

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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

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JURY TRIAL - VOLUME 15

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

FEBRUARY 14, 2020

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FEBRUARY 14, 2020

(The proceedings commenced at 9:07 a.m.)

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

THE COURT: Good morning, ladies and gentlemen. As you know, we lost one of the jurors who has a personal matter they had to attend to; so the case will be submitted just to the seven of you.

Instruction No. 1. Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others because all are important. This is true even though some of those I gave you at the beginning of the trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that does not mean they are more important than my earlier instructions. Again, all instructions, whether given and whether in writing or not, must be followed.

Instruction No. 2. Neither in these instructions

1 nor in any ruling, action or remark that I have made during
2 the course of this trial have I intended to give any opinion
3 or suggestion as to what your verdicts should be.

4 Instruction No. 3. In deciding what the facts are,
5 you may have to decide what testimony you believe and what
6 testimony you do not believe. You may believe all of what a
7 witness said or only part of it or none of it.

8 You may consider a witness's intelligence; the
9 opportunity the witness had to see or hear the things
10 testified about; a witness's memory, knowledge, education and
11 experience; any reasons a witness might have for testifying a
12 certain way; how a witness acted while testifying; whether a
13 witness said something different at another time; whether a
14 witness's testimony sounded reasonable; and whether or to what
15 extent a witness's testimony is consistent with other evidence
16 you believe.

17 In deciding whether to believe a witness, remember
18 that people sometimes hear or see things differently and
19 sometimes forget things. You will have to decide whether a
20 contradiction is an innocent misrecollection, or a lapse of
21 memory, or an intentional falsehood; and that may depend on
22 whether it has to do with an important fact or only a small
23 detail.

24 Instruction No. 4. You will have to decide whether
25 certain facts have been proved by the greater weigh of the

1 evidence. A fact has been proved by the greater weight of the
2 evidence, if you find that it is more likely true than not
3 true. You decide that by considering all of the evidence and
4 deciding what evidence is more believable.

5 You have probably heard the phrase "proof beyond a
6 reasonable doubt." That is a stricter standard than "more
7 likely true than not true." It applies in criminal cases, but
8 not in this civil case; so put that out of your mind.

9 Instruction No. 5. Certain charts and summaries
10 have been shown to you in order to help explain the facts
11 disclosed by the books, records, or other underlying evidence
12 in the case. Those charts or summaries are used for
13 convenience. They are not themselves evidence or proof of any
14 facts. If they do not correctly reflect the facts shown by
15 the evidence in the case, you should disregard these charts
16 and summaries and determine the facts from the books, records
17 or other underlying evidence.

18 Instruction No. 6. You have heard testimony from
19 experts who testified to opinions and the reasons for their
20 opinions. This opinion testimony is allowed because of the
21 education or experience of the witnesses.

22 You should judge this opinion testimony just as you
23 would any other testimony. You may accept it or reject it and
24 give it the weight as you think it deserves, considering the
25 witnesses's education and experience, the reasons given for

1 the opinion and all other evidence in the case.

2 Instruction No. 7. The term "negligent" or
3 "negligence" as used in these instructions means the failure
4 to use that degree of skill and learning ordinarily used under
5 the same or similar circumstances by an expert in defendant's
6 business.

7 The phrase "ordinary care" means that degree of
8 skill -- of care, skill and learning that an ordinarily
9 careful expert in defendant's business would use under the
10 same or similar circumstances.

11 Instruction No. 8. Two verdict forms are submitted
12 to you with these instructions. Your decision on any issue
13 listed on the verdict forms must be unanimous in order for you
14 to return any verdict. Use Verdict Form A to record your
15 verdict on the claims of Plaintiff Bader Farms, Inc. If you
16 find in favor of Plaintiff, you must answer the questions
17 contained in Verdict Form B.

18 Instruction No. 9. Negligent design and failure to
19 warn for 2015-2016, Plaintiff Bader Farms, Inc.

20 In Verdict Form A, on claims of Plaintiff Bader
21 Farms, Inc. for negligent design and negligent failure to
22 warn, your verdict must be for Plaintiff and against Defendant
23 Monsanto Company if you believe, for only the years 2015-2016:

24 First, such defendant designed, manufactured or sold
25 any one or more component of the dicamba-tolerant system in

1 2015-2006; and

2 Second, dicamba-based herbicides have a propensity
3 to move off target; and

4 Third, such defendant failed to use ordinary care to
5 either: One, design a reasonably safe dicamba-tolerant
6 system; or, two, adequately warn of the risks of off-target
7 movement; and

8 Fourth, such failure, in one or more respects
9 submitted in paragraph third, directly caused or directly
10 contributed to cause damage to Plaintiff Bader Farms, Inc.

11 If you believe any of the above elements has not
12 been proved, your verdict must be for Defendant Monsanto
13 Company.

14 Instruction No. 10. Negligent design and failure to
15 warn, 2017 to the present, Bader Farms, Inc.

16 In Verdict Form A, on claims of Plaintiff Bader
17 Farms, Inc. for negligent design and negligent failure to
18 warn, your verdict must be for Plaintiff and against Defendant
19 Monsanto Company and/or Defendant BASF Corporation if you
20 believe, for only the period 2017 to the present:

21 First, such defendant, individually or jointly with
22 another defendant, designed, manufactured, or sold any one or
23 more components of the dicamba-tolerant system in 2017 to the
24 present; and

25 Second, dicamba-based herbicides have a propensity

1 to move off target; and

2 Third, such Defendant failed to use ordinary care to
3 either: One, design a reasonably safe dicamba-tolerant
4 system; or, two, adequately warn of the risks of off-target
5 movement; and

6 Fourth, such failure in one or more respects
7 submitted in paragraph third directly caused or directly
8 contributed to cause damage to Plaintiff Bader Farms, Inc.

9 If you believe any of the above elements has not
10 been proved as to a particular defendant, your verdict must be
11 for that defendant.

12 Instruction No. 11. Actual damages, Bader Farms,
13 Inc.

14 If you find in favor of Plaintiff Bader Farms, Inc.
15 on any one or more claims in Verdict Form A, then you must
16 award Plaintiff Bader Farms, Inc. such sum as you believe will
17 fairly and justly compensate Plaintiff Bader Farms, Inc. for
18 any damage you believe it sustained and is reasonably certain
19 to sustain in the future, which the occurrence in the evidence
20 directly caused or directly contributed to cause.

21 Instruction No. 12. If you find that Plaintiff
22 Bader Farms, Inc. failed to mitigate damages as submitted in
23 Instruction No. 13, then in determining Plaintiff's total
24 damages you must not include those damages that would not have
25 occurred without such failure.

1 Instruction No. 13. If you find in favor of
2 Plaintiff Bader Farms, Inc., you must find that Plaintiff
3 Bader Farms, Inc. failed to mitigate damages if you believe:

4 First, Plaintiff Bader Farms, Inc. failed to follow
5 proper farm management practices; and

6 Second, Plaintiff Bader Farms, Inc. thereby failed
7 to use ordinary care; and

8 Third, Plaintiff Bader Farms, Inc. thereby sustained
9 damage that would not have occurred otherwise.

10 The phrase "ordinary care" as used in this
11 instruction means that degree of care that an ordinarily
12 careful person would use under the same or similar
13 circumstances.

14 Instruction No. 14. Punitive damages.

15 If you find in favor of Plaintiff Bader Farms, Inc.
16 under Instruction No. 9, negligent design and failure to warn
17 for the years 2015 and 2016, and if you believe the conduct of
18 Defendant Monsanto Company as submitted in Instruction No. 9
19 showed complete indifference to or conscious disregard for the
20 safety of others, then in Verdict Form A, you may find that
21 Defendant Monsanto Company is liable for punitive damages.

22 You may consider harm to others in determining
23 whether Defendant's conduct showed complete indifference to or
24 conscious disregard for the safety of others.

25 If you find that Defendant Monsanto Company is

1 liable for punitive damages in this stage of the trial, you
2 will be given further instructions for assessing the amount of
3 punitive damages in the second stage of the trial.

4 There is a different burden of proof that applies
5 only to punitive damages. A party seeking to recover punitive
6 damage has the burden to cause you to believe that the
7 evidence has clearly and convincingly established the facts
8 necessary to recover punitive damages.

9 Instruction No. 15. If you find in favor of
10 Plaintiff Bader Farms, Inc. on any claim in Verdict Form A,
11 then you must answer the questions in Verdict Form B. Verdict
12 Form B asks you to answer questions about joint venture and
13 conspiracy among the defendant companies.

14 Instruction No. 16. You may find that Defendants'
15 acts were within a joint venture if you find:

16 First, there was an implied agreement among the
17 defendants to commercialize the dicamba-tolerant system;

18 Second, the acts were performed to serve that common
19 purpose;

20 Third, Defendants had a shared pecuniary interest in
21 that purpose; and

22 Fourth, the Defendants had an equal voice in
23 determining the direction of the enterprise.

24 Instruction No. 17. Civil conspiracy.

25 You may find that Defendants' acts were within a

1 conspiracy if you find:

2 First, Defendants agreed to develop and
3 commercialize the dicamba-tolerant system; and

4 Second, Defendants made said agreement with the
5 expectation that off-target movement and damage to third-party
6 farmers would increase sales of their dicamba-based products;
7 and

8 Third, Defendants carried out said agreement; and

9 Fourth, Defendants' acts in furtherance of their
10 agreement caused or directly contributed to cause Plaintiffs'
11 damages.

12 There is a different burden of proof that applies
13 only to Plaintiffs' conspiracy claim. A party seeking to
14 establish a conspiracy among defendants has the burden to
15 cause you to believe that the evidence has clearly and
16 convincingly established the facts necessary to prove a
17 conspiracy.

18 Instruction No. 18. There are rules you must follow
19 when you go to the jury room to deliberate and return with
20 your verdict.

21 First, you will select a foreperson. That person
22 will preside over your discussions and speak for you here in
23 court.

24 Second, it is your duty, as jurors, to discuss this
25 case with one another in the jury room. You should try to

1 reach agreement, if you can do this without going against what
2 you believe to be the truth, because all jurors have to agree
3 on the verdict.

4 Each of you must come to your own decision. But
5 only after you have considered all of the evidence, discussed
6 the evidence fully with your fellow jurors and listened to the
7 views of your fellow jurors.

8 Do not be afraid to change your mind if the
9 discussion persuades you that you should, but do not come to a
10 decision just because other jurors think it is right or just
11 to reach a verdict. Remember you are not for or against any
12 party. You are judges -- judges of the facts. Your only job
13 is to study the evidence and decide what is true.

14 Third, if you need to communicate with me during
15 your deliberations, send me a note signed by one or more of
16 you. Give the note to the bailiff or court security officer
17 or the clerk, and I will answer you as soon as I can, either
18 in writing or here in court. While you are deliberating, do
19 not tell anyone, including me, how many jurors are voting for
20 any side.

21 Fourth, your verdict has to be based solely on the
22 evidence and on the law that I have given to you in my
23 instructions. Nothing I have said or done was meant to
24 suggest what I think your verdict should be. The verdict is
25 entirely up to you.

1 Finally, your verdict forms are -- the verdict forms
2 are your written decision in this case. I'll not read the
3 forms now but they are attached to the instructions. You will
4 take these forms to the jury room and when you have all agreed
5 on the verdicts, your foreperson will fill in the forms, sign
6 and date them, and tell the court security officer or bailiff
7 or the clerk that you are ready to return to the courtroom.

8 If there was more than one form furnished, you will
9 bring the unused forms in with you.

10 And then as I said, attached to the instructions are
11 the forms of verdict.

12 The lawyers have asked that I give them a warning
13 about the time for their argument is about to expire, so I
14 will do that.

15 Mr. Randles, you may proceed.

16 CLOSING ARGUMENT ON BEHALF OF PLAINTIFFS

17 **MR. RANGLES:** May it please the Court, Your Honor.

18 Good morning.

19 You know, this is every lawyer's favorite part of
20 the case because we get to look you in the eye and really talk
21 to you. I mean, there are strict -- we got to get up in
22 openings statements, but there are strict rules about how we
23 can just preview the evidence. But now we get to look you in
24 the eye, tell you what we think the evidence showed, apply the
25 evidence to the law, and ask you to do what we'd like you to

1 do, which is render a verdict for us.

2 You know, the challenge in a case like this is
3 there's so much evidence. We've introduced something like 180
4 documents from these companies. They have never been seen
5 before. You've seen tons of witnesses. And you have sat
6 through a long time.

7 And we want to thank you for doing that. I know you
8 didn't volunteer for this, but jury service is one of the most
9 important duties of citizenship. And it's right up there with
10 voting, in terms of your ability to make a difference.
11 Because over the ages we decided that humans should not settle
12 things based on who is stronger, who is richer, who has
13 greater numbers, but based on what people in the community say
14 should be the result.

15 And we are very comfortable with putting my clients'
16 matters and my clients' future in your hands. I've been in
17 front of a lot of jurors in a lot of places, and I have never
18 seen a jury work harder and focus more on the evidence than
19 you have, and we thank you for that. Because I know it's not
20 a thrill a minute. I mean, there are things we have to put in
21 for legal reasons. There are very technical scientific things
22 we have to put in. And you guys soldiered through it in an
23 admirable way. Thank you for that.

24 And I know some of those videos you would have
25 rather have changed the channel, but you hung in there, and so

1 thank you for it. And we are near the end and we really
2 appreciate it. Our system cannot function without citizens
3 being willing to do their duty, and you are here to do it, and
4 we can't thank you enough.

5 Let me tell you kind of how I am going to proceed
6 today. I am Plaintiff counsel, as you probably guessed by
7 now. And I get 40 minutes to start, and then I will get 20
8 minutes at the end because we get to go first and last because
9 we have the burden of proof, a burden that we believe we have
10 overwhelmingly met in this case.

11 And so my goal today is to walk you through the
12 verdict form that you are going to have back there so you
13 don't see it for the first time and then apply the evidence as
14 I see it to the various questions of the verdict form.

15 I will also highlight some of the judge's
16 instructions. I do not mean to take anything out of context,
17 and he -- he instructs you on the law, but I will suggest how
18 I think some of the legal phrases apply to the evidence you
19 are going to see in this case.

20 You know, when we started, I said to you that you
21 were going to hear evidence about an ecological disaster that
22 was foreseeable and foreseen by these defendants. I think
23 we've certainly met that burden. But as you sit here today,
24 you have seen company documents that no one else has ever
25 seen. All the documents we have shown you have been kept

1 within -- of the companies have been kept within the
2 companies.

3 You are the most informed people in the world right
4 now about how these companies came to their decisions, how
5 they enacted those decisions and what choices they made, and
6 those are the key issues in this case.

7 So I want to start by showing you the verdict form
8 you are going to see in this case. And there are several
9 pages and we are going to go through them one at a time, but I
10 want to show you the first question you are going to be asked
11 to decide.

12 It's negligent design or failure to warn, 2015 to
13 2016. And I don't think you guys are surprised about the
14 separation of the claims into '15 and '16 and '17 forward,
15 because you know the cotton seed went on sale in '15, soybean
16 seed in '16, without any legal herbicide. In the '17 forward,
17 there was the legal herbicides that were supposed to solve the
18 problem. The evidence is clear it didn't. So that's the
19 separation you have here.

20 So this one is negligent design or failure to warn,
21 2015 to '16. And I have conveniently filled in your verdict
22 form as you go here so you can just remember that as you go.
23 I am sure they may have some other suggestions for how you
24 fill it in, but we are going to ask you to find in favor of
25 Plaintiff Bader Farms, Inc.

1 I want to mention three of the instructions the
2 judge gave here and just highlight a little bit to illustrate
3 some things you want to keep in mind when you fill this out.

4 Let's look at No. 4. And if we can blow that up a
5 little bit. I was going to highlight them, but as you might
6 guess we were working to the last minute, so I will just sort
7 of highlight them as we talk.

8 This is your burden of proof for most of the claims
9 in the case, is greater weight of the evidence. And it's more
10 likely true than not. That just means if you think it's more
11 likely that what we say happened happened on an issue, you
12 find for us. And the reverse.

13 It's not a particularly high standard of proof.
14 It's just a little more than that. But I am not going to
15 stand up here and ask you to apply, you know, try to limbo in
16 under an easy standard. I believe we have proven everything
17 in this case overwhelmingly, but I just want to mention that
18 because there's a little bit higher standard for certain
19 things.

20 Again, not the proof beyond a reasonable doubt that
21 you see on TV and stuff in criminal cases. Nothing in a civil
22 case is that. So it's way up here. Reasonable -- the greater
23 weight of the evidence is somewhere in here, and then the
24 clear and convincing is somewhere in between. All right?

25 Let's look at No. 7. This is the instruction where

1 the Court tells you about sort of what does negligence mean
2 and what sort of conduct should one engage in.

