

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 14

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

FEBRUARY 13, 2020

APPEARANCES:

**FOR PLAINTIFFS BADER FARMS, INC., ET AL:**

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

Beverly Turina Randles, Esq.  
**RANGLES 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:**

Ann E. Sternhell-Blackwell, Esq.  
**BRYAN CAVE LLP - ST. LOUIS**  
One Metropolitan Square  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102

Booker T. Shaw, Esq.  
Christopher M. Hohn, Esq.  
Daniel C. Cox, 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

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

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FEBRUARY 13, 2020

(The proceedings commenced at 4:19 p.m.)

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

MOTIONS

**THE COURT:** Okay. Where do I start? So the first thing, on the 2nd of February, BASF filed a motion to amend its answer to Plaintiffs' third amended complaint. I forgot to take that up until now. Anybody want to address that for BASF or for the others? It's just basically a motion to conform to the evidence.

**MS. RANGLES:** We don't have an objection.

**THE COURT:** Okay. I'll grant that motion then. It's Document 447.

Okay. I think we should take up next Monsanto's renewed motion for judgment as a matter of law on Plaintiffs' liability theories. And so I have that before me. Document 536. So let's just go one by one, I guess.

The first one is that Plaintiff has not presented legally sufficient evidence to prove actual causation for any Monsanto product. The first point is that plaintiff did not present evidence that it was harmed by XtendiMax.

I've read all of this. My question, though, to you, Mr. Shaw, is that I don't -- I didn't understand that the -- that the plaintiffs' claim was predicated on XtendiMax alone

1 but on all dicamba herbicides. Did I get that right?

2 **MS. RANGLES:** Yes, Your Honor.

3 **THE COURT:** So --

4 **MR. SHAW:** That's all part of our product  
5 identification argument, Your Honor.

6 **THE COURT:** Okay.

7 **MR. SHAW:** That Plaintiffs' allegation, not only is  
8 it one that claims that Monsanto would be liable for products  
9 it did not manufacture or sale, they have insufficient  
10 evidence that they were harmed by a product that Monsanto  
11 actually did manufacture and sell.

12 **THE COURT:** And I noticed, too, that you concentrate  
13 specifically on unlawful applications by Mr. Fullerton, but  
14 their evidence was not at all limited to Mr. Fullerton. That  
15 was just one small part of it, I seem to think. So I'll  
16 overrule that part.

17 And then we'll go to B; that plaintiff did not  
18 present sufficient evidence that Monsanto's Xtend seed was the  
19 actual cause of its harm in any year. So I think that gets  
20 into the matter that Mr. Hohn was raising informally that  
21 there had to be evidence that Monsanto sold the  
22 dicamba-resistant seed.

23 As per our informal discussions, I thought that the  
24 evidence was clear that Monsanto did sell seed under the Xtend  
25 seed brand, but it also sold the trait to every other party in

1 the world, or in the country I should say, that might also be  
2 selling dicamba-resistant seed.

3 **MR. SHAW:** We disagree, Your Honor, that the  
4 evidence actually showed that.

5 **THE COURT:** Okay. Well, there were some -- Mr. Hohn  
6 was pretty adamant about that part. Do you all want to  
7 address that further? I was under the -- I had the  
8 understanding from the evidence that Monsanto ended up owning  
9 the trait. And once it owned the trait, nobody else could  
10 make or produce dicamba-resistant seed without the license  
11 from Monsanto.

12 **MS. RANGLES:** And that is correct, Your Honor. And  
13 that's the evidence in this case.

14 The first thing, though, Your Honor, this is an  
15 affirmative defense. And if they wanted to raise this, they  
16 should have raised this a long time ago in an answer. They  
17 never did.

18 Second, though, you are absolutely correct that --

19 **THE COURT:** I'm not sure it's an affirmative  
20 defense, but ...

21 **MS. RANGLES:** Well, the second thing, though, Your  
22 Honor, is this is what -- what they've said all along is that  
23 we did not provide any evidence that they sold the dicamba  
24 herbicides. Now this thing with the seed is completely new  
25 and different that they raised through Dr. Baldwin on

1 Dr. Baldwin's cross-examination. We objected. And  
2 Dr. Baldwin answered to the best of his knowledge, but then  
3 Alyson Emanuel, BASF's witness, came in and testified that  
4 there's licensing agreements and that -- that Monsanto does  
5 own the trait. You have to have a license through Monsanto in  
6 order to be able to sell the seed. They provided the seed  
7 sale data of the Xtend seed sales within a 15-mile radius of  
8 Bader Farms, and that's what we presented. That's what the  
9 evidence in this case is.

10 **THE COURT:** Yeah. What did you present in your  
11 case-in-chief, though?

12 **MS. RANGLES:** In our case-in-chief, the only aspects  
13 of it was -- the only aspects of it that came in at all in the  
14 case-in-chief was what Ford Baldwin said. And then, like I  
15 said, we objected.

16 **THE COURT:** Wasn't there evidence in your  
17 case-in-chief that the trait was owned by Monsanto?

18 **MS. RANGLES:** I'm not --

19 **MS. GEORGE:** Well, there was evidence through Greg  
20 Starling that he was repping the Monsanto's seeds through  
21 various brands.

22 **MS. RANGLES:** Okay. There was the testimony from  
23 Mr. Starling.

24 **THE COURT:** All right.

25 Mr. Shaw?

1           **MR. SHAW:** Yes, Your Honor. As you have pointed  
2 out, there was no evidence in their case-in-chief whatsoever  
3 on this point. I would also point out, Judge, that this point  
4 has been raised --

5           **THE COURT:** Well, I thought that there was. That's  
6 my recollection.

7           **MR. SHAW:** The testimony regarding Ms. Alyson -- let  
8 me give you her name -- Alyson Emanuel, that was in the  
9 defendant's case, and that was a BASF witness. So there was  
10 no evidence in this point -- on this point in Plaintiffs'  
11 case. And the evidence that Ms. Emanuel gave, Your Honor,  
12 basically was just that BASF sold what rights it had to  
13 Monsanto. And that when she was questioned further about it,  
14 she basically said, I don't know the terms of the license  
15 agreement; I can't testify to that; I don't know and can't  
16 testify to that.

17           And I would just cite you to --

18           **THE COURT:** Well, the terms of the license agreement  
19 don't matter. I think it just matters that there was an  
20 agreement of some sort. So my recollection, though, is from  
21 that extended videotaped deposition testimony that there was  
22 enough evidence on that point. So I'll overrule it. But it  
23 was certainly bolstered in your -- in the defendants'  
24 case-in-chief.

25           I see that the next part of your -- this is on



1 page 4 -- is that it's another causation problem that you say  
2 that Dr. Baldwin readily conceded that he could not determine  
3 whether Plaintiffs' alleged dicamba exposure came from dicamba  
4 applied over corn or some other crop not manufactured or sold  
5 by Dicamba [sic], but I think that ignores the important part.

6           The most important part of his testimony was that  
7 nearly all of the damages, nearly all of the damage was caused  
8 by vapor drift and atmospheric loading and the mushroom cloud  
9 over all of southeast Missouri, as I will call it. So I will  
10 overrule that part of your motion as well.

11           C, then, is any claim that the so-called Xtend  
12 system or dicamba-tolerant system caused Plaintiffs' harm  
13 fails as a matter of law. And again, we've been through this  
14 several times. I bought into the idea that the product is the  
15 system, the dicamba-tolerant system as reflected in the  
16 defendants' own documents time and again. And so the system  
17 is not just the seeds. The system is the dicamba-tolerant  
18 seeds, plus the low-volatility corresponding herbicides.

19           We've been through this at length; so I'll overrule  
20 that.

21           **MR. SHAW:** We have, Your Honor. And just real quick  
22 on this one, because we think that probably, you know, should  
23 things go wrong, that this would be a huge issue in any  
24 appellate proceedings that happen here.

25           And let me just quickly go through some of that with

1 you. You know, Mr. Hohn spent quite a bit of time talking  
2 with you, as you already mentioned, regarding the *City of*  
3 *St. Louis v. Benjamin Moore* case and how that case precluded  
4 Plaintiffs from proceeding with any claims in this case  
5 without the ability to identify a specific product and  
6 manufacturer of that product.

7           And this kind of system submission or claims that  
8 they are making not only violates the basic premises that have  
9 been stated in that *City of St. Louis* case but also further  
10 expounded upon in the analogous cases of *Sperry v.*

11 *Bauermeister*, the case that we discussed with you regarding  
12 Judge Limbaugh, Sr., and the TMJ case that also discusses in  
13 analogous situations the impermissibility of proceeding with a  
14 case that more or less has components, which I think that's  
15 what this system argument is really all about.

16           And I think those combination of cases make it very  
17 clear that without specific product identification, which  
18 applies to any tort, that Plaintiff cannot proceed.

19           **THE COURT:** I am intimately familiar with the  
20 *Benjamin Moore* case, as you know. And I think it's  
21 distinguishable. As we discussed earlier, though, I do think  
22 it would have applied to the products liability claim. But at  
23 this point, only negligence is being submitted. So I don't  
24 think it applies for the other reason that we are not talking  
25 about specific products that have to be identified anymore.

1 It's any kind of dicamba that would have been sprayed over the  
2 top. It's not limited to XtendiMax or Engenia. And so I'll  
3 overrule the motion on that point.

4 **MR. SHAW:** Very well, Your Honor. We understand.  
5 We just disagree.

6 **THE COURT:** Yeah. Then going on to page 8,  
7 Plaintiffs have not presented legally sufficient evidence to  
8 prove proximate causation. This is overlapping with actual  
9 causation, I think, too. And so you say Plaintiff failed to  
10 introduce evidence sufficient to support a finding that  
11 Monsanto approximately caused its alleged 2015 and '16 damage.

12 I think that there was sufficient evidence through  
13 the testimony of Dr. Baldwin and Mr. Bader on that point. To  
14 be sure, the evidence is stronger in the years after 2016, but  
15 I think that it is sufficient during 2015 and 2016.

16 Then on page 10, you do address the 2017 and 2018  
17 damage. And, again, as I understand the theory of the  
18 Plaintiffs, the damage was not limited to legal spraying --  
19 spraying, in other words, by the low-volatility herbicides --  
20 but to all spraying, whether it was legal or not legal. And  
21 so I will overrule your point on that matter, too.

22 And going on to Roman numeral III, Monsanto is  
23 entitled to judgment as a matter of law on Plaintiffs' product  
24 liability claims. Those have been withdrawn. In that  
25 connection, do you want me to say anything to the jury about

1 that? I don't think it's necessary.

2 **MS. RANGLES:** I wouldn't think it's necessary, no.

3 **THE COURT:** I agree.

4 Then going to page 13, the next point is Monsanto is  
5 entitled to judgment as a matter of law on Plaintiffs' failure  
6 to warn claims. But that's part of the -- that's part of the  
7 products liability argument, I think. Yes, yes, it is. So  
8 same reason.

9 I think that takes care of your causation arguments.

10 Then on page 17, you've got no evidence that  
11 supports a finding that Plaintiff is entitled to lost profits  
12 or future damages. And I think now that it's been made clear  
13 that their allegation and their sole argument in closing  
14 argument is that there is a total loss, because the orchards  
15 cannot simply be maintained any further, that -- and I think  
16 that there's sufficient evidence in support of that idea from  
17 Dr. Guenther.

18 So I'll overrule that point, too, as well as the  
19 point that you've made repeatedly about the measure of damages  
20 and how damages should be calculated. I set that out at some  
21 length in my earlier rulings in motions for summary judgment,  
22 or even before that on the proper measure of damages in the  
23 case, which when we get to the instructions we'll confirm that  
24 I'll allow the submission under MAI 4.01 as opposed to 4.02.

25 **MR. SHAW:** Very well. Judge, with regard to

1 Dr. Guenthner, I believe Mr. Hohn wanted to address that with  
2 you, that separate motion.

3 **MR. HOHN:** Your Honor, as you might remember, we  
4 filed a motion to exclude Dr. Guenthner --

5 **THE COURT:** Yes.

6 **MR. HOHN:** -- and strike his testimony, which was  
7 Docket No. 504. So I would --

8 **THE COURT:** Some time ago.

9 **MR. HOHN:** Yes, some time ago. I know Mr. Miller  
10 renewed that motion at the close of the evidence.

11 I just want to orally renew that again and just  
12 highlight a couple things for you.

13 So there's a number of problems that remain with  
14 Dr. Guenthner's proposed model here. And the evidence that's  
15 come in has been completely inconsistent with what his model  
16 is. And so a quick review of that.

17 Number one is that obviously Dr. Guenthner says that  
18 there were lost profits. Mr. Bader indicates there were no  
19 lost profits because his peach profits went from \$55,000 a  
20 year to, in fact, \$87,000 a year. And so obviously  
21 Dr. Guenthner's model is inconsistent on that point.

22 On point number two --

23 **THE COURT:** Let's just discuss one at a time.

24 **MR. HOHN:** Okay.

25 **THE COURT:** And as we've been over repeatedly, too,

1 I disagree with your counter calculation of damages that it  
2 was based solely on tax returns. I don't think that's the  
3 proper way to calculate it.

4 **MR. HOHN:** So I understand your position, Your  
5 Honor.

6 So point number two is Dr. Guenthner assumed two  
7 times the amount of peach revenues that actually historically  
8 existed at Bader Farms. Bader Farms was averaging between 2  
9 and 2.4 million in peach revenue a year. His -- he assumes a  
10 4-million-per-year revenue factor for peach.

11 **THE COURT:** On that point, I think that was  
12 addressed through cross-examination.

13 **MR. HOHN:** I would just point out, Your Honor, I  
14 think the cumulative effect of all these defects in  
15 Dr. Guenthner's analysis would warrant his exclusion. And  
16 that's -- I think that's the ultimate request.

17 The third point that is very problematic is  
18 obviously he used the FSA-578s, and Mr. Bader testified on the  
19 stand that those were not entirely accurate, both as to acres  
20 and peach tree life, and that the peach tree life could be off  
21 substantially as a result.

22 **THE COURT:** There was a problem with that. But the  
23 last testimony he gave, as I recall, is that I don't care what  
24 anybody says, the 578s control. Any kind of calculation on  
25 this, the 578s have to control. And so I think that you've

1 addressed the inconsistency properly on cross-examination,  
2 but -- and I don't believe any of this is cumulative, so ...

3 **MR. HOHN:** I guess I use cumulative in the sense  
4 that I've got five things that I want to say completely, five  
5 sets of, you know, evidence basically that undermined his  
6 opinions and would warrant his exclusion. That's what I meant  
7 by "cumulative."

8 **THE COURT:** Do you have a sixth?

9 **MR. HOHN:** I thought there was only three. I've got  
10 two more.

11 **THE COURT:** Oh, okay.

12 **MR. HOHN:** The next one is that he relied on the --  
13 this is a biggy, Your Honor, because he relied on the  
14 assumption that Bader Farms was basically over as of 2019.  
15 And the testimony from Mr. Bader was it's not. Obviously he's  
16 continuing to buy peach trees. He obviously continued to, you  
17 know, produce peaches. He continued to buy peach trees and  
18 plant them. He bought another peach orchard. So his  
19 testimony was -- obviously he was actively engaged in peach  
20 production in 2019 when Dr. Guenther assumed he was over and  
21 that he is proceeding in 2020.

22 So the very basic assumption that Guenther relies  
23 on has been completely undermined by Mr. Bader. And as you've  
24 heard the plaintiffs say, they have one unitary number that  
25 they are presenting for damages. And if the underlying

1 assumption, underlying Dr. Guenther, is that this orchard was  
2 at an end as of 2019, that is not accurate.

3 **THE COURT:** I agree that there -- that testimony  
4 from Mr. Bader was somewhat inconsistent, but the whole point  
5 of their case is that there is a total loss. I think their  
6 expert weighed in on that, too. And ultimately that's what  
7 Mr. Bader's claim is.

8 **MR. HOHN:** And the final, Your Honor, we haven't  
9 spent much time talking about this, is that Bader Farms  
10 doesn't own the land. That testimony came out directly from  
11 Mr. Bader. And as I think you know, in the world of trees,  
12 they run with the land. They are part of the realty. And so  
13 that is a fundamental problem with the Bader Farms claim.

14 Mr. Bader said the land is owned either individually  
15 by him and his wife and/or a trust. And so we have a  
16 situation where the proper entity that should be suing based  
17 on the trees being part of the land is not before the Court.

18 **THE COURT:** Yeah. But as I understand the  
19 testimony, though, Bader Farms runs the whole operation on all  
20 sorts of farms that are not owned by Bader Farms, Inc.,  
21 itself, including leasing out farms, in the past at least, and  
22 farming on the property that the other entities control.

23 **MR. HOHN:** But there hasn't been any -- I mean, he  
24 does -- I mean, Bader Farms does not own the land, but there's  
25 other entities that own the land. And they don't own all the



1 land is your point, and I get that, because some of the land  
2 that they produce on is leased land, but it's leased from the  
3 owners. And Bader Farms is not the owner. So there's a  
4 significant problem, Your Honor, that we don't have the right  
5 entity that owns the land and the trees.

6 **THE COURT:** Yeah, I don't think that that's much of  
7 a problem actually because it's the farming operation, I  
8 think, instead of the property itself on which the trees are  
9 located.

10 **MR. HOHN:** Well, since the trees are part of the  
11 land, that's really -- the landowner ought to be the one  
12 that's bringing the claim.

13 **THE COURT:** I understand your point.

14 Do you all want to address that further?

15 **MS. GEORGE:** Do you want me to just really quickly  
16 address --

17 **THE COURT:** Sure.

18 **MS. GEORGE:** Do you want that point or all five?

19 **MR. BOZARTH:** As BASF has done previously, we join  
20 Monsanto's motion.

21 **THE COURT:** Yes.

22 **MS. GEORGE:** Do you want me to address that one,  
23 Judge?

24 **THE COURT:** Whatever record you want to make.

25 **MS. GEORGE:** Okay. Well, he raised five points,

1 Mr. Hohn did. First he said that Mr. Bader testified he has  
2 no losses. That's not exactly what Mr. Bader testified to at  
3 all. The question that was asked of Mr. Bader pertained to if  
4 his revenues were the same before as they were after, then  
5 wouldn't it be true he didn't have any losses. And he agreed  
6 with that, but the point being his revenues per mature acre  
7 with trees in the ground -- if those were still the same, we  
8 wouldn't be here. But he testified his revenue should have  
9 been going up, and instead they were going down. So there's  
10 plenty of evidence on that.

11           With regard to the fact that Dr. Guenther presented  
12 his revenues would be higher in subsequent years, what  
13 Dr. Guenther took into account that Defendants don't want to  
14 take into account is the trees that had been newly planted  
15 that had yet come on line. So there's been ample testimony  
16 that Bill Bader testified he was planting -- he had a  
17 50,000-tree plan over a four-year period, and a lot of these  
18 trees which don't produce for years were getting ready to come  
19 on line at the same time that dicamba hit. So they're saying  
20 that Dr. Guenther has a higher number in subsequent years.  
21 And that is actually based on the trees that are in the ground  
22 that should have started to produce.

23           Second, the Court's correct that the 578s, the  
24 testimony is those are the most accurate written reflection of  
25 the trees in the ground. There's ample evidence to support

1 that.

2           The fourth point about Dr. Guenther relying on the  
3 fact that Bader Farms is out of business, what Dr. Guentner  
4 testified to is that Bader Farms is effectively out of  
5 business and that relying on Ford Baldwin's testimony that  
6 that orchard can't exist in that environment he based his  
7 opinion.

8           We also offered to the Court a calculation from  
9 Dr. Guentner that assumed he continued to operate. And it  
10 was -- the losses were so much substantially higher that we,  
11 following the Court's order that he has a duty to mitigate,  
12 we're offering the complete loss calculation as mitigation.

13           Fourth and finally, with regard to owning the land,  
14 that's not a requirement. Bader Farms does lease land, as  
15 nearly every farmer who has sizable operations does. The  
16 testimony is that Bader Farms, Inc. owns every tree and that  
17 all of the peach production, like the Court said, runs through  
18 Bader Farms. They make lease payments to the entities that  
19 own the land, and that is not a bar to recovering lost profits  
20 at Bader Farms, Inc.

21           **MR. HOHN:** Two final ones. So real quick on that.  
22 Last point, Your Honor. I mean, we cited this case law in our  
23 motion. I mean, they are seeking future losses relating to  
24 the land, and the case law is clear.

25           **THE COURT:** I thought it is related to the farming

1 operation.

2 **MR. HOHN:** Well --

3 **THE COURT:** Just that part of the operation --

4 **MR. HOHN:** Relating to the peach trees which are  
5 part of the land; right? Obviously it's not the whole farming  
6 operation, as we know.

7 **THE COURT:** Right.

8 **MR. HOHN:** It's the peach trees that's part of the  
9 land.

10 **THE COURT:** It's the peach operation, I think.

11 **MR. HOHN:** Well, but it's -- the peach operation is  
12 the peach trees in the land. And the peach trees run with the  
13 land. I mean, so it's fundamental.

14 **THE COURT:** What about a leasehold then?

15 **MR. HOHN:** There's no -- there wasn't any evidence  
16 of a lease between Bader Farms and Mr. Bader or his trust or  
17 anybody. I mean, they didn't present that. Okay? And so the  
18 land that is at issue --

19 **THE COURT:** He was a trespasser on all of those  
20 properties?

21 **MR. HOHN:** I don't know. I can't -- I won't  
22 speculate because there's not been any evidence in on it.

23 But the land that is at issue that is producing  
24 peaches and they're saying is going to decline producing  
25 peaches is not owned by this plaintiff. And there's been no

1 evidence in the record that there's any kind of leasehold that  
2 would allow Bader Farms to be the party that is suing to  
3 collect for that land and the value of it.

4 And that's what makes it even more problematic is  
5 because you're talking about future losses. And the case law  
6 is very clear, and we cite in your motion *Beaty v. Northwest*  
7 *Electric Power Coop*, 312 S.W.2d 369, saying that in terms of  
8 future losses, that again that belongs -- those kind of losses  
9 belong to the landowner.

10 On the other point that Ms. George raised, it's very  
11 clear, and Mr. Bader testified.

12 "QUESTION: Now, Mr. Bader, are you planting trees  
13 for 2020?

14 "ANSWER: Yes, sir.

15 "QUESTION: How many have you ordered?

16 "ANSWER: 2,000.

17 "QUESTION: About 2,000 more peach trees for 2020?

18 ANSWER: Yes, sir."

19 So he is continuing his operation. Guenther  
20 assumes it's over as of 2019. They have one unitary damages  
21 number that they have said in informal conferences that they  
22 cannot separate. And so you have a damage model that is at  
23 war with the facts that are before this jury.

