

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 6B

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

FEBRUARY 3, 2020

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APPEARANCES:

FOR PLAINTIFFS BADER FARMS, INC., ET AL:

Tracey F. George, Esq.
DAVIS GEORGE MOOK, LLC
1600 Genessee St., Suite 328
Kansas City, MO 64102

Beverly Turina Randles, Esq.
Billy R. Randles, Esq.
RANDLES AND SPLITTGERBER, LLP
5823 N. Cypress Ave.
Kansas City, MO 64119

REPORTED BY: REAGAN A. FIORINO, RMR, CRR, CSR, CRC, CCR
 Official Court Reporter
 United States District Court
 111 South Tenth Street, Third Floor
 St. Louis, MO 63102 | (314)244-7989

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APPEARANCES CONTINUED:

FOR DEFENDANT MONSANTO COMPANY:

David E. Dukes, Esq.
NELSON AND MULLINS, LLP
1330 Lady Street, Third Floor
Columbia, SC 29211-1070

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

FOR DEFENDANT BASF CORPORATION:

Tarifa Belle Laddon, Esq.
FAEGRE BAKER DANIELS
11766 Wilshire Blvd., Suite 750
Los Angeles, CA 90025

John P. Mandler, Esq.
FAEGRE BAKER DANIELS
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402

Troy A. Bozarth, Esq.
HEPLER BROOM
130 N. Main Street
Edwardsville, IL 62025

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FEBRUARY 3, 2020

(The afternoon proceedings commenced at 1:35 p.m.)

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

MR. MANDLER: Yes, Your Honor. I got more details on your question.

The plant was originally owned by Velsicol, many, many years ago. It was sold from Velsicol to Sandoz and then from Sandoz to BASF in 1996; so BASF took over ownership of it in 1996.

On the expansion question, the business case was made starting in late of 2013 for the expansion. The approval for the expansion came in May of 2014. Construction started mid to late 2014 and went through mid 2017.

So during the construction it has been described as, quote, "open heart surgery" on the plant such that production actually drops significantly of dicamba. So during that period BASF sourced its dicamba from alternative sources, including a Chinese supplier. The first crop year for which active ingredient dicamba that was produced in the expansion was available to be formulated and put into products was for the 2018 growing season.

THE COURT: I guess what I am getting at, maybe there is a distinction that you were suggesting between ramping up production and this particular plant which didn't

1 come online until mid 2017.

2 **MR. MANDLER:** There was -- that was part of my
3 point, Your Honor, yes; that it didn't have to do with
4 anything other than increased production for the dicamba
5 active ingredient which BASF sold to those five different
6 markets that I explained on Friday afternoon.

7 **MS. GEORGE:** BASF's Ron Repage testified and is
8 going to testify in this case that the ramp-up of the Beaumont
9 facility was done to fulfill the additional dicamba volumes
10 under the so-called "Phase I Expansion of the Dicamba-Tolerant
11 Systems Agreement." The whole purpose of the expansion of
12 Beaumont was -- and he said, in his words, "BASF considered
13 the business case justification for the Phase I expansion
14 under the Dicamba-Tolerant System Agreement to supply dicamba
15 pursuant to Monsanto and BASF's agreement." That's his
16 whole -- that's the whole point of it.

17 **MR. MANDLER:** That is one of the five reasons that I
18 mentioned, but that has nothing to do with increased sales in
19 '14 and '15 relating to Clarity. It's unrelated to that. It
20 has to do to fulfill the requirements of the DTSA because
21 Monsanto was going to buy active ingredient from us.

22 So while they may offer it for that purpose, it has
23 nothing to do with increased Clarity sales.

24 **THE COURT:** I am going to overrule the objection
25 consistent with the way I ruled last Friday afternoon.

1 **MS. GEORGE:** Thank you.

2 **THE COURT:** So you can bring the jury in, please.

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

5 **THE COURT:** You may continue.

6 (Excerpts of the videotaped deposition of Thomas Orr
7 resumed playing for the jury.)

8 **MS. GEORGE:** We are not sure why the sound isn't
9 playing on that, Your Honor.

10 Do you want us to read the last sentence?

11 **MS. ROSENBERG:** Yes.

12 **MS. GEORGE:** The last sentence to the answer is, "As
13 a scientist I rely on the risk assessment."