3 If we could again blow that up.

4 It says, "Negligence as used in these instructions
5 means the failure to use the degree of skill and learning
6 ordinarily used in the same or similar circumstances by an
7 expert in Defendants' business."

8 Now, I think that's important in this case because
9 Defendants, they can't come in and claim they don't know about
10 their products. They are held to the standard of the expert.
11 They are supposed to know what there is to know. And you have
12 seen the evidence of what they actually know, and you have
13 seen in this case how they repeatedly departed from what had
14 been done in the past, in terms of testing and putting out a
15 seed system in '15 and '16 without an accompanying herbicide.
16 And I will remind you of some of the key pieces of evidence.

17 And then just the phrase "ordinary care" means what
18 would an ordinarily careful expert in Defendants' business do.
19 And I believe we have shown you clearly that not only was not
20 ordinary care exercised, but no care at all was demonstrated
21 for independent third-party farmers.

22 **THE COURT:** Mr. Randles, just a second.

23 Are your monitors working?

24 **JUROR:** These are not.

25 **MR. RANGLES:** Oh, thank you, Your Honor.

1 **THE CLERK:** Are they still not on?

2 (Technical difficulties)

3 **THE COURT:** I will give you more time.

4 **MR. RANGLES:** I appreciate that. I assumed that.
5 Thank you, Your Honor.

6 **JUROR:** This one in the very back is on.

7 **THE COURT:** I will give you more time.

8 **MR. RANGLES:** I think this is the one technological
9 problem that's not my fault.

10 **THE COURT:** Everything working now?

11 The monitor is working? Okay.

12 I will add another five minutes extra.

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

14 Shall I proceed?

15 **THE COURT:** You may.

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

17 Let's go to Instruction No. 9.

18 This is the instruction the Court read to you
19 regarding the first question on the verdict form, which is the
20 negligent design and failure to warn in '15 and '16, and it --
21 it gives you the elements here.

22 We are going to start at first, that such defendant
23 designed, manufactured or sold any one or more component of
24 the dicamba-tolerant system in '15 and '16. And, second,
25 dicamba-based herbicides have a propensity to move off target.

1 And we have showed that overwhelmingly to you in this case.
2 We are going to talk about that a little bit more. And third,
3 such defendant failed to use ordinary care either to design a
4 reasonably safe dicamba-tolerant system or adequately warn of
5 the risks of off-target movement, and that these, what you
6 have seen above, caused or contributed to cause my clients'
7 injury.

8 So that's the legal basis of the first question.
9 And much of this applies to all of the subsequent questions,
10 so we will be shorter on that.

11 The fact is that what happened here was completely
12 foreseeable and foreseen by these defendants. You know, if
13 you remember way back at the front of the case, we brought
14 Steve Smith in. And he told you he was on the Dicamba
15 Advisory Council. And he warned Monsanto repeatedly, and
16 later BASF, that this system would move off target and it
17 would devastate crops in the midwest, and that it wasn't
18 compatible with midwestern agriculture.

19 Likewise, you have heard in one of the video
20 depositions, BASF met with the Midwest Food Processors
21 Association, and they repeated basically the same message;
22 that if you put this out, it's going to devastate midwestern
23 agriculture, and especially specialty crops.

24 Dr. Baldwin told you that over the years before this
25 came out when he would talk with Monsanto folks about this and

1 said how are you going to deal with the off-target movement
2 problem, they would be very upfront with him. They said
3 people will buy our system and the off-target movement issue
4 will go away. And we will talk more about this later, which,
5 you know, in a sense that's right, if you can buy the
6 dicamba-tolerant seeds and cotton, but there's no
7 dicamba-tolerant peach trees or apple trees or watermelons or
8 most of the things you go into the supermarket to buy.

9 So this is the first product in American history
10 that literally destroys the competition. You buy it or else.
11 And they knew that from the start and they were fine with it.

12 As a matter of fact, you saw this earlier. Several
13 academics warned them -- let's put up 311 -- when Monsanto got
14 a gathering of academics together, before the system was put
15 out and surveyed them, and said -- when asked them what they
16 thought, one of the chief messages here recorded in Monsanto's
17 own document is "managing specialty crops." "Don't do it."
18 In all caps. "Expect lawsuits."

19 So there is no way on earth that these defendants
20 can get up here and say, you know, we don't foresee the damage
21 that was going to occur. And we didn't foresee off-target
22 movement or spraying off label because they did. They
23 repeatedly talked about it. You remember the document put up
24 with Boyd Carey by Mr. Miller where they were going through
25 the decision tree at Monsanto whether or not to release the

1 dicamba-tolerant cotton without the accompanying herbicide,
2 and they did the risks and benefits. And one of the risks was
3 farmers would spray off label.

4 And I said to Dr. Carey, farmers didn't have a
5 choice here. You didn't invite people who would be victims in
6 to say, do you agree with our risk benefit analysis? You
7 didn't give them a vote. People like Bill Bader and other
8 farmers of nondicamba-tolerant crops were subjected to an
9 experiment. They were subjected to risks that they did not
10 choose. They did nothing wrong. They were simply farming
11 their land, and these defendants chose to expose them to a
12 risk, and many of them were harmed as you have heard.

13 These defendants knew so much about their product
14 that they knew they couldn't control it. We told you the
15 example about the greenhouse where they couldn't keep it on
16 track in a greenhouse. You saw -- heard testimony from BASF's
17 folks making fun of Monsanto for not being able to keep the
18 dicamba in place in Monsanto's own seed beds, over at
19 Shelbyville. It moved off target and hurt other farmers. And
20 you saw other cases of it moving off target.

21 These defendants couldn't control it before they
22 ever put it on the market. So what was Monsanto's solution to
23 moving off target? They just stopped their own people from
24 spraying it, at the very time they are trying to convince to
25 EPA and the public this is safe. You should all do it.

1 Monsanto forbade their people from spraying it so it wouldn't
2 move off target and they couldn't get bad results likewise.

3 And you heard this from Dr. Carey. For the first
4 time he knew in his 30 years in the industry, with the
5 possible exception of Monsanto maybe doing it once before,
6 they refused to let industry scientists test. Now, you
7 remember -- and we went all through this, and around and
8 around, with Dr. Carry.

9 They actually let outside university scientists test
10 the dicamba formulations for efficacy. In other words, did
11 they kill weeds?

12 Now, you didn't hear any nonsense about GLP or any
13 of that on the weed testing because they knew they would like
14 those results. Dicamba is very good at killing things. And
15 they got the results they wanted.

16 But when university scientists wanted to test for
17 off-target movement, Monsanto wouldn't let them. And BASF was
18 doing a little of it, and Monsanto told BASF, knock it off
19 because we can't control these results.

20 So I asked Dr. Carey, I said, what did you think
21 about Monsanto refusing to let university scientists test?
22 And he said, I disagreed with the decision at the time, but it
23 was made above my head. You actually heard the person who was
24 involved in that decision, Tina Bhakta, talk about it here in
25 court by video. But he said, I didn't have a say.

1 So you move forward in time. And you remember in
2 2017 at a meeting of academics at Monsanto, John Chambers
3 testified that it was a mistake to prohibit that testing. So
4 I asked Dr. Carey, is that Monsanto's possession? Yes, it is.

5 But Mr. Miller got up and talked about good
6 laboratory practices and all of that and got Dr. Carey to
7 justify the decision. So you remember I got him back on the
8 second examination, I said, can you please tell us, does
9 Mr. Chambers speak for Monsanto that it was a mistake, or does
10 Mr. Miller speak for Monsanto that it was the right decision
11 to make? And ultimately you know what his answer to me was.
12 "I don't know." I don't know what Monsanto's position is.

13 But you know what their position was. Different
14 messages for different audiences. They wanted to make the
15 academics happy so they admitted a mistake, but here in court
16 they don't want to admit a mistake to you because it might
17 cost them.

18 What was the motivation? Well, the motivation was
19 to keep a clean slate. And you've seen this document, and I
20 think in many ways this is the clearest Monsanto document
21 about their motives that you have.

22 It says "You are all aware of the things that the
23 EPA has been hearing from academics at the state level with
24 regards to dicamba and M1691. With this having such an impact
25 at the federal level, our leadership has decided to pull back

1 some of this academic testing with Xtend and XtendiMax
2 formulation to ensure that these formulations keep a 'clean'
3 slate". That was the purpose.

4 And they were even laughing at the excuses they
5 would give academics. You remember when they told Kevin
6 Norsworthy -- I mean, Jason Norsworthy at University of
7 Arkansas when he asked for it, "Well, we just don't have
8 enough for you to test it."

9 And the response in the Monsanto people to their
10 fiction was "Hahaha. Difficulty in producing enough product
11 for field testing. Hahaha. Bullshit."

12 BASF called Monsanto science voodoo science. And so
13 as a result of them failing to test and shutting down testing,
14 once they put out the product, they were putting out a product
15 that they didn't know the very basics about.

16 You remember this memo from one of their scientists,
17 Jeff Travers. He said, "All, we don't know how long a
18 sensitive plant needs in a natural setting to show volatility
19 damage. We don't know what concentration in the air causes a
20 response either. There is a big difference for plants exposed
21 to dicamba vapor for 14 versus 48 hours. Be careful using
22 this externally."

23 They want to tell people, but they didn't know the
24 very basics. They were just shoving it out there, going to
25 collect the money, and let the chips fall where they may. And

1 if they fell on innocent farmers, too bad.

2 The result was they even characterized themselves as
3 a group of renegades. Monsanto, when they were putting out
4 the seeds in '15 without a label, again, laughing at some of
5 the folks, laughing about what was happening, "That I all get
6 to work with a group of renegades that launch a technology
7 without a label, and thinks one sticker" -- the pink
8 sticker -- "is going to keep us out of jail. If that was the
9 case Rhylander would be covered in stickers." He is the U.S.
10 Crop Protection lead.

11 They called themselves a group of renegades. They
12 knew what they were doing was wrong and unprecedented, but the
13 money was too temping.

14 BASF knew what was going on. BASF warned Monsanto
15 that the off-label spraying was going to be rampant in 2016.
16 That was Dan Westberg who was here for most of the trial. And
17 he said that at a conference that Boyd Carey took the notes
18 for who was here, they knew good and well what was going to
19 happen.

20 So what did happen? Well, you've seen the EPA
21 compliance advisory for 2016 that talked about all of the
22 complaints going on, particularly in Missouri. 117 in
23 Missouri. 42,000 acres. Peaches being one of the key crops.
24 What happened wasn't surprising; it was inevitable.

25 Let's go to the second question on the verdict form.

1 Second question on the verdict form is the same
2 claim but for 2017 forward when they put out the new products.
3 I am not going to put up a separate instruction there. But
4 with all this lack of testing that Monsanto did, and BASF
5 admits it did one test with Engenia for sensitive plants, and
6 you have heard how Monsanto manipulated their testing to make
7 sure it wouldn't mimic real-world conditions, that it would be
8 over bare dirt, the sensitive plants wouldn't be nearby, like
9 being in a laboratory.

10 And Boyd Carey admitted on the stand, everything
11 that moves you toward the real world increases volatility and
12 off-target movement. When it's hot, volatility goes up. When
13 there's wind, it moves. When there's temperature inversions,
14 it picks up and moves a great distance. So -- and the more
15 acres you spray, the more volatiles get in the air.

16 So they made sure they didn't test any of that, but
17 unfortunately once you put it out in the real world with a
18 label that is as good as can be done to try to limit risk, but
19 you -- to spray the weeds by the time they reach 4 inches,
20 which is the only warranty they give you on these products, to
21 do that, Dr. Baldwin explained to you, to avoid all the things
22 they say you have to avoid, wind and rain and temperature
23 inversions, you can't get big fields sprayed, 1,000 acres or
24 more. It's impossible.

25 So what happened? Well, Dr. Bradley calculated the

1 damage that was done in '17 when things were supposed to be
2 better. And you've seen this. I won't have to go through it
3 again. But the number of claims everywhere, a total of
4 3.6 million acres damaged, and the epicenter being down around
5 southeast Missouri and northeast Arkansas, the bull's-eye.

6 So the EPA issued another report in '17 saying, you
7 know, we thought it was going to get better with the new stuff
8 and it got worse. But these companies already knew what was
9 happening. They were already planning to defend all of this.
10 You know, you saw a document earlier in the case going all the
11 way back to 2010 where Monsanto predicted that they were going
12 to have to defend volatility and off-target movement in the
13 courts. And they went forward. And as a matter of fact, they
14 actually mapped out how many claims they were going to have.

15 You've seen this claims chart when Boyd Carey
16 testified. The assumptions. They were going to damage 1300
17 people -- farmers in 2016. 2700 in '17. And on up. They are
18 telling the public they are going to solve the problems, but
19 internally they are saying, we know we are going to hurt a
20 bunch of farmers, but we are going to put it out the door
21 anyway. That's not ordinary care. That's not any care at
22 all.

23 And in all the testimony you heard, did you hear one
24 time, one test designed to see if the product was dangerous to
25 innocent third parties? No.

1 Did you hear one -- did you see one document that
2 expressed the slightest sympathy for an injured third party?
3 You did not.

4 Did you see one company witness express any sense of
5 duty to protect the public? No. All they said was we were
6 just generating data for the EPA to be able to sell the
7 product.

8 And so they pushed it out the door.

9 Now, you have heard a lot that the EPA reupped it in
10 2018. And you never would have heard if I hadn't said it.
11 That was a conditional reregistration with limits on them and
12 with obligations to do additional research, including about
13 orchards.

14 Did you hear one word of new research they did about
15 orchards? Did you hear one word about research they did on
16 perennial crops? No, because they haven't done it.

17 Well, they are on probation. The probation review
18 comes up at the end of this year. No one knows how it's going
19 to turn out, but they clearly haven't met the conditions.

20 So all of this conduct reaches inevitable result and
21 injured innocent farmers, including Bill Bader. And we put up
22 a timeline of events, a couple of timelines, showing you what
23 had been happening at Bader Farms. And this is important
24 because they want to tell you that somehow it was something
25 other than dicamba.

1 And you remember they brought in their experts,
2 looking at satellite photos from space. Experts that said
3 they never looked at satellite photos from space. They had no
4 experiences doing it. They never diagnosed injury in a field
5 based on a satellite injury from space. You never even heard
6 whether anyone's ever done that before.

7 But they had to do it, and they had to do it for
8 this reason. Because they knew I was going to stand up here
9 and say to you: What changed? What was different from 2015
10 forward? Dr. Baldwin told you. This system, pouring millions
11 of tons, millions of pounds of dicamba into the air every
12 year.

13 You heard Bill Bader say they have got 60 million
14 acres covered now with this system. They weren't covered with
15 dicamba-tolerant seeds before. Pumping somewhere around
16 16 million pounds of dicamba into the air that wasn't there
17 before. That's what changed.

18 So they had to say to you, well, even though they
19 are going to point their fingers at deer and too much water
20 and too little water and bacteria and Armillaria, something
21 that has been in the soil 1,000 years, they had -- no, let's
22 leave that up.

23 They had to say to you, well, these things -- you
24 know, some things changed about this. So the Armillaria has
25 just finally caught up to Bill Bader after 50 years in the

1 business. After an article in 1976 telling you it's a
2 secondary pathogen that mostly preys in Missouri on weakened
3 trees. And their experts loved that article but they didn't
4 like that part. Dr. Baldwin told you this is exactly what's
5 going to happen.

6 Is there Armillaria at Bader Farms? Yes. There's
7 Armillaria in the soil here, and it has been here 1,000 years.
8 But you will notice those satellite photos mostly showed you
9 the same orchards over and over. Bader Farm has about 30
10 orchards. They showed you mostly the one by the packing shed
11 and a couple of others.

12 And what they didn't tell you is -- and I had -- we
13 have -- Mrs. Randles had to ask her experts and I had to ask
14 Dr. Schnabel, well, the photos you keep showing from 2010, do
15 they account for the ice storm in 2009 and the trees pushed
16 out? Dr. Brannen at least admitted he couldn't tell from
17 space what caused the problem. Dr. Schnabel told you, oh, he
18 could, and it had to be Armillaria. Although he's never
19 looked at a photo from space before in his life.

20 Then, for the years after 2011, what they showed
21 you, I asked did you consider the flooding in 2011. And you
22 remember that the judge and I went back and forth on which
23 levees we were talking about there, and that's -- it was a big
24 flood in 2011.

25 Did you consider that? Did you know about it?

1 Dr. Brannen said he didn't and it could have been flooding.
2 Dr. Schnabel didn't have the slightest clue but said it
3 couldn't possibly be flooding and the trees pushed out either.

4 But what happened at Bader Farm is simple. Dicamba
5 caught up to them. Look at the yields. Average yield,
6 162,000 from 2002 to 2016. And then during this rebuilding
7 period they go up and down a little bit, but they are pretty
8 solid; over 70,000. Then what happens in '15 when the dicamba
9 system comes online?