24 **THE COURT:** As I understand their claim, though,  
25 they're not alleging any kind of before-and-after value of the

1 land or anything. They're just talking about the value of  
2 their peach tree operation.

3 **MR. HOHN:** But remember what Dr. Guenthner said on  
4 the stand was that 2015 was his critical year, you know, and  
5 that he used that to basically say it's going down to -- you  
6 know, it's basically at an end as of 2019, and he based it off  
7 of 2015.

8 Now what they're effectively saying is everything  
9 would have to shift to a new set of years.

10 **THE COURT:** Okay. And I think that that kind of  
11 testimony goes to your cross-examination. You have raised  
12 points that tend to counter that position. So I think that's  
13 the answer to you, not that it's not submissible. But you  
14 have raised points on cross-examination that you can share  
15 with the jury.

16 **MR. HOHN:** Okay.

17 **THE COURT:** Overruled.

18 **MR. HOHN:** All right. Thank you.

19 **THE COURT:** Okay. I think should I go to BASF now  
20 on the joint venture?

21 **MS. LADDON:** Sure.

22 **THE COURT:** I covered both of those motions by  
23 Monsanto. As I see most of -- or half of your motion deals  
24 with the joint venture problem. The other half is the overlap  
25 with Monsanto's position.

1           **MS. LADDON:** That's pretty fair, Your Honor.

2           **THE COURT:** And just on the joint venture positions,  
3 I've been through this quite a bit. I think it's submissible  
4 on the evidence that an umbrella agreement, even though it was  
5 with BASF SE and Monsanto, there was a delegation or a charge  
6 to Monsanto and BASF Corp. to form this joint venture through  
7 the alliance management team, and that the two organizations  
8 that the alliance management team put into place to implement  
9 that joint venture are really not so relevant except as the  
10 implementing tool for the joint venture.

11           I know another point that you make repeatedly is  
12 shared losses and profits. As I indicated before, I think the  
13 better way to look at the requirement for the sharing of  
14 lost -- the sharing of profits and losses is that the losses  
15 are really subsumed into the determination of profit sharing  
16 and that the bottom line on profit sharing is it doesn't have  
17 to be profit sharing of 100 percent of the whole production or  
18 the system because you have two separate revenue streams, one  
19 going to Monsanto for the dicamba seeds and the other going to  
20 BASF for the dicamba herbicide.

21           But then there is sufficient evidence to go to the  
22 jury on the sharing of profits because of the payments, which  
23 you characterize as royalty payments, but the bottom line, it  
24 seems to the Court, that BASF is getting paid based on  
25 Monsanto's success.

1           And so do you want to elaborate further on your  
2 points?

3           **MS. LADDON:** No, Your Honor. We discussed this  
4 informally, and so I understand where the Court is coming  
5 from. I can just very quickly summarize at a high level our  
6 position. It's all in our brief, which we incorporated into  
7 the record. But just, you know, in terms of an express  
8 agreement for joint venture, I think that's out.

9           **THE COURT:** Yes. It's only an implied joint  
10 venture.

11           **MS. LADDON:** Well, that being said, I mean, we think  
12 the contracts are controlling. And they specifically disclaim  
13 the existence of a joint venture and Plaintiffs can't as a  
14 matter of law use the two emails -- they cannot as a matter of  
15 law use the two e-mails they want to use because that's parol  
16 evidence, and they can't use those e-mails to reinterpret the  
17 contracts.

18           In terms of a community of pecuniary interests  
19 between the defendants, there's no evidence that the  
20 defendants had a right to share in profits of the DT system at  
21 all. There's no evidence that Defendants had a duty to share  
22 the losses of the DT system. And BASF Corporation and  
23 Monsanto did not have equal rights or voice with respect to  
24 any alleged joint venture activities.

25           So we believe the umbrella agreement is not evidence



1 of a joint venture between BASF Corporation and Monsanto.  
2 BASF Corporation, first of all, was not a party to that  
3 agreement. And the DTSA and the ARDTSA merger clause  
4 specifically states that the umbrella agreement is  
5 inapplicable to that contract.

6 **THE COURT:** Let me just interrupt you on that point.  
7 And that's been the fundamental disagreement all along. Those  
8 two agreements are simply matters that the alliance management  
9 team set into place to implement the overall joint venture.  
10 And so that's why I don't think that the disclaimers contained  
11 within those specific agreements, implementing agreements,  
12 matter to the overall joint venture.

13 **MS. LADDON:** I understand. And we disagree, Your  
14 Honor. We've discussed it. We don't believe that those two  
15 agreements, the DTSA and the ARDTSA were executed under the  
16 umbrella agreement. We think that's just Plaintiff backing  
17 into an argument that BASF Corporation is a party to the  
18 agreement too, but I think our brief sets that out fairly well  
19 in terms of our position.

20 And that's really a summary of our argument on joint  
21 venture.

22 **THE COURT:** Okay. I will overrule that again then.

23 Now, you did raise something in your briefing on the  
24 memorandum in support of the comprehensive motion for judgment  
25 as a matter of law filed by BASF. Let me see if I can find

1 it.

2 **MS. LADDON:** Well, we also went through why we think  
3 there's no conspiracy. And then we went through all the  
4 products claims. And we also had some damages arguments.

5 **THE COURT:** Let me raise this one thing before I  
6 forget. It's on pages 25 of your motion, Document 527. And  
7 this is a point that we did not discuss in our jury  
8 instruction discussions, and maybe it's better suited to talk  
9 about it then. But you say that a jury cannot simultaneously  
10 find both a joint venture and a conspiracy. If the jury  
11 concludes that Monsanto and BASF are indeed joint ventures and  
12 thus agents for each other, then it would be a legal  
13 impossibility for them to conspire together.

14 So that's something we need to talk about, I think.  
15 Maybe we can reserve it for the instruction part. But I read  
16 this closely.

17 **MS. LADDON:** You did. We can talk about it then,  
18 Your Honor.

19 **THE COURT:** Yeah. So do you want to talk further  
20 about the conspiracy then?

21 **MS. LADDON:** Again, just at a very high level. We  
22 don't believe there's any evidence of a conspiracy with  
23 respect to Monsanto's decision to release the DT cotton seed  
24 in 2015 or DT soybean seed in 2016. We believe there's no  
25 evidence of a conspiracy to encourage illegal use of older

1 dicamba formulations in 2015, 2016, or beyond. No evidence of  
2 a conspiracy to design defective low-volatility dicamba  
3 herbicides. And there's no evidence of a conspiracy with  
4 respect to the sale and marketing of Defendants' respective  
5 dicamba herbicides.

6 **THE COURT:** I'll overrule that, and we will address  
7 that further in the instruction that will be submitted on  
8 conspiracy because I think that those concerns are set out in  
9 the instruction that will be given. So I'll wait to address  
10 that further there, except to overrule it for now.

11 **MS. LADDON:** Okay. Can I just briefly --

12 **THE COURT:** Yes, yes, yes.

13 **MS. LADDON:** -- just summarize our product liability  
14 claim and our arguments as it relates to those claims? BASF  
15 Corporation believes that Plaintiff has put no evidence --

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

18 **MS. LADDON:** Sorry. It's my curse to bear. And  
19 yours. I'm sorry.

20 Plaintiff has no evidence that any of its alleged  
21 injuries were caused by Engenia. Plaintiffs' strict liability  
22 design defect claim related to Engenia fails.

23 **THE COURT:** That's off the -- that's off the table.

24 **MS. LADDON:** Oh, yeah. You're right. Sorry.

25 Well, the negligent design claims related to Engenia

1 fails because there's no evidence that BASF breached any duty  
2 or that any duty -- or that any breach of a duty was the  
3 proximate cause of Plaintiffs' injury. And the plaintiff  
4 failed to establish proximate cause between an alleged failure  
5 to warn and BASF Corporation's marketing materials and alleged  
6 offsite movement to Bader Farms.

7 And let's see if there's anything else. Plaintiff  
8 failed to identify any alternative label warning for Engenia  
9 that does not exceed the parameters of the Federal  
10 Insecticide, Fungicide, and Rodenticide Act and failed to  
11 establish proximate cause. So that's sort of our high-level  
12 arguments on the remaining points.

13 **THE COURT:** Most of those things I've addressed  
14 earlier in previous motions; so I will overrule that.

15 **MS. LADDON:** Understood. And then we just had -- we  
16 did have two damages arguments, one on compensatory and one on  
17 punitives.

18 **THE COURT:** I was going to address punitives  
19 separately for both. Just do compensatory.

20 **MS. LADDON:** Sure. We believe the Court should  
21 grant judgment as a matter of law on BASF Corporation's -- in  
22 favor of BASF Corporation on Plaintiffs' claim for  
23 compensatory damages because their damages claim requires  
24 impermissible speculation by the jury about potential future  
25 damages.

1 Dr. Guenther's net present value methodology does  
2 not comport with Missouri's measure of damages for alleged  
3 crop loss in fruit trees. And Bader Farms, Inc. has admitted  
4 it did not lose profits from 2015 to 2018.

5 Additionally, BASF Corporation cannot be held liable  
6 for Plaintiffs' nondicamba losses, and Plaintiff has failed to  
7 offer any evidence for its mitigation and lost asset value.

8 **THE COURT:** Okay. Thank you. Those will be  
9 overruled, mainly on the basis of prior rulings.

10 So let's talk about punitive damages at this point,  
11 Monsanto's renewed motion, and I will consider also BASF's  
12 motion on the same point.

13 As you know, Counsel, I've already indicated  
14 informally that I am not going to allow Plaintiffs to submit  
15 on punitive damages for conduct that occurred from 2017 on.  
16 And I am going to limit punitive damages on just the first two  
17 years, on the years 2015 and '16. And the reason for that is  
18 because I think that there's sufficient evidence to show  
19 reckless indifference by the early rollout of the Xtend seeds  
20 without the corresponding herbicide that was rolled out two  
21 years later, the low-volatility herbicide. That combined with  
22 a plethora of evidence that Monsanto disallowed testing, that  
23 it was put on notice of a huge concern about volatility and so  
24 forth.

25 But anyway, do you want to speak further to that?

1           **MR. HOHN:** Yes, Your Honor.

2           First of all, just to note, we did have -- we filed  
3 an original Rule 50(a) judgment as a matter of law motion.  
4 And that was Docket 498. And I just want to -- so the record  
5 is clear, was that -- that motion should be deemed denied,  
6 because that was the original JMOL motion at the close of the  
7 plaintiffs' case.

8           **THE COURT:** Yes. Yes, I'm now working off 528.

9           **MR. HOHN:** I just wanted to be clear. And so now we  
10 are on 529, I guess it is, is our renewed motion for judgment  
11 as a matter of law regarding punitive damages.

12           **THE COURT:** Yes.

13           **MR. HOHN:** And I want to pick up on a couple things  
14 the Court just said, because I did understand from our  
15 informal conferences that the Court was going to allow  
16 Plaintiffs to submit on punitive damages for 2015 and 2016  
17 claims because of, which I believe you said, was the early  
18 rollout of the Xtend seeds without a corresponding approved  
19 dicamba herbicide. But then -- and I understood that from our  
20 informal conferences. But I want to be clear because then you  
21 added a couple of the things that I hadn't heard you say  
22 before regarding the basis for you denying our motion to  
23 exclude those punitive claims.

24           And I think one was disallowing testing. And I want  
25 to -- I just want to be clear that obviously the early rollout

1 of the seed has -- is not related to any disallowance in  
2 testing. So that obviously what -- the evidence that came in  
3 was that there was certain -- there was a time period --  
4 before registration of the product in November of 2016, there  
5 was a time period before that where Monsanto did not allow  
6 third-party academics to test for drift and volatility. It  
7 obviously relied on -- Monsanto relied on the testing that it  
8 conducted itself, its field tests, as well as other numerous  
9 tests.

10 **THE COURT:** I think the point, though, is that  
11 because of that concern, you should have waited, that you  
12 didn't have the registration. And the registration of the  
13 herbicides, the registration was held up in part because of  
14 the lack of testing. Well, I guess --

15 **MR. HOHN:** I don't think there's any evidence of  
16 that, Your Honor.

17 **THE COURT:** You're right. You're right. Go ahead.

18 **MR. HOHN:** And then the other thing you mentioned  
19 was -- and I just want to make sure you and I are tracking.  
20 The other thing you mentioned was notice of claims and things  
21 of that nature. Or did you mean something else? Did you  
22 refer to warnings? Is that what you were suggesting? I just  
23 want to be clear as to what you're thinking, because that's  
24 important obviously to understand what the parameters of this  
25 are.

1           **THE COURT:** Why don't I call on them? They can help  
2 me along.

3           **MR. HOHN:** In terms of obviously in -- and this kind  
4 of gets right into the things I wanted to raise with you, Your  
5 Honor, because this goes back to the *Lopez* case, right, which  
6 I know you are intimately familiar with, I'm not going to  
7 repeat to you. But in '15 and '16 when Monsanto launched its  
8 seed -- in '15, it didn't have notice of prior claims. So, I  
9 mean, all of this stuff about, you know, 3,000 claims and all  
10 that stuff that came in for notice purposes, obviously  
11 there -- that didn't exist.

12           **THE COURT:** Well, I do think that there was notice  
13 that there was going to be trouble with on early rollout  
14 because people -- there was notice that people would use it  
15 illegally. Or at least the likelihood or at least a  
16 possibility.

17           **MR. HOHN:** I agree with you there was evidence that  
18 was put in that Monsanto received word from some people that  
19 they had concerns about dicamba in general, right, because  
20 their XtendiMax -- obviously XtendiMax was not on the market  
21 yet, and so there were generalized concerns about off-target  
22 movement relating to dicamba generally. And what did Monsanto  
23 do in response to those concerns?

24           Obviously when it launched the seed in 2015 and  
25 2016, it included the pink sticker on every bag, but it had a



1 10-point communication plan that we heard Dr. Boyd Carey talk  
2 about and that we heard Kim Magin testify about on video in  
3 terms of the numerous statements to the marketplace. Okay,  
4 yeah, we hear about generalized concerns about dicamba. We  
5 don't have a dicamba approved. We are also not going to  
6 charge for the trait and we are going to give people rebates  
7 to use other herbicides.

8           And remember when cotton was launched in 2015, it  
9 was resistant to both glufosinate and glyphosate. You heard  
10 Dr. Baldwin testify about that. In fact, Dr. Baldwin said  
11 that when he was contacted by people, he recommended using  
12 Xtend soy and cotton -- cotton in those years as a  
13 glyphosate/glufosinate based product.

14           So in 2015, when cotton was launched, there were  
15 multiple herbicides that could be used and Monsanto did not  
16 take -- was not inactive. So to the extent you want to say  
17 that there were certain things received for notice purposes,  
18 not for the truth but for notice purposes, Monsanto absolutely  
19 responded to those.

20           And that gets right into the *Lopez* factors. Because  
21 if a defendant takes complete inaction, that is when you have  
22 a submissible case of punitive damages. What -- there is no  
23 evidence that Monsanto was -- took no action. The contrary is  
24 true. Monsanto took extensive action to communicate about the  
25 illegality of using any dicamba herbicides over its Xtend

1 cotton in '15 and its Xtend soy in 2016.

2           **THE COURT:** I do acknowledge that there were  
3 legitimate reasons to release the product early, but it just  
4 seems -- I have heard so much evidence in the case that  
5 farmers were incentivized to use dicamba now that they had a  
6 dicamba-resistant seed product and -- well, that's the bottom  
7 line. But I will allow Plaintiffs to address this when you  
8 are finished.

9           **MR. HOHN:** Yeah, just give me a -- couple more  
10 points I want to make quickly.

11           **THE COURT:** Yeah.

12           **MR. HOHN:** Obviously the USDA through APHIS  
13 deregulated these seeds, which allows them to be  
14 commercialized; right? And also we have to look through all  
15 of this through the lens of clear and convincing evidence. I  
16 mean, that has to be the lens through which we look at these  
17 factors.

18           Now, under *Lopez* you have prior similar incidents.  
19 In '15 and '16 we didn't have prior similar incidents related  
20 to these products. *Lopez* also talks about the injurious event  
21 unlikely to occur without the negligence of a third party.  
22 Well, actually, the only reason that any use of dicamba  
23 occurred was not only to negligence, but the outright unlawful  
24 conduct of third parties.

25           And the final *Lopez* factor relates to violating a

1 statute or reg. To the contrary, in fact, the USDA allowed  
2 Monsanto to be able to sell this product.

3 So as both the *Alcorn* case that I know you are also  
4 familiar with and the *Lopez* --

5 **THE COURT:** I think that's distinguishable.

6 **MR. HOHN:** And *Lopez*, though, both say "compliance  
7 with regulations negates malice." And so there's no evidence  
8 here we didn't comply with regulations. In fact, USDA allowed  
9 its sale. And then there isn't the prior similar incidents as  
10 I mentioned. The any injurious event occurred not only from  
11 the negligent but actually unlawful conduct. And there is no  
12 violation of a statute of regulation.

13 **THE COURT:** The *Alcorn* case was much less egregious.  
14 I remember that. But I know -- I -- I want you to understand  
15 I did consider the *Lopez* factors altogether in making a  
16 decision on submissibility, the clear and convincing evidence  
17 standard.

18 **MR. HOHN:** I hear you on *Alcorn*. *Alcorn* was a  
19 crossing case where the railroad actually had notice of prior  
20 incidents at that crossing. And basically what the court said  
21 was that there was a state regulatory scheme where basically  
22 the state notified the railroad if they thought there were  
23 problems at the crossing and they did. And the railroad was  
24 in the process of making adjustments at that crossing but  
25 hadn't gotten around to it yet. And that's exactly what the

1 Court focused on, was that, you know, there were -- there were  
2 efforts by Union Pacific in that case. And just like we have  
3 here, where there were not just efforts, but extensive efforts  
4 put forth by Monsanto. And that --

5 **THE COURT:** I still think that case is  
6 distinguishable. And, remember, I did grant your motion on  
7 punitives from 2017 on.

8 **MR. HOHN:** Understood and appreciated. Understood.  
9 And I think we just obviously wanted to make these points,  
10 Your Honor, because we don't think they are submissible for  
11 '15 and '16 either.

12 **THE COURT:** Okay.

13 **MR. HOHN:** If you -- I do want to bring up the  
14 bifurcation issue, too, but we can talk about that separately  
15 if you want.

16 **THE COURT:** Why don't we let them respond first to  
17 the punitive damages evidence.

18 **MS. RANGLES:** Your Honor, I will try to be brief  
19 because I know we have talked about this issue an awful lot.

20 But Plaintiffs believe we have more than enough  
21 evidence to submit on punitive damages for all years but  
22 certainly for '15 and '16 as the Court has ruled.

23 Monsanto did not pause university testing. They  
24 just disallowed university testing. And the Tina Bhakta  
25 testimony confirms that. That's what they decided to do. It

1 was very high-level and that was a decision which was because  
2 they did not want the negative publicity and the fallout from  
3 what would happen when people knew that the volatility of  
4 these new formulations would cause problems.

5 **THE COURT:** Well, I think Mr. Hohn's position about  
6 that, that that didn't have anything to do with the release of  
7 the seeds, that was just concerning the release of the  
8 corresponding herbicide.

9 **MS. RANGLES:** But for the seed being released, Your  
10 Honor, they wanted all of it to be as clean as possible. So  
11 the university testing -- all of it factors in. It can't be  
12 separated seed issues and herbicide issues. Because what they  
13 wanted was for the seed to be released so that then the EPA  
14 would then have incentive to have the herbicides released at a  
15 later date.

16 But the defensive planting documents that have come  
17 in, those were early on as well. They were warned about the  
18 effects of what would happen. Steve Smith offered testimony  
19 about that extensively. Dr. Baldwin offered testimony about  
20 that.

21 **THE COURT:** Yeah. I discount that a little bit.  
22 Well, at least the Smith because it was so much beforehand  
23 back in 2010, 2011, maybe as late as 2012. But the whole  
24 point of that testimony was that Monsanto and BASF did indeed  
25 take that into consideration in making sure that they had a

1 product that was better than Clarity that was truly low  
2 volatility in anticipation that it wouldn't cause harm.

3 **MS. RANGLES:** Well, but that didn't happen before  
4 the seed was rolled out. And even Boyd Carey testified that  
5 there was only one instance that he can remember where a seed  
6 was rolled out without a corresponding herbicide. So the seed  
7 was released before there was even these newer supposedly low  
8 volatility herbicides on the market.

9 **THE COURT:** Was he the one who testified, too, that  
10 he would have allowed testing before the rollout of the seeds  
11 or that was after?

12 **MS. RANGLES:** You mean was who the person --

13 **THE COURT:** Boyd Carey.

14 **MS. RANGLES:** Boyd Carey was the one who testified  
15 that he thought there should have been testing. So, yes, he  
16 did say that; that they should have allowed university  
17 testing. And then another Monsanto person, I think John  
18 Chambers also testified that it was a mistake not to allow  
19 university testing.

20 **THE COURT:** Was that before or after the actual  
21 rollout and approval of the seed?

22 **MS. RANGLES:** You mean was his decision? Well, when  
23 he said it, it was after they rolled out the seed.

24 **THE COURT:** Okay.

25 **MS. RANGLES:** So we have that -- we've got the --

1 Mr. Hohn keeps talking about the pink sticker, but it says  
2 absolutely nothing about the risks of off-target movement.  
3 They have the renegade document where -- that shows even  
4 internally they knew that the pink sticker would not stop  
5 people from spraying illegally and over the top of the Xtend  
6 seed once it was released.

7           So all of those things showed that they -- they  
8 certainly were warned. We believe that the evidence shows  
9 that they knew that it was happening and certainly that there  
10 was a very strongly likelihood that it would happen and they  
11 rolled the seed out anyway. And if just having a government  
12 agency approval was enough to relieve a company of punitive  
13 damages, there wouldn't be any Roundup litigation right now  
14 that also encompasses punitive damages.

15           I am sure there are other things, too. But, Your  
16 Honor, there's been -- I have a long list of documents here  
17 that we sent over yesterday and testimony that's come into  
18 this case about the risks that they knew that they were going  
19 to be undertaking. Why do I need to plant a seed without --  
20 that I don't need, a trait that I don't need, protection from  
21 your neighbor?

22           **THE COURT:** And I took all of that into  
23 consideration.

24           **MS. RANGLES:** I mean, I think -- obviously, I think  
25 the Court's decision on this is right. I do not believe that

1 Plaintiffs have any -- without question we have met our burden  
2 of showing there's reckless indifference and disregard and so  
3 I believe that punitive damages in 2015 and '16 are  
4 appropriate.

5 **THE COURT:** Anything else you want to say, Mr. Hohn?