14 **THE COURT:** Is that the conclusion of the
15 deposition?

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

17 **THE COURT:** All right. Next.

18 **MS. GEORGE:** Your Honor, Plaintiffs will play the
19 video deposition of Mr. Schmitz.

20 (Excerpts of the videotaped deposition of Gary
21 Schmitz taken on June 6, 2019, were played for the jury.)

22 **THE COURT:** Why don't we take a break at this time.
23 We will take an afternoon break for 10 or 12, 15 minutes and
24 we will call you back in shortly. And remember the
25 admonition.

1 Court is in recess.

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

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

5 **MS. GEORGE:** Your Honor, this video has about an
6 hour ten, an hour 15. I don't know how you want to proceed
7 after that.

8 **THE COURT:** Why don't we do that for the day then.

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

11 **THE COURT:** You may continue.

12 So you'll know, this is going to be about hour and
13 ten minutes or so; so we will probably recess for the day
14 after this segment.

15 Unless you want to stay and we can do another --

16 (Laughter)

17 **THE COURT:** Another unanimous vote, I see.

18 (Laughter)

19 (Excerpts of the videotaped deposition of Gary
20 Schmitz resumed playing for the jury.)

21 **MS. GEORGE:** We can start another one for 30 minutes
22 or we can do whatever Your Honor and the jury wants to do.

23 **THE COURT:** I'm really concerned about finishing the
24 depositions tomorrow.

25 Could we go for another 30 minutes? Or would you

1 rather recess?

2 **JUROR:** I need to use the bathroom myself.

3 **THE COURT:** All right. Well, why don't we recess
4 for the day then. Unless you want to come -- let's recess for
5 the day. Remember the admonition I told you not to discuss
6 the case, especially at home at night.

7 So we will come back at 9:00 and try to finish all
8 these depositions tomorrow then.

9 Thanks again for your patience.

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

12 **THE COURT:** Okay. So I've got the chart that shows
13 we have left four video depositions that amount to five hours
14 and 40 minutes; is that right?

15 **MS. GEORGE:** That may be changing with
16 communications and reductions due to disputes, but close --

17 **THE COURT:** More or less.

18 **MS. GEORGE:** Oh, no. We are not adding. It will be
19 less.

20 **THE COURT:** It will be less. Okay. So if we really
21 do start at 9:00, and that's my fault a lot, and if we take
22 only one 15-minute break and just spend an hour and ten
23 minutes for lunch, I think we can get all of the depositions
24 in. That would really help, don't you think?

25 **MS. GEORGE:** And we also have potentially one that's

1 not super long that we could do after we do some live
2 witnesses and still go forward with --

3 **THE COURT:** Okay. Well, I will let you all decide
4 what you want to do. I just noticed there's -- the listed --
5 well, this is really from the other side, but it seemed like
6 there were five hours and 40 minutes of deposition left and
7 that's okay.

8 I will just let you all do what you want then. But
9 I am concerned about finishing the plaintiffs' case this week.
10 I really want to do that.

11 **MS. GEORGE:** We did work over the weekend and cut 45
12 minutes all of Mr. Orr and we are going to trim at least one
13 more; so we are making efforts.

14 **THE COURT:** Okay.

15 **MR. RANGLES:** It is our hope and expectation to
16 close on Friday, Your Honor.

17 **THE COURT:** Okay. Great. So you had some other
18 motions you wanted to talk about for tomorrow's witnesses.

19 **MR. MANDLER:** Yeah, if I could do one housekeeping
20 or I'm going to get in trouble back with the office. This is
21 the order that we prepared for the testimony for today.

22 **THE COURT:** Yeah, thank you.

23 **MR. MANDLER:** As we have with the other video
24 witnesses, Your Honor, we are -- we have reserved all of our
25 objections that we worked out, incorporated your rulings into

1 this proposed order.

2 **THE COURT:** Yes. Yes, that's right. And this is
3 all Dr. Schmitz; right?

4 **MR. MANDLER:** Yes, for the video we just heard. And
5 I assume -- I didn't interrupt because we went right from one
6 witness to another, but I assume based on the practice we have
7 had turning them in after the deposition is acceptable to Your
8 Honor.

9 **THE COURT:** That's fine. Thank you. That's
10 helpful.

