

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.)

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JURY TRIAL - VOLUME 5A

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

JANUARY 31, 2020

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JANUARY 31, 2020

(The proceedings commenced at 9:08 a.m.)

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

THE COURT: Any preliminary matters? I know we have something to take up at the break.

MR. RANGLES: Yes, Your Honor.

THE COURT: Okay.

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

THE COURT: Good morning ladies and gentlemen. I'm going to sit down here with you again for these video depositions.

All right. We will pick it up where we left off then for Plaintiffs.

(Excerpts of the videotaped deposition of Tina Bhakta taken on June 27, 2019, were played for the jury.)

MR. RANGLES: That's the end of this video, Your Honor.

THE COURT: All right. You said earlier that you have a very short video deposition we could play next.

MR. RANGLES: Less than five minutes.

THE COURT: Okay. Let's do that then.

MR. RANGLES: Okay.

1 (Excerpts of the videotaped deposition of Ty Witten
2 taken on July 11, 2019, were played for the jury.)

3 **MR. RANGLES:** That's it, Your Honor, for this video.

4 **THE COURT:** Why don't we take a recess for about 10
5 or 12 minutes again.

6 Remember the admonition I have given you not to
7 discuss the case. Go to the jury room. We will call you back
8 shortly. Thank you.

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

11 **THE COURT:** Who is -- what is the next deposition?

12 **MR. RANGLES:** The next video is Jeff Travers,
13 30 minutes give or take. And then we are going to go --

14 **MS. GEORGE:** Then Greg Starling.

15 **MR. RANGLES:** Then Greg Starling's video in which
16 there is an issue or two that Defendants have that we need --
17 it shouldn't be more than a three- or four-minute discussion.

18 **THE COURT:** Well, do you want to do it now?

19 **MR. RANGLES:** We can do it now.

20 **MR. HOHN:** One housekeeping issue, Your Honor. We
21 have an order on the Tina Bhakta clips similar to what we have
22 done in the past. There is not going to be one for Dr. Witten
23 because it was just that short clip.

24 We do have a discrete issue relating to the Greg
25 Starling video clip, specifically Clip No. 131, that the

1 plaintiffs are proposing to use because it -- it violates your
2 ruling. And we are asking Your Honor to stick with your
3 ruling on Monsanto motion *in limine* No. 3 which, related to
4 the conversation between Donald Masters and Greg Starling.

5 So our specific -- as you might remember, our
6 specific motion *in limine* was that there shouldn't be evidence
7 about that conversation wherein the plaintiffs were trying to
8 directly assert or insinuate that Monsanto was instructing
9 farmers to illegally spray. As you know, Donald Masters
10 recanted. You know, he is -- obviously that testimony is not
11 relevant, and the plaintiffs' clip that they are trying to
12 play relates to that very conversation.

13 **THE COURT:** I thought, Mr. Randles, you said you
14 weren't going to use that.

15 **MR. RANGLES:** Well, he is not actually telling you
16 what the clip is for.

17 Here is what the clip is. What I said was, you
18 remember when we were in the conference room and you said the
19 Arkansas Plant Board testimony of Don Masters, you felt it
20 shouldn't come in. I said, okay, we have other things we want
21 to do with Don Masters. And then we had the "as the crow
22 flies" motion about Don Masters. And so I decided I'm not
23 subpoenaing Don Masters.

24 This clip, and I have the transcript right here, is
25 the clip that the Court actually referred to in the

1 interlocutory appeal order where Greg Starling -- in the
2 spring of 2015, two years before it was legal to spray
3 dicamba, when Don Masters was buying the seed -- told him what
4 use rate that the crop would tolerate.

5 As the Court said in its order, and I have the
6 paraphrase pretty close in my head, I didn't look it up --

7 **THE COURT:** Just to interrupt you. I do remember
8 that you indicated that you would try to call him for other
9 purposes, not just that.

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

11 **THE COURT:** The one --

12 **MR. RANGLES:** Yes, sir. That's that conversation.

13 **MR. HOHN:** It's the same conversation.

14 So Donald Masters testified in front of the plant
15 board about this conversation and Your Honor said he wasn't
16 going to be able to introduce evidence relating to that
17 conversation. And it was the conversation between Greg
18 Starling and Donald Masters about use rate and their
19 implication that that meant that we were instructing farms not
20 to spray.

