont for its FeXapan product and others.

20 And they make the AI, the active ingredient, to put  
21 in their own Engenia products.

22 They have all of these uses. The fact that they  
23 were expanding this plant is unrelated to any issue that the  
24 Plaintiffs have to prove in this case.

25 The fact that they had to expand the plant for any

1 combination of those five different things they used the AI  
2 for is just the course of business.

3 THE COURT: This is the first time I've heard about  
4 expanding the plant.

5 MR. MANDLER: Well, you heard about it earlier as  
6 part of Commission F. So Commission F was part of that team  
7 that had to approve the expansion of the plant.

8 THE COURT: Okay.

9 MR. MANDLER: So they expanded it, because the  
10 market was going to -- they anticipated at least the market  
11 was going to increase for all of these -- some combination of  
12 all of these different uses.

13 THE COURT: Sure.

14 MR. MANDLER: That issue doesn't prove or disprove  
15 any of the elements of the Plaintiffs' case. Therefore,  
16 it's irrelevant, confusing, and doesn't need to be part of  
17 what's already a confusing case, a long and confusing case.

18 MS. GEORGE: Your Honor, this isn't going to be a  
19 long, protracted case against BASF. Like I told you  
20 yesterday, we could put our entire case against BASF on in  
21 half a day, but they've added to our case.

22 We aren't having a ton of witnesses. This is  
23 evidence that goes to establish that they were investing  
24 money, shared costs, shared resources into the joint venture,  
25 foreseeability that they were scaling up production of

1 dicamba. And shared services was not going to be --

2 THE COURT: What's the timetable on this plant  
3 expansion?

4 MR. MANDLER: It was initially contemplated in  
5 the --

6 MS. GEORGE: 2014.

7 MR. MANDLER: -- '14, which you can't build a plant  
8 in a matter of days. So it was contemplated for whenever any  
9 of these uses come up.

10 So, Your Honor, regardless of what they're putting  
11 in against BASF, all the things -- it doesn't show that it  
12 was some sort of -- it has nothing to do with the joint  
13 venture. It doesn't show that it was -- it was BASF alone  
14 who paid for this. No shared costs. There's no shared  
15 losses.

16 They expanded their own plant to be able to supply  
17 dicamba to the market that they had. That's unrelated to  
18 anything the Plaintiffs are claiming.

19 MS. GEORGE: And you can put on evidence of that in  
20 your case, and we argue differently, and it's relevant.

21 THE COURT: Well, I do think it's relevant. Those  
22 are good explanations on why it doesn't lead to a joint  
23 venture, but I think it's some elements -- evidence that just  
24 the fact that you-all were making the active ingredient for  
25 Monsanto for their part of the roll out of the system



1 according to their theory of the case.

2 Plus, I suppose it also goes to that point that the  
3 Plaintiffs are trying to make about generating more and more  
4 dicamba product to meet the need.

5 MR. MANDLER: But there's no evidence to tie it to  
6 that at all. It's just an expansion of the plant, Your  
7 Honor.

8 THE COURT: They're in a --

9 MR. MANDLER: Thank you, Your Honor.

10 THE COURT: So I'll overrule the objection.

11 MS. GEORGE: Thank you, Your Honor.

12 THE COURT: Anything else?

13 MS. CHAMBERLAIN: Yes, Your Honor. Sara  
14 Chamberlain on behalf of Monsanto Corporation.

15 THE COURT: Does Mr. Miller know you're here?

16 MS. CHAMBERLAIN: He does. They all abandoned me,  
17 though, so I don't know what that's about.

18 But so we do have a couple brief objections  
19 hopefully on two different witnesses. And I have the  
20 transcripts on the sessions I want to talk about. If you  
21 don't mind if I approach.

22 THE COURT: Okay.

23 MS. CHAMBERLAIN: The first one relates to witness  
24 Jeffrey Birk, who was the Product Regulatory Manager at BASF.  
25 And this one was addressed with you just briefly yesterday

1 morning at pretrial. It relates to the Defendant's Joint  
2 Motion in Limine Number One on the fraud on the agency.