6 **MR. HOHN:** Just, you know, obviously they are  
7 bringing up Steve Smith. As Your Honor has pointed out, that  
8 testimony should be discounted from the time period that it  
9 relates to when people had generalized concerns about old  
10 dicamba.

11 You heard Dr. Ford Baldwin get up here and say he  
12 was extremely hopeful that, you know, in fact, they were  
13 putting together formulations that were going to be effective.

14 **THE COURT:** But that's the problem.

15 **MR. HOHN:** Yeah. But that's --

16 **THE COURT:** He put it out before that happened.

17 **MR. HOHN:** Yeah. But, I mean, the seed -- as you  
18 pointed out, the seed had multiple other benefits and you had  
19 other groups saying we need this seed for great reasons to  
20 combat, you know, weeds that are really problematic. So the  
21 product benefits there are -- really were not disputed.

22 You got -- I mean, you referenced that Dr. Boyd  
23 testified about another instance where the seed was released  
24 without chemistry. He did say that. And Greg Starling  
25 mentioned two instances where seed was released without a



1 corresponding chemistry. So that evidence is in the case.

2           The renegade document. I mean, it's not just about  
3 the pink sicker. And they keep harping on that. I mean, we  
4 heard extensive testimony about the 10-point communication  
5 plan and the extensive word. You had Dennis Cravens get up  
6 hear who said he knew it couldn't be done. He knew it was  
7 illegal and you couldn't apply it. That was common knowledge.

8           Even Dr. Ford Baldwin recognized it was common  
9 knowledge that people understood that it was illegal because  
10 Monsanto saturated the marketplace with communications through  
11 everywhere and every media.

12           So this does -- the clear and convincing evidence  
13 standard obviously has to instantly tilt the scales. And in  
14 light of all the mitigation efforts that negates any malice,  
15 this does not amount to something that borders on intentional  
16 conduct which is why --

17           **THE COURT:** I know. It just seems that the one  
18 mitigation effort that would have avoided a punitive damages  
19 claim would be additional testing on volatility.

20           **MR. HOHN:** But not relating to the early release of  
21 the seed, Your Honor. I mean, that's what we are talking  
22 about here. It's -- I mean, releasing the seed in '15 and  
23 '16.

24           **THE COURT:** Well, and then in '15 and '16 you  
25 started to get complaints right off the bat, lots.

1           **MR. HOHN:** No, I don't think there was evidence of  
2 lots in '15 and '16. In fact, in '15 the evidence came in  
3 there was -- were there some allegations that -- of, you know,  
4 complaints of use of illegal chemistries? Yes, there were  
5 some. And then in '16 I think they went up a little bit.  
6 Obviously the evidence in '17 things changed. But that was  
7 with the XtendiMax and Engenia herbicides that were on the  
8 market.

9           Obviously we believe, Your Honor, that we understand  
10 that you've limited the punitive submission to claims relating  
11 to 2015 and '16, relating to that release of the seed in those  
12 years. We understand that.

13           **THE COURT:** I got that part right.

14           **MR. HOHN:** Well, I won't say you got it right, but  
15 we will certainly -- we are happy that you have recognized  
16 that there shouldn't be any submission for 2017 on.

17           **THE COURT:** Okay. Anything else you want to add?

18           **MS. RANGLES:** Your Honor, I just want to make a few  
19 points.

20           First, working backwards, Mr. Hohn is not correct  
21 that Dr. Baldwin testified that it was common knowledge, the  
22 volatility of dicamba herbicides. He said within the  
23 scientific community they knew. He actually testified that  
24 dicamba had not been used very much in prior years and  
25 certainly not in Dunklin County, that is mostly cotton and

1 soybean. So it was not common knowledge among farmers there.

2 Next, in 2015 BASF told Boyd Carey that widespread  
3 OTM spraying of dicamba would be rampant in 2016. So they  
4 knew that. Boyd Carey, a very high executive in Monsanto,  
5 that was his testimony. So they knew that.

6 And in terms of people calling Monsanto and  
7 informing them about complaints, the plaintiff in this case  
8 called in 2015 and in 2016 and they didn't do anything. They  
9 refused to come down. He invited them multiple times and they  
10 refused to come. That's enough to meet that standard.

11 **THE COURT:** Yeah, that's all in your long list.

12 **MS. RANGLES:** Yes.

13 **THE COURT:** I'll overrule the motion.

14 Do you want to address bifurcation?

15 **MR. HOHN:** Yes, Your Honor. And real quick before I  
16 do that, I just want to -- we -- just so the record is clear,  
17 our original 50(a) motion on all the other liability theories,  
18 that was Docket No. 496, just so the record is clear, that  
19 motion was denied at the conclusion of the plaintiffs' case?

20 **THE COURT:** Yes, yes. If I didn't make that  
21 expressed determination then, I do now.

22 **MR. HOHN:** I just wanted to make it clear for the  
23 record.

24 **THE COURT:** Now that I remember, I did hold the  
25 punitive damage in abeyance.

1           **MR. HOHN:** You did.

2           **THE COURT:** So I have ruled on both motions at this  
3 time.

4           **MS. LADDON:** And, Your Honor, just for the record, I  
5 don't need to have a discussion on punitive damages given the  
6 Court's ruling, but we will just incorporate the arguments in  
7 our briefs.

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

9           **MR. HOHN:** Judge, on the motion to bifurcate, we  
10 filed that motion. That was Docket No. 301.

11           **THE COURT:** That was a long time ago. We are on 527  
12 now.

13           **MR. HOHN:** It was a long time ago. And I think the  
14 record has basically -- it's sort of been held in this state  
15 of abeyance for a period of time, so I do think it's important  
16 that we address it quickly on the record and get Your Honor's  
17 conclusion on it.

18                   But obviously we set forth in that motion that  
19 Rule 42(b) authorizes the Court to do what Monsanto is  
20 requesting, which is to have two phases in this case with the  
21 second phase being both entitlement and amount of any punitive  
22 damage award.

23                   I know from our informal conferences that the Court  
24 was leaning or inclined or whatever word you want to use to  
25 bifurcate but only have Phase 2 just be the amount of any

1 punitive damages award.

2 **THE COURT:** Right.

3 **MR. HOHN:** I would submit to you that in light of  
4 the potential confusion, because we do have -- where we have  
5 it is we have a case partially submitted on punitive damages  
6 relating to '15 and '16 claims, but not as to '17 and beyond  
7 claims. And the problem is since the body of evidence is  
8 going to be all one and punitive damages will only be allowed  
9 for one time period, it does create the possibility, and maybe  
10 more the possibility, the substantial risk for juror confusion  
11 in terms of punitive damages.

12 Whereas if you had a separate phase that both  
13 addressed entitlement and amount, that would greatly reduce  
14 any potential prejudice because the attorneys could focus in  
15 very specifically on the conduct that the Court believes is --  
16 makes it a submissible case.

17 I would say also --

18 **THE COURT:** On that point, I am convinced, though,  
19 that the jury can distinguish between the two episodes here,  
20 the '15 and '16, and the '17 and on. Mainly because of the --  
21 those are the two years of the early rollout. So I don't  
22 think that the jury will have any problem whatsoever in  
23 separating out the evidence for the two years from the  
24 evidence afterward.

25 **MR. HOHN:** We disagree obviously but understand Your

1 Honor's position.

2 I have pointed out that obviously in the other  
3 MDL -- ag MDL recently in this district, that's exactly the  
4 process that was done, which is to have entitlement and amount  
5 in Phase 2. It's also been -- you know, I can cite you some  
6 Judge Webber cases as well where he does the same thing as a  
7 routine matter.

8 I would also say that I think it would be very --  
9 there's a very helpful component to bifurcating because  
10 obviously if the case was improperly submitted on punitive  
11 damages, and if it's reversed on that basis, in this case it's  
12 not bifurcated as we are suggesting, that would mean potential  
13 retrial of the whole case, versus if it was improperly  
14 submitted and it were only in Phase 2, we wouldn't have that  
15 problem. So I think's there's a real practical point here  
16 that would be helpful.

17 **THE COURT:** The other thing I would add, too, in  
18 denying your motion is that all of the evidence is hugely  
19 overlapping between negligence and punitive damages  
20 submissions. And I just don't think there will be a problem.  
21 So I will deny that motion.

22 Now, on that point, though, as we -- I don't know  
23 that I brought this up. Maybe we did. But I think that it  
24 turns out that we can use the courthouse on Saturday morning  
25 after all. I guess we did talk about that. And so what I

1 would propose is that if, at the end of the day tomorrow, the  
2 jury comes back with a verdict that would allow a punitive  
3 damages submission, we will take that up at 9:00 a.m. the next  
4 morning.

5 So is that agreeable to everybody?

6 **MS. RANGLES:** Yes, Your Honor.

7 **MR. HOHN:** Yes.

8 **THE COURT:** I think it just will be too late of a  
9 night to continue on, as you suggested, Mr. Hohn, in the same  
10 day or the same night. And it's Valentine's Day.

11 **MR. HOHN:** Understood. I do have one -- I don't  
12 know, Ms. Randles, if you've had a chance to figure out what  
13 evidence might be submitted in a potential Phase 2.

14 **MS. RANGLES:** I have not talked to Mr. Randles.

15 **MR. HOHN:** Okay.

16 **MS. RANGLES:** That's a question for Mr. Randles.

17 **MR. HOHN:** Okay. But it is your intent to submit  
18 some kind of net worth evidence?

19 **MS. RANGLES:** Some sort of financial evidence, yes.

20 **MR. HOHN:** Okay. I would -- we would have a  
21 suggestion in that regard, Your Honor.

22 **THE COURT:** Twenty-four-hour rule?

23 **MR. HOHN:** It's too late.

24 **THE COURT:** Not if we are talking about Saturday  
25 morning.

1           **MR. HOHN:** You are right. I'm losing track of my  
2 days.

3           So no, I'm not going to invoke that oft-cited rule,  
4 but I do have --

5           **THE COURT:** Oft-cited.

6           **MR. HOHN:** But I do have a suggestion. I have not  
7 oft-cited it.

8           **MS. RANGLES:** You have not.

9           **MR. HOHN:** Okay. All right. Thank you.

10           So we have used a stipulation in the past relating  
11 to net worth of Monsanto. And so audited -- the most recent  
12 audited financials of the company would show what that number  
13 is. And so what we would propose from an evidentiary  
14 standpoint is that we show that to Plaintiffs and hopefully  
15 reach some agreement that that would be the evidence because  
16 then we won't have to present a witness.

17           **THE COURT:** That's great.

18           **MR. HOHN:** Or do anything like that. It would  
19 greatly --

20           **THE COURT:** Hopefully you can all work that out.

21           **MR. HOHN:** -- greatly streamline the presentation of  
22 this very unlikely thing to happen.

23           **THE COURT:** Okay. That's fine.

24           Now, any other motions that you-all want to take up  
25 at this time then? I think we have covered all the filings



1 for Plaintiff then?

2 **MS. GEORGE:** We have nothing, Your Honor.

3 **THE COURT:** All right. So are we ready to go into  
4 the instruction conference?

5 **MS. GEORGE:** I believe so.

6 **THE COURT:** Now, do you have the -- everything put  
7 together as we discussed?

8 **MS. GEORGE:** I sent it over -- they sent a proposed  
9 instruction for superseding and for mitigation. And I  
10 explained the one issue we have with mitigation and the  
11 superseding we have an objection to because it doesn't define  
12 what superseding is at all. We can talk about it back there  
13 if you want.

14 **THE COURT:** Okay. Well, why don't we go just off  
15 the record for five minutes or so, so that I can see what you  
16 have and we can exchange information. So if you give Shane a  
17 couple copies of what you had.

18 We can go off the record now.

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

20 **THE COURT:** Let's go on the record now.

21 What are we going to do on exhibits? What is your  
22 proposals? After the case is submitted to the jury.

23 **MR. BOZARTH:** Exhibits for the jurors?

24 **THE COURT:** Yeah. How do you want to handle that?

25 **MR. MOOK:** So, Your Honor, I guess the question is:

1 Do they have the ability to see electronic exhibits if we gave  
2 them the flash drive? Or anything that they want to go back,  
3 it has to be a paper copy?

4 **THE COURT:** I think so, yeah.

5 **MR. MOOK:** Okay. Our intention had been, I think,  
6 that they would have the availability to have the exhibits all  
7 go back with them. I don't know what that conceptually looks  
8 like in terms of a pile of paper right this second, so --

9 **THE COURT:** You may not know after more than a  
10 second?

11 **MR. MOOK:** I know.

12 **THE COURT:** What do you-all think?

13 **MR. COX:** I think it probably depends what they ask  
14 for, what it is, how big it is.

15 **THE COURT:** That's not much help.

16 **MR. COX:** We haven't given it any thought either,  
17 Your Honor.

18 **MR. SHAW:** Why don't we just cross that bridge when  
19 we get to it.

20 **MR. MOOK:** Well, I vote -- is the question whether  
21 or not we send everything back with them at the first  
22 instance? I mean, what's what I had contemplated was that  
23 it's been a document-intensive case and that there would be  
24 a -- everything that had been admitted into evidence would be  
25 sent back with the jury, at least that's what I think the

1 plaintiffs had considered.

2           **THE COURT:** That's fine with me, if we got some  
3 wheelbarrows and stuff.

4           **MS. GEORGE:** Where are they going to put it?

5           **MR. BOZARTH:** Can we confirm maybe with John and  
6 some of our other counsel in the morning?

7           **THE COURT:** Yeah, but -- okay.

8           **MR. MOOK:** We will have documents available.

9           **THE COURT:** I mean, I think it's your people who are  
10 going to be concerned about it more than me.

11           **MS. LADDON:** We have paralegals working during  
12 closings.

13           **THE COURT:** Is that right?

14           **MS. LADDON:** Yeah, a couple.

15           **MS. RANGLES:** We don't, Your Honor.

16           **MS. GEORGE:** I'm the paralegal.

17           **MS. RANGLES:** We will figure it out.

18           **MS. GEORGE:** We will figure it out and let you know.

19           **MR. SHAW:** Tomorrow.

20                           INSTRUCTION CONFERENCE

21           **THE COURT:** All right. At this time, then, let's  
22 have our instruction conference. And my intent is to go  
23 through all of the instructions that we have tentatively  
24 agreed will be submitted, and then after that each side can  
25 offer or tender instructions that I will then reject.

1           Okay. Instruction No. 1 will be Eighth  
2 Circuit 3.01. Any objection?

3           **MS. GEORGE:** No objection.

4           **MR. COX:** No, Your Honor.

5           **THE COURT:** For BASF?

6           **MR. BOZARTH:** No, Your Honor.

7           **THE COURT:** Instruction No. 2 will be Eighth  
8 Circuit 3.02. Any objection?

9           **MS. GEORGE:** No objection.

10          **MR. SHAW:** None.

11          **MR. BOZARTH:** None.

12          **THE COURT:** Instruction No. 3 is Eighth  
13 Circuit 3.03. Any objection?

14          **MS. GEORGE:** No objection.

15          **MR. SHAW:** No objection.

16          **MR. BOZARTH:** No objection.

17          **THE COURT:** Instruction No. 4 will be Eighth

18 Circuit 3.04. That's the burden of proof instruction. Any  
19 objections?

20          **MS. GEORGE:** No objection.

21          **MR. SHAW:** No objection.

22          **MR. BOZARTH:** No objection.

23          **THE COURT:** Instruction No. 5 is Eighth

24 Circuit 2.11. That's the charts and summaries instruction.  
25 Any objection?

1           **MS. GEORGE:** No objection.

2           **MR. SHAW:** No objection.

3           **MR. BOZARTH:** No objection.

4           **THE COURT:** Instruction No. 6, then, will be the  
5 opinion -- expert opinion instruction based on Eighth  
6 Circuit 3.8. Any objection?

7           **MS. GEORGE:** No objection.

8           **MR. SHAW:** No objection.

9           **MR. BOZARTH:** No objection.

10          **THE COURT:** Okay. Then 7 will be the negligence  
11 definition. And I understand this is submitted by Plaintiffs,  
12 and I understand that there is an objection by the defendants.  
13           Do you want to state that on the record, then? You  
14 can do it at your chair. We are fine.

15          **MR. COX:** Yes, Your Honor, we object to that. And  
16 believe that MAI 11.07 is the appropriate instruction. It's  
17 our understanding that the Court has determined that the seed  
18 is the issue or the defect. And if that is the case, the  
19 manufacturer of the seed is not subjected to a higher --  
20 higher standard for ordinary care. And for that reason, we  
21 think that MAI 11.07 is the appropriate --

22          **THE COURT:** And you join in that?

23          **MR. BOZARTH:** We do. And we would be submitting  
24 11.07 as well.

25          **THE COURT:** So anyway, I think that the plaintiffs'

1 submission is more appropriate given the submission that their  
2 theory of liability that the -- which is based on a system  
3 that consists of both dicamba-tolerant seed and low volatility  
4 corresponding herbicide. So I think that given the context of  
5 this case, that this particular 11.10 negligence definition is  
6 appropriate, so ...

7           As we go along, maybe we could -- if you have  
8 specific instructions that pertain to this, it might be  
9 appropriate to tender those now then as an alternative to  
10 11.10. So you have got -- you want to tender 11.07 at this  
11 time?

12           **MR. COX:** Sure.

13           **THE COURT:** Both defendants tender 11.07, and that  
14 will be rejected then.

15           **MR. BOZARTH:** And we filed, I think along with  
16 Monsanto, our packet that has all the instructions in it. So  
17 11.07 is in that.

18           **THE COURT:** Yes, yes.

19           Okay. Next, Instruction No. 8 is just the -- the  
20 packaging instruction. Two verdict forms are submitted. Any  
21 objection to Instruction No. 8?

22           **MS. GEORGE:** No, Your Honor.

23           **MR. SHAW:** Regarding the verdict forms, Your Honor?

24           **THE COURT:** No. This is, two verdict forms are  
25 submitted to you with these instructions.

1           **MR. SHAW:** No objection.

2           **MR. BOZARTH:** No objections, Judge.

3           **THE COURT:** Then Instruction No. 9 is the verdict  
4 directing instruction for the years 2015 to 2016 based on  
5 MAI 25.09 and MAI 19.01.

6           And, Counsel, I'll -- how do you want to handle this  
7 way of objections? Just to incorporate all of the -- several  
8 motions you made about this case on causation?

9           **MR. COX:** Judge, we have -- Dan Cox on behalf of  
10 Monsanto Company, Your Honor.

11           We have an overall -- I think I would call it an  
12 overall objection to both the negligent failure to warn  
13 verdict director for 2015 and '16, as well as the one that  
14 follows for 2017 forward.

15           And I don't want to plow new ground because there is  
16 some overlap on this point in our argument with the JMOL, but  
17 I think it's important that we get this right. As I said off  
18 the record, and I want to revisit what we discussed with  
19 regard to the *City of St. Louis v. Benjamin Moore* case, it's  
20 the case by the Missouri Supreme Court that we have all been  
21 referring to as the "City of St. Louis lead case."

22           As we discussed that case and while there was still  
23 an understanding that there would be a claim for strict  
24 products liability with respect to XtendiMax with VaporGrip,  
25 the Court did an analysis with us and came up with sort of two

1 points with regard to that in support of its decision that it  
2 would not be submitting a verdict director for strict, either  
3 theory, for strict products liability with regard to  
4 XtendiMax. And it did so in referring to that controlling  
5 Missouri Supreme Court case.

6 And in doing that you agreed that there is no  
7 evidence that Monsanto's XtendiMax with VaporGrip herbicide,  
8 which was first sold in 2017, was the actual cause of  
9 Plaintiffs' damage in this case.

10 **THE COURT:** There was evidence but that was not the  
11 exclusive evidence. There was evidence of it.

12 **MR. COX:** Well, the -- actually with regard to the  
13 evidence, Judge, the only other evidence with regard to  
14 XtendiMax with VaporGrip was that Mr. Cravens indicated that  
15 he thought Chad Fullerton sprayed it at some point in 2017.  
16 That's the only reference to it.

17 **THE COURT:** I take it what you are trying to say is  
18 that that's not the exclusive cause.

19 **MR. COX:** No. What I am trying to say is that --  
20 that neither that application, nor any other application, has  
21 been identified as the product that damaged any peach trees on  
22 the Bader Farm at any time over the top of an Xtend crop. And  
23 when we had that discussion, that was the context in which the  
24 atmospheric loading theory for the strict liability claims was  
25 raised.



1           And as you mentioned earlier, you believed that the  
2 City -- because we talked about the corresponding negligence  
3 cases, and you said just earlier that the City lead case is  
4 distinguishable because it only applies to products liability  
5 claims.

6           And we think that in rejecting the strict liability  
7 claim for both of those claims for 2017 forward was a correct  
8 application of those two cases; the City lead case and *Zafft*.  
9 As we had that conversation, the Court pointed out -- actually  
10 came up with the Court's own argument in explaining that after  
11 XtendiMax with VaporGrip was approved by the EPA and sold for  
12 use over the top of dicamba-tolerant crops, there was no  
13 evidence that VaporGrip was misused or that it was foreseeable  
14 that it would be misused in any way after approval.

15           Now, that wasn't our primary argument, but that was  
16 an additional analysis that the Court added to its conclusion.

17           **THE COURT:** Consistent with the underlying argument.

18           **MR. COX:** Consistent with the -- right. And so we  
19 don't think that the Court -- we don't think that that case is  
20 distinguishable with respect to the two submissions for  
21 negligence. We don't believe that it only applies to strict  
22 liability claims.

23           And, in fact, the Court -- the brief history of that  
24 case was that the City filed a number of claims initially,  
25 strict product liability claims, negligence claims. And we

1 think faced with the product ID and actual causation problem  
2 that they had with the City lead paint case, they said -- they  
3 dismissed those cases and said, we are only going to pursue on  
4 another tort theory, a different tort theory, and ask the  
5 Supreme Court for a relaxed standard with actual causation.  
6 And the Missouri Supreme Court rejected that case.

7           It said that the requirement that actual causation  
8 can be established only by identifying the defendant who made  
9 or sold a particular product. And it said that that  
10 requirement applies to all tort cases. That was the specific  
11 holding with respect to the other tort claim, the nonproducts  
12 liability claim in the City lead case.

13           So because of that holding, we believe that neither  
14 Instruction No. 8 and 9, I think with the two negligence  
15 theories that the Court has -- that we have been discussing,  
16 we don't think those claims are submissible at all,  
17 notwithstanding our objections to the specifics of those  
18 instructions. But we don't think -- we don't think they are  
19 submissible at all for that reason.

20           Now, in this case we think that to avoid the  
21 requirement of strict products identification, they have  
22 argued that they should be able to submit on a system. And,  
23 Judge, that system is what I understand is defined from these  
24 instructions as a dicamba-tolerant system. And as we have  
25 argued and as we think the record is clear, Monsanto does not

1 design or sell a system. The farmer designs the individual  
2 weed control system that he chooses to use.