11 Now, did you have some other things you wanted to
12 bring up for tomorrow's witnesses?

13 **MR. MANDLER:** Two other issues that relate to video
14 deposition of Dr. Repage, both of which were topics that we
15 covered on the end of the day on Friday and we just have
16 different interpretations as to how to apply your orders.
17 Neither of us, I think, are rearguing your orders, but we want
18 to figure out a little guidance as to apply them.

19 The first has to do, you will remember that we had
20 an argument to exclude extensive or parol evidence as it
21 relates to a description of either the DTSA, the
22 Dicamba-Tolerant System Agreement or the amended
23 Dicamba-Tolerant System Agreement. And Your Honor's ruling,
24 which I have, it was obviously just on the record, but was
25 that they are admissible as long as they are the same, but if

1 they are inconsistent they are not admissible.

2 **THE COURT:** What is admissible?

3 **MR. MANDLER:** Other people's description of
4 the ingredient -- you will remember we argued that that's
5 parol evidence. And I'm not rearguing, but you ruled, Your
6 Honor, that if it's inconsistent it wouldn't be admissible,
7 but if it's consistent there's no reason it can't be
8 admissible.

9 **THE COURT:** Correct. And you agree with that,
10 surely.

11 **MR. MANDLER:** Well, I don't. But you already
12 overruled me; so I'm not rearguing it.

13 **THE COURT:** Okay.

14 **MR. MANDLER:** I explained my reasons on Friday. I'm
15 not going to repeat them, Your Honor.

16 **THE COURT:** Okay.

17 **MR. MANDLER:** But we do have a document that was
18 authored in 2010. So it was one year before the 2011
19 Dicamba-Tolerant System Agreement, the DTSA, and it was
20 four years before the amended Dicamba-Tolerant System
21 Agreement. It describes a certain relationship where both
22 Monsanto and BASF would sell the traded seeds.

23 Obviously, anyone who sat through this trial, has
24 known that's not what eventually was negotiated. And we
25 quoted these provisions in the DTSA and in the ADTSA and all

1 of our briefings, but Monsanto had the sole control of when
2 and how to commercialize the seed. That's in the agreement.
3 We have all stipulated to all the witnesses have said that.

4 So a PowerPoint that says otherwise one year before
5 the contract was signed -- and, again, that contract has a
6 merger clause, all the typical things -- is inconsistent with
7 the terms of the contract. So it's -- and Plaintiffs have
8 been upfront; the reason they want to offer the document is it
9 says that BASF and Monsanto are partnering in the sale of that
10 seed.

11 It just is not the case. It's not the facts. So
12 it's inconsistent with the agreement offered to try to
13 interpret the agreement which is precluded under the parol
14 evidence rule.

15 **MS. GEORGE:** Can I stand next to you?

16 **MR. MANDLER:** You may.

17 **MS. GEORGE:** Thank you.

18 What it says is that they agree to partner for the
19 distribution of the trait and seed and we think that's
20 consistent with the agreement. Their own witness will
21 testify -- this is Mr. Repage -- "I would agree that the
22 intention here was to set up a contract that allowed us to be
23 able to distribute the trait and the chemistry."

24 If you and I, Judge, tonight agreed to distribute a
25 banjo and fiddle CD, just because you play banjo and I play

1 fiddle doesn't mean we are not partners in distributing the
2 CD.

3 **THE COURT:** At least as to that part of the
4 discussions, it seemed that part of the discussions did merge
5 into the single agreement; and so that would have to control
6 over whatever was discussed preliminarily to that part of the
7 contract.

8 **MS. GEORGE:** And it's not inconsistent. It's his
9 explanation of what the parties' intent was.

10 And so Your Honor has already ruled that when you
11 have an implied joint venture, it's the intent of the
12 relationship you want to form. Right? And he says the intent
13 was to set up a contract that allowed us to be able to
14 distribute the trait and chemistry.

15 Just because one partner takes primary
16 responsibility for the trait and one the chemistry doesn't
17 mean they are not partnering to distribute the trait and
18 chemistry. It's the same thing. It's our whole case.

19 **MR. MANDLER:** That's changing the English language,
20 Your Honor.

21 **THE COURT:** So why don't we just -- it's easier for
22 me to understand if you say the "seeds" and the "herbicides"
23 as opposed to the "trait" and the "chemistry."