10 Let's go to the next one.

11 It collapses. 39,000. Bill Bader testified he made
12 epic efforts to restore his orchard and he got it up in '16;
13 67. And a little bit -- it hung around '16, '17. And then
14 the bottom fell out in '18. There was no major weather event.
15 There was nothing in '18 to account for this, except the trees
16 being weakened by years of dicamba use.

17 You saw a little tick-up in 2019 that actually
18 proves our point. In 2019 the planting was delayed a month.
19 Bill Bader's early harvest was pretty good because there was
20 no dicamba spraying, but the minute the dicamba spraying
21 started, knocked right back down again.

22 So clearly we are talking about damage from dicamba
23 here. It's the only reasonable explanation. And Dr. Baldwin
24 had explained to you how dicamba moves off target,
25 volatilizes, gets caught in temperature inversions, and how

1 when you get enough of it, you get atmospheric loading and it
2 can't go anywhere. Not a new phenomenon. Not a theory of
3 ours. Temperature inversions were discussed on the label.
4 Atmospheric loading has been recognized with herbicides for a
5 long time. That's what's going on.

6 But of course these companies are not going to admit
7 it. They are going to deny. The strategy has been to deny
8 from years on. You saw a Monsanto document basically
9 complimenting BASF's policy and indicating they were going to
10 follow the same. For 30 years BASF has denied volatility as
11 the issue with Clarity.

12 It's all been off-target trespass. Drift. Now they
13 are making volatility the number one reason Clarity sucks. We
14 need to get on this right now. Deny, deny, deny.

15 And you know what you are going to hear when I sit
16 down? Deny, deny, deny. Point your finger at anything else.

17 But that's their plan. Look for any other cause.
18 That's what they instructed their own people to do before they
19 went out in the fields. When you go out -- Monsanto internal
20 purposes only. This is the guidance they gave to the people
21 out on the ground that was supposedly collecting the unbiased
22 information.

23 "What to look for in the course of an investigation
24 and information collection. Are the symptoms consistent with
25 those typically caused by dicamba? Could the symptoms

1 potentially be caused by another dicamba factor?"

2 Environmental stress. High temperatures, drought. Other.

3 Sounds familiar to you? This script was written in
4 St. Louis a long time before this -- these products went on
5 the market. And a long time before the Bader Farms case was
6 filed.

7 But just as a reminder, one of the Monsanto folks
8 said, now -- when he was forwarding an article, you will see
9 at the bottom, *Suspected dicamba damage begins to come into*
10 *focus for bootheel soy farmers.*

11 So forwarding a newspaper article about the damage
12 being caused in the bootheel in 2016, again before anybody
13 went to Bader Farms, John Chambers says, "I am not sure how we
14 will be able to separate the two, but we need to make sure
15 disease impact is not overlooked in the conversation around
16 drift."

17 So these companies have said they were going to
18 deny, deny, deny; that they were going to look for any other
19 factor they can, including disease. And guess what? They
20 just happened to bring in a bunch of experts from states that
21 don't have a dicamba problem. I showed you that. The East
22 Coast. Experts that have virtually no experience with
23 dicamba. To tell you it's not dicamba.

24 Wayne Mitchem, their weed scientist who doesn't have
25 a PhD, doesn't have all the years of experience as Dr. Ford

1 Baldwin. His entire experience with dicamba in the real world
2 was he saw it on grapes one time before this case started and
3 a few peach trees sprayed with dicamba directly.

4 Dr. Brannen had no experience before this case. And
5 Dr. Schnabel had looked at exactly one photograph of dicamba,
6 but he chose to do tests for Armillaria and not test for
7 anything else, including dicamba. They were brought in here
8 not to find dicamba.

9 Do you think they would be up here if they found
10 dicamba? You think there's any chance they would be here?
11 Deny, deny, deny.

12 The three experts' combined experience with
13 southeast Missouri before they were hired in this case was
14 Wayne Mitchem ate at Lambert's once. That's it. But now
15 supposedly they are the experts in farming in the bootheel.

16 I will tell you there is one expert on farming
17 peaches in the bootheel in this courtroom. He is sitting
18 there, 50 years' experience.

19 You got these academics sitting around, you know, in
20 the peanut gallery saying, I think you should do this
21 different, I think you should do that different.

22 So I said, "Well, during the period you say he is
23 doing everything wrong, he sold, from just 2000 to present,
24 1.5 million bushels of peaches. 75 million pounds. How many
25 have you sold?"

1 It's like a bunch of sports writers sitting around
2 telling you why Steph Curry doesn't shoot a jump shot right.
3 Don't criticize unless you can do it.

4 But here is the real problem. And you've seen it.
5 Let's put up the maps.

6 2015, the cotton sales within 15 miles of Bader
7 Farms. People planting dicamba crops where they never were
8 before.

9 2016.

10 2017.

11 2018.

12 Now, they and their experts will tell you this is
13 just a coincidence. It just happens to be a coincidence that
14 Bader Farms started collapsing when the dicamba-tolerant
15 system was put out and they were surrounded by a sea of
16 dicamba.

17 And apparently that happens to be the time that Bill
18 Bader and everybody at Bader Farms suddenly forgot how to grow
19 peaches. They forgot how to mow. They forgot how to deal
20 with deer. They forgot how to plant their trees. Apparently
21 it's a miracle Bill Bader ever sold a bushel of peaches,
22 because according to their experts, he's done everything wrong
23 the whole time.

24 Damages. Well, I am just going to put this up
25 because I am getting a little low on time.

1 Put up 2196. No. Put up 2196.

2 Well, while they are looking for it, you heard our
3 expert testify what Bill Bader's damages are. They are
4 \$20.9 million. Here is the exact number.

5 Now, this is a conservative calculation, because
6 remember this was based on the period where Bader Farms was
7 rebuilding, from 2011 forward, from the ice storm and the
8 flood. We are not asking you to consider the much higher
9 numbers that were occurring before the ice storm and flood.
10 So this number is conservative to start with.

11 Now, they picked at it and said, oh, the FSA records
12 aren't that accurate. Everybody uses the FSA records in
13 testifying, including our expert when he testified for
14 Monsanto.

15 Do all farmers keep their records in a perfect
16 condition where they are appropriate to litigation? No. And
17 you can nibble around the edges. But that's the fair value.

18 I want to mention -- talk about punitive damages a
19 minute. All the evidence I've told you so far warrants
20 punitive damages; that these defendants acted with complete
21 disregard for public safety. And they need to have a message.
22 It was foreseeable. They manipulated their testing. They
23 failed to investigate. They showed total indifference. And
24 they knew the number of claims that were coming and they
25 shoved this out the door on the way to make a profit.

1 You are going to be asked to talk about joint
2 venture and conspiracy. The joint venture is absolutely
3 established in this case. They signed numerous agreements,
4 worked together for years.

5 Now, the instruction on joint venture, I do want to
6 pull that up, No. 16. These are the elements that you have to
7 show for a joint venture. And as you heard them, none of them
8 involve shared bank accounts or any of that, or a building.
9 These companies worked together. They worked together a long
10 period of time. They formed -- they were -- they set it up to
11 form the dicamba-tolerant system and put it on the market.
12 They had a shared pecuniary interest in that purpose.

13 You know they did that because the payments went
14 back and forth. Not only were they looking to make money from
15 the herbicide sales and the seed sales, but BASF was getting
16 payments for every seed sold by Monsanto. And you saw that.
17 And then BASF was getting reimbursed from Monsanto in terms of
18 invoices.

19 Their own employees called it joint venture. And
20 then -- so they put up a witness not to dispute what we said
21 but to dispute what their own employees called it. It was a
22 joint venture. They had a share of pecuniary purpose, and
23 they had an equal voice in determining the direction of the
24 enterprise.

25 Now, BASF is going to get up here and say we didn't

1 control when the seed was released. That's not the standard.
2 Each -- each company had its own area within the joint
3 venture. Monsanto, the seed; BASF, the herbicide expertise.
4 And they shared it. They shared information for regulatory
5 purposes. They refer to themselves as a joint venture in
6 preparing questions for regulators and answers.

7 But they had an equal voice because the agreement
8 formed the AMT, as you saw, Alliance Management Team, which
9 oversaw the whole joint venture. Equal voting; four and four.
10 And on all the subteams, equal representation. They had a
11 completely equal voice. They had some delegation of duties
12 and responsibilities but an equal voice. They were clearly in
13 a joint venture.

14 Likewise, they were clearly in a conspiracy. I
15 mean -- let's put up 175. 1075.

16 From the beginning they knew that they were going to
17 cause damage. And from the beginning they had a choice to
18 make. Do we put it out and hurt innocent farmers or do we
19 not?

20 BASF, as Monsanto was putting out the '16 soybeans,
21 said I have a major concern of nonlabeled dicamba formulations
22 being used by growers on Xtend soybeans in 2016. What was
23 their response? To warn the public? To try to dissuade their
24 joint venture partner? No. "I feel we need to get behind
25 Xtend soybeans and promote the opportunity to look at yield

1 potential in 2016, and then use that momentum to sell Engenia
2 for '17. What's it matter if innocent farmers are going to be
3 hurt? There is money to be made and we are going to make it."

4 And they did make it. BASF made money selling
5 Clarity before it was legal to spray dicamba. I mean, did you
6 see them bring in their new numbers and a whole witness to
7 give you new numbers? These aren't our numbers. These are
8 their numbers. The Clarity sales went up to 100 million as
9 opposed to 60 million before.

10 And it says down at the bottom, it says use has
11 increased especially in 2016. Dicamba demand spike with the
12 DT trait. They knew what they were making money doing.
13 Farmers spraying off-label and damaging innocent farmers, but
14 it was part of the plan to whole time.

15 Let's put up 22. Plaintiffs' 22.

16 You know, you heard testimony from Kim Magin,
17 high-ranking Monsanto executive, that in '13 she put this
18 presentation together. What do you say to a farmer who says I
19 don't have a resistant-weed problem, and I don't want to pay
20 extra for your system? What were the reasons given?
21 Protection from your neighbor. Buy it or else. It's the only
22 way to protect yourself.

23 And BASF, it was part of their plan as well.

24 Let's put up 10019.

25 This was by the man who said -- Nathan Borgmeyer --

1 he was the Engenia launch team. He was the guy at the top.
2 Potential market opportunity. Defensive planting.

3 When you have to buy it to protect yourself, when
4 you buy it or else, you do so. And you saw the documents.
5 And I questioned Boyd Carey about Monsanto implementing it.
6 Going out there after people were damaged and trying to turn
7 driftees, as they call them, into customers.

8 So what happened? What was the result?

9 Let's put up 1371.

10 What happened was utterly foreseen and utterly
11 inevitable.

12 This is a BASF document describing what happened --
13 was happening in the bootheel. "The one thing most acres of
14 beans have in common is dicamba damage. There must be a huge
15 cloud of dicamba blanketing the Missouri bootheel. That
16 ticking time bomb has finally exploded. The scope of the
17 damage is on a massive scale, and fingers will be pointing in
18 all directions from grower to grower. It will be interesting
19 to see how all of the complaints are handled."

20 This case is summarized in this document.

21 **THE COURT:** Three minutes.

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

23 This case is summarized in this document. It's a
24 ticking time bomb. A ticking time bomb isn't a surprise.
25 They put the time bomb in the bootheel and lots of other

1 places. And what happens to a bomb? It explodes. That's its
2 purpose. That's what it does.

3 And what was the result? A huge cloud of dicamba
4 blanketing the Missouri bootheel. In other words, atmospheric
5 loading. Covering everything. He says the scope of the
6 damage is massive. Yet these companies sat around going,
7 well, you know, we don't know if the claims are valid or not.
8 Because they chose not to investigate them in '15 and '16, and
9 only did when they were made to.

10 Fingers pointing. And he says it would be
11 interesting to see how all of the complaints are handled. Not
12 all that interesting and not all surprising really. Deny,
13 deny, deny. And you are going to hear another hour and a half
14 or so of deny, deny, deny.

15 But you know what you have not seen in this case?
16 You haven't seen Monsanto bring a single company witness in
17 here to dispute what we have had to say. We brought them in.
18 Boyd Carey, the only live Monsanto witness, we subpoenaed to
19 be here. We played the videos.

20 If they had an explanation or a justification in
21 their conduct, they would have put it forward. BASF brought
22 some company -- brought one company witness live and some
23 videos, mostly to separate themselves from Monsanto. And I
24 don't blame them for trying, because Monsanto's conduct is
25 inexcusable, but so is theirs. They were a full participant,

1 trotting along right behind, gathering all the cash they
2 could, at the expense of people like Bill Bader.

3 One other thing I will mention to you. They are
4 going to get up here and point fingers at our number that
5 we're asking. Oh, it's too much. It's crazy. All they did
6 was nibble around the edges in cross-examination. If they had
7 a better number, don't you think they would have given you
8 one? But they didn't.

9 Look, this is a big case. We make no apology for
10 that. We told you that at the start. And I asked you in jury
11 selection if you would have any problem if we proved our case
12 awarding all the damages that our client is entitled to. And
13 by your silence you indicated you would. Well, now is the
14 time for you do render judgment. Now is the time for you to
15 make a difference.

16 My clients' future is in your hands. This family
17 business will not survive. The evidence is crystal clear on
18 that. And my client asks for justice.

19 I will be back up in a little while to deal with a
20 few of the remaining issues, and then I am going to be asking
21 you for a plaintiff's verdict. Thank you.

22 **THE COURT:** Mr. Miller.

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

24 May it please the Court.

25 **THE COURT:** You may proceed.

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

2 CLOSING ARGUMENT ON BEHALF OF DEFENDANT MONSANTO

3 **MR. MILLER:** Counsel, ladies and gentlemen of the
4 jury. Good morning.

5 I want to add my thanks for the time and attention
6 that you-all have given in this case. It has been
7 extraordinary. And it has been long, and it has at times been
8 tedious, but it is very important for all of us that we have
9 people like you sitting in the jury box. And you have really
10 carried out your duties remarkably and we all, everybody who
11 is involved in this case, thanks you for that.

12 Now, I told you at the beginning of this case that
13 there is a core key issue in this case, and that core issue
14 has not changed. The core issue in this case is the
15 plaintiffs' claim that it was dicamba sprayed over Xtend seed
16 that volatilized, turned into a vapor, moved off target and
17 hit their peach orchard causing yield loss and tree death.
18 That's what they have to prove. That's at the core of this
19 case.

20 And in fact, Judge Limbaugh has already instructed
21 you that with everything they have to prove, they have to
22 prove that the actions of Monsanto "directly caused or
23 directly contributed to cause damage" to Plaintiff Bader Peach
24 Farms, Inc.

25 That causation language comes up again in other

1 instructions. It talks about it in the damages instructions.
2 That's the key question in this case. Have the plaintiffs met
3 their burden to prove that it was Xtend seed, dicamba over
4 Xtend seed that has caused their damage?

5 Now, that might sound like a hard job to figure out,
6 well, have they proved their burden or not, but, you know, we
7 make these types of judgments every day. Every day people are
8 telling us things -- TV, commercials, what have you, friends
9 of ours -- and we always evaluate, we might not recognize we
10 are doing it, but we evaluate what information we are given.
11 And we decide by looking at a variety of factors, well, what
12 do we believe. Do we believe this story or don't we?

13 And those same sorts of things that we all look at
14 every day to determine whether we are going to believe a story
15 or not you can use in this very case when you are back in that
16 jury room. This is just a list of a few things that we all
17 tend to look at when we are determining whether we are going
18 to believe a story or not.

19 Has the story been consistent? Because, you know,
20 if a story is consistent from beginning to end, it tends to
21 sound more believable. But if the story changes, depending on
22 who you are telling it to or who the person is telling it to
23 or why they are telling it, we become a little suspicious of
24 that story.

25 What else do we look at? Well, if somebody is

1 telling us something, we want to look at, look, is there clear
2 objective evidence that we can evaluate for ourselves? You
3 know, if you see a picture that you can see with your own
4 eyes, you know exactly what happened.

5 Is the person telling the story believable? That's
6 obviously key to any time we are listening to somebody. And
7 there are various things we can consider under that, but a
8 couple of them that are particularly at issue in this case is,
9 is the subject that the person is telling me about, is that
10 within their field of expertise or are they reaching outside
11 of it? And does this person have a history of giving false
12 statements or have they always been truth tellers?

13 You know, if somebody stays within their field of
14 expertise, we tend to believe them more. If they are reaching
15 outside into areas they have never worked in before, it makes
16 us a little more suspicious. And if they have a history of
17 not always telling the truth, that's a big red flag.

18 Is there an independent third party that's weighed
19 in on this particular issue? You know, every argument has two
20 sides, and certainly in every court case both sides have an
21 interest in the outcome. So if there's an independent third
22 party that has no dog in the fight and they make a decision
23 about something, that's something we tend to listen to.