3 We believe there's some statements in the testimony  
4 and as they're related to the exhibits the basis of it goes  
5 to the fact that Monsanto is trying to trick the EPA as far  
6 as volatility testing. And so we have suggested just some  
7 very small --

8 THE COURT: I wouldn't keep that out.

9 MS. CHAMBERLAIN: So we've just suggested some very  
10 short edits to that effect.

11 THE COURT: Have you tried to work this out  
12 already?

13 MS. CHAMBERLAIN: Yes, and we have.

14 THE COURT: Oh, you have worked it out?

15 MS. CHAMBERLAIN: Oh, no, we have not.

16 MS. GEORGE: No, we have not worked it out.

17 MS. CHAMBERLAIN: We have attempted to work it out.

18 MS. GEORGE: Several times, Your Honor.

19 THE COURT: Okay. What do you have? Give me the  
20 page and line number.

21 MS. CHAMBERLAIN: So it starts on page 101. It's  
22 lines -- the middle of line 3.

23 THE COURT: I've got it.

24 MS. CHAMBERLAIN: -- to 7. And it says, "drift."  
25 It's that quote.

1 THE COURT: Let's see.

2 MS. CHAMBERLAIN: So the section says, "With the  
3 objective of convincing the EPA that volatility is not a  
4 contributing factor to the off-target plant injury by  
5 dicamba, and the volatility myth can be explained by physical  
6 drift."

7 THE COURT: I don't have a problem with that. I  
8 mean, they're -- they're not suggesting any kind of fraud  
9 there. It's just going through the natural -- the natural  
10 administrative process, regulatory process.

11 MS. CHAMBERLAIN: And we don't have a problem with  
12 all of that, Judge. It's just that specific portion that  
13 that's talking about, the objective of trying to convince the  
14 EPA that volatility is a myth.

15 We don't have a problem with any of the rest of the  
16 exhibit or the attached talking points, just that  
17 characterization.

18 THE COURT: Oh, I get it. I missed that part. Let  
19 me look at that.

20 MS. CHAMBERLAIN: And it goes over a brief portion  
21 on that. It's on page 102, line 14.

22 THE COURT: I am concerned about it. I didn't see  
23 the word "myth" in there. That does bother me. And here it  
24 is again on page 102. That I have to say bothers me.

25 That is a little inflammatory to the extent that

1 it's arguable that they were trying to hoodwink the EPA.

2 MS. GEORGE: Your Honor, we're not offering this to  
3 show that any evidence was withheld from the EPA or any  
4 studies were withheld. The parties don't disagree -- we're  
5 all in agreement that these companies were trying to convince  
6 the EPA to issue a label.

7 So putting together talking points to convince the  
8 EPA that the volatility myth can be explained by physical  
9 drift is simply the company saying they think everybody is  
10 wrong about volatility and that there's this big urban legend  
11 about it, not that they're trying to do anything like  
12 withhold studies. They're crossing the line by taking big  
13 leaps over the Court's ruling that we can't even mention.

14 This document has already been used. I mean, this  
15 is simply stating talking points to convince the EPA that  
16 volatility is an intervening factor.

17 They've even said that they have had studies to  
18 convince the EPA about it. That's not in dispute.

19 MS. CHAMBERLAIN: Your Honor, it's the implication  
20 and the way that it's worded. We're not trying to keep out  
21 the entire exhibit. It's just that language that we believe  
22 is inflammatory. The exhibit itself and the talking points  
23 would still come in. They're just --

24 THE COURT: I think it's inflammatory. Once you  
25 start suggesting that the -- that the Defendants were

1 submitting mythological matters to the EPA it is --

2 MS. GEORGE: Oh, no, Judge, that's not what this  
3 says at all. This isn't saying that they're -- they -- that  
4 the company is submitting mythological matters, what it's  
5 saying is the company is going to put together talking points  
6 to convince the EPA that volatility is not a contributing  
7 factor to off-target plant injury and that the volatility  
8 myth that's out there in the public perception can be  
9 explained by physical drift. They're not submitting any  
10 myth. They're not saying anybody else at the other  
11 company is --

12 THE COURT: So whose using that term then? Maybe  
13 I've got the context wrong.

14 MS. GEORGE: This is Jeff Birk. This is -- okay.  
15 It's an e-mail that Linda Ian at Monsanto and Tom Miro  
16 (Phonetic) at Monsanto were sending, and they were putting  
17 together talking points with BASF for how to, you know,  
18 explain away to the EPA that everybody's beliefs that there  
19 is this volatility huge problem is actually a myth. They're  
20 not trying --

21 THE COURT: Oh, I see. Okay. Just so I understand  
22 the context I do see what you're saying.

23 In that context I don't think there are -- okay.

24 MS. CHAMBERLAIN: We still think that there's an  
25 indication, Your Honor, that they will be using it for the

1 purpose of trying to say that we're --

2 THE COURT: No, no, no. No, they're not.

3 MS. GEORGE: No, we're not.

4 THE COURT: Okay. I understand now that I've got  
5 the context, so I'll overrule that objection.

6 MS. CHAMBERLAIN: And then the second issue relates  
7 to witness Gary Schmitz, who is the Regional Technical  
8 Service Manager at BASF.