24 **MS. GEORGE:** That's what the witness says and that's
25 what the slide says, is trait and chemistry.

1 So the seed and the herbicide.

2 **THE COURT:** Yeah, but it -- so what's your problem?
3 It's easy to explain away that this doesn't -- is not
4 inconsistent with the proposition that Monsanto will
5 distribute the trait and BASF the chemistry or the herbicide.

6 **MR. MANDLER:** It is inconsistent, Your Honor,
7 because it says both will do both and that's not how the
8 agreement -- I mean, that may have been their goal at the time
9 in 2010, if you look at the front of the page, that was what
10 they were hoping before they even started the negotiations.
11 How the negotiations ended up is what is ultimately put into
12 the Dicamba-Tolerant System Agreement. I just handed you a
13 copy. And if you look at the provision at 3.1, it says
14 "Monsanto solely is responsible for the seed."

15 **THE COURT:** Well, it is a little confusing because
16 it does kind of suggest, maybe, that Monsanto and BASF would
17 both be distributing the trait and the chemical.

18 **MR. MANDLER:** That's absolutely right, Your Honor.
19 It's black letter law. If it's confusing, then you have to be
20 governed by the terms of the agreement, not some prior writing
21 that was merged into the agreement.

22 **THE COURT:** It's confusing without any explanation
23 of what --

24 **MS. GEORGE:** This witness is going to explain that
25 that was the intent, to set up that distribution partnership,

1 and that's what happened. BASF got paid for every bag of seed
2 sold. So just because Monsanto did it --

3 **MR. MANDLER:** In royalty.

4 **THE COURT:** I think I am going to sustain this part
5 of the objection. I think it is a little too confusing. And
6 this was not part of the original -- or of the agreement as
7 merged into the document covering this stuff.

8 **MS. GEORGE:** So Mr. Repage can't testify that the
9 parties intended to set up a contract to distribute the trait
10 and seed?

11 **THE COURT:** Well, yeah, he can do that if he
12 specifies that -- I think it's undisputed that Monsanto is
13 going to distribute the seed and everybody -- both parties
14 will distribute the chemical.

15 **MS. GEORGE:** And they ask him about that.

16 **MR. MANDLER:** Your Honor --

17 **MS. GEORGE:** They do ask him about that.

18 **MR. MANDLER:** Your Honor, all Counsel just read was
19 Mr. Repage reading that section from -- she is trying to get
20 around --

21 **MS. GEORGE:** That's not true.

22 **MR. MANDLER:** Can I finish, please?

23 **MS. GEORGE:** But it's not true.

24 **MR. MANDLER:** She tried to get around your ruling by
25 simply reading what's in there and saying he's going to

1 testify to it. If the document --

2 **MS. GEORGE:** No, he says -- the witness's answer is:
3 "I would agree" --

4 **MR. MANDLER:** Excuse me.

5 **MS. GEORGE:** -- "that the intention here was to set
6 up a contract that allowed us to be able to distribute the
7 trait and chemistry." He is not reading anything. He is
8 testifying about their intent.

9 **MR. MANDLER:** That was the intention in 2010. He is
10 referring to the language that they just asked him about in
11 the document, Your Honor.

12 **THE COURT:** I do think it's just a little too
13 confusing given what eventually happened, and especially that
14 all of these discussions were, in fact, merged into an
15 agreement.

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

17 **MS. GEORGE:** That's fine, Your Honor. We will
18 remove it.

19 **MR. MANDLER:** The other issue I think is relatively
20 minor. You ruled that references to Germany should come out.
21 We identified those. Mr. Mook agreed they should come out.
22 And then Plaintiffs later, I guess, had second thoughts and
23 now are taking the position that they shouldn't come out.

24 **MS. GEORGE:** That's not true. We have removed every
25 reference to Germany. I don't know what you are talking

1 about.

2 **THE COURT:** Like Deutschland or something like that.

3 **MS. GEORGE:** Yeah, and Limburg and all the other
4 words I can't pronounce.

5 **MR. MANDLER:** There was an email that said we will
6 agree to do it as long as you agree to do something else.

7 **MS. GEORGE:** No.

8 **MR. MANDLER:** So you are withdrawing that?