3 Ty Witten took the stand and explained that a grower  
4 can choose a variety of products to make up his own weed  
5 control system. He can choose to use one or more of  
6 Monsanto's products or he can choose not to use them at all.  
7 If he does choose to use a Monsanto product, Monsanto can only  
8 be liable for the design and the warnings with regard to its  
9 own products.

10 I know the Court has ruled and mentioned earlier  
11 today on the record that it has determined that Monsanto can  
12 be liable for herbicides that it did not design, manufacture  
13 or sell. We think that is inconsistent with Missouri law.

14 And I would add with respect to the system, being  
15 the product, Boyd Carey took the stand and his testimony was  
16 that Monsanto marketed an Xtend crop system, and he identified  
17 the three products that comprised Monsanto's Xtend system, not  
18 a dicamba-tolerant system in general. Obviously Xtend cotton,  
19 Monsanto-branded Xtend cotton, Monsanto-branded Xtend  
20 soybeans, and XtendiMax with VaporGrip are Monsanto's  
21 products, and those are the products they put in the market  
22 and for which they can only be liable.

23 And with respect to 2015 and 2016, the only one of  
24 those products was the seed. It was Monsanto-branded Xtend  
25 seeds. And in '15 it was the cotton product, and in '16 it

1 was the soybean product. But that was the only product --  
2 those were the only products that were on the market that can  
3 be included in any system, however defined.

4 And our point with respect to '15 and '16, in  
5 addition to the fact that there has been no product ID with  
6 respect to any seeds either for those years, because we think  
7 their record is clear that other companies make their own  
8 brands of Xtend seeds that we do not design, manufacture or  
9 sell.

10 So with respect to our seeds, our Monsanto-branded  
11 seeds, Judge, they are not defective. They were not defective  
12 when they left Monsanto's control, and they do not become  
13 defective if somebody else applies an illegal herbicide over  
14 the top.

15 **THE COURT:** Well, as I've indicated before I think  
16 that the defect is the release of the seed without the  
17 corresponding herbicide, because that is the system. As you  
18 well know, I bought into the "system" theory of liability a  
19 long time ago, after an initial hiccup.

20 **MR. COX:** I'm well aware of that, Judge, which is  
21 why we submitted the additional case that we did for  
22 components.

23 **THE COURT:** The other point, too, I would make is  
24 that I do think that the lead paint case from 2007 is  
25 applicable to a products liability case. I don't think it's

1 applicable to the straight negligence case.

2           **MR. COX:** And I understand that's the Court's  
3 ruling.

4           But just one quick point with respect to the system,  
5 as we have not had a chance to really walk through this, but  
6 the system is made up of component parts. And as I said,  
7 Monsanto-branded seeds were not defective when they left, and  
8 we know that because Mr. Bader testified that in 2018 and 2019  
9 he planted those same seeds. He chose not to -- as part of  
10 his weed control system, he chose not to include as a  
11 component of that system any dicamba product. He grew  
12 Monsanto seeds, he harvested them, and he did not cause any  
13 damage in doing so.

14           So --

15           **THE COURT:** I know it's a novel theory, but I think  
16 it is submissible.

17           **MR. COX:** Well, and the last point I would say,  
18 Judge, is that the two cases -- *Sperry* and the  
19 temporomandibular joint case -- that we submitted with one of  
20 our other briefs point out that we can only be liable for the  
21 component part that we manufacture.

22           **THE COURT:** I think those cases are distinguishable.

23           **MR. COX:** I understand. I think that's our main  
24 objection to the overall submissibility of both of their  
25 negligence theories and --

1           **THE COURT:** Now --

2           **MR. COX:** Since we are going through these one by  
3 one, we thought we would do some -- that we would do some  
4 specific objections in addition to --

5           **THE COURT:** Okay. And then tell me if you want to  
6 submit some proposed alternative.

7           **MR. COX:** Yes. And we do, Your Honor.

8           So I think the first thing that we would point out  
9 with respect to the negligence directors is that for 2015 and  
10 2016, it allows consideration of BASF's conduct as a basis for  
11 liability, but there is no opportunity to hold them liable on  
12 Verdict Form A for 2015 and '16. And there is no  
13 apportionment responsibility for them on Verdict Form B,  
14 either A or B.

15           **THE COURT:** I thought we are addressing that concern  
16 in the verdict forms.

17           **MR. COX:** We are. I added -- I put a tail on that  
18 one, Judge.

19           **THE COURT:** Okay.

20           **MR. COX:** So we will address that then as well.

21           I've made my point with respect to the system.  
22 There is another objection that we have with respect to the  
23 phrase "such defendant individually or jointly with another  
24 defendant," because it permits vicarious liability without a  
25 finding that all of the elements for vicarious liability

1 theory are met.

2           **THE COURT:** And, again, that concern is addressed in  
3 the joint venture submission combined with the pertinent parts  
4 of the verdict form.

5           **MR. COX:** And then, Judge, there is the additional  
6 argument that we talked about off the record in the first --  
7 in the paragraph that starts "first" on the verdict director  
8 for 15, as well as the same language in 15 refers to a  
9 defendant selling any one or more component of the  
10 dicamba-tolerant system. But when you go down to the third  
11 numbered paragraph, it changes the terminology and we think  
12 that's confusing and needs to be consistent with the rest of  
13 the instructions.

14           So in third little ii we think -- where it reads  
15 "adequately warns of the risks of off-target movement," that  
16 is not directing the jury to any particular component or the  
17 system itself. And we think that language needs to be  
18 consistent, and we would say that in the -- in the warning  
19 section that the language should track either, quote, "one or  
20 more component" or, two, quote, "dicamba-tolerant system" or  
21 "components" would work as well.

22           So I think those are our specific objections to both  
23 of those directors. Of course the Court knows how fond I am  
24 of the City lead case, so I wanted to start and finish with  
25 that.

1           **THE COURT:** I do not think that it is confusing to  
2 the jury. I think the confusion results in your unwillingness  
3 to acknowledge that the whole claims are based on a system.

4           **MR. COX:** I certainly understand that. Our point  
5 with respect to the system is that these instructions don't  
6 identify any product that we manufactured and sold. So in  
7 '15 if Monsanto-branded Xtend seeds that they think were  
8 defective, the jury should be instructed on that. And the  
9 same for our herbicide product in 2017.

10           **THE COURT:** You join in everything?

11           **MR. BOZARTH:** I do, with respect to BASF product  
12 Engenia we join.

13           We also have -- and this is something that we  
14 discussed with regard to the split with the '15 and '16 and  
15 '17 going forward, we have the -- I am not in agreement with  
16 the indivisibility --

17           **THE COURT:** So what do you mean by that?

18           **MR. BOZARTH:** Well, what we've done is we have split  
19 out the years to deal with the liability portion.

20           **THE COURT:** To accommodate your client.

21           **MR. BOZARTH:** Rightly so, yes.

22           And the damage that Plaintiff is submitting they are  
23 saying is indivisible. We don't believe that's the case.  
24 They have -- they -- their expert may not have testified about  
25 it but he certainly made findings of '15 damage, '16 damage



1 and '17. So -- and that's the related but different issues  
2 where there's a single verdict amount on the verdict form for  
3 an amount versus --

4 **THE COURT:** Well, under their theory of liability  
5 and their theory of damages, though, they are asking for all  
6 or nothing. So they are not asking that the jury break out  
7 damages for any given year. They think that they should get  
8 damages for the entire total loss.

9 **MR. BOZARTH:** I understand that, Judge. I'm just  
10 telling you what our objection is and that I think that --

11 **THE COURT:** That's more to your damages instruction,  
12 isn't it?

13 **MR. BOZARTH:** Correct. But it's a piece of this  
14 just as well.

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

16 Do you-all want to add anything in support of your  
17 verdict directors?

18 **MS. GEORGE:** We would say we believe the Court  
19 correctly understands our theory of the case, which is based  
20 upon a system and not any one component part and we don't feel  
21 there's a need to add anything in contradiction to what the  
22 Court already said.

23 **MR. BOZARTH:** I was just going to -- we have also  
24 submitted in our packet our Engenia claim that relates to  
25 this.

1           **THE COURT:** Yeah, I know. You have the same  
2 objections.

3           **MR. BOZARTH:** Yeah.

4           **THE COURT:** So those objections will be overruled.  
5 I am going to submit Instructions 9 and 10 as submitted by  
6 Plaintiffs.

7           Now, do you-all want to tender some alternative  
8 instruction, verdict directing instructions on behalf of the  
9 plaintiff?

10           **MR. SHAW:** Your Honor, I have a group of  
11 instructions that are marked as Exhibit A to documents filed  
12 with the Court today, Docket No. 537, Monsanto Company's  
13 proposed jury instructions and verdict form. And the -- and I  
14 will hand them separately to the clerk now.

15           And the top one is the alternative negligence  
16 instruction.

17           **THE COURT:** Okay. So we will use that first. I  
18 will mark that A.

19           **MR. SHAW:** The remainder, Judge, are the  
20 instructions we propose that should be used in the submission  
21 of the case.

22           **THE COURT:** Okay. So as we discussed on the  
23 negligence instruction with the regular ordinary care  
24 definition, I am going to mark that Defendants', plural,  
25 Instruction A, tendered and rejected then.

1           So going into the proposed verdict directors, you  
2 have a load of them. So I count one, two, three, four, five,  
3 six and seven; right? Seven alternative verdict directors?

4           **MR. SHAW:** Hold on just a second, Your Honor.

5           **THE COURT:** Sure there's not eight?

6           **MR. SHAW:** Six verdict directing instructions,  
7 Judge. And one which would have given a definition of Xtend  
8 seed and XtendiMax herbicide.

9           **THE COURT:** Oh, okay. That's the first one. Okay.  
10 That's not a verdict directing instruction. That's a  
11 definition of Xtend seed. And I will mark that Instruction B,  
12 tendered by Defendants and rejected.

13           And then the next six, then, are the proposed  
14 verdict directors. Did I get that right finally?

15           **MR. SHAW:** That's correct, Judge.

16           **THE COURT:** Okay. I'm going to mark those C, D, E,  
17 F and G and H, and mark them tendered by Defendants, plural,  
18 and all rejected.

19           Do you have other proposed verdict directing  
20 instructions?

21           **MR. BOZARTH:** Yes, sir.

22           **THE COURT:** That are different than these?

23           **MR. BOZARTH:** I'm sorry?

24           **THE COURT:** That are different than these?

25           **MR. BOZARTH:** We had a definition of Engenia.

1           **THE COURT:** Okay.

2           **MR. BOZARTH:** Which is in our packet. So what I can  
3 do is I can pull them apart so you can have them. I just  
4 thought we were going to do them from the packet, but that's  
5 fine. I'm happy to do it either way.

6           **THE COURT:** Why don't we wait on yours then, because  
7 I'm going to show you agreeing with all of theirs first of  
8 all.

9           **MR. BOZARTH:** Okay. Thank you.

10          **THE COURT:** So if there are any particular to BASF  
11 only, we will take those up at the end.

12          **MR. BOZARTH:** All right. Thank you.

13          **THE COURT:** I am running -- that will skew my  
14 lettering.

15          **MR. BOZARTH:** I thought it would streamline.

16          **THE COURT:** Okay. Now, let's go, then, to the  
17 damages instruction. That will be Instruction No. 11.

18                 And that's based on MAI 4.01 submitted by  
19 Plaintiffs. There's been extensive briefing and argument on  
20 this matter about the proper measure of damages. And I know  
21 that Defendants want to submit 4.02. But I think you have  
22 briefed that point extensively, and I have issued a ruling  
23 about the proper measure of damages, which speaks for itself I  
24 think. So I don't need to say anything further, but you may  
25 elaborate if you wish.

1           **MR. COX:** You have, Judge. And we won't belabor it,  
2 but -- and we do have an alternative submission. Our specific  
3 objections to 4.01 in addition to the arguments that BASF  
4 submitted in brief, and we will address here shortly, is that  
5 it refers to -- at the end of the instruction, and the quote  
6 is "which the occurrence in the evidence directly caused or  
7 directly contributed to cause," this -- we think the  
8 instruction should limit recovery to damages caused by the  
9 defendants' conduct for which liability was found, and we have  
10 a proposal that we believe takes care of that.

11           It's on page 22 of document 537, our proposals.

12           **THE COURT:** Is that the one that reads "In order to  
13 find that Plaintiff Bader Farms, Inc. was damaged as a direct  
14 result of Defendant Monsanto's alleged negligence, Plaintiff  
15 Bader Farms, Inc. must prove that its peach orchard was  
16 damaged as a direct result of Monsanto Xtend seed or Monsanto  
17 XtendiMax herbicide"?

18           **MR. COX:** Judge, that's one of our causation  
19 submissions. The altern -- the alternative 4.02, is on  
20 page 27 of our submission.

21           **THE COURT:** Okay. Let me -- oh.

22           **MR. COX:** And as I said, this is not one I want to  
23 belabor because I know the Court's position on this.

24           **THE COURT:** I have got it now. So I will label that  
25 instruction I, tendered by both defendants and rejected.

1           **MR. BOZARTH:** The only other issue on that that just  
2 corresponds with our briefing, just to round out the  
3 objection, is the recent Eighth Circuit case of *Keller Farms*  
4 we believe mandates 4.02 in this situation.

5           **THE COURT:** That's part of the briefing, correct.  
6           So now let's take up the mitigation. Is that -- I  
7 think that's where we decided to plug in the mitigation  
8 instruction. You all have a copy of that. This is submitted  
9 by Defendants.

10           And do you have a citation to it?

11           **MR. PRZULJ:** Yes, Your Honor.

12           **MR. SHAW:** I think it -- it's not on there, Judge.  
13 MAI 32.29.

14           **THE COURT:** 32.29. All right. Any objection by  
15 Plaintiffs?

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

17           Plaintiffs object to the submission of a mitigation  
18 instruction because we believe that Defendants have failed to  
19 offer sufficient evidence of any specific damage at Bader  
20 Farms that was caused by Bill Bader or Bader Farms' failure to  
21 mitigate damages. There's been insufficient evidence from  
22 either experts or financial witnesses who are able to quantify  
23 any damage that occurred as a result of Bader Farms' farm  
24 management practices. So we would just preserve those  
25 objections for the record.

1 I think that's all that we are making of that,  
2 right?

3 **THE COURT:** Okay. I will overrule your objections.  
4 I think there is sufficient evidence to support the mitigation  
5 instruction; so I will submit MAI 32.29 and mark it  
6 Instruction J.

7 And in that regard do you wish to submit some  
8 alternative instruction?

9 **MS. GEORGE:** No, Your Honor. Thank you.

10 **THE COURT:** Okay. Now we will go to the punitive  
11 damages instruction.

12 **MR. MOOK:** Your Honor, I'm sorry to interrupt. Why  
13 is that one being numbered J, since it is going to be  
14 submitted with the packet instead of as a --

15 **THE COURT:** I misspoke.

16 **MS. GEORGE:** Is it 12 maybe?

17 **MR. BOZARTH:** 12.

18 **THE COURT:** Yeah, it's 12. I misspoke. Thank you.  
19 I caught it at the same time you did. My letters  
20 and my numbers are becoming confused.

21 **MR. MOOK:** It's late in the day.

22 **MR. SHAW:** Okay. Judge, before Troy, the  
23 Instruction 12, as you recall when we were in chambers, we had  
24 an instruction that would go just before the little short one.

25 **THE COURT:** You are going to tender --

1           **MR. SHAW:** We want to tender that one as well, but I  
2 don't know if that one is still back in chambers or not.

3           **THE COURT:** Let's see here. That's on your sole  
4 cause instruction?

5           **MR. SHAW:** No, no, no. The mitigation one.

6           **MR. BOZARTH:** The shorter one directs to the larger  
7 one. So it should be 12 and 13.

8           **THE COURT:** You are right. And I am sorry about  
9 that.

10          **MR. SHAW:** It should be 12 and 13 now, Judge, with  
11 the little short one, introductory. And that should be 12 and  
12 mitigation would be 13.

13          **THE COURT:** I wish we could combine those, but I  
14 guess it's no big deal. I will just mark the first one as  
15 Instruction No. 12. So it will read "If you find that Bader  
16 Farms failed to mitigate damages as submitted in  
17 Instruction 13."

18                   Did I get it right then?

19          **MR. SHAW:** Yes.

20          **THE COURT:** Sorry. Now we are back on track.

21                   And we will go to the punitive damage submission.  
22 This is based on -- and I will mark this as Instruction  
23 No. 14 -- based on MAI 10.02 and MAI 35.19. And I do notice  
24 that when you give me a final copy of all of this, there's --  
25 it needs to be -- blanks need to be fixed. Great.



1           Objections?

2           **MR. COX:** Yes, Your Honor.

3           **THE COURT:** A multitude of them.

4           **MR. HOHN:** We don't think they should be submitted  
5 at all for all the reasons that I previously gave, but with  
6 respect to this specific instruction, we have several  
7 objections we want to make sure are on the record and in front  
8 of the Court.

9           **THE COURT:** In addition to those that we discussed  
10 just a while back today?

11          **MR. HOHN:** That is correct, Your Honor.

12           So specifically we would object to this Instruction  
13 No. 14 for all of the same reasons we objected on the verdict  
14 directors as well, because basically if there's an incorrect  
15 verdict director, then this punitive instruction is based upon  
16 that so obviously we would object on that basis.

17           Secondly, Your Honor, we object to the inclusion of  
18 the words "or jointly with Defendant BASF" because that would  
19 allow punitive damages awarded against Monsanto based upon the  
20 conduct of BASF, which we think is inappropriate.

21           Third, Your Honor --

22          **THE COURT:** Well, let me address that now. Isn't  
23 that taken care of in the verdict form, that concern?

24          **MR. HOHN:** Well, that just allocates the number, you  
25 know. What this effectively does, because this is directed to

1 Monsanto's conduct, is that they could -- the jury could take  
2 into account conduct of BASF Corporation for which Monsanto is  
3 not responsible.

4 **THE COURT:** I thought we addressed all of this stuff  
5 in our informal meetings.

6 Go ahead.

7 **MR. HOHN:** So, yeah, it obviously allows the jury to  
8 consider conduct of BASF in coming up with a decision of  
9 whether or not to punish Monsanto.

10 **THE COURT:** But that's only if there's joint  
11 venture.

12 **MR. HOHN:** Well, no, because this instruction is --  
13 is going to be out there -- I mean, so the jury is going to  
14 make a decision based on this instruction whether to award  
15 punitive damages, and they can decide later either it's a JV  
16 or not. And so as it stands right now, you know, just with  
17 this instruction, this is allowing the jury to consider the  
18 conduct of BASF. So we think --

19 **THE COURT:** I wish you would have raised this  
20 earlier when we were going over --

21 **MR. HOHN:** Well, we were going pretty fast. And so  
22 that, you know, was -- that's obviously a concern, Your Honor,  
23 and we think inappropriately allows a jury to consider another  
24 party's conduct.

25 **THE COURT:** What else?

1           **MR. HOHN:** You want me to keep going?

2           **THE COURT:** Yeah.

3           **MR. HOHN:** All right. So, Your Honor, also we would  
4 object to the use of the term "harm to others." This  
5 instruction basically allows the jury to consider evidence of  
6 harm to others. I know the Court has, specifically with  
7 respect to the other complaints that are out there or other  
8 information that was provided to Monsanto, all of that has  
9 come in not for the truth of the matter asserted but for  
10 actual notice.

11           **THE COURT:** Well, let me ask you. Isn't this taken  
12 directly from the MAI?

13           **MR. HOHN:** It is, yes. But I think in the context  
14 of this case --

15           **THE COURT:** You don't think the evidence supports  
16 it?

17           **MR. HOHN:** It does not support it.

18           **THE COURT:** So that's your point then?

19           **MR. HOHN:** It is my point. But it's also my point  
20 that in the specific instance of this case, when you are  
21 talking about harm to others, when the evidence came in only  
22 for the purpose of notice, that that is incorrect as submitted  
23 as such.

24           I would also make the point, Your Honor, since I did  
25 have a chance to look at -- I know we have been looking at the

1 annotations to MAI, and I did have the chance to look at the  
2 annotations real quick on this particular instruction from  
3 MAI 10.02, that it -- that the notes from the committee  
4 specifically reference risk of bodily harm.

5           And that is a problem. Obviously we don't have a  
6 case here where there -- where there is a claim of bodily  
7 harm. Nor are any of the other complaints or incidents that  
8 we have -- that have come in for purposes of notice at all  
9 relating to bodily harm. Obviously it's an economic loss  
10 case. It's straight dollars and figures in terms of economic  
11 loss.

12           So --

13           **THE COURT:** What about other kinds of harm, other  
14 than --

15           **MR. HOHN:** Well, I am just telling you what the  
16 advisory committee notes to 10.02 reflect is that the  
17 statement in 10.01 and 10.02 --

18           **THE COURT:** They are talking about bodily harm only?

19           **MR. HOHN:** They are talking about bodily harm.

20           **THE COURT:** Really?

21           **MR. HOHN:** Yep. So this -- the committee notes say  
22 in *Nichols v. Bresnahan*, "The Court cited with approval, the  
23 Restatement of Torts, Section 500, stating the actor's conduct  
24 is in reckless disregard of the safety of another if he  
25 intentionally doesn't act or fails to do an act which is the

1 duty of the other to do, knowing or having reason to know  
2 facts that would lead a reasonable man to realize that the  
3 actor's conduct not only creates an unreasonably" --

4 **THE COURT:** Go slower for the court reporter.

5 **MR. HOHN:** -- "not only creates an unreasonable risk  
6 to bodily harm to the other but also involves a high degree of  
7 possibility that that substantial harm will result to him."

8 **THE COURT:** Well, wait a minute. This is straight  
9 out of MAI; right? Are you proposing --

10 **MR. HOHN:** The 10.02 is straight out of MAI, and  
11 what I am reading to you are the notes of the committee  
12 relating to that, relating to that instruction, which  
13 specifically tie back to bodily harm.

14 So in this instance, and as the evidence has come  
15 in, Your Honor, there is no evidence of bodily harm. It's an  
16 economic loss case. And all of the complaints and other  
17 incidents have come in not for the truth but for notice.

18 So for all of those reasons, we think that this  
19 instruction as written is inappropriate and would allow the  
20 jury basically to consider this evidence for an improper  
21 purpose and deprive Monsanto of its due process rights under  
22 the constitution.

23 **THE COURT:** Okay. I will hear from Plaintiffs on it  
24 then.

25 **MR. HOHN:** The only other -- I will make one final

1 point, Your Honor.

2 **THE COURT:** Okay. Yeah.