21 And so we are fine with other parts of the Donald
22 Masters' reference in the deposition. Specifically there's a
23 part of the testimony they want to introduce, which we are not
24 objecting to, wherein Greg Starling is asked.

25 "Did you know Donald Masters?"

1 "Yes."

2 "Did you eventually learn that he applied
3 illegally?"

4 "Yes, I did."

5 "How long have you known him?"

6 "Twenty years."

7 But then they go into the very conversation that we
8 are talking about. And it was the conversation in front of
9 the plant board that's been recanted, and it's that discussion
10 between Greg Starling and Donald Masters wherein it -- the
11 back-and-forth about, oh, yeah, I talked to him about use
12 rates.

13 Now, Donald Masters has already said, listen,
14 Starling told me I can't apply it, it's illegal, I knew that.
15 And this whole discussion about "what my crop could tolerate
16 related to this use rate," this is all the same discussion.
17 And so they want to introduce this testimony, this evidence to
18 try and insinuate, to try and confuse this issue. And you
19 have already ruled that this conversation should be out. This
20 is that conversation. And the only other thing that it could
21 possibly go to would be to training of other people and
22 farmers, which has also been excluded under your motion
23 *in limine* ruling.

24 So obviously we are asking you to stick to the
25 original ruling that this is out. The ruling, if you look at

1 it, on your January 24th order on page 32, was you said this
2 testimony about that issue was out.

3 **THE COURT:** And that was agreed on, too.

4 **MR. HOHN:** That was agreed on. And now did we talk
5 about the plant board issue? Yes, we did. But your ruling is
6 broader than that and our motion was broader than that. It
7 relates to this very conversation which is this anecdotal
8 thing, they are trying to make insinuations that Monsanto
9 instructed people to spray illegally, which has been -- is
10 false and as Your Honor recognizes has been recanted.

11 **MR. RANGLES:** Your Honor, no. He is mixing two
12 things. What we discussed was Masters was asked: Did someone
13 tell you to spray illegally?

14 **THE COURT:** Or that it was okay.

15 **MR. RANGLES:** Yes. And that's what you ruled on.
16 And that's what I agreed to.

17 Let me paraphrase very closely -- and I can look it
18 up if you want -- what the Court said about this exact
19 conversation that we have here in your order. You said a jury
20 could reasonably find that Monsanto gave a wink and a nod to
21 pigweed-plagued farmers by telling them the use rates that a
22 pigweed-plagued farmer might find irresistible.

23 That's what it is offered for. Why is a Monsanto
24 representative two years before it is legal telling a farmer
25 who is buying the seed what the use rate is? That's all it

1 is. And this conversation is not disputing it happened.

2 Starling, their person, says, yeah, I told him this
3 at that time. Now what they are trying to do is bootstrap
4 clearly relevant evidence, a clear statement from --

5 **THE COURT:** What was the other evidence you agreed
6 not to --

7 **MR. RANGLES:** The testimony before the Arkansas
8 Plant Board where they ask him, "Did someone tell you whether
9 to spray illegally," and he said, "Well, who" -- they said,
10 "Who told you to spray illegally?" And he said, "Well, you
11 know." And then they said, "Well, who was it?" And he said,
12 "I don't want to say."

13 So it's the "told you to spray illegally" because
14 you concluded that plant board testimony transcript was
15 ambiguous, this transcript from Greg Starling about the use
16 rates.

17 **THE COURT:** What does it say exactly?

18 **MR. RANGLES:** Excuse me?

19 **THE COURT:** What does it say exactly?

20 **MR. RANGLES:** Would you like me to hand it up to
21 you, you know, or I can tell you the relevant portion.

22 "Do you recall what the two of you discussed?"

23 "We would have been discussing the upcoming season,
24 the planting season, picking varieties, talking about
25 different varieties on different soil types and talking about

1 the new technology of the XtendiMax with VaporGrip that would
2 hopefully be launched in 2015."

3 "So at the -- do you recall whether at the time you
4 had your conversation with Mr. Masters" --

5 I'm on page 254 now, Your Honor, at line --

6 **THE COURT:** I got it.

7 **MR. RANGLES:** Do you see that?

8 "Do you recall whether at the time you had your
9 conversation with Mr. Masters, whether XtendiMax with
10 VaporGrip had been approved for commercial use?"