24 And then finally, is the story itself internally
25 consistent? Does it hang together or does it contradict

1 itself?

2 So let's take a look at these things that we do
3 every day, and let's apply it to the actual evidence you have
4 heard in this case to see if the plaintiff has met their
5 burden to prove that its dicamba sprayed over Xtend seed,
6 volatilizing and causing the damage.

7 First of all, has the story been consistent? Well,
8 I submit to you, ladies and gentlemen, the evidence on that is
9 clear. The story about what has been happening at Bader Farms
10 has not been consistent.

11 Let's start with 2015. 2015 is the first year that
12 the plaintiffs are claiming that dicamba started damaging
13 their peach yields. But remember what the plaintiff said in
14 July and August of 2016. Now, that's before this lawsuit was
15 filed. And that was when the plaintiffs were having a fight
16 with that crop duster who sprayed a variety of herbicides and
17 hit that peach farm.

18 And you heard it with your own ears, you heard
19 Mr. Bader tell not one but two different reporters in July and
20 in August -- end of July, beginning of August 2016 -- that
21 that crop duster application that had nothing to do with this
22 case wiped out half of their peach yield.

23 And you know what's interesting, because if you take
24 that half and you double what their actual yield was in 2015,
25 you are getting up to that 100,000 bushels that they were

1 shooting for, before you even add in the other 10 percent,
2 15 percent of frost loss that they filed an insurance claim
3 on.

4 So back before this lawsuit was filed, the story was
5 half of my yield has been wiped out by this crop duster
6 application. Now of course, no, it's only 10 percent;
7 everything else is dicamba sprayed over Xtend seed.

8 There were other things, though. You've seen these
9 also in 2015. Plaintiff filed an insurance claim for hail
10 damage. 100 percent hail damage that caused another drop.
11 And, again, if you add those two things together, you are back
12 up to the yield that they said they should have been having in
13 2015.

14 2018, another insurance claim for freeze damage.
15 Now, at trial I believe when they first started talking about
16 this, they said it was a slight frost. But in the insurance
17 claim that they filed, it was freeze damage that wiped out
18 75 percent, it covered 400 acres, Mr. Bader testified to, of
19 the 513 acres listed in their insurance records. 75 percent
20 of their field was damaged and their yield was damaged by
21 frost.

22 But now everything is dicamba sprayed over Xtend
23 seed. And that change is something you can consider when you
24 determine whether they have met their burden of proof here.

25 And what's the next thing we tend to look at? We

1 tend to look at, is there objective clear evidence that we can
2 see for ourselves? We don't have to take somebody else's word
3 for it.

4 Well, what have you seen in this case? And yeah, I
5 am going to talk about Armillaria, because the evidence
6 regarding Armillaria is absolutely unrefuted in this case.
7 And you have seen it for yourself.

8 You've seen pictures starting back in 1996. Now,
9 these are ones that Dr. Brannen showed you. And you can see
10 the fields here, no holes at all. A few years later, 2005,
11 you see the areas where the trees are dying out. Now,
12 Mr. Randles just talked about, well, they don't talk about the
13 ice storm in 2009. This is four years before that ice storm.
14 They don't talk about the flood in 2011. This is six years
15 before the flood.

16 And by the way, I am not sure how a flood would get
17 up 150 to 200 feet up on Crowley's Ridge to get at this. But
18 in any event, the trees, the patterns of death, the infection
19 centers are already showing up years before the ice storm,
20 years before the flood, and ten years before the first Xtend
21 seed is ever sold.

22 It goes on, of course, 2007. Two years before the
23 ice storm. Four years before the flood. Eight years before
24 the first Xtend seed. And those infection areas are dropping
25 out even more.

1 2009, same thing. Still starting to spread just
2 like Armillaria does.

3 2010, even larger.

4 2012, they start replanting. And what happens if
5 you replant peach trees in ground that has already been
6 infected by Armillaria and already attacking those trees? You
7 start to get, within a couple of years, the same patterns of
8 death in exactly the same areas. And that's what happened at
9 Bader Farms. You can see the trees dying already in 2015 in
10 exactly the same areas that you saw before.

11 And, ladies and gentlemen, you can see for yourself,
12 these are not low-lying areas. Here is a low-lying area.
13 Here is a low-lying area. You can see for yourself these are
14 all over the field.

15 But you also saw from Dr. Schnabel, 2010, big areas
16 of missing trees.

17 They replant in 2014. You can see they are already
18 starting to die out a little bit here. But by 2018, exactly
19 the same areas are dying again. Again, this is how Armillaria
20 works.

21 Now, Plaintiffs' counsel several times has referred
22 to this as satellite photo reconnaissance. Ladies and
23 gentlemen, these are pictures of trees. You can see for
24 yourself that the trees are dying out in exactly the same
25 places years before any Xtend seed has ever been sold.

1 On the other hand, the plaintiffs have not given you
2 any objective evidence at all regarding the presence of
3 dicamba at Bader peach farms. The only witness that they have
4 is Dr. Baldwin. And I am going to talk about him in a little
5 while.

6 But actually the evidence that has come in, the
7 objective evidence that you can rely on from the plaintiffs,
8 actually shows exactly the opposite. Remember that in 2016,
9 second year that they believe they were being hit by dicamba
10 sprayed over Xtend seed, Mr. Bader called the FDA and asked
11 them to come test his peaches. And they picked up 420 pounds
12 of peaches. And this is interesting. Even Dr. Baldwin
13 admitted that when the peaches are growing, it's called
14 something called a sink in the tree. He admitted that that's
15 where everything in the tree goes, is to the peaches, which
16 makes sense. That's where it's growing.

17 So if there's dicamba hitting these trees every day,
18 and if the peaches are collecting everything that's going into
19 that tree, that's where you would find it. Well, the FDA
20 tested 420 pounds of peaches and didn't find any dicamba.

21 Now, the plaintiffs could have brought in some
22 objective scientific evidence for you to evaluate on your own.
23 We all know that you can find dicamba in peach tree leaves.
24 And we know that because in 2015, when that aerial crop duster
25 incident occurred, Mr. Bader called in the Missouri Department

1 of Agriculture. And they tested the leaf samples. And they
2 found 2,4-D, and they found Flumioxazin, and they found some
3 dicamba from a burndown application, nothing to do with this
4 case. But what's important about that is it shows that you
5 can test these leaves and find dicamba if it's there.

6 Dr. Baldwin admitted that if you took -- because his
7 theory is it's hitting it every day, if you took a leaf sample
8 every day for a couple of weeks, you would find the dicamba.

9 And, ladies and gentlemen, you also heard the
10 Plaintiffs have those samples. They have got a freezer full
11 of leaf samples. They could have sent off some of those to
12 have them tested to give you the evidence you need to show
13 that they met their burden of proof. But Dr. Baldwin told you
14 why they didn't. He told you that they didn't want to get the
15 negative test results.

16 And you can consider that, ladies and gentlemen,
17 when you are back there deliberating. You can consider the
18 fact that the plaintiffs had the opportunity, still as we sit
19 here today, had the materials they needed to give you the
20 objective evidence but they decided, they decided not to do
21 that.

22 You also have, of course, the scientific evidence
23 regarding the presence of Armillaria through DNA testing.
24 Again, something you did not get from Plaintiffs.

25 Now, what's the third thing we can look at? Is the

1 person telling the story believable? Are they staying within
2 their field of expertise? Do they have a history of giving
3 false statements?

4 Now, again, the plaintiff is resting their entire
5 causation case on Dr. Baldwin. As I told you in opening
6 statement, Dr. Baldwin is a lot of things. He is a weed
7 scientist, but there are a number of things that he admitted
8 he is not. He is not a peach expert. He is not a
9 meteorologist. He is not a plant pathologist. But in spite
10 of all of that, he was more than willing to give you-all
11 opinions regarding, for example, Armillaria, which he had
12 never even heard of until he was in this case.

13 He was willing to give you opinions regarding
14 meteorological factors like temperature inversions and
15 atmospheric loading. And he was obviously able to give you a
16 whole host of information, or opinions rather, on peaches. In
17 spite of the fact that he had never, ever worked on a peach
18 farm, or never worked on peaches at all in the 40 years of his
19 career before he set foot on Bader Farms. That's important to
20 consider. Because, again, when somebody is stepping out of
21 their area of expertise, it is something you need to consider.

22 But you know, there is something else that's
23 troubling about Dr. Baldwin's testimony. First of all, he
24 told you he made up his mind before he ever set foot on Bader
25 Farms. He told you when he was driving up there he had

1 already decided it was dicamba.

2 But more than that, you saw his affidavit that he
3 filed in this case. On April 27, 2017, Dr. Baldwin filed
4 under oath with this Court an affidavit in which he swore that
5 on Valentine's Day, exactly three years ago today, as it turns
6 out, he went on to Bader Farms. He inspected its peach trees,
7 its row crops and its other vegetation, and based on that
8 inspection he came to the opinion that it was dicamba.

9 But Dr. Baldwin admitted to you that that just
10 flat-out wasn't true. That's something you have to take into
11 consideration. Because you have their star witness, really
12 their only witness, regarding causation, telling you that in
13 this very case, he did not live up to his oath to tell the
14 truth.

15 Now, on the other hand, you have Wayne Mitchem and
16 you have Dr. Brannen and you have Dr. Schnabel, who stayed
17 completely within their areas of expertise. Wayne Mitchem has
18 worked with peaches for 25 years. He is the guy that the weed
19 scientists goes to.

20 Dr. Norsworthy, you've heard about. When he was at
21 Auburn, he would send peach questions to Wayne Mitchem.

22 Dr. Prostko, who you have heard about, still at the
23 University of Georgia, when there's an issue with peach trees,
24 because the weed scientists tend to deal with row crops, he
25 calls in Wayne Mitchem. And Wayne Mitchem went to that peach

1 farm, and he told you he looked at thousands of terminals.
2 Never found any terminal death. In fact, Dr. Baldwin admits
3 there was no terminal death there.

4 But there's something else very interesting about
5 Wayne Mitchem's testimony. He told you when he first got
6 there they couldn't look at the leaves yet because it was in
7 wintertime, like when Dr. Baldwin went the first time. But he
8 saw areas of tree death that looked to him like Armillaria.
9 But he didn't say, well, now I'm an Armillaria expert. He did
10 the right thing.

11 He said you need to go get a plant pathologist. I
12 think there's Armillaria here, but you need to go get a plant
13 pathologist. And that's what brought in Dr. Brannen and
14 Dr. Schnabel. And they stayed within their lane.

15 Of course they are not going to go out making
16 opinions about dicamba. They were here to talk about
17 Armillaria, the testing for it and to walk you through exactly
18 how that works and to show you with those photos so that you
19 can see for yourself, you don't have to take anybody else's
20 word for it, that that is what is causing the yields over time
21 to go down at Bader Farms.

22 So on the one hand you have Drs. Brannen -- that
23 should be Mr. Mitchem and Dr. Schnabel. Peach experts who
24 relied on scientific testing. You have Dr. Baldwin on the
25 other side who formed his opinion before he even inspected the

1 orchard, before he ever stepped foot on there, and who
2 admitted that he had made a false statement in the affidavit
3 in this case under oath.

4 Fourth thing to look at. Has an independent third
5 party weighed in on this case? Well, you know, it's obvious
6 that you have two very different views of what happened here.
7 For example, Mr. Randles talked about again academic testing.
8 And on the one hand you heard Dr. Carey and Tom Orr tell you
9 that the academic testing was stopped preregistration because
10 EPA did require GLP. That's uncontroverted. No other
11 witness, no witness got up here and said, oh, no, they don't
12 require GLP for these things.

13 What else did you here though? You heard that as
14 soon as the application label was granted by FDA for
15 XtendiMax, Monsanto not only allowed it, it encouraged
16 academic testing. It funded it with unrestricted funds. And
17 Dr. Carey and Mr. Orr told you that those academic tests
18 supported exactly what had been found before; that when you
19 use XtendiMax, according to the label, it will not volatilize
20 and move off target and hurt other crops.

21 Now, the plaintiffs say, well, that's not true.
22 Dr. Baldwin said there were problems with some of the academic
23 testing afterwards. Fortunately, you don't have to take
24 either side's word for it on this one. There was an
25 independent third party involved: the FDA. And that's very

1 important. Mr. Randles, again, has pointed to the FDA
2 advisory from August 2016. And they did come out with an
3 advisory because there were complaints coming in. But what
4 happened when the FDA looked at those complaints? Two months
5 later it approved the sale of XtendiMax.

6 More importantly, all the academic testing that was
7 done in 2017 and 2018, all the complaints that were filed with
8 BASF and with Monsanto, and with the state regulatory
9 agencies, and all of the results of those investigations went
10 to the EPA who does not have a dog in this fight. And the EPA
11 reviewed all of that information. And what did they do? They
12 even sent a couple people to Mr. Bader's farm, in I believe it
13 was August of 2018. And then two months later they say after
14 evaluating all of that information, all of the information
15 that Plaintiffs are pointing to, they say again you can sell
16 XtendiMax with VaporGrip. It's safe to use if you follow the
17 label.

18 Are they checking other things out now? Of course
19 they are. Because there are still complaints that are coming
20 up like Mr. Bader's. That is not an indication of something
21 being wrong; that's an indication, frankly, that the
22 regulatory system is doing what it's supposed to do. People
23 have questions, they ask for additional information, and they
24 make their evaluation.

25 And the key questions in this case: What happened

1 in 2017? What happened in 2018? They are saying a cloud of
2 dicamba occurred and started destroying everything and that
3 the testing supports that.

4 The EPA, an independent third party, looked at all
5 of that and completely disagreed. And you can consider that
6 when you are having your deliberations.

7 Finally, is the story being told internally
8 consistent? And I will tell you, ladies and gentlemen, I
9 think this is perhaps the most interesting of these five for
10 this particular case. Because again we get back to
11 Dr. Baldwin's testimony.

12 Dr. Baldwin's theory, as I understand it, is this:
13 Once dicamba was starting to be sprayed over Xtend crops,
14 although he can't tell whether it was over Xtend crops or corn
15 or burndown, but once it was being sprayed, it volatilized,
16 turned into a vapor, moved off site and went to the peach
17 farm, from all over the bootheel. All over the bootheel it
18 ended up at Bader's peach farm. That's his theory.

19 Now, when you think about it and apply that theory
20 to some of the most basic testimony, it doesn't hold together.
21 For example, Dr. Baldwin testified that dicamba vapor is
22 heavier than air and so it's going to sink in the air. Yet,
23 his theory is that this vapor volatilizes and somehow climbs
24 its way up 150 to 200 feet up Crowley's Ridge to get to the
25 peach orchard. It doesn't make sense.

1 Dr. Baldwin says that, well -- and, frankly,
2 Mr. Randles referred to it in his closing statement and said
3 that this is one of the key pieces of evidence; that in 2019
4 in the spring, there was no dicamba being sold and no dicamba
5 being used and, therefore, the peach trees were fine in the
6 spring of 2019.

7 But think about it. If that's true, then there
8 should be no symptomology that Dr. Baldwin points to at Bader
9 peach farm in the spring of 2019.

10 But what did you see? There's a picture from May of
11 2019 of one of the trees at the Bader Farm peach orchard and
12 you are seeing exactly the same symptomology that Dr. Baldwin
13 says is actually the indication of dicamba. Well, if his
14 theory is there was no dicamba being sprayed in May of 2019,
15 why is this supposed symptomology there? And why is it
16 looking exactly the same in July when now he says the dicamba
17 is being sprayed? There should be a dramatic difference
18 between those two sets of pictures, if Dr. Baldwin's theory is
19 correct. There isn't. It does not hold together.

20 But perhaps the most basic contradiction of
21 Dr. Baldwin's theory actually comes from Dr. Baldwin itself --
22 himself and it completely destroys his theory. Remember,
23 Dr. Baldwin's theory is that dicamba is moving from miles away
24 to Bader peach farm repeatedly every day. Okay?

25 Remember what happened on cross-examination with

1 Dr. Baldwin. And this was not me asking the cross-examination
2 questions. It was BASF's counsel, Mr. Anderson. And
3 Mr. Anderson asked Dr. Baldwin, "Isn't it your opinion that
4 you gave to the jury yesterday that the chemicals at issue,
5 the dicamba chemicals at issue, XtendiMax and Engenia, are
6 prone to volatilize?"

7 Dr. Baldwin's answer: "They absolutely volatilize."

8 Mr. Anderson asked the next question: "So why would
9 it be difficult for you to use those products and conduct a
10 test to expose peach trees to multiple exposures if your
11 opinion is they easily volatilize?"

12 And what did Dr. Baldwin say? "That would be a big
13 issue on how you are going to get the volatiles there. I
14 mean, you would have to spray the herbicide in the orchard to
15 get the volatiles there."