3 **MR. HOHN:** Is that, again, we raised this in the  
4 informal conference, but there's been no definition of clear  
5 and convincing. And I think -- to this instruction or to  
6 conspiracy. And without that definition, we think the jury  
7 lacks sufficient guidance as to the requirements for awarding  
8 punitive damages.

9 **THE COURT:** Okay. Again, this is straight out of  
10 MAI, and I do think that there was evidence of harm to others,  
11 though not bodily harm, and the evidence was not limited just  
12 to notice but there was some to actual harm. But I will let  
13 Plaintiff address these points at this time.

14 **MR. HOHN:** We would disagree. I am not sure -- I  
15 don't think I heard that evidence, but ...

16 **MS. GEORGE:** That section, you are right, Judge, is  
17 straight out of the MAI, in that you may consider harm to  
18 others. And it's actually a requirement from the *Philip*  
19 *Morris v. Williams* case, and it's also in 10.02 in the  
20 committee notes which refers to the concept that "conduct that  
21 harmed Plaintiff also posed a substantial risk of harm to the  
22 general public."

23 This instruction is given in punitive damages cases  
24 all across Missouri not limited to bodily harm cases.

25 Prior to that, Mr. Hohn made an argument that there

1 shouldn't be the phrase "individually or jointly" because it  
2 allows --

3 **THE COURT:** Go a little slower.

4 **MS. GEORGE:** I'm sorry.

5 -- because it allows the jury to consider conduct  
6 that was solely of BASF. That's a false statement. We talked  
7 about this back in our informal conference. Judge, you are  
8 right. We did speak of this. And what we discussed is the  
9 way this is worded is intended, and it's very clear, that it's  
10 to consider Defendant Monsanto Company's conduct individually  
11 or jointly with BASF.

12 Meaning something Monsanto did on its own or  
13 something Monsanto did with BASF, not something BASF did by  
14 itself. So it doesn't -- it doesn't do that. And Your Honor  
15 already addressed this back in chambers.

16 **THE COURT:** I will overrule the objections, then, on  
17 that.

18 Now, do you want to offer a different instruction,  
19 tender a different instruction?

20 **MR. HOHN:** Yes, we do have alternate instructions to  
21 tender, and I believe Mr. Shaw provided those to you in the  
22 packet.

23 So just to be clear, you've overruled the objections  
24 that I raised?

25 **THE COURT:** Yes.

1           **MR. HOHN:** All right.

2           **MS. GEORGE:** Chris, before we move, can I make a  
3 record of our form, our verdict form?

4           **MR. HOHN:** Verdict form?

5           **MS. GEORGE:** I'm sorry, verdict directors.

6           **MR. HOHN:** Okay.

7           **MR. BOZARTH:** For BASF.

8           **MR. SHAW:** Judge, you were asking if we had given  
9 those to you, our submission on punitives, and they are at  
10 pages 29 through 35.

11           **THE COURT:** Got it.

12           **MR. BOZARTH:** Because this potentially is implicated  
13 with the JV, BASF would join in the objections for our record.

14           **MS. GEORGE:** Real quick. Just to make a record,  
15 Your Honor, you know that Plaintiffs object to not being  
16 allowed to submit punitive damages claims for '15 all the way  
17 through '18, and so we did submit -- we filed an instruction  
18 that a verdict director that would include all years. We  
19 filed it at Docket 538, Exhibit A. But I can hand them up to  
20 you if you would like to mark as -- to reject, an instruction  
21 on punitives for the whole time instead of just being limited.

22           **THE COURT:** Okay.

23           **MS. GEORGE:** The first one is a punitive damages  
24 verdict director against Monsanto, which would include strict  
25 liability which -- and for all the years, which I know you are



1 rejecting.

2           **THE COURT:** Okay. Now, before I do that, though, I  
3 forgot another failure to -- failure to mitigate damages  
4 instruction that the Defendants had, and that in an informal  
5 conference we reduced the one that I've already approved and  
6 submitted.

7           Do you want to submit this too? This is the one  
8 that talked about continuing to plant peach trees and that  
9 kind of thing.

10           **MR. HOHN:** Not necessary.

11           **MR. SHAW:** No, that was the one you rejected, Your  
12 Honor.

13           **THE COURT:** No, this is the mitigation damages that  
14 we culled down to what we eventually agreed on that you  
15 submitted.

16           **MR. HOHN:** We are fine with the one that we culled  
17 down and agreed to.

18           **THE COURT:** I will set that aside.

19           **MR. HOHN:** Very good.

20           **THE COURT:** Thank you.

21           So first of all, I am going to mark -- what letter  
22 am I up to? I.

23           The Court notes that both Plaintiffs and Defendants  
24 are submitting alternate punitive damages instructions, and so  
25 the ones that I -- the one that I just approved as Instruction

1 No. 14 is the one that will be given. That was submitted by  
2 Plaintiffs.

3 Plaintiffs also submitted alternative instructions,  
4 and I will mark those -- did I get two copies of the same  
5 thing?

6 **MS. GEORGE:** One is the punitive damages verdict  
7 director against Monsanto and one was for BASF. Our original  
8 submission where we were going to submit on punitive damages  
9 for all years on all claims.

10 **THE COURT:** I see. So I will mark the punitive  
11 damages against Monsanto as Instruction No. J and mark it  
12 tendered and rejected.

13 And then K will be the Plaintiffs' proposed  
14 alternate punitive damages instruction against BASF. K is  
15 tendered and rejected.

16 Now I will go to Defendants' punitive damages  
17 instructions. While the first one is based on 10.03 modified,  
18 we will call that Instruction No. L. Tendered and rejected.

19 And then there's an instruction that begins  
20 "Punitive damages may not be imposed unless Plaintiff Bader  
21 Farms has proven by clear and convincing evidence," and it's  
22 basically a definition of clear and convincing evidence. And  
23 that's not required by MAI, and so I'm going to show that as  
24 Instruction No. M, tendered and rejected.

25 And then there's also a punitive damages director

1 submitted by Defendants, which I will mark as Instruction  
2 No. N, based on MAI 10.04 modified. I will mark that tendered  
3 and rejected. And that was specifically against Defendant  
4 Monsanto.

5 And there was an identical one that's specifically  
6 addressed to BASF, which I will mark as Instruction No. O,  
7 tendered and rejected.

8 And here is one. It says "In considering whether  
9 Defendant Monsanto's or Defendant BASF's conduct meets the  
10 standard for an award of punitive damages, you may consider  
11 only the specific conduct you found harmed Plaintiff Bader  
12 Farms, Inc.," and it goes on.

13 So I will mark that Instruction No. P, tendered and  
14 rejected.

15 **MR. BOZARTH:** For the record, BASF is not joining in  
16 the instructions tendered on BASF's punitive damages.

17 **THE COURT:** Okay.

18 **MR. BOZARTH:** Thank you.

19 **MS. GEORGE:** I have two more. Can you reject two  
20 more?

21 **THE COURT:** Yes.

22 **MS. GEORGE:** Your Honor, these are the strict  
23 liability instructions that would have encompassed all years,  
24 and the Court ruled that we couldn't submit on '17 through  
25 '18, so this is the one against -- one for product defect and

1 one for failure to warn, strict liability, that had all years.

2 **THE COURT:** Okay. Okay. I'm going to mark these Q  
3 and R.

4 The first one is product defect and the second one  
5 is failure to warn. Both strict liability. And the reasons I  
6 rejected these is, as we discussed informally, that  
7 paragraph third says that the Xtend system was used in a  
8 manner reasonably anticipated, and that under the lead paint  
9 case, that would exclude the evidence that's come in the case  
10 that there was damage that was caused in a manner not  
11 reasonably anticipated.

12 Did I get that right, Defendants?

13 **MR. COX:** I believe so, Your Honor.

14 **THE COURT:** All right. So anyway, I will show  
15 Instructions Q and R tendered and -- by Plaintiff and  
16 rejected.

17 Well, here is another one.

18 Now I'm getting them out of order, kind of. This is  
19 page 18 of the Defendants' submissions. This is one that says  
20 "In order to find that Plaintiff Bader Farms, Inc. was damaged  
21 as a direct result of Monsanto's alleged negligence, Bader  
22 Farms must prove its damage was as a direct result of Monsanto  
23 Xtend seed or Monsanto XtendiMax herbicide."

24 For the reasons stated earlier, I will mark that one  
25 as Instruction No. S. That's tendered by Monsanto only and

1 rejected.

2           Instruction No. T is -- says "In order to find that  
3 Bader Farms, Inc. was damaged as a direct result of Monsanto's  
4 negligence" and so on. I will show that tendered and rejected  
5 by Monsanto.

6           Then Instruction No. U is a superseding cause  
7 instruction that we've discussed and the Court has determined  
8 that MAI does not permit a sole cause instruction or a  
9 superseding cause instruction that is essentially a sole cause  
10 instruction.

11           So I will show Defendant Monsanto's Instruction U as  
12 entered and rejected.

13           Here is another one. Defendant Monsanto is not a  
14 guarantor against or liable for any and all accidents and  
15 injuries, and it goes on and on. That's V. Instruction  
16 No. V, tendered and rejected.

17           Instruction No. W is that "Defendants have the right  
18 to reasonably assume that any warning issued in connection  
19 with Xtend seed would be read and heeded."

20           As we discussed, I'm not going to submit that as a  
21 written instruction, but you can certainly argue it. So  
22 that's marked Defendants', plural, Instruction W. Tendered  
23 and rejected.

24           Now, we finished through 14, and so the next one on  
25 page 14 is -- states "If you find in favor of Bader

1 Farms, Inc. on any claim in Verdict Form A, then you must  
2 answer the questions in Verdict Form B. Verdict Form B asks  
3 you to answer questions about joint venture and conspiracy  
4 among the Defendant companies."

5 So I am going to mark this Instruction No. 15.

6 **MS. GEORGE:** No objection.

7 **THE COURT:** This is just an introductory  
8 instruction.

9 **MR. SHAW:** No objection.

10 **THE COURT:** Okay. It's -- that's Instruction  
11 No. 15.

12 And then 16 is the joint venture instruction  
13 submitted by Plaintiffs based on *Morley v. Square*.

14 So, Counsel, I know you want to object to the joint  
15 venture instruction for all the reasons that have been  
16 submitted so far and put on the record.

17 **MR. BOZARTH:** Yes.

18 **THE COURT:** Is there anything else?

19 **MR. BOZARTH:** Well, if you could flip back to 15  
20 real quick, Judge. There was an issue that you actually  
21 raised which was in our judgment as a matter of law whether a  
22 joint venturer can conspire with itself. So I don't know if  
23 you want to -- you said you wanted to talk about it during the  
24 instructions.

25 **THE COURT:** Oh, you are right about that. Thanks

1 for bringing that up.

2           Let's go back to 15 because it does say -- asks you  
3 to answer questions about joint venture and conspiracy among  
4 the Defendant companies. But we've determined, I think -- did  
5 you-all consider that, that you can't have -- it's one or the  
6 other and not both?

7           **MS. GEORGE:** You mean -- so the damages would be the  
8 same. If they find them liable for joint venture, they find  
9 them liable for conspiracy, so there's no -- there's -- even  
10 if they argue that joint venturers can't conspire, if the jury  
11 does select yes, that they find a conspiracy and yes, that  
12 they find they engaged in a joint venture, the damages are the  
13 same and there's no error in that.

14           There's no inconsistency in the application to the  
15 verdict form and the damages that would be awarded. It  
16 doesn't double them. It doesn't halve them. It doesn't do  
17 anything. So checking yes on both of those is not  
18 inconsistent. It would invite legal error to do it any other  
19 way.

20           What is your proposal?

21           **MR. BOZARTH:** Our proposal is you need to choose a  
22 cause of action that goes back to the jury. You can't send  
23 both back.

24           **THE COURT:** How are you doing it, then, on failure  
25 to warn or design defect? Same deal, isn't it?

1           **MR. BOZARTH:** I'm sorry?

2           **THE COURT:** How do you do it, then, on failure to  
3 warn or design defect? I mean, you can have multiple  
4 submissions that way. Why not this way?

5           **MR. BOZARTH:** Because a -- there's actually a  
6 Supreme Court case and Missouri cases that say that a joint  
7 venture cannot conspire with itself.

8           **THE COURT:** Right.

9           **MR. BOZARTH:** And to send both back is confusing to  
10 the jury. They -- they need to argue one or the other, and  
11 they can't just argue both. We have --

12           **THE COURT:** Well, by that same token, how do they  
13 get to argue failure to warn or design defect?

14           **MR. BOZARTH:** I don't think those are -- I don't  
15 think those are the same level or the same issue, Your Honor.  
16 Because what we are dealing with here is you -- and this comes  
17 up all the time, and there's actually three or four U.S.  
18 Supreme Court cases on whether a joint venturer can conspire  
19 with itself. And they say they can't.

20                   So a lot of the cases -- and this is why it came up  
21 in the JMOL context, because the cases say that it should be  
22 one or the other. And it's usually dismissed earlier on, but  
23 to send both back to the jury, basically what you are doing is  
24 you are inviting error from the confusion of just -- if  
25 they -- if they answer both, for example, if they answer both



1 yes, that's clearly legally inaccurate. It cannot happen,  
2 according to the U.S. Supreme Court. So you have just  
3 injected error there.

4 I think they need to pick a horse and ride it. They  
5 have been beating the joint venture, so --

6 **THE COURT:** Okay. I think that everybody needs to  
7 brief this and we will see you in a week or so. This is an  
8 issue that is impossible for me to resolve right now.

9 You are saying something that is fundamental to this  
10 case now, and it was brought up for the first time yesterday  
11 in your motion for directed verdict at the conclusion of all  
12 the case, all the evidence. I -- I read it very closely. I  
13 saw the point that you are trying to make. And here we are  
14 confronted with a major problem.

15 **MS. GEORGE:** Your Honor, I just have to say it's not  
16 a major problem. I know that -- I know that he has  
17 addressed -- the way he presents it, it sounds like a major  
18 problem. Even if he were correct, which he is not, that there  
19 would be some error in it --

20 **THE COURT:** Well, he cited Supreme Court cases to me  
21 I'm not familiar with, and I am going to have to go research  
22 this. Because I can't just not take his word for it.

23 **MS. GEORGE:** Well, this is the first we are hearing  
24 of it too, and I haven't had a chance to brief it. I think  
25 he's completely wrong.

1           If there were any error invited by checking both yes  
2 on conspiracy and joint venture, the damages would change not  
3 at all. Not at all. There would be no error in that. That  
4 would not -- it would be harmless. There would never be a  
5 reversal on that.

6           **MR. BOZARTH:** Which is why only one should be  
7 submitted.

8           **MS. GEORGE:** I have never heard of this ever, so I  
9 am not -- I am not prepared to brief it for you. And he did  
10 not -- if this were -- if this were a legitimate theory, we  
11 would not be hearing about this over three years after we  
12 filed this case.

13           **THE COURT:** Yeah. I mean, there has been hundreds  
14 and hundreds of pages of briefing on joint venture, and all of  
15 a sudden -- and conspiracy, when we get this issue.

16           **MR. BOZARTH:** I can e-mail cases to Your Honor.

17           **MS. GEORGE:** This is ridiculous.

18           Do you have any case saying that it is reversible  
19 error to submit simultaneous claims of conspiracy and joint  
20 venture? Do you have one case that says it's reversible  
21 error?

22           **MR. BOZARTH:** It's a legal impossibility is what the  
23 Missouri Appellate Court said. At Walk -- at *Walking Inc. v.*  
24 *American States Insurance*, 25 S.W.3d 682, "Courts routinely  
25 dismiss conspiracy claims when Plaintiffs" --

1           **THE COURT:** Slower.

2           **MR. BOZARTH:** Sorry.

3           -- "simultaneously attempt to allege an agency or  
4 joint venture relationship, reasoning that while there is a  
5 right to plead claims in the alternative, the right to plead  
6 alternatively or hypothetically does not sanction deviations  
7 from the basic obligations to plead comprehensively. It's a  
8 legal impossibility."

9           "Dismissing conspiracy claims" -- oh, I'm sorry.  
10 And that's *Freeley v. Total Realty Management Group*, which is  
11 an Eastern District of Virginia case.

12           **THE COURT:** Eastern District of what?

13           **MS. GEORGE:** Virginia.

14           **MR. BOZARTH:** Virginia.

15           -- "dismissing conspiracy claim where Plaintiffs  
16 allege one defendant acted as another's agent."

17           There's also a *Torti v. Hoag*, Eastern District of  
18 Arkansas, "dismissing conspiracy allegations where plaintiff  
19 alleged that the individual defendant was an agent of the  
20 corporate defendant."

21           The Rehoboth v. SuperValu [phonetic] --

22           **THE COURT:** Why did you-all wait on this? This is  
23 the first we have heard yesterday when you filed this. I  
24 mean ...

25           **MR. BOZARTH:** Well, as far as them being

1 inconsistent?

2           **THE COURT:** Yeah. And that you can't submit both.  
3 The more important question.

4           **MR. BOZARTH:** Judge, I don't -- I can't answer why  
5 we didn't do it earlier in our informals. I just think at  
6 this time it's -- one or the other should be submitted.

7           **MS. GEORGE:** They don't have a single case from  
8 Missouri that says it's reversible error. And they should  
9 have submitted this sooner. This is -- there is no case that  
10 I'm aware of stating it's reversible error to submit both of  
11 these. I have never heard of that.

12           **MR. BOZARTH:** Well, it --

13           **MS. GEORGE:** And you still haven't cited one for  
14 Missouri at all. Even those don't say it's reversible error.

15           **MR. BOZARTH:** They say it's a legal impossibility.

16           **MS. GEORGE:** It would still have to be a reversible  
17 error. They are not consistent when it comes to applying any  
18 damages from the verdict form. It doesn't change the outcome  
19 in any way. There's no Missouri law on this.

20           **THE COURT:** Well, let me just hypothesize this.

21           What if they come back and say yes on both claims,  
22 and it goes to appeal and the Court of Appeals says there was  
23 sufficient evidence to support the verdict on one and not the  
24 other?

25           **MS. GEORGE:** Then the outcome would still be the

1 same, because if they said there's only enough for conspiracy,  
2 they found it, and that would mean joint and several liability  
3 on the damages. If the Court said, you know, not enough for  
4 conspiracy but these joint venture elements were met, same  
5 result -- joint and several liability. So it's not  
6 reversible. It would be harmless error if there were an error  
7 and there's not. But it changes nothing.

8 **THE COURT:** I think, though, that the general rule  
9 is that you are not supposed to submit mutually exclusive  
10 submissions, though.

11 **MS. GEORGE:** I haven't seen anything from him that  
12 says in the state of Missouri that that is a mutually  
13 exclusive event and it's reversible error to submit.

14 **MR. BOZARTH:** *Creative Walking Inc. v. American*  
15 *States* case is the case that says that it would be "legally  
16 impossible."

17 **MS. GEORGE:** For two agents to conspire with each  
18 other?

19 **MR. BOZARTH:** Correct.

20 **MS. GEORGE:** They aren't just acting in an agency  
21 relationship. They have a joint venture. And they can  
22 conspire to do this act. And certainly there were acts that  
23 they committed together before even forming the umbrella  
24 agreement part of the conspiracy.

25 So I don't see any mutually exclusive event or

1 situation here. There's no error that would be submitted.

2 **THE COURT:** Well, I think there is mutually  
3 exclusive. But that's not -- the question is whether they can  
4 still be submitted in the alternative.

5 **MR. BOZARTH:** Correct.

6 **MS. GEORGE:** I just think in the absence of any  
7 conclusive law saying we can't, at this stage of the game  
8 it's -- to interject this now? I mean, what am I going to go  
9 do a 50-page brief tonight when we are closing tomorrow?

10 **THE COURT:** Well, and that's your right to be  
11 aggravated about that.

12 So -- but still, we have to get it right. And, you  
13 know, what is the law on inconsistent verdicts?

14 **MR. BOZARTH:** As far as submitting inconsistent  
15 theories to the jury?

16 **MS. GEORGE:** There's nothing inconsistent about the  
17 outcome either, so, I mean --

18 **THE COURT:** That's true. I really don't see what --

19 **MS. GEORGE:** Either path -- if it's yes on  
20 conspiracy --

21 **THE COURT:** The damages would be the same --

22 **MS. GEORGE:** In every event.

23 **THE COURT:** -- except the verdicts are clearly  
24 inconsistent on those two points.

25 All right. We are going to take a recess, and

1 you-all research this and we will come back in an hour.

2 This is ridiculous.

3 **MS. GEORGE:** Yes, it is.

4 **THE COURT:** Absolutely ridiculous.

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

6 **THE COURT:** All right. I am going to cite *Trimble*  
7 *v. Pracna*, P-R-A-C-N-A. Citation is 167 S.W.3d 706,  
8 Mo. Banc 2005. I sat on the case. Here is what it says:

9 "Entirely distinct from the election of remedies is  
10 the election of inconsistent theories of recovery. Under this  
11 doctrine, a party must elect between theories of recovery that  
12 are inconsistent, even though plead together as permitted by  
13 Rule 55.10, before submitting the case to the trier of fact.

14 "If two counts are so inconsistent that proof of one  
15 necessarily negates, repudiates, and disproves the other, it  
16 is error to submit them together. The determination of when  
17 two theories are inconsistent is heavily dependent upon the  
18 facts of the case. Theories are inconsistent in requiring  
19 election only if, in all circumstances, one theory factually  
20 disproves the other, which seems to be the import of the cases  
21 they cite."

22 **MS. GEORGE:** May I respond briefly?

23 **THE COURT:** Yeah.

24 **MS. GEORGE:** The *Creative Walking* case, which they  
25 cite, has to do with an employee and employer. And what it

1 says is two entities which are not legally distinct can't  
2 conspire with each other. These two maintained their separate  
3 corporate entities. Right?

4 So what they are saying is, look, there's an  
5 exception to the general rule that -- that agents can't  
6 conspire with each other if they maintain their separate  
7 corporate entity and they have their own personal stake at  
8 interest as well, they can conspire.

9 For example, they have a personal stake in Engenia  
10 that's separate, and they have a personal stake in XtendiMax  
11 which is separate, so they can conspire with -- to further  
12 their own personal interests in addition to the joint venture.  
13 If we were here arguing BASF SE and Corp were conspiring, we  
14 would have a problem because there's not a clear distinct  
15 corporate relationship there. The evidence has shown the  
16 employees don't even know who works for who.

17 But here they have maintained their distinct  
18 corporate entities. And so if you look at their *Creative*  
19 *Walking* case it does not say what they say. It says two  
20 agents. It has nothing to do with joint venture. It says  
21 when there's a clear agency relationship, you can't conspire  
22 unless you're legally distinct. You have two entities that  
23 are legally distinct can conspire with each other.