11 "Yes."

12 "Had it?"

13 "No."

14 "Do you recall if the traits -- the Xtend traits had
15 been approved for use?"

16 "Yes."

17 "Okay. So does that give you an idea of when you
18 might have had your conversation with Mr. Masters?"

19 "It would be wintertime, when we get some dead time,
20 it could have been anywhere from January to the first of
21 March, really before they get in the field and start burning
22 down."

23 "January of 2015?"

24 "Yes."

25 "All right. And do you recall specifically what the

1 two of you discussed in terms of products?"

2 "We would have talked about what we were seeing with
3 the use rates which we were running pretty hard in comparison
4 with some of our sites that we set up, tank mixes and
5 different rates with the new technology and the new products."

6 "Okay. And when you say that you were telling him
7 about the products and what you were seeing, what do you mean?
8 Are you talking about the -- at the test sites that you
9 testified to earlier?"

10 "We would check for like crop response at different
11 use rates, as well as tank mixes at different rates, and crop
12 response, and then we would do what was called a bare ground
13 comparison and do tank mixes at different rates and look at
14 the comparisons of that too."

15 "And are you doing that product development at the
16 test site or the strip sites that you testified to earlier?"

17 "Yes."

18 "Okay. And so do you have -- do you have a name for
19 the sites or events?"

20 "We call them Xperience sites."

21 "Okay. And are they set up for who? Your
22 retailers?"

23 "Yes."

24 "So tell us how that works."

25 "The retailers would have certain days for certain

1 companies that they would come in and we would have people
2 there lined up at different stations to educate them on what
3 they were seeing from a crop to a chemistry, anything that was
4 new coming down from the pipeline."

5 "All right. Just a moment ago you mentioned what
6 you were seeing in terms of different application rates."

7 "Uh-huh."

8 "What do you mean by that?"

9 "At the time we were trying -- we had two different
10 formulations that had -- they were numbered at the time, but
11 we would have been trying different rates from, say, 16 ounces
12 of an XtendiMax prelaunch product to as high as 44 ounces at
13 one time. Seeing what the crop response would be."

14 "When you say 'crop response' what do you mean?"

15 "If it hurt a plant at all, once you applied it."

16 "All right. Did you have a conversation with
17 Mr. Masters about that, about what you were seeing in terms of
18 crop response?"

19 "Yes."

20 "At a particular rate or rates?"

21 "Yes."

22 **MR. HOHN:** Your Honor, this was the only evidence --

23 **THE COURT:** Let me -- now, when was this
24 conversation?

25 **MR. RANGLES:** This conversation was 2015 early on,

1 two years before it was legal to spray.

2 **MR. HOHN:** This is the very conversation that we
3 discussed in our motion *in limine* pretrial hearing. And Your
4 Honor said that now I think we agree we are -- that's a grant
5 because there's no testimony about that for Masters. And that
6 the plaintiffs don't intend to offer any testimony on that
7 point.

8 And our motion was there is no evidence other than
9 this one conversation that Plaintiffs want to point to that we
10 instructed farmers to illegally spray.

11 **THE COURT:** Here is the problem. I didn't know
12 there were two different exchanges, two different pieces of
13 evidence pertaining to this.

14 **MR. HOHN:** It's one conversation.

15 **THE COURT:** I am going to go back and review my
16 earlier rulings and look at this a little more closely and we
17 need to decide it before noon.

18 **MR. RANGLES:** Your Honor, we were planning to start
19 it before noon, but if that is not feasible with your ruling,
20 we can start another witness. The other witness is a long
21 stretch. This is --

22 **THE COURT:** Tell me again what is next.

23 **MR. RANGLES:** Thirty minutes from Jeff Travers is
24 right after the break.

25 **THE COURT:** Okay.

1 **MR. RANGLES:** And we were going to do this next, but
2 we can -- we can move it. It's not that big a deal to move
3 it.

4 **THE COURT:** Well, I want to go review the thing. So
5 we will be in recess for another ten minutes or so.

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

7 **THE COURT:** Let's go on the record with this.

8 First of all, arguably Monsanto's motion *in limine*
9 may have covered this, but I really don't think it did because
10 there were two pieces of evidence. One was the Arkansas Plant
11 Board testimony. This is something different. This is kind
12 of an off-the-cuff, shooting-the-breeze kind of discussion
13 between Masters and --

14 **MR. RANGLES:** Starling.