16 Think about that for a minute.

17 On the one hand, when he is telling you that all of
18 these problems are caused by dicamba, he is telling you that
19 it's moving miles and miles and showing up at the Bader peach
20 farm. But when he's called on it, and he says -- a very
21 simple question, Why didn't you test for it? If it's there
22 all the time, why didn't you test for it? And he says, "Well,
23 you can't do that. You would have to spray it to get that gas
24 vapor there" -- those are the volatiles -- "you would have to
25 spray it right in the orchard."

1 Those two things can't possibly be true at the same
2 time. It's impossible.

3 You know, the truth comes out sometimes in
4 interesting ways. Sometimes it takes days and days and days
5 of testimony and piles and piles of documents. Sometimes it
6 just slips out in an answer to a perfectly reasonable
7 question. And when you look at this admission by Dr. Baldwin,
8 his entire theory falls apart. And the plaintiffs' causation
9 case falls apart.

10 Now, I want to cover some of the other things that
11 Mr. Randles talked about in his closing. Mr. Randles says,
12 well, Monsanto knew that people were going to be illegally
13 spraying old dicamba in 2015 and 2016. Unfortunately, it is
14 the case that people are going to break the law. We all know
15 that. It's an unfortunate fact of life. It would have,
16 frankly, been foolish and ridiculous for Monsanto to come in
17 here and say, oh, we knew every single person out there was
18 going to follow the law and not use old dicamba in 2015 and
19 2016.

20 But what they did do is exactly what they should do.
21 They warned repeatedly that you cannot use dicamba over Xtend
22 cotton in 2015. There were these large stickers, very visible
23 on every single bag of cotton that was sold, cotton seed that
24 was sold in 2016. There were the large pink stickers on every
25 bag of soybeans that were sold in 2016 telling you again do

1 not apply dicamba herbicide in crop to Roundup Ready Xtend 2
2 beans in 2016.

3 You know, it's interesting because the plaintiffs
4 say, well, because Monsanto knew that some people or could
5 foresee that some people were going to use their product,
6 their seed, illegally, therefore Monsanto should be liable.
7 Think about that for a minute.

8 We all drive cars. We all know that the speed
9 limits go up to 70, maybe 75. When you buy your Chevy,
10 Chevrolet knows that some people are going to speed when they
11 are selling that car. In fact, you could argue if you were
12 Plaintiffs' lawyer that they are inviting people to speed
13 because the speedometer goes up to 110, 120, 130, whatever.
14 They will say in the owner's manual, of course, you'll find it
15 in there, do not speed, follow all applicable traffic laws, et
16 cetera. But unfortunately people will speed and unfortunately
17 because of that accidents will happen. That does not mean
18 that Chevrolet is liable for the fact that somebody got into
19 their vehicle and used it illegally. That's what's being
20 claimed, frankly, for 2015 and 2016 in this case.

21 Because if there was any dicamba sprayed over any
22 Xtend crop in 2015 and 2016, it was an illegal application.
23 And Monsanto went out of its way and spent lots of time and
24 lots of resources warning people about that. You saw the
25 stickers, but you also saw the multiple education tactics that

1 Monsanto had. They had a whole timeline. They are going to
2 send letters to all the growers. Letters to all the dealers
3 with inventory. They are going to use attachments to the bill
4 of lading. They are going to put technical bulletins out.
5 Again and again and again they are sending out the message you
6 cannot use dicamba in 2015 and 2016.

7 In their materials that they use with their own
8 distributors, page after page after page, they are telling
9 them you cannot use dicamba. Now, Mr. Randles says, well,
10 then they are sending out a product with no legal herbicide.
11 And, frankly, that's just not true. Just not true.

12 Xtend cotton was -- was tolerant not just to dicamba
13 but also to glyphosate and also to glufosinate, which is known
14 as Liberty. There were legal alternatives to use over Xtend
15 cotton. In fact, Dr. Baldwin said when growers called him to
16 say what to do, he told them: use glyphosate, use glufosinate.

17 And Dr. Baldwin also told you why Monsanto would
18 release that seed at that time. He told you they were
19 matching the glyphosate and glufosinate resistance with a
20 great germplasm and that means higher yield. That means more
21 money into the farmers' pockets.

22 Same thing with soybean in 2016. To say that there
23 was no legal herbicide is just not true. You could still use
24 glyphosate over it. And, frankly, you have heard, I believe
25 from Dr. Carey, with both of those there are numerous other

1 herbicides that can be used. And, again, it's being linked to
2 the best germplasm out there.

3 Going on, then, once we get into 2017, and we have
4 XtendiMax on the market, Monsanto is warning people to use it
5 properly. This is one of the labels for XtendiMax. And it
6 tells everyone "Follow the requirements set forth herein to
7 prevent severe crop injury or destruction and yield loss.
8 Contact with foliage, green stems or fruit or crops, or any
9 desirable plants that do not contain a dicamba-tolerance gene
10 or are not naturally tolerant to dicamba, could result in
11 severe plant injury or destruction."

12 This is right in the label in all caps. And as you
13 have heard over and over and over again, "The label is the
14 law." So to suggest that Monsanto sat back and allowed either
15 illegal use of old dicamba or improper use of the new
16 low-volatility dicamba, again, defies the evidence that you
17 have seen with your own eyes.

18 Now, I do want to talk a little bit about
19 Dr. Guenther. I don't know that I need to spent a lot of
20 time on this, but this is the damage calculation that
21 Plaintiffs are asking you to consider of \$20.9 million.

22 Dr. Guenther is an interesting fella. And he
23 obviously spent a lot of time coming up with his numbers. But
24 according to Mr. Bader, Dr. Guenther used the wrong inputs.
25 Garbage in, garbage out. Mr. Bader told you that the

1 information regarding acres in his FSA-578s was unreliable.
2 Now, Mr. Randles says, well, that's what you use in every
3 case. Well, you don't use it if the client is telling you
4 it's not reliable.

5 And Mr. Bader said there were reliable records; it
6 was the insurance records. So it's not like Dr. Guenther was
7 left with nothing to use. If he had used the information that
8 his own client said was the reliable information, he could
9 have used proper acreage counts.

10 Same thing with the dates of planting. Mr. Bader
11 testified that the dates of planting in those FSA-578s are not
12 reliable. And that's very important, as you know, because of
13 the average tree life and when they start producing salable
14 fruit.

15 Mr. Bader said, well, in the fourth year you get an
16 average around 40 percent yield from a tree, in the fifth year
17 you get an average of around 70 percent yield from a tree.
18 That's not what Dr. Guenther used. He used 58 percent in the
19 fourth year and I believe 83 percent in the fifth year. Of
20 course that's going to make the number go up. Again, he is
21 ignoring the information from Mr. Bader himself.

22 And then he uses the wrong cost figures to deduct
23 out. He uses about \$1,064 for producing an acre of peaches.
24 In the very complaint in this case, the plaintiff says it
25 costs \$2,000 an acre to produce an acre of peaches.

1 You add up all of those problems, you add up all of
2 those inconsistencies, and it's completely understandable that
3 Dr. Guenther is going to come up with an absurd number. But,
4 you know, there's something else even more basic that
5 Dr. Guenther ignored. It took a while but you finally saw
6 the information from the financial statements for Bader Farms,
7 Inc.

8 Now, Dr. Guenther just poo-pooos them and says,
9 well, you know, Jeff Bezos doesn't pay any taxes or Amazon
10 doesn't pay any taxes, so you can't believe this information.
11 But this is the only hard information you've got, ladies and
12 gentlemen. This is it. This is all you've got to go on as to
13 what profit Bader Farms was making before they alleged they
14 were hit by dicamba and then after they alleged they were hit
15 by dicamba.

16 And what did you see? You saw that in the
17 four years leading up to 2015 -- those are the four years
18 Dr. Guenther uses, by the way, for his averages. The whole
19 farm made about 109,000-dollar profit a year and Mr. Bader
20 told you it's about 50 percent profit peaches, 50 percent
21 profit of other crops. So if you just take the peaches,
22 that's about 54,600 per year. That's before dicamba.

23 After dicamba, starting in 2015, you've got
24 four years. And, by the way, it's interesting that the loss
25 of the profits are going up every year. '15 it's a little

1 loss. '16 it goes up to 121. '17, 250. '18, 368. When
2 supposedly the damage is becoming worse and worse and worse
3 and worse.

4 Now, what do you see, the average here is about
5 \$174,000 a year or \$87,000 a year with peaches alone. What
6 does that mean? That means their profits went up on average
7 after dicamba than before dicamba.

8 And what did Mr. Bader tell you? I asked him, If
9 they show that your profits went up on an average basis,
10 doesn't that mean you don't have any lost profits? And
11 Mr. Bader admitted, because it's pretty clear, yeah, if
12 profits go up, you don't have lost profits.

13 So Dr. Guenther completely ignores the only solid
14 evidence you have of the financial situation of Bader Farms
15 before dicamba of \$109,000 a year. Fifty-four five for other
16 crops, fifty-four five for peaches.

17 And Dr. Guenther comes up with a damage number of
18 \$20.9 million. And I did this a little bit, but let's use the
19 real numbers. If you use Dr. Guenther's number of
20 \$20.9 million in damages and you divide that by the average
21 total profit that all of Bader Farms was making before they
22 claimed dicamba was even around of \$109,000 a year, it could
23 take 192 years for Bader Farms to make that \$20.9 million
24 through crops.

25 **THE COURT:** Three minutes.

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

2 If you take only the peach profit of 54,500, it
3 would take 384 years for them to make that amount of money.
4 And as Dr. Guenthner said, that's ridiculous. And it is
5 ridiculous.

6 There are a variety of other things I can talk
7 about, ladies and gentlemen. I could talk about, for example,
8 the fact that the plaintiffs are claiming that for years now
9 their peach trees are being devastated by dicamba and yet in
10 2018 they spend another million point one dollars to buy more
11 land to plant peaches on. Is that what somebody would do if
12 it's really true that their peach orchard is being devastated
13 by dicamba? They planted more trees in '17. They planted
14 more trees in '18. Mr. Bader told you they are planting 2,000
15 more trees this year.

16 I am going to show you the verdict form, as
17 Mr. Randles suggested. You will have Verdict Form A. And
18 what I'm asking you to do, ladies and gentlemen, is to give
19 the only verdict that is supported by the evidence in this
20 case. On the first line, fill in "Monsanto Company," on the
21 second line "Monsanto Company," on the third line "BASF." You
22 can then skip over Parts 2 and 3. Have your foreperson sign
23 it and date it. That's what we are asking for. Because
24 that's the only verdict supported by what you actually heard
25 with your own ears and what you actually saw with your own

1 eyes.

2 You know, I am going to end where I began. This has
3 been a very long trial and you have been remarkably attentive.
4 It's been a very long trial and it's been a trial, a very long
5 trial in which I lost my cool at one point and I shouldn't
6 have done that. And I apologize for that. Frankly, I let my
7 emotions get the better of me. And we should never ever do
8 that, but we especially shouldn't do that in a court of law.

9 As Judge Limbaugh as told you, the only things that
10 matter in a court of law is the law and the facts. You can't
11 have sympathy or emotion play a part in your deliberations.

12 Now, it's a shame, it really is a shame that Bader
13 Farms has to be dealing with Armillaria. And that, like every
14 other farm, they have to deal with things like hail and frost
15 and ice storms and all of that sort of thing. Farming is
16 hard. Nobody disagrees with that. And it would be easy to
17 say, I suppose, well, sure they haven't proven the main issue
18 in this case that this is what's causing their problem, but
19 what's the harm in giving them a little bit of money?

20 I have to go back to the law and the facts. You
21 took an oath to apply the law in this case. You took an oath
22 to follow the evidence and follow the instruction that
23 Judge Limbaugh has given you. If you do that, the only
24 verdict you can come back with is for Monsanto and BASF.

25 Ladies and gentlemen, on behalf of the men and women

1 of Monsanto, from the bottom of my heart, I truly want to
2 thank you for your time and your attention and your patience
3 for the last three weeks.

4 Thank you very much.

5 **THE COURT:** Ladies and gentlemen, we will take a
6 recess at this time and then reconvene right at 11:00 for the
7 remainder of the closing arguments.

8 Please remember the admonition I have given to you
9 not to discuss the case.

10 Court is in recess until 11:00.

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

12 **THE COURT:** Mr. Mandler.

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

14 May it please the Court, counsel.

15 Good morning, ladies and gentlemen.

16 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT BASF

17 **MR. MANDLER:** Let me add my thanks to what
18 Mr. Miller and Mr. Randles said. It's been a long trial.
19 You-all have been very attentive. And let me particularly add
20 my thanks for hanging with us and hanging with me until the
21 end of trial. I asked you at the beginning and I told you at
22 the beginning that BASF would go third. We went third in the
23 opening. We went third whenever there was a witness up. And
24 now we are going third in closing. I very much appreciate
25 that you-all have paid attention throughout and paid attention

1 until the end. So thank you.

2 Like Mr. Miller, I want to focus on what is the
3 evidence that you saw, what is the evidence that the
4 plaintiffs brought to the trial, to try to establish that it
5 was dicamba that caused their injury.

6 There are a couple of main themes I'm going to talk
7 about this morning. The first is Engenia herbicide because
8 that is what BASF made and sold. Engenia is a product that
9 the evidence showed was well-designed. It was very
10 exhaustively tested and it was exhaustively warned. The label
11 includes a very great depth of warnings of exactly what might
12 have happened or didn't happen in this case.

13 But just as importantly, that's the product that you
14 have to judge BASF on: Engenia herbicide. BASF did not sell
15 the system. You will see multiple references in the jury
16 instructions to "the system." Of course I know you know by
17 this part of the trial the system means the seeds, the
18 dicamba-tolerant seeds plus a herbicide. BASF didn't sell the
19 system. They have no role in the seed. Didn't sell the seed.
20 Didn't sell other herbicides. Only sold Engenia.

21 The second thing I'm going to focus on this morning
22 is that BASF and Monsanto were, in fact, competitors. And
23 they were particular competitors when it came to selling that
24 herbicide product. Now, we weren't competitors with Monsanto
25 on the seed because we didn't sell the seed. We had no

1 control over the seed. That was their market. There's others
2 out there who also sell DT seed that Monsanto competes with
3 but not BASF. We compete with them on the selling of the
4 herbicide.

5 So you'll get instructions, as the Court read to you
6 already, and you will get a copy when you go back to the jury
7 room. One of those instructions is Instruction No. 10.
8 That's one of the guides you will have to sort of identify
9 what it is that the products are, for each of the defendants.
10 And it reads in the first instance that the defendant
11 individually or jointly with another defendant manufactured or
12 sold any one or more of the dicamba-tolerant system.

13 The part of that that applies to BASF is that it's a
14 defendant, it individually sold one component. It didn't sell
15 the system. BASF individually sold one component and that
16 component is Engenia.

17 What that means is: Within the system, Monsanto had
18 the seed, which is completely controlled, and it had its own
19 herbicide, XtendiMax, and had complete control of that. BASF
20 didn't have any seed and had no control over the seed. And it
21 had complete control over Engenia herbicide. And that was
22 where, that area is where Monsanto and BASF are competitors.
23 Each want to sell their own herbicide because each thinks they
24 are the best. I will tell you why I think Engenia is the best
25 in a little bit.

1 How that relates to Bader Farms is for those first
2 two years, 2015 and 2016, BASF did not have a product in the
3 system. Nothing being sold. It was only the seeds. BASF was
4 not related to the seeds. Our product didn't come out on the
5 market until 2017, at the same time XtendiMax was on the
6 market. You heard DuPont's product FeXapan was also on the
7 market.

8 So one area that I agree with Mr. Miller on, and I
9 told you I'm going to try not to cover -- I told you at the
10 beginning of the trial I will try not to repeat things that
11 have already been said, but this is one where I'm going to
12 repeat because I agree it's the heart of the case.

13 The first question you are going to have to figure
14 out is: Did Plaintiffs prove that, in fact, Engenia or
15 XtendiMax or any other dicamba caused the injury on Bader
16 Farms? And we think the evidence here is conclusive that,
17 first of all, that dicamba didn't cause what's going on. And
18 Mr. Miller explained a little bit. I will talk a little bit
19 more about what was going on. And even beyond that, that the
20 plaintiffs have not offered any evidence at all that it was
21 specifically Engenia herbicide that they think reached their
22 farm.

23 Let's talk -- let's start with whether it was
24 dicamba damage at all. Bader Farms and their expert
25 Dr. Baldwin said every bit of the damage that they are

1 claiming, all \$20 million was caused by dicamba. There are
2 two years where we know that's just not true. The first is
3 Mr. Bader himself admits that there were multiple other issues
4 during the time in question.

5 He talks about the 2019 ice storm and he testified
6 that that was -- the effects of that was still going on in
7 2014 and 2015, the years in question. There was a 2015 hail
8 event. Now, the two that are highlighted in yellow, those are
9 both events where he made insurance claims. Mr. Miller showed
10 you the forms. He made insurance claims where he swore under
11 oath that 100 percent of the cause of loss was first from hail
12 and then from frost. And he got money for it. So we know it
13 wasn't 100 percent dicamba.