24 **THE COURT:** Okay. Here is my -- here is what I want  
25 to find out. Does one theory factually disprove the other?



1           **MS. GEORGE:** No. Absolutely not.

2           **MR. BOZARTH:** First of all, Judge, I apologize for  
3 the timing of this. I do. And to you, too. It was not my  
4 intention to do anything that would cause undue delay.

5           The *Texaco Inc. v. Dagher*, U.S. Supreme Court case,  
6 547 U.S. 1, and this is in the context of Sherman Act  
7 conspiracy, you have two companies, Texaco and Shell, that  
8 operated as a joint venture. The Supreme Court found that the  
9 pricing policy challenged here amounts to little more than the  
10 price of setting of a single entity, albeit withing the  
11 context of a joint venture and not a pricing agreement between  
12 competing entities with respect to their competing products.

13           That's in the context of a Sherman Act conspiracy.  
14 And they said these are two distinct companies, but they're  
15 operating as a joint venture so they can't conspire.

16           **MS. GEORGE:** The cases we found say there's -- while  
17 that is the general rule, there is an exception to the general  
18 rule when an employee or an agent has an independent personal  
19 stake in achieving the object of the conspiracy, then there  
20 can be a conspiracy and a joint venture. There's nothing  
21 distinct.

22           The reason why these people have to make value share  
23 payments to each other is because they are different  
24 companies. Otherwise if they were not distinct legal  
25 entities, they could have that joint bank account that

1 Mr. Mandler put up on there that's not required.

2 **THE COURT:** Okay. Nobody is answering my question:  
3 Does one theory factually disprove the other?

4 **MS. GEORGE:** No. Because the elements of  
5 conspiracy, if you look at that, you can meet all of those and  
6 still also meet a shared pecuniary interest to have an equal  
7 vote to control the right -- I don't see how proving those  
8 disproves that they acted together with an unlawful motive to  
9 achieve a goal. There's no facts that prove one that  
10 disproves the other. At all.

11 **THE COURT:** So are you saying that in every case,  
12 bar none, that a conspiracy cannot be submitted with a joint  
13 venture? It's impossible. Are you saying it's impossible?

14 **MR. BOZARTH:** I am saying -- no, I am saying if the  
15 conduct completely overlaps. What they are saying is our  
16 conduct is either joint venture or conspiracy. And Counsel is  
17 arguing value share payments to support a conspiracy, when  
18 that's what she is arguing to support a joint venture.

19 **MS. GEORGE:** So it wouldn't disprove the other, they  
20 would both prove the same. And what you are looking at is  
21 facts of one would disprove the other.

22 **THE COURT:** How are they mutually inconsistent then?

23 **MR. BOZARTH:** Again, the *Texaco* case says joint  
24 venturers cannot conspire with one another because they are  
25 legally the same entity. That's what a joint venture is.

1 That is what -- that is what the whole point of the joint  
2 venture doctrine is.

3 **THE COURT:** Well, here is another angle on it. It  
4 says that the election of theories doctrine primarily applies  
5 in cases where the jury is asked to draw diametrically  
6 opposite inferences from a single set of facts.

7 **MS. GEORGE:** We want them to rely on the exact same  
8 facts to find the exact same thing as to both claims.

9 **MR. BOZARTH:** Either they are a joint venture or a  
10 conspiracy, so the exact same facts, one or the other, that's  
11 exactly what you just said they shouldn't be allowed to do.

12 **MS. GEORGE:** There's not a single fact that proves  
13 joint venture that disproves conspiracy. There's not a single  
14 fact --

15 **THE COURT:** That's my real question.

16 **MS. GEORGE:** -- or conspiracy that disproves joint  
17 venture.

18 **MR. BOZARTH:** Which is -- isn't that exactly what  
19 you just read they can't do? They can't take the same facts  
20 and get diametrically opposed results?

21 **MS. GEORGE:** You wouldn't get opposed results. You  
22 would get the same result. That's what he's saying.

23 **MR. BOZARTH:** No. Joint venture or conspiracy are  
24 two different things.

25 **THE COURT:** Okay. Tell me how joint venture

1 disproves -- factually disproves conspiracy.

2           **MR. BOZARTH:** Because if they are in a joint  
3 venture, they are legally one entity and they can't conspire  
4 with themselves if they are legally one entity.

5           **MS. GEORGE:** Two distinct entities can form joint  
6 ventures. It happens all the time. And they maintain their  
7 distinct corporate entity, and they also have their own  
8 personal stakes in other aspects.

9           **THE COURT:** Well, how do you conspire with each  
10 other and -- well --

11           **MS. GEORGE:** There's nothing inconsistent here.  
12 Every single fact that we are going to offer to prove  
13 conspiracy supports joint venture and vice versa.

14           **THE COURT:** So, again, how is it inconsistent?

15           **MR. BOZARTH:** So -- and again, this is in the  
16 context of a Sherman Act conspiracy claim, U.S. Supreme Court.  
17 Texaco and Shell were in a joint venture. They -- and what  
18 the Court held was the pricing policy challenged here amounts  
19 to little more than the price setting by a single entity,  
20 albeit in the context of a joint venture. This is not a  
21 pricing agreement between two competing entities with respect  
22 to their two competing products, because they are, in the  
23 context of the joint entity -- or joint venture, the same  
24 entity.

25           **MS. GEORGE:** The court is finding them not to be

1 competitors. Every piece of evidence that they have offered  
2 in this case is that they are competitors, which means they  
3 can conspire. There is not -- he hasn't told you one fact,  
4 Judge, that proves joint venture that disproves conspiracy, or  
5 one fact that proves conspiracy that disproves joint venture.  
6 And those are the cases you are looking at.

7 **MR. BOZARTH:** And it can't be both.

8 **MS. GEORGE:** It absolutely can.

9 **THE COURT:** It can if it doesn't disprove the other.

10 **MR. COX:** Judge, I did not find that case, but the  
11 fact that this disproves the other is if you find -- if you  
12 find a joint venture, that's akin to a partnership.

13 **THE COURT:** Right.

14 **MR. COX:** And that fact, the fact of the finding of  
15 a joint venture disproves the conspiracy because the  
16 conspiracy -- you cannot conspire with yourself or your own  
17 agent. And that's the law.

18 So if there's a finding of joint conspiracy -- I  
19 mean of joint venture -- I'm sorry, it's late. If there's a  
20 finding of joint venture, that fact disproves the --

21 **THE COURT:** Now, that's what's been added.

22 **MS. GEORGE:** That's not true, though, because the  
23 courts have held that when the entities are legally distinct,  
24 you can conspire. The case he cited says two entities which  
25 are not legally distinct can't conspire with each other.

1           You guys have a legal distinction that you've been  
2 touting through this whole entire case. And all of the  
3 evidence is going to be that you guys are competitors. You  
4 are fierce competitors. And you can still be in a joint  
5 venture and you can still conspire.

6           You maintained your own personal stake in addition  
7 to the joint venture for your Engenia, for your XtendiMax, and  
8 you still have your joint venture.

9           **MR. BOZARTH:** In the *Texaco* case, it was Texaco and  
10 Shell, two distinct companies.

11           **THE COURT:** Okay.

12           **MR. BOZARTH:** They were in a joint venture together.

13           **THE COURT:** Okay.

14           **MR. BOZARTH:** They set prices. Someone sued them  
15 because they set their prices together. The U.S. Supreme  
16 Court said this is nothing more than one entity setting prices  
17 because of a joint venture.

18           It's the same thing that she's arguing.

19           **THE COURT:** Well, the larger point, though, is that  
20 if you are in a joint venture, you cannot conspire with each  
21 other.

22           **MR. BOZARTH:** Correct.

23           **THE COURT:** Now tell me about that. Answer that.

24           **MS. GEORGE:** He hasn't shown one Missouri case that  
25 says that. There -- there's not -- none of his cases by the

1 way are joint venture.

2           **THE COURT:** Okay. That's what we need to find out  
3 next then.

4           **MS. GEORGE:** I can't find a single one that says  
5 that. The cases that you've cited are employee/employer, like  
6 agency. And then in that context, they still say you can  
7 conspire so long as one has an additional personal stake on  
8 top of it.

9           **THE COURT:** Well --

10          **MS. GEORGE:** They clearly do.

11          **THE COURT:** Let's go back. And I want to find the  
12 definitive answer to the question of can a joint venture  
13 conspire with each other.

14          **MR. BOZARTH:** I would just -- I will look for more,  
15 but the cite is 547 U.S. 1, and that's the Texaco case.

16          **MR. MOOK:** What's the pinpoint? I am looking at  
17 that case, and I am trying to find out where it says that.

18          **MR. BOZARTH:** I don't have it. I will find it.

19          **THE COURT:** You guys any help?

20          **MS. GEORGE:** It does say Texaco and Shell.

21          **MR. COX:** Judge, I don't know that I have anything  
22 to add, but if it would help the Court's analysis, and I  
23 haven't really got to this because we've been sort of on the  
24 joint venture, the other argument to be made with respect to  
25 the submissibility of a conspiracy is that parties cannot

1     conspire to commit a negligent act.

2             **THE COURT:** I have already dealt with that in my  
3 motion and I've determined to the contrary.

4             **MR. COX:** I understand that. There's -- there's an  
5 Eighth Circuit case. It's --

6             **THE COURT:** I briefed it to the hilt and that's  
7 overruled. I thought like you did, and I did the research and  
8 proved myself wrong.

9             **MR. COX:** The Eighth Circuit case that I am  
10 referring to actually refers to your -- because we didn't --  
11 this is not the first time we are raising this. You know  
12 that. We raised this before. And the Eighth Circuit that  
13 addressed this issue in 2018, it's *A.O.A. v. Rennert*,  
14 350 F.Supp 3rd 18 -- 818 in 2018, refers to not only your  
15 order, your earlier Bader order, it refers to --

16             **THE COURT:** Is it overruling me?

17             **MR. COX:** No. It says "It is common sense that  
18 one cannot conspire to commit a negligent or unintentional  
19 act."

20             **THE COURT:** Right.

21             **MR. COX:** And it cites the Eighth Circuit case in  
22 2005 and one of your orders in this case.

23             So I am throwing that out there. I spoke my mind on  
24 the joint venture. I think that disproves conspiracy. And I  
25 would reassert our argument with regard to the fact that you



1 cannot conspire with another to commit a negligent act.

2           **THE COURT:** Well, I want the definitive answer on  
3 that proposition that you said, that -- what was it? That  
4 joint ventures cannot conspire with one another.

5           **MR. MOOK:** Your Honor, I'm looking at this case -- I  
6 am looking at this case, and what it says is that they jointly  
7 invested in a third entity called Equilon, and then through  
8 Equilon, set up a price-fixing scheme. And what the Court  
9 case says is, "Through Equilon's existence, Texaco and Shell  
10 Oil shared in the profits of Equilon's activities in their  
11 role as investors, not competitors. When persons who would  
12 otherwise be competitors" --

13           **THE COURT:** Whoa, whoa, whoa, whoa, whoa.

14           **MR. MOOK:** I'm sorry. Yeah.

15           They are saying by pooling their investment, through  
16 Equilon's existence, and I am reading it specifically. This  
17 is at Star 6, "Texaco and Shell Oil shared in the profits of  
18 Equilon's activities in their role as investors, not  
19 competitors. When persons who would otherwise be competitors  
20 pool their capital and share the risk of loss as well as the  
21 opportunities for profit, such joint ventures are regarded as  
22 a single firm competing with other sellers in the market."

23           **MS. GEORGE:** They made their own entity. That is  
24 the whole point. If you make it -- if you go form another  
25 company, then that -- of course that's different. They didn't

1 do that here. They maintained their distinct legal entities,  
2 which is what the Missouri cases say. It's two entities which  
3 are not legally dis -- can't conspire.

4 **THE COURT:** So why isn't that a distinction? I  
5 mean, you've got a joint venture already established.

6 **MR. BOZARTH:** They said we were impliedly in a joint  
7 venture. That is an explicit joint venture.

8 **THE COURT:** Right.

9 **MR. BOZARTH:** There's no legal difference. That's  
10 the reason why they are still trying to hold us in under joint  
11 venture.

12 **MS. GEORGE:** That's one entity. They formed one  
13 company together. So it's its own company. That's -- that  
14 is -- it flies in the face of Missouri cases which you cite,  
15 which says two entities that are not legally distinct can  
16 conspire. This is one company that they formed.

17 **MR. HOHN:** They are saying it's the AMT. We have  
18 been hearing that for a week now. The AMT is the same thing  
19 as this entity.

20 Two separate companies create another entity, which  
21 is the joint venture that they are trying to pursue here,  
22 which is the AMT.

23 **MS. GEORGE:** The AMT is not a company --

24 **MR. HOHN:** Doesn't have to be --

25 **MS. GEORGE:** -- with one bank.

1           **MR. HOHN:** -- a separate company.

2           **MS. GEORGE:** Yes. It apparently does. That's what  
3 Missouri cases say. And that's what that acknowledges. That  
4 if you form a distinct entity -- the AMT was a group of  
5 employees who came together and voted and went back their  
6 separate companies. They didn't form a company with one bank  
7 account and one taxpayer ID and all of --

8           **MR. HOHN:** Then there's no joint venture.

9           **MS. GEORGE:** That's wrong. There is no requirement  
10 for a joint bank account.

11                   This is a red herring that is taking up way too much  
12 time that should have been brought up years ago.

13           **MR. BOZARTH:** I'm sorry, Judge. Either a joint  
14 venture is a legal entity and therefore we are liable for  
15 Monsanto and they are liable for us or it's not. And whether  
16 it's an explicit or an implied, they want to try to do it  
17 implied, so that's where we are.

18                   I mean, I -- it's not legally inconsistent to say  
19 that an expressed and implied joint venture are the same legal  
20 entity because that's what the concept of joint venture means.  
21 They are trying to prove it impliedly. We say it should be  
22 expressed. But that's what a joint venture is, the same legal  
23 entity.

24           **MS. GEORGE:** You are on solid legal ground here,  
25 Judge, because there's not a single fact that proves one that

1 disproves the other. They still haven't told you that.

2 **THE COURT:** Okay. I am going to look at that case  
3 and we will recess until I am satisfied.

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

5 **THE COURT:** I'm going to overrule the objection by  
6 BASF. I don't think that they are inconsistent. I mean,  
7 essentially co-conspirators are the same as joint ventures for  
8 liability purposes. I don't think that one theory factually  
9 disproves the other, and we are going to go on.

10 **MR. BOZARTH:** Thank you. And I apologize again.

11 **THE COURT:** That's okay.

12 So 16 is the joint venture. And you-all have  
13 submitted all of your arguments, pro and con, on that. And we  
14 will go to -- so I am going to submit the one that has been  
15 proposed by the plaintiffs.

16 Now, I do see that Defendants Monsanto and BASF have  
17 an alternate instruction on joint venture. Where am I? V, W,  
18 X. I am going to mark that Instruction No. X and call it  
19 tendered and rejected.

20 **MR. SHAW:** Is that the one at page 23, Judge?

21 **THE COURT:** Yes.

22 So next is the civil conspiracy. And your  
23 objections are noted on the basis of what you claim are  
24 mutually and consistent theories. And I am going to submit  
25 the civil conspiracy submitted by Plaintiff, and that will be

1 marked Instruction No. 17.

2 And do you want to speak to that further, then?

3 **MR. COX:** Not particularly, Judge.

4 Joint venture and conspiracy, we have already made  
5 those arguments. We submitted our objections in Document  
6 No. 540. It's our understanding that all of the specific  
7 objections that we have and that we've talked about today,  
8 including the ones that sort of are discussed here without me  
9 for a bit have been overruled with regard to each of the  
10 instructions that have been submitted. But in particular the  
11 ones -- the additional ones that we raised with respect to  
12 joint venture and civil conspiracy.

13 **MR. BOZARTH:** I think we have hit all of our  
14 objections as well, Judge. We do have instructions to tender  
15 when you are ready for those. And if you want to do all BASF  
16 at the end, that's fine.

17 **THE COURT:** We will do all of yours at the end.

18 **MR. COX:** I'm sorry, Judge. Am I clear that the  
19 Court is overruling our objections that we submitted with  
20 respect to those additional counts?

21 **THE COURT:** To those additional --

22 **MR. COX:** I told the Court earlier that when we were  
23 back there, I'd hit some highlights and that we would  
24 delineate our specific objections in a chart. We have gone  
25 over those. And I just want to make sure that the Court is

1 aware that we have filed -- I know we have been talking about  
2 a lot of different papers here, but our specific objections to  
3 all of those are included in our chart.

4 **THE COURT:** All of what? I thought we were talking  
5 about civil conspiracy.

6 **MR. COX:** We are, Judge. Actually in an effort to  
7 try -- you can give that to him, Booker -- in an effort to  
8 speed this along, I realized I just probably slowed it down a  
9 little bit because the Court probably did not have our  
10 submission in front of you.

11 But when we were back in chambers, I told you that I  
12 was going get up and talk about a couple of my favorite cases,  
13 which I've done, and then set forth our -- more fully our  
14 specific objections that we talked about ad nauseam in  
15 chambers as well as here. And rather --

16 **THE COURT:** I was going to use that term but I just  
17 decided not to. I didn't want to offend anybody. But I'm  
18 glad you brought that up.

19 **MR. COX:** Yes, Your Honor.

20 So we would just -- it's our understanding that the  
21 Court is overruling all of our specific objections unless --  
22 that we submitted in the chart that is -- that's attached to  
23 that filing. I think it accurately sets forth all of the ones  
24 that we have talked about. So rather than go back with some  
25 additional ones --

1           **THE COURT:** This is on conspiracy only?

2           **MR. COX:** No, no, no. My point is conspiracy and  
3 joint venture and the others that are still in play are there.  
4 I think we have talked about them all.

5           **THE COURT:** That's fine, yeah.

6           **MR. COX:** And the Court is fully overruling the  
7 objections.

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

9           **MR. COX:** Thank you.

10          **THE COURT:** Now, I see that you have proposed an  
11 alternate conspiracy instruction. That's page 25 of your  
12 submission. And so I'm going to mark that Instruction No. Y,  
13 tendered by defendants and rejected.

14           And then the next one will be, not the verdict form,  
15 but instead Instruction -- or -- Eighth Circuit 3.06. Any  
16 objection to 18? That's mandatory.

17          **MS. GEORGE:** No objection.

18          **MR. SHAW:** I'm sorry. Where are we now, Judge?

19          **THE COURT:** It's the mandatory -- the rules you must  
20 follow when you go to the jury room.

21          **MS. GEORGE:** The select a foreperson. Are you going  
22 to object?

23          **MR. BOZARTH:** No objection.

24          **THE COURT:** Okay. Now let's go to the verdict forms  
25 themselves.

1           Okay. What about Part 1? So my proposal is then  
2 where it says "Part 1, on the claim of Plaintiff Bader Farms,  
3 Inc. for negligent design or failure to warn" in Instruction  
4 No. --

5           **MS. GEORGE:** 9.

6           **THE COURT:** -- 9, that's the verdict director.

7           And then 10 will be for negligent design from  
8 failure to warn from 2017 to present, reference Instruction  
9 No. 10.

10           **MR. COX:** Judge, my copy has -- of what I think they  
11 filed, has inserted strict liability product defect claims.

12           **MS. GEORGE:** No.

13           **MR. COX:** Am I looking at the wrong one?

14           **MS. GEORGE:** Those are not in there.

15           **MR. MOOK:** That's the one we submitted to be  
16 rejected.

17           **MR. COX:** Okay. Thank you.

18           **THE COURT:** So I do see, at the bottom of page 17,  
19 that you have broken out negligence claim against Monsanto and  
20 the negligence claim against BASF for 2017 to the present. So  
21 that second one would also reference Instruction No. 10.

22           **MS. GEORGE:** That's correct, Your Honor.

23           **THE COURT:** So let's take that Part 1 first then.  
24 Or maybe we should just do it all together.

25           **MR. HOHN:** That's fine.



1           **THE COURT:** Then part 2 is --

2           **MR. COX:** If I can excuse the Court. We are flying  
3 blind here because we don't have a current Verdict Form A.

4           **MS. GEORGE:** I e-mailed this whole thing to you guys  
5 and the Court at the same time, about -- I don't know -- a  
6 couple hours ago. Before -- yeah, it's what I e-mailed to  
7 Shane and copied everybody on.

8           **MR. COX:** You don't have an extra copy by any  
9 chance, do you?

10          **MS. GEORGE:** I don't even have mine.

11          **MR. COX:** Well, I am not the only one. The Court is  
12 the only one with a current --

13          **MS. GEORGE:** Everyone has it. I don't know what you  
14 printed.

15          **THE COURT:** We will make some copies real quick  
16 then.

17          **MR. COX:** All three verdict forms.

18          **THE COURT:** All right. Let's go on -- while he is  
19 doing that, let's go on to something else.

20          **MS. GEORGE:** I e-mailed it at 3:45, if you want to  
21 know the time.

22          **MR. COX:** I'm cool with that. I just want to make  
23 sure I get it.

24          **MR. SHAW:** In an effort to save a little time,  
25 Judge, what I handed up to you was Docket No. 540. And this

1 was our effort to compile all of the specific objections we  
2 made to the instructions during our informal instruction  
3 conference and there was a chart in the back.

4 **MR. COX:** I just did that, Booker.

5 **MR. SHAW:** Yes. And so we just wanted to be sure,  
6 Your Honor, that the record was clear that this was a  
7 reflection of the objections that we made during informal  
8 conference, specific objections we made to all of the  
9 instructions, and that you are overruling all of those  
10 objections so we don't need to go through each and every one  
11 of them at this moment on the record.

12 **THE COURT:** Yes, I am overruling all of them.

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

14 **MR. HOHN:** One more minor one, Your Honor.

15 **THE COURT:** That is, I assume that they correctly  
16 represent our discussions.

17 **MR. HOHN:** Yes, they do.

18 **MR. MOOK:** We haven't seen them at all.

19 **MR. HOHN:** They were filed.

20 **THE COURT:** Did you get Document 540?

21 **MR. MOOK:** Judge, we have been here all day. We  
22 haven't pulled them off and looked at them. I can tell you  
23 that.

24 **MS. GEORGE:** We will let you know if we see  
25 anything.

1           **THE COURT:** Good idea.

2           **MR. HOHN:** On -- real quick on negligent failure to  
3 warn as submitted in the Instructions 9 and 10, which I  
4 understand the Court intends to submit. We would object to  
5 those for the additional reason, Your Honor, based on FIFRA  
6 preemption. As --

7           **THE COURT:** You've done that already, several times.

8           **MR. HOHN:** Yeah. I just wanted to note that for the  
9 record we think that the claim as instructed is expressly  
10 preemptive.

11          **THE COURT:** It's overruled.