15 **THE COURT:** Yeah.

16 But that -- that said, I'm just not sure -- I don't
17 think it says what you all --

18 Where is Chris?

19 I don't think it says what you are concerned about
20 because this discussion is about the new technology of
21 XtendiMax with VaporGrip. It doesn't talk about any roll-out
22 of seed without those new technologies.

23 **MR. HOHN:** Can I offer one --

24 **THE COURT:** Well, let me keep going.

25 And so I don't think there's any connection between

1 this discussion and -- I don't think it constitutes even a
2 hint of a suggestion that it's okay to use the seed without
3 the new technology. And I --

4 **MR. HOHN:** In which case it should come out, Judge,
5 because it's not relevant.

6 **THE COURT:** And that's my ultimate point. I wonder
7 what the relevance is.

8 **MR. RANGLES:** We have had a lot of discussion about
9 their stewardship program and what they are telling farmers,
10 how they are telling them to use it. And then here, this, and
11 they also put in their literature well before it was legal to
12 spray, they listed the use rates that were safe for crops to
13 use.

14 **THE COURT:** With XtendiMax.

15 **MR. RANGLES:** With dicamba in general. It will
16 tolerate this level of dicamba.

17 **THE COURT:** I think that the context, though --

18 **MR. RANGLES:** But it is the same.

19 **MR. MILLER:** It's not the same.

20 **MR. RANGLES:** In other words, the amount of poundage
21 you can put on the old dicamba without harming the new system
22 is the same amount of poundage even with the new stuff.

23 **MR. HOHN:** No. It's about XtendiMax.

24 **THE COURT:** There is no suggestion in here that you
25 should use old dicamba on the new seeds without using the new

1 technology of XtendiMax.

2 **MR. RANGLES:** My point is they are saying -- they
3 talked a lot about their stewardship. And they have opened
4 this door anyway since they've started. Our point is you also
5 were telling farmers, who hadn't used dicamba before, how they
6 could use it before it was legal to use it.

7 **THE COURT:** Correct, but with XtendiMax.

8 **MR. RANGLES:** But then they went on and used it with
9 the other stuff. They took this information --

10 **THE COURT:** There is no correlation, is what I'm
11 saying.

12 **MR. RANGLES:** The correlation is they didn't know
13 how to use it before. They hadn't used it over -- in-crop
14 before. This is the first information they received about how
15 much in-crop these seeds could tolerate. And it came from
16 Monsanto, both in their presentation and in their literature.

17 **THE COURT:** All this is about nothing. I don't see
18 how you can make a valid argument that this suggests to them
19 they can use the seeds without the proper technology, which is
20 XtendiMax. And there's no discussion -- they thought it was
21 going to be released earlier and it wasn't. So everybody
22 agrees with that.

23 **MR. RANGLES:** I am not saying this is the "what."
24 I'm saying this is the "how." This is how you can use
25 dicamba, whether it's XtendiMax or any dicamba. Your Honor,

1 there's no dispute in this case it will withstand a
2 one-pound-per-acre of Clarity.

3 **THE COURT:** So you are not going to use this then to
4 suggest that they said it was okay, are you?

5 **MR. RANGLES:** This is the "how."

6 **MR. HOHN:** That's exactly where they are going with
7 it.

8 **THE COURT:** I don't think you can make that -- I
9 don't think there's enough connection, so ...

10 **MR. RANGLES:** Your Honor, I --

11 **THE COURT:** And if you can get it relevant for some
12 other purpose, help me with that.

13 **MR. RANGLES:** Your Honor, this is the purpose to
14 which we are offering this: They are instructing farmers on
15 how to use it two years before it is legal to use.

16 **THE COURT:** But they are not instructing farmers how
17 to use it without XtendiMax, though.

18 **MR. HOHN:** That's right.

19 **MR. RANGLES:** It's dicamba. He is giving the same
20 pound --

21 **THE COURT:** I know. But in the context of this, I
22 don't think you can make the connection.

23 **MR. RANGLES:** I'm not going to argue with the Court.

24 **THE COURT:** Okay.

25 **MR. MILLER:** It's not relevant then, Your Honor.