14 He also had a 2015 aerial drift that he said was
15 unrelated to the claims in this issue. There were products
16 that were unrelated to this issue. And I'll show you in a
17 little bit that Engenia cannot be applied aerially over the
18 top of Xtend seed. It's prohibited. So whatever came from
19 that aerial application is unrelated to that case. And he
20 told the radio station before this case that that caused
21 50 percent of his loss in 2015. So not caused by dicamba.

22 In 2016 and 2017, he had frost. One year he said it
23 reduced his yield by 30 percent. Only reason he couldn't make
24 an insurance claim is because his yields were already high
25 enough that he didn't qualify. And in 2018 again he got paid.

1 The other factors that are impacting yield I want to
2 point out, primarily Armillaria root rot. Armillaria root rot
3 is moving through his orchards, as it has done in the past.
4 There are multiple other factors that are impacting yield.
5 But the point is, instead of just looking at one thing,
6 dicamba, the experts for the defendants looked at all of these
7 other issues including what had happened by Mr. Bader's own
8 admission and what else they found when they did detailed
9 inspections of the fields.

10 Mr. Baldwin, as Mr. Miller pointed out, had no
11 experience with peaches. And, frankly, he formed his opinion
12 before he got there. He told you a story of driving up
13 Crowley's Ridge and he had in his mind I already know it's
14 dicamba. And that was in February. When he couldn't look at
15 any foliage. He couldn't look at any other crops. He
16 couldn't look at any plants. He already had decided before he
17 got there that it was dicamba.

18 On the other hand you heard the testimony of three
19 other university experts. Wayne Mitchem has been working with
20 herbicides and peaches for years. You heard Dr. Schnabel said
21 when he has a herbicide question, there's one person he calls.
22 He calls Wayne Mitchem. And Mr. Mitchem said the same thing.
23 When he didn't know what to do about a pathology issue, he
24 called the pathology experts. You heard from Phil Brannen.
25 When Phil Brannen took his samples, he sent them to Guido

1 Schnabel to have him run the DNA analysis in his lab. None of
2 that was done by Dr. Baldwin.

3 Mr. Mitchem said he inspected thousands of trees.
4 He said there was one visual symptom you need to see in order
5 to know that dicamba was there and he knew that from his own
6 test, his own experience with dicamba and peaches. And you
7 have to see terminal dieback. He said he was there five
8 different times when the trees were in full bloom or full
9 foliage and he didn't see one leaf, one tree ever that had
10 terminal dieback.

11 Dr. Brannen, likewise, was very thorough. He was
12 there multiple times. He took samples. Sent them off to
13 Dr. Schnabel's lab. Dr. Schnabel testified that Armillaria
14 has been killing trees at Bader Farms long before 2015, the
15 first year in question. He confirmed those inspections
16 with -- that premise with on-the-ground inspections, from
17 visually identifying the white fungus around Armillaria and
18 taking samples from doing DNA tests.

19 You remember toward the end of the case,
20 Dr. Schnabel was our last witness, and he was asked multiple
21 times about whether he could look at one photo alone, one
22 photo alone and diagnose Armillaria. And his answer was
23 consistent. It was emphatic. He said, "Armillaria was
24 definitely on Bader Farms before 2015." He said, "I was
25 there, boots on the ground. I examined the trees, I looked at

1 the infection centers, I did DNA analysis, I looked at the
2 satellite pictures. Armillaria root rot has been on his farm
3 for decades."

4 The pattern has been consistent for 20 years with
5 his own work of Armillaria root rot. He said he's seen that.
6 He said he's seen it wipe out farms in South Carolina and
7 Georgia and he said the exact same thing is happening on Bader
8 Farms.

9 He showed you the pictures of how it moves down the
10 rows, how it will skip a row and continue to move down those
11 rows. He showed you how he gathered his samples. He showed
12 you the fungus in the samples. And he showed you that in
13 2018, 43 out of 43 samples were positive, DNA analysis
14 positive for Armillaria, and in 2019, six out of six samples
15 were positive.

16 He showed you multiple photographs on the ground.
17 We looked at the drone footage -- I'm not going to play it
18 again now -- where the drone actually taken by Mr. Bader
19 himself was flying over the orchards and you can see the
20 infection centers.

21 He looked at Mr. Bader's own photos over time. He
22 looked at satellite images. And he looked at Bader Farms'
23 history of tree replacements. These pictures themselves are
24 from Mr. Bader. And they are from July 15 and Dr. Schnabel
25 showed you where there were tree losses and gaps that would

1 have taken years to form prior to 2015, when dicamba was first
2 on the market.

3 I am not going to go over these multiple witnesses.
4 We have gone over these over the time. And one of the things
5 that Mr. Randles said is that, well, all the experts said they
6 are not experts in satellite technology. I showed these to
7 Mr. Bader. We went -- it wasn't just one farm as suggested or
8 two farms. We went over six or seven different examples. I
9 know it was a little painstaking. But I asked him, in each
10 case, this gap from 2010, that was before dicamba. He
11 admitted it was there. He admitted it wasn't caused by
12 dicamba. The same gap in 2014, the same thing and that same
13 gap ended up in 2018.

14 Well, if dicamba didn't cause it in 2010 and didn't
15 cause it in 2014, that same gap it didn't cause in 2018, and
16 that's the loss they are asking you to award money for because
17 they say now it's related to dicamba.

18 Dr. Schnabel did also talk about a few other causes.
19 They may not be farm-wide but they impact yield. This
20 particular issue is bacterial spot. It was on a number of
21 fields Dr. Schnabel testified in 2019. He said at least one
22 field, 50 percent of the crop was lost because of bacterial
23 spot. Now, it's preventable if it's sprayed. You can spray a
24 fungicide for it. But Mr. Bader, for whatever reason, hadn't
25 done that in that field and he lost yield because of it.

1 That's all yield that their expert is now trying to put a
2 dollar amount and claim it all came from dicamba.

3 Finally, Mr. Bader agreed that he cannot tell and
4 does not allege if it was Engenia or any other brand that he
5 says got to his farm. And Dr. Baldwin said the same thing.
6 He can't confirm what source or what product it was that made
7 it to the fields at Bader Farms.

8 And that's important. Because obviously for 2015
9 and 2016, we didn't have a product, so BASF didn't have an
10 issue there. For 2017, there was XtendiMax. There was
11 Engenia. But there was also FeXapan. There were also dozens
12 and dozens of other dicamba products that could have been the
13 source.

14 It's the plaintiffs' burden in this case to actually
15 establish that the cause that they allege -- we don't think
16 there was dicamba there at all, but at a minimum they have to
17 show that the dicamba came from a product that BASF
18 manufactured.

19 Mr. Miller said, and I agree, that every single of
20 the questions you are going to be asked, when you get back to
21 the verdict form, all have this element of causation. So if
22 you decide either that Mr. Bader didn't show that his injuries
23 were actually caused by dicamba or if you decide that he
24 didn't show that it came from Engenia, in either case, that
25 answers every question. And basically you are done.

1 So if you don't think Engenia caused the damage at
2 Bader Farms, you get to write in "BASF Corporation" in
3 answering that question. The same is true for Monsanto. If
4 you don't think it caused it, you can fill in, as Mr. Miller
5 suggested, either "Monsanto" or "BASF" in each one of those
6 forms and then your work is done.

7 And we think that's the answer.

8 I could stop now, but I still have time left on my
9 timer, so I am going to keep going.

10 I am going to talk a little bit about Engenia.
11 Plaintiffs didn't do that during the case. They didn't focus
12 on the testing. They didn't focus on the design. They
13 certainly didn't focus on the label. It's their burden. If
14 they want to say it's a negligently designed product, they
15 have to bring in an expert and talk about it.

16 Dr. Baldwin didn't say anything about the design of
17 Engenia. Didn't say anything about the label. Not a witness
18 came in from the plaintiffs, not an expert, not anybody, to
19 say it -- that any of this isn't true. I am still going to
20 talk about it.

21 Engenia herbicide was a low-volatility design, it
22 was extensively tested, and the warning was complete and the
23 training was complete.

24 We will go through this a little quickly here. This
25 compares the relative volatility of Engenia herbicide to some

1 of the other products that came before. Banvel, you heard the
2 term throughout the trial, old dicamba. Banvel is an example
3 of old dicamba. I mentioned in opening it was first
4 introduced in 1954. I think one of the witnesses took issue
5 and said 1957. I don't think it matters. That was one of the
6 original products.

7 Clarity is much more recent. It is a low-volatility
8 product, if you see, compared to Banvel. Great reduction in
9 the volatility. And Engenia was designed with a BAPMA salt to
10 be even lower. And how does BASF know this? It tested it
11 five different ways. It did something called a
12 thermogravimetric analysis, something called an incubator, a
13 C14 type test, the humidome test and actually testing out in
14 the field.

15 Now, they all, you know, come up with different
16 numbers because they are designed to measure volatility in
17 different ways, but they are all moving in the same direction.
18 The TGA machine said it was 91 percent less volatile. The
19 incubator, 98 percent less volatile. C14, 41 percent.
20 Humidome, 77 percent. And the field sampling, 44 percent. If
21 you pull all of those together, that's where you get the
22 average of 70 percent less volatile. It didn't stop just with
23 the lab testing or the air -- or the field testing with the
24 air sampling. It did additional field testing.

25 You heard the testimony of Dr. Birk by video. He

1 described the large scale drift studies. He described the
2 flux studies. He described that the EPA concluded that based
3 on those studies there was no yield loss or risk of yield loss
4 from drift or for volatility.

5 Now, there's been a lot of discussion about
6 university studies and what decisions Monsanto did or didn't
7 make. Whatever the evidence is on that, whatever you feel
8 about it, it doesn't apply to BASF. It's uncontroverted that
9 BASF did not stop university testing ever. Worked with
10 university cooperators. Supplied Engenia products so the
11 university could do their own testing.

12 Here is a little more detail about the large scale
13 drift study. In fact, it was done by outside university
14 expert Greg Kruger, who is a professor at the University of
15 Nebraska and Andrew Hewitt who is primarily from Australia but
16 a professor there. They did a study where they measured drift
17 by putting out monitors on the edge of the field and in the
18 middle of the fields and they tried to test various different
19 types of nozzles to see and reduce the potential for Engenia
20 to drift.

21 They then took that information and did wind tunnel
22 testing on multiple different tank mix, multiple different
23 nozzles. That resulted in a recommendation that you will see
24 in a minute that made its way onto the label that BASF only
25 recommended the very -- the nozzles that produced the

1 various -- best result as far as reducing the ability to
2 drift.

3 And if you look at the one on the end, the TTI,
4 again you will see them a little bit later, BASF felt so good
5 about that nozzle it spent \$50 million of its own money
6 passing out free nozzles to users of Engenia.

7 BASF did the four full-scale flux studies that
8 Dr. Birk testified about where they -- this was actually to
9 measure and test for volatility, the potential for volatility.
10 Setting up -- it's a little small, but you can see on the top
11 one, setting up the monitors all the way around the edges of
12 the field. I think we have a little bigger one here.

13 And not only did BASF do that, the same type of
14 testing was done by the University of Arkansas, the University
15 of Wisconsin, Michigan State and the University of Nebraska.
16 EPA evaluated all of it, both the Monsanto's testing, BASF's
17 testing and the university testing. They said, "We evaluated
18 the new data including field volatility and vapor exposure
19 toxicity studies submitted by the registrants and the large
20 field studies conducted by academic researchers."

21 After reviewing all of that, they concluded that at
22 the edge of the field, not in a cloud 15 miles away, but at
23 the edge of the field, the amount of volatility didn't reach
24 the -- it affects endpoints. What does that mean? It means
25 the exposure was too low at the edge of the field to affect

1 the yields of nearby sensitive crops. That's the EPA's
2 conclusions, not BASF's.

3 Let me turn for a minute to the warnings. Now, in a
4 case where the plaintiffs are claiming a failure to warn, the
5 fact that you have not seen this label, and they haven't shown
6 you the warnings until what I'm going to show you right now,
7 to me shows you they haven't presented the evidence to carry
8 their burden. And if Mr. Randles gets up in his remaining
9 20 minutes when I can't respond and says something about our
10 failure to warn and something about the label, just remember
11 that's the first time you are hearing it from the plaintiffs.

12 There's way too much on here and with my limited
13 time I'm not going to be able to go over it in detail, but I
14 want to give you the sense of how much BASF warned.

15 This is a 34-page label that was approved by EPA.
16 The very first thing on it says "It is a violation of federal
17 law to use this product in a manner inconsistent with its
18 labeling."

19 Right off the bat it talks about product
20 stewardship, picking the right nozzle, picking the right boom
21 height, avoiding sensitive targets and cleaning out spray.
22 That's a pretty good warning. That's not the warning. That's
23 the index to the warning.

24 More warning about the care you need to take around
25 sensitive desirable plants including fruit trees.

1 Spray drift management program. Controlling droplet
2 size. Nozzle type, which to pick. Volume. Pressure.
3 Temperature and humid. All ways to reduce off-site movement.
4 And I know I'm going through this quickly, but it's a very
5 long label.

6 A whole section on temperature inversions, which
7 Dr. Baldwin said is the cause of what happened here. A very
8 long section about how to spot them, how to avoid them, how
9 not to apply. None of this is discussed up until this point
10 in the case.

11 Again, how to avoid sensitive areas. To make sure
12 the wind is blowing away from the sensitive areas at the time
13 of application.

14 Wind speed. Again, ground application drift
15 management. Telling you exactly which nozzles you should pick
16 by brand name. And these are the nozzles that you will see
17 BASF passed out.

18 Boom height. Ground speed. And specific directions
19 for cotton that include a lot of the same elements. And this
20 is -- I am not repeating, these are all different and separate
21 warnings.

22 More temperature inversion. Fruit trees again. And
23 then soybeans. And you go through the whole set of warnings
24 again for soybeans.

25 Thirty-four pages of warnings. You will be asked

1 whether we failed to warn. We did not.

2 It didn't stop there. In the training, BASF gave
3 out \$5 million worth of free nozzles trained over 20,000
4 growers.

5 So you are going to be asked whether BASF was
6 negligent in the design or the warning of Engenia from 2017
7 on. Now, you won't be asked about '15 and '16 because our
8 product didn't come out on the market until 2017. We think
9 the answer to that is no. We will ask that you fill that in
10 for BASF.

11 All right. I'm going to say a little bit about
12 damages. I'm going to say it quickly because Mr. Miller
13 covered that. First of all, Bader Farms admitted they didn't
14 lose revenue. Their profits went up. Second of all, there's
15 no evidence they are going out of business. You heard
16 Dr. Guenther testify all of his damages theory was based on
17 the fact they would be out of business, not functioning as of
18 2019. And based on that he ran damages out to 20 years in the
19 future. He admits that didn't happen.

20 Dr. Baldwin, upon whom Dr. Guenther relied,
21 admitted he was wrong. For the 2019 part of the crop, he was
22 wrong that it was continuing to produce. I think he said it
23 was like a beehive when he went there in 2019, how busy it
24 was.

25 Dr. Guenther said he was asked to assume by the

1 plaintiffs that they would be out of business in 2019. He
2 admitted that was wrong and he admitted he never revised his
3 report once he figured out they were not out of business in
4 2019 and they weren't going to be out of business in 2020.

5 And you saw the photos of -- you know, there are
6 areas that where the Armillaria is growing, but there are some
7 areas that are doing well.

8 Now, Mr. Miller looked at profits. I'm going to
9 look at revenue. Because I suspect Mr. Randles will stand up
10 and say profits don't mean anything because, as Dr. Guenther
11 said, Jeff Bezos doesn't pay taxes. So I'm just going to look
12 on the revenue side. These are numbers from Mr. Bader's own
13 chart. You see that on the bottom.

14 These are the four years prior to when they said
15 dicamba affected it. These are the four years after. And you
16 can see the average. For 2016 and 2017, no impact at all.
17 This is from his own revenue. And remember in 2015, that's
18 the year he said he lost 50 percent because of the aerial
19 drift unrelated to dicamba and he lost another 10 percent
20 because of hail.

21 In the orange there he got paid on. He tried to get
22 paid on the aerial drift. He submitted it to the insurance
23 company for the applicator, but they didn't pay him. He said
24 they are still fighting. There was another 30 percent freeze
25 in 2017. Didn't get paid on that because you can see the

1 green line already met his average. And in 2018, that orange
2 he got paid on. So for each of the four years, 2015 to 2018,
3 the revenue was the same but for these other causes that he
4 got paid on as compared to the previous years.

5 And there was good fruit in those years, too.

6 So for that reason we asked -- and I don't think you
7 will get to this part because I think you will say no on
8 causation, but if you get there, the damages are zero.