9 And this one relates to the Defendants' Joint  
10 Motion in Limine Seven and Eight, which is The Negligent  
11 Training of Third Parties and the Anecdotes Regarding Alleged  
12 Negligent Training that Has No Connection to the Plaintiffs.

13 And the section in question, it begins on page 60,  
14 line 10 and goes through 62, line 15. And the context of it  
15 relates to a DTC production field that was operated by  
16 Pioneer, by not -- not Monsanto. They were not an agent or a  
17 party. They were a third party.

18 And it's discussing the fact or implicating them  
19 that Monsanto had provided inappropriate nozzle  
20 recommendations and that the training of Pioneer was  
21 inappropriate or was negligent in some way and that -- and  
22 there's also a related exhibit that also discusses that as  
23 well that's at 1070.

24 THE COURT: And so your objection is relevancy or  
25 what?

1 MS. CHAMBERLAIN: It relates to the motion in  
2 limine on the negligent training, again, on the anecdotal  
3 record regarding the alleged negligent training.

4 THE COURT: Well, the negligent training claim  
5 stays in for parties but not the third parties. So where are  
6 we on that? Explain the whole --

7 MS. CHAMBERLAIN: My understanding was that you  
8 cannot -- you cannot admit into evidence to training for  
9 third parties, and this is relating to a third party.  
10 Pioneer is a third party. They are not -- so the underlying  
11 document may actually assist.

12 So what they're talking about in the document is  
13 they're alleging that Monsanto negligently trained Pioneer,  
14 and so that would be -- that would be an allegation of  
15 negligent training by Monsanto of a third party.

16 THE COURT: Well, the third parties we were talking  
17 about is the actual growers. And I thought that was the real  
18 subject of the motion in limine.

19 MS. CHAMBERLAIN: They're still a third party.  
20 They're not employees. We don't have control over those  
21 people.

22 MS. GEORGE: I'd like to respond if you're open to  
23 it, Judge.

24 THE COURT: Okay.

25 MS. GEORGE: This isn't offered to show that

1 Monsanto negligently trained a third party to support our  
2 negligent training claim. It's offered to show the  
3 difficulty in applying this product, that even Monsanto after  
4 training Pioneer to do it couldn't make a proper on-label  
5 application and couldn't use the right nozzle.

6 We're not offering this to support a negligent  
7 training claim. We're offering it to show the difficulty in  
8 applying this within all of the parameters that have to be  
9 followed and how even a seed production field after being  
10 trained by Monsanto itself can't keep this on target. That's  
11 why it's being offered. It has nothing to do with negligent  
12 training.

13 MR. MANDLER: Your Honor, if that's the case, then  
14 it's an improper purpose, because it's the application of  
15 Clarity, which isn't Engenia, different label, different  
16 product. It's unrelated.

17 MS. GEORGE: They -- you just heard Orr tell you  
18 that everything about Clarity is protective and conservative  
19 and relevant to XtendiMax and VaporGrip, and that's why the  
20 EPA considered Clarity too.

21 But you can't have it both ways. The difficulty in  
22 applying a dicamba-based product over the top is relevant to  
23 this whole case. These people were trained by Monsanto to do  
24 it and still couldn't do it. We're not offering it to say,  
25 therefore, they damaged Bill Bader. This field did not



1 damage Bill Bader. It's not supporting our negligent  
2 training claim.

3 THE COURT: So I still need a little more context.

4 MS. CHAMBERLAIN: So in this document they're  
5 talking about a report by another -- by an individual of BASF  
6 to someone else. They're talking about there was an incident  
7 alleged of some field investigations that were done of a  
8 Pioneer DTC production field.

9 So there was some allegations made by growers that  
10 experienced alleged off-target movements or symptomology to  
11 their fields, and there are discussions in this document that  
12 are talking about what potential causes were of that, and  
13 they're talking about the implication that Monsanto -- or not  
14 implication, the exact statement that Monsanto made  
15 inappropriate nozzle recommendations, that they did not  
16 appropriately train Pioneer to get them ready for the launch  
17 for applying the product.

18 And we're not saying that the whole exhibit can't  
19 come in. We're just saying -- so they can still bring in  
20 evidence about this other incident. We are just asking that  
21 information about Monsanto's negligent training or negligent  
22 recommendations be pulled out.

23 MR. DEMORET: Your Honor, if I may submit as  
24 well -- I'm Martin Demoret for BASF -- the application,  
25 according to Dr. Schmitz's testimony, was done under a

1 completely separate label for seed production fields. It has  
2 nothing to do with Engenia.