12           Okay. While we are waiting on copies, let's move to  
13 a different subject altogether.

14           How much time do you-all want for oral argument?

15          **MS. GEORGE:** I think -- I thought we had settled on  
16 an hour and --

17          **THE COURT:** I know, but how much time -- what is  
18 your split?

19          **MS. RANGLES:** Oh, you mean for the closing tomorrow?

20          **THE COURT:** Yeah.

21          **MS. RANGLES:** Forty and 20.

22          **THE COURT:** All right. And do you want like a  
23 two-minute warning each way?

24          **MS. RANGLES:** That would be good, Your Honor.

25          **THE COURT:** Okay. And so what kind of warning to

1 you-all want for your arguments? Five minutes? Two minutes?

2 **MR. COX:** Give him three minutes.

3 **THE COURT:** Three minutes.

4 Three minutes over here, too, for Mandler?

5 **MR. BOZARTH:** Sold.

6 **MR. COX:** Three-minute warning. He'd like a little  
7 bit more than three minutes to argue the case, obviously.

8 **THE COURT:** Okay. I am going to make yours three  
9 minute, too, just to be consistent.

10 **MS. RANGLES:** That's fine.

11 **THE COURT:** All right.

12 We will go back to instructions now.

13 Also about the joint venture and the conspiracy, I  
14 don't think they disprove the other, each other, if I didn't  
15 say that before.

16 So we are on Verdict Form A right now.

17 **MR. HOHN:** Want to talk on the Verdict Form A?

18 **THE COURT:** Yes.

19 **MR. HOHN:** Okay. So one thing, Your Honor, which I  
20 think is maybe just a cleanup detail, and unless I'm  
21 misunderstanding what we were going to do, but I thought in  
22 Part 3 where we are referencing the punitive damages question,  
23 I thought that was going to refer to both the claim of  
24 negligent design.

25 **THE COURT:** I am just on Part 1, I'm sorry. Let's

1 do that first.

2 **MR. HOHN:** You want do that first? All right.

3 So, Your Honor, actually in any part relating to  
4 2015 and 2016, we think there should be an allowance for  
5 allocation to BASF. In light of the fact of what I mentioned  
6 previously, that in the verdict director No. 9, it's  
7 considering conduct of BASF. And, in fact, all the verdict  
8 directors relating to 2015 and 2016.

9 And the punitives, there's a consideration on the  
10 conduct of BASF. And I know I requested that that be  
11 eliminated because I thought it allowed for conduct to BASF to  
12 be imputed to Monsanto, but absent that, then if their conduct  
13 forms a basis for a finding of damages against Monsanto, then  
14 there should be an allocation as to 2015 and 2016.

15 So that would implicate Part 1.

16 **THE COURT:** So do you-all want to address this or  
17 what about BASF?

18 **MR. BOZARTH:** We don't think -- we don't see that  
19 the verdict director, which is Instruction 9 that Your Honor  
20 has entered in this case for '15 and '16, says anything about  
21 BASF conduct. So I don't know why that argument relates to  
22 us.

23 **MS. GEORGE:** Your Honor, we understood that you told  
24 us that we couldn't submit against BASF for '15 and '16, and  
25 the only theory would be if they were found liable with joint

1 venture. So that's why we removed them from there.

2 The reference in the verdict director to conduct  
3 that they did, Monsanto did on its own or jointly with BASF,  
4 is really strictly pertaining to the conduct they did by  
5 themselves or they did with BASF. There's -- so we removed it  
6 because we thought you said we couldn't proceed on that,  
7 except if it was a joint venture. So this was consistent with  
8 your rulings. That's why we did it this way.

9 **THE COURT:** Well, this is the first I've heard about  
10 this course.

11 **MS. GEORGE:** Me too.

12 **MR. HOHN:** It's just the corollary of what I brought  
13 up earlier.

14 Yeah, I mean the Instruction No. 9 references such  
15 Defendant Monsanto, individual or jointly with another  
16 defendant. The only other defendant that there is is BASF.  
17 So I mean the conduct of BASF is being considered, so either  
18 that reference should go or we have to address it on the  
19 verdict form.

20 **MS. GEORGE:** No. Because the conduct that Monsanto  
21 does by itself or the conduct that Monsanto does with someone  
22 else can support a claim against Monsanto. The joint venture  
23 will address whether BASF's conduct put it into a joint  
24 venture with Monsanto or a conspiracy and is therefore liable.  
25 There is nothing inconsistent here.

1           **THE COURT:** Well, is there evidence to support a  
2 negligence against BASF for 2015 and 2016?

3           **MS. GEORGE:** To the extent they acted as a joint  
4 venture or co-conspirator, absolutely.

5           **THE COURT:** Well, that's different.

6           **MS. GEORGE:** Right. And that's why we have  
7 addressed that.

8           **THE COURT:** But -- so what evidence is there against  
9 BASF for their negligence in those first two years?

10          **MR. HOHN:** I am not saying that there is. I am  
11 saying that --

12          **THE COURT:** Well, then why do you want an  
13 allegation?

14          **MR. HOHN:** I am saying it's either/or. Either the  
15 reference to their actions with us need to come out, or there  
16 should be an allocation in the verdict form.

17          **MS. GEORGE:** Those are not inconsistent. We have at  
18 least ten times addressed that phrase of Monsanto's conduct on  
19 its own or its conduct with BASF can support a claim against  
20 Monsanto.

21          **THE COURT:** I have got it here. It doesn't even  
22 mention BASF.

23          **MS. GEORGE:** Well, he is talking back about the  
24 verdict form that -- the verdict director that we have already  
25 approved and passed over, that I have already submitted

1 another one and you rejected.

2           **MR. HOHN:** I am talking about the verdict director  
3 No. 9.

4           **THE COURT:** I know, but unless there is a verdict  
5 form that references BASF's negligence, it doesn't make sense.

6           **MS. GEORGE:** Right.

7           **MR. HOHN:** Well, I think by implication it does, if  
8 it says "such defendant individually or jointly with another  
9 defendant."

10           **THE COURT:** Oh, I see. That's what you are saying.  
11 Well, that's only put in there to address the possibility that  
12 a joint venture might be found.

13           **MS. GEORGE:** It's the conduct that you did -- that  
14 Monsanto did by itself or the conduct Monsanto did by BASF.  
15 Nowhere in there does it say considered by -- BASF's conduct  
16 on its own.

17           **THE COURT:** This is crazier and crazier.

18           **MR. HOHN:** Yeah. I mean, the problem is if that --  
19 there's not a joint venture, then you are considering conduct  
20 of BASF. And it's at least confusing to the jury --

21           **MS. GEORGE:** No.

22           **MR. HOHN:** -- that conduct of BASF could form part  
23 of the claim against Monsanto.

24           **MS. GEORGE:** Judge, you've already ruled on this.  
25 This same argument has now been put before you at least six



1 times. We have already talked about this phrase. The phrase  
2 refers to Monsanto's conduct on its own or Monsanto's conduct  
3 jointly with BASF.

4 **THE COURT:** Well, the problem is they never asked  
5 for this. They never asked for this until now. So I didn't  
6 have to address that concern.

7 **MR. HOHN:** I don't think we addressed it, and I  
8 think --

9 **THE COURT:** That's the problem.  
10 Here is another thing that you brought up for first  
11 time.

12 **MR. HOHN:** Well, Your Honor, again, I think it has  
13 to do with -- it's the relationship between the verdict forms,  
14 which have been changing, and this instruction. That's my  
15 point.

16 **THE COURT:** Well, I know, but why didn't you bring  
17 it up before? I mean ...

18 **MR. HOHN:** Well, we have brought up the concept that  
19 we shouldn't be responsible for BASF's conduct.

20 **MS. GEORGE:** Well, until these are read to the jury,  
21 this is never going to stop. Like, there's going to be  
22 something new that you guys are going to bring up, and we are  
23 never going to get done. He has ruled on this I can't even  
24 count how many times.

25 **THE COURT:** I don't care about getting it done. I

1 care about getting it right.

2 **MS. GEORGE:** I understand. But you got it right the  
3 first five times.

4 **THE COURT:** Well, that's only because they didn't  
5 ask for that kind of relief. I didn't have to address it  
6 then.

7 **MS. GEORGE:** So they want -- let me make sure I  
8 understand. You want BASF on the verdict forms. You want to  
9 add a claim against them, that you told me we can't have?

10 **MR. HOHN:** No. I am saying there should be -- if  
11 this language remains in Instruction 9, then there should be  
12 an apportionment for '15 and '16 for them.

13 **MS. GEORGE:** There's an apportionment already as to  
14 any damages --

15 **THE COURT:** I would like to hear from BASF on this.  
16 Do you want in on this?

17 **MR. COX:** Judge, I did -- just to point out I did  
18 make an earlier objection on the record. It was one of the  
19 earlier ones I made. And we objected to the fact that the  
20 verdict director itself allows for the consideration of BASF's  
21 conduct, but there's no opportunity to hold them liable on  
22 Verdict Form A.

23 **THE COURT:** When did you raise that?

24 **MR. COX:** Right after we had the -- another great  
25 discussion about the City of St. Louis lead case, I got

1 through that and said there were a few others that I wanted to  
2 highlight before I sat down. So that's at the top of my --

3 **THE COURT:** Is there evidence to support a  
4 negligence claim against BASF for those two years?

5 **MR. COX:** We don't think so.

6 **THE COURT:** Well, then, why do you want me to --

7 **MR. HOHN:** It could come out of the -- then the  
8 reference to the -- the conduct of the -- the reference to the  
9 other defendant should come out of the verdict director.

10 **MS. GEORGE:** Not referring to the other defendant  
11 for the other defendant's sole conduct. It's only referring  
12 to conduct Monsanto did individually or Monsanto did with  
13 BASF. Never once does it say you should consider BASF's  
14 conduct on its own.

15 **THE COURT:** What about this, "individually or as  
16 part of a joint venture with another"?

17 **MS. GEORGE:** Well, then you build the joint venture  
18 finding into the finding -- I don't want them to have the --

19 **THE COURT:** No. You can refer it to the joint  
20 venture director then.

21 **MS. GEORGE:** I don't want them to have to find two  
22 claims in one verdict form. Because they can find against  
23 Monsanto without finding a joint venture, based on Monsanto's  
24 own conduct or conduct Monsanto did with BASF and still not  
25 find joint venture. They can still consider Monsanto's

1 conduct on its own.

2           **THE COURT:** I thought everybody agreed that this  
3 answer to this question was that we were going to submit a  
4 separate joint venture instruction that would take care of any  
5 concern that anybody would have about this.

6           I would like to hear from BASF.

7           **MR. BOZARTH:** That's -- I think that's right, Your  
8 Honor. When we were back there, and we were back there  
9 several times, I did say that I thought that having that  
10 "jointly with another defendant" in could cause confusion  
11 because of the joint ventures where it really should be, and  
12 we had a discussion and you said it's going to stay in.  
13 That's the way I remember it. So it wasn't just raised right  
14 now; it was raised before.

15           **THE COURT:** I thought -- no, his request right now  
16 is to add you.

17           **MR. BOZARTH:** That I do not agree with.

18           **THE COURT:** That's the new request.

19           **MR. HOHN:** Well, because -- only because that  
20 language is staying in there. That's the point. It's one or  
21 the other. If that -- if the "jointly with another defendant"  
22 is not there, then that alleviates the concern. If that  
23 remains in, then we do think that it needs to be apportioned  
24 out for '15 and '16 for BASF.

25           **MS. GEORGE:** Are you suggesting to this Court that

1 the jury can't consider your conduct that you did together  
2 with someone else to find a claim of negligence against you?

3 **MR. HOHN:** That's what the joint venture --

4 **MS. GEORGE:** Let me finish please. I let you talk.  
5 It absolves you of liability so long as you were  
6 doing it with BASF? That is nonsense.

7 **MR. HOHN:** That's not --

8 **MS. GEORGE:** It is the conduct that Monsanto engaged  
9 in either on its own or together with somebody else. It's  
10 still Monsanto's conduct. That's the way it's worded.

11 **MR. HOHN:** And there's going to be all sorts of  
12 evidence in this record about everything that the parties did  
13 together, and they are going to -- the jury is going to be  
14 able to believe that, well, I can use that as a basis to hold  
15 Monsanto responsible.

16 **MS. GEORGE:** You can, if you did it together. Yes.

17 **MR. HOHN:** Only if you prove the joint venture.

18 **MS. GEORGE:** No.

19 **MR. HOHN:** I thought I was talking. Now you are  
20 going to interrupt me?

21 **THE COURT:** Wait. Wait.

22 **MS. GEORGE:** I'm sorry.

23 **THE COURT:** So if that's your position, they do get  
24 an instruction as to both of them, a verdict director.

25 **MS. GEORGE:** Well, if you want to add BASF to the

1 verdict form, I'm fine with that.

2 **THE COURT:** No, to do verdict director.

3 **MS. GEORGE:** They are in the verdict -- what do you  
4 mean? Say that again.

5 **THE COURT:** I mean, if you think that there's  
6 evidence to support negligence against BASF between 2015 and  
7 2016, then we need to add them here and then apportion the  
8 fault with them too.

9 **MS. GEORGE:** And I am fine adding them back here. I  
10 just thought I wasn't allowed to do that.

11 **MR. BOZARTH:** Because the only reason why we are in  
12 in 2015 or 2016 is because of the potential joint venture and  
13 the release of the seed. I mean, that's --

14 **MS. GEORGE:** Well, that's not what we pled.

15 **THE COURT:** That's true for punitives.

16 **MS. GEORGE:** That's not what we pled. We pled the  
17 whole development of the system was going to make both of you  
18 money, including increasing your sales of Clarity when they  
19 sold the seed. And we even offered evidence to the jury that  
20 your sales of Clarity did go up in those years as part of this  
21 joint venture to do the system and they dumped the seed early  
22 and you made a bunch of money off of it. And that's what --  
23 we offered evidence of your negligence.

24 Because you controlled this enterprise and you got  
25 equal vote and you are going to shut it down.

1           **THE COURT:** Well, is the evidence of negligence  
2 anything more than the early release of the seed?

3           **MS. GEORGE:** Well, yeah, because -- what I just told  
4 you about. They are working together to develop the system --

5           **THE COURT:** I understand.

6           **MS. GEORGE:** -- and the dumping of Clarity into the  
7 market. This is all their joint venture conspiracy.

8           **THE COURT:** I know. But they weren't involved in  
9 the timing of the dump.

10          **MS. GEORGE:** Well --

11          **THE COURT:** There's no evidence of that.

12          **MS. GEORGE:** As we have talked before, they had a  
13 shared AMT that gave Monsanto that authority. That same  
14 AMT --

15          **THE COURT:** And that's why they might have joint  
16 venture liability, but it's not independent negligence on the  
17 part of BASF.

18          **MS. GEORGE:** And that's why we have written it this  
19 way. It does not establish -- under no set of circumstances  
20 can it establish responsibility to BASF unless a joint venture  
21 is found. They are not on the verdict form. It does not make  
22 it possible. It's impossible for them to find liability under  
23 this verdict director against BASF unless they find a joint  
24 venture. That's what they're not --

25          **THE COURT:** But your whole case, your entire case on

1 2015 and '16 is based on the early release.

2 **MS. GEORGE:** Correct.

3 **THE COURT:** That doesn't have anything to do with  
4 BASF.

5 **MS. GEORGE:** Well, I don't have them on the verdict  
6 form.

7 **THE COURT:** But you do have them in the verdict  
8 director.

9 **MS. GEORGE:** Because their conduct together -- and  
10 listen, I have it specifically set out so it only is  
11 considering Monsanto's conduct on its own or with someone  
12 else. It doesn't say to consider BASF's conduct by itself.

13 **THE COURT:** Wait a minute. Why does 16 not satisfy  
14 every concern you have? That's the joint venture instruction.

15 **MS. GEORGE:** So the concern is that we are letting  
16 the jury consider the conduct that they did together to find  
17 against Monsanto? I guess I'm having trouble understanding  
18 you. I'm sorry, I'm just getting really tired.

19 **THE COURT:** So why didn't 16 take care of the whole  
20 problem that you have? Why do you need the other reference to  
21 other defendants so long as you've got a joint venture that  
22 keeps in the other defendants regardless?

23 **MS. GEORGE:** I don't need the reference to other  
24 defendants to do anything against BASF. I want the jury to  
25 consider Monsanto's conduct by itself and what Monsanto did



1 with BASF. I'm not saying to consider BASF's conduct to do  
2 anything against BASF.

3 **THE COURT:** I don't -- I am lost then. Why do you  
4 have to have that in there?

5 **MR. BOZARTH:** So then it should just say Monsanto's  
6 conduct, period.

7 **THE COURT:** Yes.

8 **MR. HOHN:** We are fine with that. I mean, that's --  
9 we are said -- we have said from minute one that we released  
10 the seed and that's the basis.

11 **THE COURT:** The problem I have is you have no  
12 evidence that BASF did anything wrong in 2015 and 2016.

13 **MS. GEORGE:** We have a lot of evidence that they did  
14 stuff wrong in '15 and '16, but we are still only asking --  
15 that they dumped Clarity in the market, they were working  
16 together with this. They knew exactly when that seed was  
17 coming out. They sold like 50 percent more Clarity when it  
18 was illegal for use.

19 **THE COURT:** Well, that's what I've been asking you  
20 for the last ten minutes.

21 **MR. HOHN:** That's the joint venture though.

22 **MS. GEORGE:** I thought I said that.

23 **THE COURT:** I am not sure that that is. I think  
24 that's independent negligence.

25 **MR. HOHN:** Selling more herbicide? It's also part

1 of the unlawful act in the conspiracy.

2 **THE COURT:** It is. It is, but it's also part of the  
3 negligence. That's what I'm trying to ask you.

4 What's the independent negligence on the part of  
5 BASF for 2015 and '16?

6 **MS. GEORGE:** They dumped Clarity in the market to  
7 capitalize on the sales of that when they knew, from Monsanto,  
8 that the seed was going to hit the market.

9 **THE COURT:** Okay.

10 **MR. HOHN:** That is not --

11 **MS. GEORGE:** There is plenty of evidence.

12 **THE COURT:** There's evidence to that -- I am going  
13 to agree with her on that.

14 So I think the answer is then we need to plug in  
15 both of you in this instruction.

16 **MS. GEORGE:** That's the one I submitted.

17 **THE COURT:** Which is exactly what Mr. Hohn  
18 requested.

19 **MR. HOHN:** No, I didn't request that.

20 **THE COURT:** Yeah, you did.

21 **MR. HOHN:** What I requested is the elimination of  
22 four words.

23 **THE COURT:** No, but you came up here and said if we  
24 are -- if they are going to be on the -- you know what you  
25 said. You wanted to include them.

1           **MR. HOHN:** Yeah, which was --

2           **THE COURT:** You said if they are not included, and  
3 so we have to include them.

4           **MR. HOHN:** With that language which you said was in,  
5 and I think it should be out, then, yes. I think there should  
6 be an apportionment if that language remains in. But I don't  
7 think that language in No. 9 should stay in.

8           **THE COURT:** And I agree to the apportionment part.

9           **MR. BOZARTH:** Judge, from the beginning when we  
10 started dealing with this, '15 and '16, it was only the  
11 release of the seed. That's been your ruling consistently  
12 until right now. It's only the release of the seed.

13           We are not -- we were not involved in the release of  
14 the seed and that's why we are not in.

15           **THE COURT:** I know, but that's not the only aspect  
16 of negligence during that time. Because the release of the  
17 seed was accompanied by evidence that they've presented that  
18 you also produced Clarity that might be used over the top,  
19 unlawfully.

20           **MS. GEORGE:** That's always been our theory.

21           **THE COURT:** I know.

22           **MR. BOZARTH:** Judge, there is no evidence that our  
23 Clarity impacted the Baders at all. I mean, seriously, the  
24 issue of the Clarity being increased, we have evidence that  
25 the production numbers actually went down, so ...

1           **MS. GEORGE:** Actually the evidence shows that your  
2 sales to retailers happened even earlier at '14, and then  
3 they, with your authority to sell it, sold it directly to  
4 growers and dumped it in the market.

5           **MS. RANGLES:** And Bill Bader testified that when he  
6 talked to Boyd Carey, and Boyd Carey said the same, that when  
7 Bill Bader called, he said -- when he asked about the people  
8 spraying around him, he said it was one of the old  
9 formulations, Banvel or Clarity. And he specifically said  
10 Clarity.

11           **THE COURT:** Why do you have to have that in there?  
12 Why didn't 16 take care of all your problems?

13           **MS. GEORGE:** So you just want me to take the phrase  
14 out and just have -- and instruct them that they can only  
15 consider Monsanto's conduct?

16           **MR. HOHN:** Take the four words out and we are done.

17           **MS. LADDON:** That language would encompass  
18 necessarily conduct that Monsanto did with BASF. "Monsanto's  
19 conduct."

20           **THE COURT:** It does in 16.

21           **MR. HOHN:** You don't need to --

22           **THE COURT:** Why doesn't 16 take care of the problem?

23           **MS. GEORGE:** Fine. I am tired.

24           **THE COURT:** Okay. There's an agreement then, it  
25 sounds like.

1           **MR. HOHN:** Well, yeah. I mean that takes care of  
2 one of our objections, that's correct. We still have the  
3 other objections, but, yes. Removal of "jointly with another  
4 defendant," yes, that takes care of the issues in the verdict  
5 form, other than the one that I started with, which I thought  
6 was something that we talked about and I want to make sure I  
7 am not missing something.

8           Part 3, Your Honor, references that if you found in  
9 favor of Plaintiff Bader Farms against Defendant on the claim  
10 of negligent design and failure to warn, I thought we were  
11 going to refer back to the punitives instruction there also,  
12 because in order to -- for the -- they need to obviously look  
13 at the punitives instruction along with the verdict director  
14 for that claim.

15           **MS. GEORGE:** That again, I'm sorry. Can you please  
16 say that?

17           **THE COURT:** It does refer back.

18           **MS. GEORGE:** I added "pursuant to instruction."

19           **THE COURT:** It does refer back.

20           **MR. HOHN:** Where does it say that?

21           **MS. GEORGE:** I guess it will be 14. It should  
22 be 14.

23           **THE COURT:** Right.

24           **MR. HOHN:** I think the only --

25           **MS. GEORGE:** It doesn't make sense up there.

1 Because up there in the note it says "If you found in favor of  
2 Plaintiff Bader Farms, Inc. and against Defendant Monsanto  
3 Company on the claim of negligence," you can't refer to the  
4 punitives instruction up there because it's talking about the  
5 negligence claim.