9 All right. I will spend the last bit of time I have
10 talking about joint venture and conspiracy. The only reason
11 these are on here is for BASF to be held liable for things
12 that happened in '15 and '16. When you are asked about '15
13 and '16 both from the punitive side and on the liability side,
14 you will only see Monsanto's name there.

15 Now, again, I don't think you get there because I
16 don't think there's causation, but for '15 and '16 you won't
17 see BASF's name because we didn't have a product there. So
18 for both punitives and liability, what the plaintiffs want you
19 to do is find a conspiracy and joint venture because that
20 means BASF shares Monsanto's losses.

21 So I'm asking you, if you think it's unfair for BASF
22 to share the losses for '15 and '16 when they had zero control
23 over the seed, to say no to these two. And that's all you
24 need to do. Now, I'm going to go through in a little more
25 detail because there's a few more facts to go over, but that's

1 the bottom line. We shouldn't share the losses for something
2 we had no control over.

3 All of these witnesses testified that BASF and
4 Monsanto were fierce competitors. And I apologize for going
5 fast through this, but there's a lot of data.

6 Fierce competition. Absolutely viewed them as our
7 biggest competitor. Fierce competitor in the marketplace.
8 Monsanto would not share their seed sales data with BASF. I
9 don't blame them; it's their product. But there was no
10 sharing of data about the seed. We didn't even know where the
11 seed was even planted.

12 You will see the instruction that says "shared
13 pecuniary interest" and "equal voice." Now those are not
14 everyday terms. Shared pecuniary interest is another way of
15 saying shared profits and losses. They are in it together.
16 If they lose money, we lose money. If they make money -- they
17 sold the seed, and you have heard some of the figures about
18 how much seed they sold. BASF did not get half of that money.
19 There was no share of profits and losses and there was no
20 equal voice.

21 There are a number of written contracts between the
22 competitors and those contracts explicitly said there was no
23 equal voice. Monsanto had responsibility for its seed and its
24 herbicide. BASF had responsibility for its herbicide. They
25 each control their own products.

1 There was language, as we saw a few days ago, in the
2 contracts that said there was -- there was -- explicitly not a
3 joint venture. Nothing contained in this agreement is
4 intended implicitly or is to be construed or is to constitute
5 Monsanto or BASF as partners in the legal sense. Not only
6 that, is they made sure that each product [sic] had sole
7 discretion and sole expense for its own products. So Monsanto
8 had sole discretion and sole expense for the seed, which means
9 no equal voice and no shared pecuniary interest.

10 Monsanto also had sole discretion and sole expense
11 for its own herbicide which means no equal voice. BASF, on
12 the other hand, controlled its own herbicide, Engenia, and
13 that's the only thing BASF should be judged on in this case is
14 Engenia.

15 As I said, we are competitors with Monsanto. And we
16 are competitors when it comes to XtendiMax versus Engenia.

17 So that's what the written agreements say: no joint
18 ventures. Instead, the plaintiffs want you to rely on
19 something called an implied joint venture through invoices and
20 memos, something called an umbrella agreement they never even
21 showed you and you haven't seen any of the terms for and
22 because we received royalties.

23 There's something in the contract specifically that
24 says you can't rely on other understandings outside of the
25 agreement. Memos and invoices. It says the agreement itself,

1 the contract, is the entire agreement, which means you can't
2 imply it from outside materials.

3 It specifically says this contract is not under the
4 umbrella agreement. Notwithstanding the provisions of the
5 umbrella agreement, neither party shall have rights or
6 obligations under the umbrella agreement. So no implied joint
7 venture from that.

8 And, finally, you heard that because of an actual
9 litigation between BASF and Monsanto, that BASF gave up any
10 claim it had to the seed and instead was getting royalties.
11 In fact, the invoices specifically say they were getting
12 royalties. You heard the questioning of the BASF witness
13 where, you know, does this particular provision have the word
14 "royalties" in it? And she said the agreement as a whole set
15 up royalties. The invoices prove that.

16 Royalties are not shared profits. I gave the
17 example in the opening and the witness did as well, which is
18 if you are a music provider, a singer, and sell -- you have
19 your song played on the radio, you may get a dollar. You have
20 it played on Spotify you may get 20 cents. I don't know what
21 the numbers are. But you are not sharing -- you don't get
22 half the profits from the radio station. You certainly don't
23 get half the profits from Spotify.

24 Pecuniary interests are shared profits and losses.
25 That was not happening here. Royalties are not the same as

1 profits.

2 If you have a joint venture you have a business
3 together. Businesses mean you create an entity, you have a
4 board of directors, you have common employees, you pool your
5 assets. All of these issues.

6 **MR. RANGLES:** Your Honor, I object. The Court says
7 in the instructions what the elements of a joint venture are.
8 None of these are included.

9 **THE COURT:** The jury will be guided by the evidence
10 presented and the instructions on the law.

11 **MR. MANDLER:** To have a joint venture you still have
12 to operate a business. Shared pecuniary interest means a
13 business. Shared control means a business. And at the end of
14 the day, BASF and Monsanto were not running a business
15 together.

16 The law does say that the written contract is the
17 best evidence and that contract specifically says there's no
18 joint venture. The law does say you have to have an equal
19 voice and there was no equal voice. We saw that in the
20 agreements. And there was no shared pecuniary interest. We
21 didn't share Monsanto's losses or their profits. So I'm going
22 to ask when you get to the joint venture section to circle no.

23 Finally as to conspiracy, what's the evidence? The
24 evidence is BASF and Monsanto were competitors. There's no
25 evidence of a conspiracy. Plaintiffs will say BASF agreed to

1 Monsanto releasing the seed without the registered herbicide.
2 Somehow we supported that. That's not the evidence you heard
3 at trial.

4 They will say BASF ramped up Clarity production and
5 sold more Clarity or opened -- you heard that they opened,
6 expended the Beaumont plant. None of that turned out to be
7 true. And then finally they say that BASF expected it was
8 going to hurt its own -- that it's going to hurt customers,
9 that they spent eight years and all of that money developing
10 the product with the expectation that it was going to move.
11 Absolutely not true. Absolutely not supported.

12 Each of those witnesses testified that BASF had no
13 role in the release of the seed and Monsanto agreed. We read
14 the stipulation into the record. BASF company was not
15 involved and had no role in Monsanto's decision to
16 commercialize DT cotton seed prior to the 2015 season and DT
17 soybean seed prior to the 2016 season.

18 All of the witnesses said BASF was uninvolved in the
19 release of the seed or the deregulation of the seed. And all
20 of these other witnesses that were directly involved.

21 (Nathan Borgmeyer's testimony clip played:)

22 "QUESTION: To your knowledge, did BASF promote the
23 sale of dicamba-tolerant seed in 2015?

24 "ANSWER: No, we did not.

25 "QUESTION: How about 2016?

1 "ANSWER: No.

2 "QUESTION: How about 2017?

3 "ANSWER: No.

4 "QUESTION: And to your knowledge, did BASF have any
5 role in Monsanto's decision to release dicamba-tolerant seed
6 in 2015?

7 "ANSWER: No, not to my knowledge.

8 "QUESTION: How about the dicamba-tolerant soy seed
9 in 2016?

10 "ANSWER: No.

11 "QUESTION: Would it be fair to say that you learned
12 about Monsanto's decision to release the seed around the same
13 time that the marketplace learned of that information?

14 "ANSWER: Very, very close to the same time."

15 (End of clip.)

16 **MR. MANDLER:** Scott Kay, the vice president of U.S.
17 Crops for BASF, the head executive as it relates to Engenia
18 herbicide said the same thing.

19 (Scott Kay's testimony clip played:)

20 "QUESTION: Let's take you back in time now to 2015,
21 spring of 2015. You testified earlier today about a time when
22 it became known to you and your leadership team that Monsanto
23 would release DT cotton seed and that would be sold for the
24 2015 season.

25 "ANSWER: Yeah. So that was in -- that was a big

1 surprise. And we weren't -- you know, I think regardless how
2 we felt about the timing of it -- well, one thing we made very
3 clear to the staff was that by no uncertain terms were we ever
4 to recommend any of the current dicamba products we had, one.
5 Two, the products would have killed the crop and the other
6 product was not registered and that would have been illegal to
7 use.

8 "I remember very specifically being direct with the
9 staff around that -- a recommendation in that line of, you
10 know, of off-label recommendation was breaking our code of
11 conduct. And breaking our code of conduct would result in a
12 dismissal."

13 (End of clip)

14 **MR. MANDLER:** So even though BASF had nothing to do
15 with the release of the seed, it did everything it could to
16 make sure that illegal use didn't happen. Including telling
17 its own employees that if you recommended illegal use you
18 would be dismissed.

19 You saw the documents where that warning went out.
20 "All BASF employees must recommend and follow the label
21 directions. Do not even suggest or hint at off-label
22 application of Clarity." This is not evidence of a
23 conspiracy.

24 The same information went out to their customers, to
25 the dealers, not that it has -- you have to follow the label,

1 that there's no approved use. Always read and follow the
2 label directions.

3 Despite that the plaintiffs claim somehow there was
4 a spike in production at Beaumont plant and there was a spike
5 in Clarity sales, we showed you the evidence that that didn't
6 happen. The production in the Beaumont plant that was
7 undergoing a reconstruction at the time went down. It did not
8 go up. It didn't ramp up. It didn't spike. During 2015 and
9 2016 production of dicamba was down.

10 Same thing with Clarity sales. Now, they pulled up
11 a memo of some region in Oklahoma where the fellow said he
12 thought he had higher sales. That's not the 10-state cotton
13 region that we are talking about. That's not the 10-state
14 soybean region we are talking about.

15 They insisted in the litigation that we produce the
16 sales data for it. The sales data. And when we did, they
17 didn't use that. They pulled out a memo or a PowerPoint and
18 showed you one little slide from it. They didn't use the
19 actual data of what happened. And what happened is the sales
20 went down. Both Clarity, which is BASF's own product, and
21 private label Clarity that we have no control over that we
22 sell to other distributors, those sales also went down. Now,
23 they are critical that we don't know what those other
24 companies did with it after we sold it to them.

25 **THE COURT:** Three minutes.

1 **MR. MANDLER:** It's their product.

2 Thank you.

3 They put their own label on it. They distribute it.
4 They control where it went. What we know is our sales went
5 down in those years and that evidence is uncontroverted.

6 So what that leaves us with, as far as Bader Farms
7 is concerned, is there's no evidence of any wrongdoing at all
8 from BASF during '15 and '16. And the sole reason they want
9 you to have a joint venture and the sole reason they want you
10 to have a conspiracy is to somehow put fault on BASF for those
11 years when they had no product and took no actions other than
12 to warn their own employees and their own customers to void
13 off-label use.

14 So the burden for civil conspiracy is higher. It's
15 clear and convincing. It's that higher standard that
16 Mr. Randles talked about. And I would submit that they
17 haven't met it.

18 (Scott Kay's testimony clip played:)

19 "ANSWER: It's pretty simple. I think all of our
20 plans, strategies, tactics have been aligned to compete
21 directly with Monsanto."

22 "QUESTION: Is that the opposite of a conspiracy?

23 "ANSWER: That would be the direct opposite of a
24 conspiracy."

25 (End of clip)

1 **MR. MANDLER:** There's no evidence of a conspiracy at
2 all, and there's certainly not clear and convincing evidence.

3 So we would ask when you get to that question, if
4 you get to that question, if you get beyond causation, to
5 circle that one no.

6 Thank you for your time. I do very much appreciate
7 all of the effort you-all put in throughout these three weeks.
8 I know we were only supposed to be here two weeks. And you
9 have all hung in there and paid attention to us to the end.
10 So this is an important process. It's about an important
11 product. And I know you-all will take it very seriously.

12 Thank you.

13 **THE COURT:** Mr. Randles.

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

15 REBUTTAL ARGUMENT ON BEHALF OF PLAINTIFFS

16 **MR. RANGLES:** You are really at the end now, ladies
17 and gentlemen. Thank you for your attention. Thank you for
18 listening to us today.

19 You know, one of the things Mr. Miller said I very
20 much agree with. And I said this to you in jury selection, as
21 you recall. At the end of this case, you are going to be
22 asked to make some hard creditability decisions. Who do you
23 believe? Because I told you then, and I think you found it to
24 be true, this isn't going to be one of those cases where you
25 say, well, I can believe a little bit over here and a little

1 bit over there. Because these cases go like this. I mean,
2 you can't believe our case and believe theirs and you can't
3 believe theirs and believe ours.

4 I believe we have shown you overwhelmingly through
5 their witnesses on the stand, through their documents and
6 through what you have seen here in court -- which I get to be
7 pretty blunt about at this moment in time. These defendants
8 are not worthy of belief.

9 They laugh as they lie to academics about why they
10 don't give them product to test. They joke about putting out
11 the products in 2015. They mock their own pink stickers.
12 They -- they repeatedly have shown themselves unworthy of
13 belief. And even in this courtroom repeatedly taking things
14 out of context, showing you half the stuff when we have to
15 tell you the rest.

16 Would you know that the EPA conditionally approved
17 these products for two years if I hadn't told you that?
18 Because the word "conditional" has never exited Mr. Miller or
19 Mr. Mandler's mouth. Not once. They're like the EPA gave us
20 a big round of applause and we are off to the races. That's
21 not what happened at all. They are on probation.

22 So I am going to ask you this. There are two ways
23 for you to evaluate credibility. One way is to say, well, I
24 know a lot of what they say is not true and sort of dig around
25 and try to sort out the truth from the lies; that's one way.

1 The other way is to say to them, you are not worthy of belief,
2 I am not going to go through that process, I just don't
3 believe you. And I would suggest that is the appropriate
4 response in this case.

5 I am going to tick through a few of the things they
6 talked about and then return to some of the core concepts.

7 They talked about Dr. Ford Baldwin and somehow he's
8 not worthy of belief. Now, he was worthy of belief when he
9 spent 16 years as one of Bayer's chief outside consultants and
10 we was worthy of belief when he testified for these companies
11 in the past. And apparently he has been worthy of belief to
12 be a fellow in Weed Science Society of America, Arkansas
13 Agricultural Hall of Fame Distinguished Professor.

14 He's got more honors draped off of him in the
15 herbicide field than everybody else in this courtroom put
16 together. And what did he tell you? He said, look, he's been
17 walking fields for 45 years and diagnosing injuries from
18 herbicides. He's been diagnosing dicamba injuries since the
19 mid '80s. It's all new to their experts. You heard that.

20 Now, the EPA says dicamba injury is easy to diagnose
21 if you're a trained investigator. He's trained. He knows
22 what he's talking about. And they say he came to Bader Farms
23 with his mind made up. You know good well that's not what he
24 testified. He testified he had spent all of 2016 walking
25 northeast Arkansas and the bootheel, looking at the damage

1 from all of this.

2 No, no. Their experts were here. They were all
3 from states where there was no damage. He was at the
4 Portageville meeting where Dr. Kevin Bradley was there talking
5 about what he saw at Bader Farms. The folks from the Missouri
6 Department of Ag were there talking about what they saw. The
7 train wreck slide and all of that. He didn't come into this
8 not knowing what he was talking about. He came into this with
9 real experience.

10 I found it fascinating Mr. Miller pulls a snippet
11 out of his testimony out of context and says, well, you could
12 test for volatility, couldn't you? And he says, well, that's
13 tricky to do. Now, of course Mr. Miller left it there, ah ha,
14 I've proven my case. Well, really? You know what volatility
15 is. You've been here long enough. It's when dicamba moves
16 off in a gas, anywhere from 24 hours to 96 hours, and then it
17 either, as Dr. Baldwin says, just goes up in the air or it
18 moves with the air currents.

19 So if you are out there -- here trying to make
20 volatility go there, you can't. Not without the wind. And
21 then he said his theory about temperature inversions.
22 Mr. Mandler shows you the label. Temperature inversions were
23 on the label. Everything Ford Baldwin told you about what
24 happens in temperature inversions is on the label and we
25 showed it to you. That it catches up volatiles and takes them

1 a vast distance. That's what happens. And so what they call
2 our theories are scientific fact established over a long
3 period of time and on their very labels.

4 They mentioned samples again. Look, Bill Bader said
5 he followed their guys. When they took a leaf, he took a leaf
6 to annoy them. If they wanted to test them, they could have
7 tested them. They didn't. You know why they didn't test
8 them? Two very good reasons. Number one, as the BASF
9 document says, sample -- testing leaf samples is pointless for
10 volatilized dicamba. The tests don't work. BASF documents
11 said it's pointless. But that didn't stop them from repeating
12 that somehow we should do it.

13 Now their expert takes all of these samples, does 50
14 tests for Armillaria. \$250 a test. Not one for dicamba. Not
15 one for anything else. Why? Because their theory was already
16 written. We have told you, before all of this started, way
17 back in 2010, they decided they were going to have to defend
18 this in the courts. They were going to push this unsafe
19 product out there and they were just going to fight it. How
20 were they going to fight it? Deny, deny, deny. Point to
21 other causes. Train your people to go look for other causes.
22 Environmental, et cetera. And in particular in the bootheel,
23 make sure you point the finger at disease.