1 **THE COURT:** I guess it would be vaguely relevant,
2 but it wouldn't be relevant for the purpose that you want it
3 for. That's what I'm saying.

4 **MR. RANGLES:** Well, it's relevant for two purposes.
5 Okay? If you want to say it's not a wink and a nod, that's
6 fine. But they talk a lot about their instructions to
7 farmers. Two weeks before it's legal, they are also
8 instructing farmers on how they can spray --

9 **THE COURT:** That's not what this is about.

10 **MR. RANGLES:** They are not saying spray illegally.
11 They are telling them how: If you chose, you can spray a
12 pound of dicamba over this.

13 **THE COURT:** I do not get the connection in this
14 dialogue between these two guys.

15 **MR. RANGLES:** Fair enough.

16 **THE COURT:** That's the ruling.

17 So we can do both depositions then?

18 **MS. GEORGE:** Yes. Yes, Your Honor.

19 **THE COURT:** We won't finish the second one?

20 **MS. GEORGE:** Travers is only 30 minutes. And this
21 one, Starling is two hours. So we can start another one after
22 that. Or depending on where we are in the day, we do have a
23 few matters to take up.

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

25 **MR. RANGLES:** We will need about 30 minutes at the

1 end of the day or during the break for the Court to resolve
2 BASF issues for videos for Monday.

3 **THE COURT:** That's fine. So we don't have to miss
4 the Super Bowl; right?

5 **MR. RANGLES:** No, sir, we do not. I may not live
6 another 50 years to see my Chiefs get back.

7 **THE COURT:** So do you want to start the second
8 deposition then, Tracey?

9 **MS. GEORGE:** Yes. We are going to start it, yeah.
10 We will start with Travers.

11 **THE COURT:** And then break it up at lunchtime.

12 **MS. GEORGE:** And Travers we should finish before
13 lunch and if we want to start the next one, we are fine
14 starting it.

15 **THE COURT:** That's fine. Yeah.

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

18 **THE COURT:** You want to call your next witness by
19 videotape deposition.

20 **MS. GEORGE:** Your Honor, we will play the deposition
21 of Jeff Travers.

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1 (Excerpts of the videotaped deposition of Jeffrey
2 Travers taken on September 12, 2019, were played for the
3 jury.)

4 **MR. RANGLES:** That's all of that video, Your Honor.

5 **THE COURT:** Okay. Ms. George.

6 **MS. GEORGE:** We will put on Mr. Starling.

7 **THE COURT:** All right.

8 (Excerpts of the videotaped deposition of Gregory
9 Starling taken on June 21, 2019, were played for the jury.)

10 **THE COURT:** Why don't we stop now. It's noon. Is
11 this an adequate stopping place?

12 We will take a lunch recess at this time. Report
13 back -- is an hour and ten minutes okay? Is that sufficient
14 to get lunch wherever you go?

15 Okay. Why don't we report back and reconvene at ten
16 after 1:00 then. And remember the admonition I have given you
17 repeatedly not to discuss the case. You can go to the jury
18 room and we will reconvene at 1:10.

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

21 **THE COURT:** So now you want to do the BASF
22 depositions when? At the end of the day?

23 **MS. GEORGE:** At the end of the day.

24 **THE COURT:** When is that coming up then?

25 **MS. GEORGE:** They are for depositions played on

1 Monday, so we need to resolve them at the end of the day.
2 They are meeting and conferring at 2:00 one more time, our
3 people are, to see if there's anything else.

4 **THE COURT:** The other teams, whoever they are.

5 **MS. GEORGE:** Yes.

6 **THE COURT:** Okay. So you may be able to resolve a
7 lot of it then?

8 **MS. GEORGE:** We have already resolved quite a bit.

9 **MR. MANDLER:** We will be prepared to address any
10 that aren't resolved.

11 **THE COURT:** How long do you think it will take?

12 **MR. MANDLER:** I have no idea.

13 **MS. GEORGE:** We will he hopefully get some word back
14 right after -- maybe by break in the afternoon we will be able
15 to tell you if it's 30 minutes or --

16 **THE COURT:** All right. We will recess until 1:10.

17 (At this time, the Court declares a recess at
18 12:02 p.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 1 through 805 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 31st day of January, 2020.

/s/ Reagan A. Fiorino

Reagan A. Fiorino, CRR, RMR, CCR, CSR
Official Court Reporter