6 **THE COURT:** No. The way we suggested doing it is to  
7 put another big clause in there. So it would read "If you  
8 found in favor of Plaintiff Bader Farms, Inc. and against the  
9 Defendant Monsanto Company on the claim of negligent design  
10 and failure to warn, 2015, 2016, and if you also find that" --

11 **MS. GEORGE:** But then do what? Say you find --

12 **THE COURT:** And then "if you also find that  
13 Defendant Monsanto is liable for punitive damages pursuant to  
14 Instruction No. 14," then complete the following paragraph by  
15 writing in the words.

16 **MS. GEORGE:** They would have already found it. So  
17 that's why it doesn't work.

18 **THE COURT:** Okay.

19 **MS. GEORGE:** We tried that. It doesn't --

20 **THE COURT:** I see what you are saying.

21 **MS. RANGLES:** And this is how I have also seen it  
22 done.

23 **MS. GEORGE:** This is actually out of the MAI.

24 **THE COURT:** So what's wrong with that, now that I  
25 understand it better?

1           **MR. HOHN:** It's not optimal. But in the interest of  
2 the hour of the day ...

3           **THE COURT:** Good move.

4           **MR. HOHN:** While my colleague is looking something  
5 up here, can I bring -- Your Honor invited us to look for  
6 additional cases on the intervening superseding cause. And we  
7 did find a case, and I hate to be the one that keeps bringing  
8 up cases you were involved in, but this was a Missouri Supreme  
9 Court case called *Seitz v. Lemay Bank*, 959 S.W.2d 458.

10          **THE COURT:** Do you have a copy?

11          **MR. HOHN:** Yes, I do.

12          **MR. MOOK:** You said S.W.2d 415?

13          **MR. HOHN:** 458. I have another copy if you want.

14          **LAW CLERK:** Do you have the pincite?

15          **MR. HOHN:** Yes. The pincite would be 464 and  
16 note 8.

17                 So this was a negligent bailment case, Your Honor.  
18 And the defendant Lemay Bank and Trust complained on the  
19 instructions, both on the instruction relating to -- well, the  
20 verdict director, but then there was also an instruction given  
21 for intervening cause. And so the Supreme Court went through  
22 the analysis and ultimately concluded the instructions weren't  
23 misdirecting, misleading or confusing, and the judgment of the  
24 trial court was affirmed.

25                 And if you look, Instruction No. 5 was the verdict

1 director and Instruction No. 6 was the intervening cause  
2 instruction. And the Court set out the actual intervening  
3 cause instruction that was given. This case postdates the  
4 decisions that we were looking at in the MAI book.

5 So while I would acknowledge --

6 **THE COURT:** I thought pocket parts were supposed to  
7 pick up these.

8 **MR. HOHN:** You would hope that they would. But in  
9 this one, Your Honor, I would say that while the Court didn't  
10 delve into this giving of the instruction very much, it did --  
11 part of its reasoning in concluding that there was not a  
12 roving commission was that the jury had the option under  
13 Instruction No. 5 to find Lemay Bank, if it found the  
14 evacuation was an intervening cause as defined in Instruction  
15 No. 6.

16 So the Missouri Supreme Court, you know, found  
17 that --

18 **THE COURT:** That's what it says.

19 **MR. HOHN:** So this case being -- postdating the  
20 decisions in the MAI, we would submit, Your Honor, supports  
21 the giving of our intervening, superseding cause instruction.

22 Now, we can obviously, you know, spend a little bit  
23 of time messing with the words, but this was a similarly  
24 short-handed instruction that was given.

25 **THE COURT:** Well, under this, I don't see where



1 there was any discussion or criticism of the submission of  
2 that instruction. I mean, in other words, that wasn't an  
3 issue in the case.

4 **MR. HOHN:** Well, no, and I said there wasn't an  
5 in-depth discussion on this. The defendant did complain on  
6 the roving commission issue, and then the Court used, as part  
7 of its reasoning, that they didn't think it was a roving  
8 commission. And also they cited back to, well, the jury also  
9 could look at Instruction No. 6, which was an intervening  
10 superseding cause instruction.

11 There's not many authorities that discuss this, Your  
12 Honor, and this happens to be the most recent discussion of it  
13 by the Missouri Supreme Court.

14 **MS. GEORGE:** Doesn't sound like there was any  
15 objection to that instruction, though.

16 **THE COURT:** That's what I am seeing. I don't think  
17 there was -- the issue wasn't presented in this case. I am  
18 looking at the footnote now. And that's just a recitation of  
19 what the instruction said. But I'm going to stick with  
20 MAI because -- and you have already submitted your proposal  
21 on --

22 **MR. HOHN:** We did, Your Honor.

23 **THE COURT:** You've already submitted that. That  
24 would be consistent --

25 **MR. HOHN:** Yeah, I am not saying this is -- this is

1 not the silver bullet. I readily admit that. But it does  
2 reflect the Missouri Supreme Court, you know, at least  
3 recognizing the giving of this instruction. I presume that  
4 they would have said that that was not an appropriate  
5 instruction and couldn't have cured the roving commission.

6 **THE COURT:** That presumption is not accurate, if the  
7 issue wasn't presented to the Court. I mean, it's nothing  
8 more than an observation by the Court at this point.

9 **MR. HOHN:** Okay. Well, that was the --

10 **THE COURT:** I really don't think that they  
11 considered it. Stop citing my cases.

12 **MR. HOHN:** I did -- I did with a little trepidation,  
13 Your Honor.

14 **THE COURT:** Well, I didn't write it at least. I  
15 just compared.

16 **MR. HOHN:** Exactly.

17 **THE COURT:** Who wrote it?

18 **MR. HOHN:** Maybe you had a problem with that  
19 intervening cause instruction.

20 **THE COURT:** So anyway, you've submitted your  
21 alternative submission on intervening cause. Although it  
22 doesn't track what this says.

23 **MR. HOHN:** It doesn't. And that's why I am saying  
24 we could -- we would gladly sit down and try and track that  
25 instruction.

1           **THE COURT:** Too late. Okay.

2           **MR. COX:** Judge, turn -- just turning back to  
3 Part 3. So, of course, Parts 1 and Parts 2 refer to a finding  
4 of negligent design or failure to warn.

5           Parts 1 and Parts 2, Your Honor, refer to the  
6 findings of negligent design and negligent failure to warn.  
7 But Part 3 seeks to impose liability for punitive damages with  
8 a finding of negligent design and failure to warn. Part 3  
9 should read that if you find in -- that Monsanto was liable  
10 for punitive damages under instruction blank, and I don't know  
11 what that was, you know, then you can go on. But you -- but  
12 they do not get an instruction that just because there was a  
13 finding of negligence, they get to answer the question yes or  
14 no for punitives.

15           **THE COURT:** Now, what --

16           **MR. COX:** They have to meet the -- they have to find  
17 the elements.

18           **THE COURT:** And what does MAI say?

19           **MS. GEORGE:** Exactly this.

20           **MR. COX:** I've got the book right here.

21           **THE COURT:** Well, somebody is wrong, it sounds like.

22           **MR. COX:** We actually talked about this in the back.

23           **THE COURT:** Was that your caucus back there?

24           **MR. COX:** No, no, no. That back.

25           And I don't remember which time it was, but the

1 point is, Judge -- and you made the point that it has to refer  
2 back to a finding under the punitive damages instructions.

3 **THE COURT:** And it does.

4 **MR. COX:** No, no, no. It finds -- it goes on to  
5 that, if you find a claim of negligence or failure to warn,  
6 that they get that instruction.

7 **THE COURT:** Okay.

8 **MR. COX:** Or that opportunity.

9 **THE COURT:** But what do you propose?

10 **MS. GEORGE:** Do you want to see it? I don't know if  
11 it will help you.

12 It's a 35.19 illustration. Because it's bifurcated,  
13 so we have to look at this right here.

14 **THE COURT:** Yeah, but you did add something that's  
15 not in here.

16 **MS. GEORGE:** The reference back to the instruction  
17 or what?

18 **THE COURT:** Yeah. Here is what the note says.  
19 That's what you are working off of; right?

20 **MS. GEORGE:** Yeah.

21 **THE COURT:** It says: If you found in favor of  
22 Plaintiff Hurt and against Defendant Acme, why don't you just  
23 in Instruction No. blank, complete the following paragraph.

24 **MS. GEORGE:** Use the word -- well, the only reason I  
25 identified it is because you said we can't get punitives from

1 '17 and '18, and that particular case there wasn't --

2 **THE COURT:** Well, it's still a reference to the  
3 instruction -- it looks like it tracks it exactly.

4 **MS. GEORGE:** I tried.

5 **MR. COX:** Okay. Judge, where are you looking at?

6 **THE COURT:** This is 35.19, page 768. I think it's  
7 the right book. Yeah. The 7th edition.

8 Looks like it's the same.

9 **MR. COX:** So, Chris, is this your alternative  
10 submission 4? I think this is ours.

11 Judge, I am looking at another 36.19, which is on --

12 **THE COURT:** 35.19.

13 **MR. COX:** 35.19, I'm sorry.

14 And where is -- Chris, do you just want to submit  
15 the alternative?

16 **MR. HOHN:** Sure.

17 **MR. COX:** Yeah.

18 Judge, we think that we will -- we can argue and  
19 point out with a reference to the prior instruction. We would  
20 prefer it to be the reference to the instruction to be above  
21 the question. I haven't looked at all the illustrations.  
22 Obviously there's a ton of them. But we think it would be  
23 less confusing if it was above because, as I read it and as we  
24 are all struggling with, it looks like if you find simple  
25 negligence design or failure to warn, they get to answer that

1 question.

2           **THE COURT:** Yeah, I don't think there's going to be  
3 any confusion. I'm going to follow the MAI example.

4           **MR. COX:** Okay. And we have an alternative to  
5 submit.

6           **THE COURT:** All right. Is it in the packet you gave  
7 me already?

8           **MR. COX:** Yes, Your Honor.

9           Judge, we are going to get you a page citation for  
10 our verdict form so you have it up there. Give us one second.

11           **MR. SHAW:** Judge, it's at page 36 through 38 of our  
12 submission, so you can mark it as denied.

13           **MS. GEORGE:** Judge, just to reject the verdict form  
14 that had all of the claims in it that you already rejected.

15           **THE COURT:** I may set the record.

16           **MS. GEORGE:** For the most rejected.

17           **THE COURT:** For most rejected instructions in the  
18 history of the world.

19           **MR. COX:** Judge, I just have one -- two quick points  
20 that we filed. One is just a simple administrative point.

21           On January 7th we filed some initial proposed  
22 instructions. Obviously that was all pretrial. And we've  
23 moved to withdraw that and ask the Court to grant our oral  
24 motion to file our previously submitted proposed instructions.

25           **THE COURT:** What do you mean?

1           **MR. COX:** We have another set that is in the Court  
2 file, and we just want the Court to be aware that we are  
3 moving to withdraw that because we spent a good amount of time  
4 coming up with the ones that we think we are submitting today.  
5 We were required to submit these previously.

6           **THE COURT:** So I can ignore the other ones, then?

7           **MR. COX:** You can ignore these. In fact, you can  
8 say granted, and these are no longer a part of the record, I  
9 think.

10          **THE COURT:** Motion is granted.

11          **MR. COX:** Okay. Thanks.

12                 And then the only other thing is, Judge, there were  
13 some discussion about what the record entails with regard to  
14 ownership of the trait. And I'm not going to belabor the  
15 point, but Monsanto did not design the trait. It licensed the  
16 trait. It did not own the trait, nor did it design it. And  
17 there's no evidence to that regard. We have made that point  
18 earlier. I just wanted to clarify that record.

19          **THE COURT:** You said Monsanto did not own the trait?

20          **MR. COX:** That's correct. We licensed the trait.  
21 The universe -- there is no evidence in the record of who owns  
22 it and who designed it.

23          **THE COURT:** Oh.

24          **MR. COX:** And so this came up in the context earlier  
25 of us --

1           **THE COURT:** But there is -- who owns it?

2           **MR. COX:** University of Nebraska.

3           **THE COURT:** I thought you bought it from the  
4 University of Nebraska.

5           **MR. COX:** We -- it's my understanding we took it  
6 pursuant to a license. There was some discussion about  
7 whether the license was exclusive or not because we can then  
8 relicense it to others, but the point is that we didn't design  
9 the trait itself. We only designed our Monsanto-branded Xtend  
10 seed, which is the point I made earlier about product ID.

11           **THE COURT:** I understand that part. But it's still,  
12 whether you own it or have it as a license, I think there's  
13 plenty of evidence in their case-in-chief about that.

14           **MR. COX:** No evidence of ownership. No evidence of  
15 design.

16           **THE COURT:** Well, maybe not design.

17           **MS. GEORGE:** We offered evidence that they own the  
18 proprietary rights. They exclusively own the proprietary  
19 rights, but you have offered no counterevidence to that.

20           **THE COURT:** Right.

21           **MS. RANGLES:** And Scott Kay testified that just --  
22 he said that Monsanto owns the seed and no one else can sell  
23 it. Monsanto got it deregulated.

24           **MR. COX:** We own Monsanto-branded Xtend seeds.  
25 We -- there's no evidence that we own or design the trait.



1 And that's the point I want to clarify for the record.

2 **THE COURT:** Okay.

3 **MS. RANGLES:** There is no other Xtend seed.

4 **THE COURT:** Yeah. I agree with the Plaintiffs on  
5 all of this.

6 **MR. COX:** Well, Dr. Ford Baldwin and Plaintiff's  
7 witness testified that there were. And just making the -- our  
8 point clear on the record, Your Honor.

9 **THE COURT:** All right.

10 **MR. BOZARTH:** If we are ready to move on, I was  
11 going to do the --

12 **THE COURT:** No, I can't find the 78th and 79th  
13 submission by the plaintiffs to kick them out. So I -- I'm --  
14 the paper is going everywhere.

15 I mean by the defendants. I misspoke. I meant by  
16 the defendants.

17 What are those last ones that you said that you were  
18 talking about?

19 **MR. SHAW:** The special verdict.

20 **THE COURT:** Yeah, the verdict forms.

21 **MR. SHAW:** Should be 36 through 38.

22 **THE COURT:** Okay. I think I got it.

23 Got it. Okay. So -- all right. Your special --  
24 your special verdict form said on pages 36 through 39.

25 Document 5371, I'm going to mark that tendered and rejected.

1 I will call that just special verdict form.

2 **MR. SHAW:** Only one other thing, Judge. If we can  
3 just --

4 **THE COURT:** No, I'm sure there will be more than one  
5 thing.

6 **MR. SHAW:** Just to check through everything, Judge,  
7 to see that we are on track with everything that you are  
8 giving and everything that's denied, and we don't need to make  
9 a record, I don't think. We just want to take a look.

10 **THE COURT:** What are you talking about?

11 **MR. SHAW:** Just to make sure we have tracked  
12 everything you have done.

13 **THE COURT:** You are not coming back up here.

14 **MR. SHAW:** We want to take a quick look at how we  
15 marked them, Judge, so we know which were the rejected ones  
16 and which are the ones being given, so we have a clear record.

17 **LAW CLERK:** Are you wanting Plaintiffs'? We went  
18 through these.

19 **THE COURT:** Here is another one.

20 This is why -- this was the last one, I think.

21 **LAW CLERK:** You want A through Y or the numbered  
22 ones?

23 **MR. COX:** Both. We just don't have a set.

24 **MR. PRZULJ:** It doesn't need be done on the record.  
25 We can do it later.

1           **THE COURT:** X and Y. That goes here.

2           **MR. PRZULJ:** Can we just get a copy of it by chance?

3           **THE COURT:** That's A through -- this also includes  
4 some of the plaintiffs, though.

5           **MR. SHAW:** Yes, Judge. If we can get -- I guess it  
6 would probably be good for both sides or all three sides to  
7 have copies of everything.

8           **MS. GEORGE:** That's been rejected?

9           **MR. SHAW:** Given and rejected.

10          **MS. GEORGE:** I am assuming he is going to file the  
11 rejected ones, so we will all get them that way.

12                   And then I am going to make -- add in all the  
13 numbers that he said and take out the four words that nobody  
14 likes but me.

15          **THE COURT:** Well, we haven't yet got to Verdict  
16 Form B either. We need to talk about that.

17          **MS. GEORGE:** Right.

18          **THE COURT:** We need to talk about that. We went  
19 'round and 'round and 'round on Verdict Form B. What's the  
20 problem now?

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

22          **THE COURT:** Well, it's submitted by Plaintiffs.

23                   Based on MAI 36.15. And I have already noted your  
24 objection that you can't go with joint venture and conspiracy  
25 at the same time. That's overruled.

1           **MR. BOZARTH:** BASF understands your rulings, Your  
2 Honor. We are going to submit as part of our packet, but we  
3 understand. Thank you.

4           **THE COURT:** A separate joint venture verdict form  
5 you mean?

6           **MR. BOZARTH:** Yes, sir.

7           **THE COURT:** Okay.

8           Any objection by Monsanto?

9           This Verdict Form B takes care of the possibility  
10 that the jury would find no joint venture and no conspiracy,  
11 in which case there would have to be an apportionment of  
12 fault.

13           So any objections over here? I mean, by --

14           **MR. HOHN:** No further objections.

15           **MR. COX:** No further objections.

16           **THE COURT:** Okay. All right. So that leads us to  
17 BASF's stack of stuff.

18           **MR. BOZARTH:** Yes, I handed it to you.

19           **THE COURT:** Here we go.

20           Why don't you make copies of those and give them  
21 to -- not yet because they need to be redone.

22           **MR. BOZARTH:** So what we have --

23           **THE COURT:** Got it.

24           **MR. BOZARTH:** So what we have submitted, and this is  
25 Docket 539, is a complete packet. And I am going to jump to

1 the ones that need to be tendered and rejected.

2           **THE COURT:** Okay. Just your page number is all I  
3 need then.

4           **MR. BOZARTH:** Yes, sir.

5           So the first one I believe is page No. 13, which is  
6 the definition of Engenia.

7           **THE COURT:** Okay. 13, I will -- X, Y, Z. I am  
8 going to label that Instruction No. Z, tendered by BASF and  
9 rejected.

10          **MR. BOZARTH:** Thank you.

11          We have a comparative fault, which is 14.

12          **THE COURT:** Okay. I will label that Instruction  
13 No. AA. Tendered and rejected.

14          **MR. BOZARTH:** Thank you.

15          I believe that 15 is a causation.

16          **THE COURT:** Okay. I'll label that BB. Tendered and  
17 rejected.

18          **MR. BOZARTH:** 16 is our verdict director.

19          **THE COURT:** Okay. CC, tendered and rejected.

20          **MR. BOZARTH:** Thank you.

21          **THE COURT:** And we are to page 17?

22          **MR. BOZARTH:** Yes, sir.

23          **THE COURT:** DD, tendered and rejected.

24          **MR. BOZARTH:** Thank you.

25          **THE COURT:** What next?

1           **MR. BOZARTH:** It's basically this one, 18. And this  
2 was -- corresponds to the -- it corresponds to the one you  
3 rejected for Monsanto.

4           **THE COURT:** Okay. EE, tendered and rejected.

5           **MR. BOZARTH:** Thank you.

6           **THE COURT:** 19, you want that too?

7           **MR. BOZARTH:** Yes, sir. 19 is --

8           **THE COURT:** FF, tendered and rejected.

9           **MR. BOZARTH:** Thank you.

10          **THE COURT:** Page 20.

11          **MR. BOZARTH:** This is the guarantor accident proof.

12          **THE COURT:** What am I at? GG? Yeah.

13          **MR. BOZARTH:** Yes.

14          **THE COURT:** GG, tendered and rejected.

15          **MR. BOZARTH:** 21 is the read and heeded.

16          **THE COURT:** HH, tendered and rejected.

17                   To proceeding cause, do you want that one?

18          **MR. BOZARTH:** Yes, tendered and rejected.

19          **THE COURT:** II.

20          **MR. BOZARTH:** Thank you.

21          **THE COURT:** Tendered and rejected. Here is your  
22 joint venture.

23                   **MR. BOZARTH:** Correct. Just so we are clear on the  
24 record, we have -- we have a joint venture which is the  
25 first -- which is on page 23, is an expressed joint venture.

1           **THE COURT:** Okay. And the other is implied?

2           **MR. BOZARTH:** Yes.

3           **THE COURT:** So JJ is the expressed.

4           KK is the implied. Both rejected.

5           And your civil conspiracy?

6           **MR. BOZARTH:** Yes, the next is 26, civil conspiracy.

7           **THE COURT:** LL, tendered and rejected.

8           Damages.

9           **MR. BOZARTH:** Yes. Which is 28.

10          **THE COURT:** MM, tendered and rejected.

11          Mitigation, NN.

12          **MR. BOZARTH:** Yeah, we can -- I think you

13          submitted -- you submitted one so we don't have to --

14          **THE COURT:** So we don't have to do that one.

15          **MR. BOZARTH:** Correct. And then --

16          **THE COURT:** That's it.

17          **MR. BOZARTH:** 30 is our verdict form.

18          **THE COURT:** They are getting stuck together.

19          Okay. And then your verdict form on pages 30

20          and 31, I will just attach that without labeling it further.

21          So that's tendered and rejected as well.

22                 So I am going to put a clip on all of these, and I  
23          will mark them on the front tendered and rejected. And I will  
24          do the same thing with the other packet that Shane took from  
25          me. Okay.

1           **MR. BOZARTH:** Then very quickly for the record, Your  
2 Honor, BASF also filed preliminary jury instructions on  
3 January 7. And if we can have the same order, withdrawing  
4 those.

5           **THE COURT:** So you will dump those too?

6           **MR. BOZARTH:** Yes, sir.

7           **THE COURT:** Okay.

8           **MR. BOZARTH:** And then we filed, similar to  
9 Monsanto, a table with our objections, which is 541.

10          **THE COURT:** Okay.

11          **MR. BOZARTH:** So just for the record if we could get  
12 a ruling on those as well.

13          **THE COURT:** Okay. They will all be overruled.

14          **MR. BOZARTH:** Thank you, sir.

15          **THE COURT:** I am going to mark on yours "BASF  
16 instructions tendered and rejected this 13th day of February,  
17 2020."

18                 Okay. Now, I haven't marked the other packet up,  
19 but it will be the same.

20          **MR. BOZARTH:** Thank you.

21          **THE COURT:** Okay. Do you have everything you need  
22 for Plaintiffs now?

23          **MS. GEORGE:** Yes, I believe so.

24          **THE COURT:** Okay. Why don't we meet at 8:30 then  
25 with the final packet. I want one with tails and one without.



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**MS. GEORGE:** Yes, sir.

**THE COURT:** One clean copy for the jury.

Anything else for Plaintiffs?

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

**THE COURT:** Defendants?

All right. Let's go home.

(The proceedings concluded at 9:01 p.m.)

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 2284 through 2438 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 14th day of February, 2020.

*/s/ Reagan A. Fiorino*

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