3 THE COURT: It does seem like it's a little far  
4 afield even by analogy. I know you're using it as an  
5 analogy, but I think it's a little too confusing at that  
6 point now that we're going to introduce Pioneer and so --

7 MS. GEORGE: If you don't like it, Judge, we'll  
8 take it out.

9 THE COURT: Yeah. I think that it's --

10 MS. GEORGE: So we can keep the document in?

11 THE COURT: -- prejudicial.

12 MS. GEORGE: And the testimony about the document  
13 we're just going to eliminate any suggestion that it was  
14 negligent training, that it was the training.

15 THE COURT: I think it's just a little bit too much  
16 prejudice and confusion otherwise.

17 MS. GEORGE: Okay. That's fine.

18 MS. CHAMBERLAIN: So does that include removal of  
19 the section requested or --

20 MS. GEORGE: Well, we'll have to confer about that.

21 THE COURT: You're making progress.

22 MS. CHAMBERLAIN: We don't want to come back here.

23 THE COURT: You're making progress, though.

24 MS. CHAMBERLAIN: We're trying.

25 MS. GEORGE: Well, I think we still have enough

1 witnesses to get this -- Schmitz will probably not be Monday,  
2 but we'll see.

3 MS. CHAMBERLAIN: All right. That's it for  
4 Monsanto.

5 THE COURT: All right. Anything else?

6 MS. GEORGE: The only thing I would do is just  
7 enter some exhibits, but I'll do them Monday, move exhibits  
8 into the record that were played with the video.

9 THE COURT: Well, you might as well do it now.

10 MS. GEORGE: You're fine.

11 MR. MOOK: Your Honor, there was a statement by  
12 Mr. Mandler that said BASF wouldn't introduce any anecdotal  
13 evidence as to whether or not a joint venture exists, and, in  
14 fact, there has been testimony designated where a witness  
15 testified that, in fact, we don't -- this wasn't really a  
16 joint venture.

17 And if the ruling is the witnesses -- a lay witness  
18 can't testify that this was not a joint venture, then that  
19 testimony should come out as well.

20 MR. MANDLER: No. One, that's not the ruling. If  
21 it's going to be an implied joint venture, you can't handcuff  
22 us, let them put in little pieces of paper that some clerk  
23 put a joint venture down and not have the people who actually  
24 drafted it who know how the business world is say whether  
25 it's a joint venture or not. That's ridiculous.

1 THE COURT: I kind of think that all of it should  
2 come in.

3 MR. MANDLER: Because --

4 THE COURT: We're not dealing with an  
5 express agreement. It's an implied agreement. And so that  
6 opens the door for all sorts of evidence.

7 MS. GEORGE: Let's do it. All right. So I'll read  
8 these exhibits slowly for you, Michelle, so you can write  
9 them down.

10 DEPUTY COURT CLERK: Okay. Thank you.

11 MS. GEORGE: Plaintiffs move into evidence exhibits  
12 that have already been used in video depositions played to  
13 date.

14 Exhibit Plaintiff's Exhibit 2, 3, 6, 7, 12, 13,  
15 20, 21, 30, 32, 284, 285, 286, 287, 288, 289, 290, 291, 292,  
16 294, 295, 298, 299, 300, 301, 302, 303, 304, 499, 241, 243,  
17 246, 247, 248, 249, 250, 252, 256, 257 and 259.

18 THE COURT: Okay. And just the same objections  
19 that have been made earlier.

20 MR. MANDLER: And we submitted those in written  
21 form, Your Honor. I understand you'll be entering those  
22 orders, so we'll stand on those.

23 THE COURT: Okay. That's fine.

24 MR. MANDLER: And, likewise, Your Honor, for your  
25 rulings today we'll generate one of those written sheets for

1 you to -- it has all the exhibit numbers and the way that you  
2 ruled.

3 THE COURT: That's very helpful.

4 MR. MANDLER: Thank you, Your Honor.

5 THE COURT: Very helpful. And I'll sign those when  
6 you submit them, but I'll let the rulings stand as indicated.

7 MR. MANDLER: We understand, Your Honor.

8 THE COURT: Okay. We'll go off the record now.

9 (A discussion was held off the record.)

10 (PROCEEDINGS CONCLUDED AT 5:20 P.M.)

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C E R T I F I C A T E

I, Alison M. Garagnani, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 807 through 844 inclusive 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 Cape Girardeau, Missouri, this 1st day of February, 2020.

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/s/Alison M. Garagnani  
Alison M. Garagnani, CCR, CSR, RMR, CRR  
Official Court Reporter