9 **MS. GEORGE:** No. There was no -- this is not the
10 dispute. The dispute is: We want to leave in a question that
11 all throughout Ron Repage's deposition he refers to the board
12 approving things. So the Board of Directors is SE's board,
13 not Corp's board. And I said if you guys are willing to
14 stipulate that that's what he is referring to, we will take
15 out one question, which he says he didn't even know BASF Corp
16 had a board. Which means he was dealing with BASF SE.

17 And that's what we need to prove. Mr. Mandler is
18 going to tell the Eighth Circuit that we haven't proved SE has
19 any involvement and the umbrella agreement doesn't apply. And
20 I need this to be airtight.

21 **MR. MANDLER:** I don't need to tell the Eighth
22 Circuit that at all because they don't. They are not a
23 defendant in the case, Your Honor.

24 **MS. GEORGE:** See.

25 **THE COURT:** I thought the objection was they are

1 going to talk all about Germany.

2 **MS. GEORGE:** I don't say anything about Germany.

3 The words "Germany" have been removed.

4 **MR. MANDLER:** And you will agree those are all
5 removed?

6 **MS. GEORGE:** Yes. We removed them.

7 **MR. MANDLER:** If that's the agreement. Okay.

8 That's not what was conveyed, but there may have been some
9 confusion between the --

10 **MS. GEORGE:** We removed at least 14 "in Germany"s
11 and --

12 **MR. MANDLER:** You will agree all the ones you said
13 you were going to remove will be removed?

14 **MS. GEORGE:** I will not agree this reference to
15 BASF --

16 **MR. MANDLER:** Not --

17 **MS. GEORGE:** Let me finish.

18 I will not agree that any reference to BASF SE's
19 board will be removed.

20 **MR. MANDLER:** That wasn't my question.

21 **MS. GEORGE:** I will remove "Germany." And that's
22 what we have already done.

23 **MR. MANDLER:** Then we are done then.

24 **THE COURT:** I thought that's where we were last
25 Friday.

1 **MS. GEORGE:** Us too.

2 **THE COURT:** Now, you gave me this Dicamba-Tolerant
3 System Agreement. Is that what your Exhibit 1105 was merged
4 into?

5 **MR. MANDLER:** Yes, sir.

6 **THE COURT:** Okay. That's what I thought. You
7 want --

8 **MR. MANDLER:** I think I gave you all the copies,
9 actually.

10 **THE COURT:** Any other matters?

11 **MS. ROSENBERG:** Housekeeping, Your Honor.

12 As you might recall, Plaintiffs on Friday moved into
13 evidence exhibits used that Plaintiffs had used in the video
14 deposition testimony thus far. And Monsanto wanted to do the
15 same as to exhibits that Monsanto had introduced as part of
16 the video deposition; so that would be Monsanto Exhibit No. 1,
17 which was introduced through Kim Magin and Monsanto
18 Exhibit 303, which was introduced through Tom Orr.

19 **MS. GEORGE:** No objection, Your Honor.

20 **THE COURT:** Okay. They are admitted then.

21 **MS. ROSENBERG:** And then two other bits of
22 housekeeping. On the Boyd Carey proposed order we had given
23 you with the preservation of objections and your --

24 **THE COURT:** I think I've signed that already.

25 **MS. ROSENBERG:** It turns out that a number of the

1 exhibits that Plaintiffs provided to us on the list -- we gave
2 you two, but it turns out there were more exhibits that were
3 not actually introduced through Dr. Carey. Is it easiest for
4 you if we provide a new proposed order --

5 **THE COURT:** Or just a supplemental.

6 **MS. ROSENBERG:** Supplemental. Okay. And we will
7 provide one for Tom Orr tomorrow.

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

9 **MS. ROSENBERG:** Thank you.

10 **THE COURT:** Now, I did -- we just did this afternoon
11 issue a formal memorandum about the motion to reconsider
12 your -- the joint venture.

13 **MR. MANDLER:** I haven't seen it yet, Your Honor, but
14 I will read it tonight.

15 **THE COURT:** It's consistent with my earlier rulings,
16 I will just say that.

17 **MR. MANDLER:** I assumed it would be.

18 **THE COURT:** Okay. Anything else?

19 Okay. We will reconvene at 9:00 then tomorrow.

20 Thank you all.

21 (The proceedings concluded at 4:40 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 871 through 890 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 3rd day of February, 2020.

/s/ Reagan A. Fiorino

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