24 They wrote all of that down before the Bader case
25 was even around and then they just happened to go to the East

1 Coast and find experts who followed their script exactly.
2 What a coincidence. But you know it's not. And you know why
3 they went to the East Coast. They went to somewhere where
4 there's not this dicamba problem. Because they couldn't find
5 any reputable expert in our part of the country that's
6 actually having these problems that would spout this sort of
7 nonsense.

8 Bill Bader. You saw the insurance forms. You saw
9 that they were partial payments for certain fields injured for
10 certain things. And they keep indicating he was lying about
11 the aerial application. That interview, you saw the script.
12 He was talking about drift of dicamba in a general way. He is
13 not an expert. But I will tell you this: If their case boils
14 down to they want you to believe that Bill Bader is greedy and
15 dishonest, I would ask you to think about that a minute.
16 Monsanto and BASF are saying this man is greedy and dishonest.

17 You ever notice the old adage that people who lie a
18 lot seem to find liars everywhere and the people who are
19 dishonest always seem to think everybody is cheating? That's
20 what you are looking at here. They are going to point the
21 blame. They are going to blame everything but their product.
22 And you know they are going to because they told you that's
23 what they are going to in their own documents.

24 And that's the difference between their case and
25 ours. I told you at the beginning of the case I would prove

1 my case in large part through their words, not ours. We've
2 kept that. And the vast majority of what we've said has gone
3 undisputed in this case.

4 The photos from space whittled down to one. One
5 from 1996. Well, supposedly Bader Farms is being ravaged by
6 Armillaria all the way back to '96 now. Well, let's look at
7 Exhibit 2194. Look at the average yield down here from 2002
8 to 2006. 162,000 bushels. Now, if Armillaria was ravaging
9 the orchard all the way back in the '90s, I think most peach
10 farmers would say bottle that Armillaria because
11 162,000 bushels a year is an amazing yield.

12 But you know what they kept showing you, what they
13 showed you right there? I told you what it would be. That
14 snippet from around the packing shed. An insignificant
15 fraction of the thousand acres at Bader Farms. Once again,
16 evidence taken and twisted out of context. But, again, you've
17 seen the yields.

18 And go to the next one. What happened to the yield
19 after 2014? It collapsed. And, yeah, there were some efforts
20 here. And it just keeps going. And you know what the story
21 is in '19 with the early harvest and late harvest delayed by
22 rain. The fact is, they say we have -- we have to tell you
23 everything at Bader Farms, every problem is dicamba. That's
24 not the law. It's contributed to cause. And certainly
25 dicamba contributed to this. Dr. Baldwin explained it has

1 weakened the trees and they are falling apart because of
2 dicamba.

3 Now let's put up Exhibit 2196.

4 These are the damages Bader Farms has sustained.

5 This is the only number you have been given in this case.

6 This is the only number an expert testified to in this case.

7 And we told you this is a conservative number because it's not
8 based on the peak years; it's based on the rebuilding years.

9 Now, they want to nibble around the edges.

10 Mr. Miller gets up here and repeats again the tax
11 forms. You know what tax forms are for. Tax forms list what
12 happens after everything is paid. Depreciation. Payment of
13 workers. Payment of family. Payment of the Baders
14 themselves. That's not the revenue number. That's not the
15 appropriate number to use here.

16 It's misleading. And if they had a better number
17 they would have brought you a witness. Not lawyer
18 calculations based on squinting one eye and tilting your head.
19 They would have brought you a witness. This is a number from
20 a conservative witness that they've used in the past.

21 Now, Mr. Miller, when he stood up, I was wondering
22 how much he would try to defend his client. How much of the
23 conduct I talked about would he actually even try to defend.
24 He made a brief passing reference to testing and GLP. Bless
25 his heart. Did you hear, again, the explanation I've been

1 seeking since opening? Why did you not need GLP from
2 university scientists to test for killing weeds but you needed
3 it for off-target movement? And there's no explanation. Of
4 course you didn't. You could have let them test. But you
5 were terrified of the results. You wanted to keep a clean
6 slate. You didn't want bad results coming out and that's why
7 you shut it down.

8 And apparently Mr. Miller is still sticking to his
9 story that it was the right thing to do. Now his client says
10 different. Mr. Chambers told the academics it's a mistake.
11 Boyd Carey said it was a mistake before it happened. Then he
12 said he agreed with Chambers it was a mistake. Until
13 Mr. Miller examined him and then it wasn't a mistake. And
14 then he finally just threw it up in the air and said I don't
15 know.

16 So I leave it to you. Talking out, well, both sides
17 of their mouth and the back of their head at the same time.

18 He talked about the pink sticker. You know, I don't
19 have to mock the pink sticker.

20 Let's put up 521.

21 Monsanto employees mocked the pink sticker. "That I
22 all get to work with a group of renegades that launch a
23 technology without a label and thinks one sticker is going to
24 keep us out of jail." That was the cynicism within Monsanto
25 about the wonderful pink sticker and its effects.

1 I'll tell you what Mr. Miller did not dispute. He
2 did not dispute that this was foreseeable. He did not dispute
3 that they were going to have to defend this in the courts. He
4 did not dispute that Monsanto employees told Ford Baldwin
5 repeatedly everybody is just going to have to plant our seed
6 and that will fix the off-target movement problem. He did not
7 dispute that academics told him don't do it. He did not
8 dispute they put the product out, as the Travers e-mail
9 suggests, without knowing the basics about what was going to
10 happen in the real world.

11 He did not dispute that BASF warned Monsanto that
12 off-label spraying would be rampant. He did not -- neither of
13 them disputed that the label is impossible to follow in the
14 real world. Neither of them disputed the claims chart that
15 Monsanto sat down and calculated how many people they were
16 going to hurt ahead of time and still sent it out the door.
17 He didn't dispute that Monsanto made the risk benefit analysis
18 for innocent farmers and they were harmed thereby. They
19 didn't dispute that their plan was to deny, deny, deny. Point
20 to other causes. Point to disease.

21 They did not argue the criteria for punitive
22 damages. All of this leads to punitive damages.

23 Now, they also did not argue, did not dispute that
24 part of their sales strategy was protection from your
25 neighbor, damaging fields, making people. They did not

1 dispute that BASF counted on defensive planting as part of its
2 marketing.

3 And he used the example of cars somehow on the pink
4 sticker. Look, this is not a Mad Max movie where Ford cars go
5 down the road destroying Buicks and Chevys and Dodges. That's
6 what this product does. It destroys the competition and you
7 can suffer the harm or you can use it. They knew in the real
8 world that this product was going to hurt innocent people.

9 He talked about warnings. Did you see anything on
10 the warnings about anything I've told you about today? Any of
11 their knowledge? Any of their planning? Any of that intent?
12 Did they put a warning on there saying, you know, be careful
13 using it around your neighbors because they are going to have
14 to buy this next year if you damage them? They didn't tell
15 you any of that. They didn't tell you anything about why they
16 denied it.

17 Now joint venture. The one time I objected was when
18 Mr. Mandler got up and, frankly, just misstated the law to
19 you. Let's show the instruction, Instruction 16. Here is
20 what has to be shown for joint venture.

21 "There was an implied agreement to commercialize the
22 dicamba-tolerant system." Well, you know that's true. You've
23 seen the documents and heard the testimony over and over. It
24 started in 2010, their agreements. That "the acts were
25 performed to serve that common purpose." They were working

1 intensely to get the system out the door. They formed the
2 Alliance Management Team with four and four voting. Then they
3 formed working groups underneath it. They met constantly to
4 get this out.

5 They had a "shared pecuniary interest in the
6 purpose." They did. Monsanto profited from seed sales and
7 its own herbicides. BASF profited from its herbicide sales
8 and got a cut of every seed sale. Of course they share a
9 pecuniary interest. And they "had an equal voice in
10 determining the direction."

11 Now he says that means they had to control every
12 detail of each other's business basically. No. They had an
13 equal voice. The agreements were Monsanto would take the lead
14 on the seed, send it out when it wanted to, BASF could do its
15 own herbicide.

16 Do you see anything in here of all the stuff he put
17 up in that slide? That you gotta have a board of directors
18 and share an office and form a company? There's none of that
19 in there. That's not what -- this is the law, not what he
20 told you.

21 Now, he mentioned Clarity. I showed you the Clarity
22 sales went up to 100 million. From their document.
23 Mr. Mandler spent most of his time not arguing with me but
24 arguing with what his own client said. These are his
25 documents. His own clients called his relationship with

1 Monsanto a joint venture. Not my words. Their words. So
2 Mr. Mandler's problem is really with his own client.

3 Now, punitives. You will notice on the verdict form
4 it says there's going to be a process if you say yes to
5 punitives. And you certainly should. These defendants need
6 to be punished. If you let them off without punishment, you
7 are patting them on the head and sending them home and saying
8 keep doing what you're doing. And I don't think any of you
9 believe that.

10 But if you say yes to punitives, there will be a
11 very short process. Nothing like we've done. Two or three
12 hours where you get some financial information and make that
13 decision. Don't leave your job undone. Render full justice.
14 The entire world is depending on -- on your judgment of this.
15 You are the only people who know these things. You are the
16 only people that have been exposed to this information. Don't
17 let them off the hook.

18 Look, you know what's caused the damage in this
19 case.

20 Let's put up the maps one more time.

21 It's no coincidence that Bader Farms started
22 collapsing in 2015.

23 Next map.

24 2016.

25 2017.

1 2018.

2 Bader Farms is an island in a sea of dicamba. What
3 changed? When you want to know causation -- and I know that
4 they want to dispute because they know if you find that it
5 caused the damage, you are going to hit them and you are going
6 to hit them hard. And they need to be hit hard.

7 What changed? Bader Farms is getting along fine.
8 Yeah, there was Armillaria in the soil. Nobody disputes that.
9 Yes, there was frost and deer and people had to plant trees.
10 It's doing fine and then it can't recover. Ordinary things
11 like Armillaria, like frost. The trees can't do it. Bill
12 Bader tells you his trees started looking different. What
13 changed? The continual exposure to volatitized dicamba all
14 around him, all directions, year after year. Dr. Baldwin told
15 you Bader Farms can't survive. You know, the exact exit date?
16 Not known, not required to be known.

17 **THE COURT:** Three minutes.

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

19 But Bader Farms cannot continue to exist.

20 And Mr. Miller made the statement, you know, that I
21 said there was a cloud of dicamba. I didn't say there was a
22 cloud of dicamba. BASF said there was a cloud of dicamba over
23 the Missouri bootheel. They said dicamba damage was common.
24 There must be a huge cloud of dicamba blanketing Missouri
25 bootheel and it's a ticking time bomb.

1 These are not our allegations. We have proven our
2 case overwhelmingly. For punitive damages, for causation, for
3 the amount that the Bader Farms is seeking, all of that has
4 been proven overwhelmingly.

5 And further, we have proven to you these defendants
6 entered into a long-term conspiracy to damage farmers and to
7 profit from it. And they didn't even bother denying it today.
8 They didn't even bother getting up and saying that wasn't part
9 of their calculation because it was. They didn't bother to
10 get up and tell you they didn't foresee all of this, they
11 didn't plan it, they didn't map it out. Because they did.
12 They mapped out the number of people they were going to hurt
13 and put it out there anyway.

14 It is not a justification to put a dangerous product
15 on the market and say, well, it makes us money and it helps
16 some farmers. You don't get to destroy other farmers to help
17 some. That's not how it works. And you don't get to say to a
18 farmer I'm going to put you in harm's way because it's
19 convenient for me. You don't get to do that. And you are the
20 only folks with the power to say something about it.

21 You ever heard a story on the news, made you mad,
22 and you said somebody ought to do something about that? Well,
23 today you are that somebody. You are the only people my
24 client can come to for justice. This is it. This is the only
25 chance. And you can dispense justice. You can fairly

1 compensate my client and you can say to these defendants no.
2 The -- you are the conscience of the community and you can say
3 the community says this is not acceptable.

4 You cannot destroy innocent farmers' lives,
5 livelihoods and the dreams of families just to pad your bottom
6 line. I ask you to render a complete verdict for Bader Farms
7 in this case.

8 Thank you.

9 **THE COURT:** The bailiff will be sworn.

10 (The clerk swears in the court security officers.)

11 **THE COURT:** Here are the instructions. Go now to
12 the jury room with the bailiff to begin your deliberations.

13 (The case was given to the jury at 12:04 p.m., on
14 February 14, 2020, and the jury retired to deliberate on their
15 verdict.)

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

18 **THE COURT:** Court is in recess for ten minutes and I
19 will see counsel to talk about exhibits in ten minutes.

20 Court is in recess.

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

22 **THE COURT:** All right. How do you want to handle
23 exhibits?

24 **MS. GEORGE:** Your Honor, we are comfortable with --
25 we feel the jury knows the documents pretty well. If they

1 want to ask for something, sending it back as opposed to
2 sending back the huge box, which they wouldn't really know
3 what to do with.

4 **MR. DUKES:** We are fine with that also.

5 **MR. MANDLER:** We are fine. Or we have all of ours
6 ready and tabbed, if you want them.

7 **THE COURT:** So you just want to wait and see what
8 they ask for?

9 **MR. MANDLER:** Can I turn these in, in case they ask
10 for one of these?

11 **THE COURT:** Now what?

12 **MS. GEORGE:** We just wants to get rid of his tabs.
13 He is really proud of them.

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

15 **MR. MANDLER:** I don't want to hang out here to pass
16 them out.

17 **THE COURT:** Okay. So I guess that's what we will
18 do. We will wait to see what they ask for. What if they ask
19 for everything? What are we doing to do then?

20 **MS. GEORGE:** We've got everything.

21 Well, we have everything on Plaintiffs' side. And
22 then Amy has a flash drive with everything that's been
23 admitted through the whole trial. If we needed to print
24 anything, we could.

25 **MR. MOOK:** But we shouldn't need to.

1 **MS. GEORGE:** I mean, I don't know that -- I just
2 mean that we only have Plaintiff's admitted exhibits, right?

3 **MR. MANDLER:** So would it be best to leave these
4 with the clerk in case -- I mean, so you don't have to round
5 up the lawyers every time they ask for a document.

6 **THE COURT:** Well, maybe we just need one
7 representative from each side here all the time. I think that
8 would be the easiest. That way you can go have lunch or
9 whatever.

10 **MR. MANDLER:** Then we will get a call if there's
11 a --

12 **THE COURT:** Yeah, but --

13 **MR. RANGLES:** May we give the clerk one person's
14 contact number from each team. For us it would be
15 Mrs. Randles. She will have her phone on and we will either
16 be downstairs or close enough by to handle anything you need.

17 **THE COURT:** Yeah, well, we can do it that way.
18 But --

19 **MR. MILLER:** We will make sure somebody is here,
20 Your Honor.

21 **MR. RANGLES:** Would you rather have someone in the
22 courtroom physically?

23 **THE COURT:** Just one person. And you can switch
24 off.

25 **MR. RANGLES:** Of course, Your Honor, if that's what

1 you would prefer.

2 **THE COURT:** Yeah, because it takes another ten
3 minutes to get everybody rounded up.

4 **MR. MANDLER:** We will just make our own calls.

5 **MR. RANGLES:** We will rotate around in here.

6 **THE COURT:** Okay. Let's do that then. Anything
7 else then? Okay. Your closing arguments were very good.

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

9 **THE COURT:** We will be in recess.

10 I do anticipate that we will get some notes from the
11 jurors soon. The clerk said that -- well, as a matter of
12 fact, one of them said, "What do we do if we need something?"
13 And so they are advised in the instruction to send us a note
14 and let us know what they want. So that's how we will handle
15 it.

16 **MR. MANDLER:** All right, Your Honor.

17 **THE COURT:** Okay. We will be in recess.

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

19 **THE COURT:** We have a note here that -- what time is
20 it? It came in at about 10 until 2:00. I will read the note
21 to you.

22 It says, "First, can we see the chart that had the
23 values for the assessment damages on the Plaintiffs' side?

24 "Second, can we see all evidence pertaining to the
25 assessment damages. We want to see the numbers on the

1 Plaintiffs' side.

2 "Third, can we award less than the \$20.9 million
3 that is being asked for or do we only have to award the
4 \$20.9 million?"

5 So what do you want to do on the evidence first?

6 **MR. MANDLER:** Is that three, Your Honor, or four?

7 **THE COURT:** What?

8 **MR. MANDLER:** Three points or four?

9 **THE COURT:** There were three.

10 **MR. MANDLER:** Okay.

11 **MS. ROSENBERG:** The chart with the assessment
12 numbers?

13 **THE COURT:** "Can we see the chart that had the
14 values for the assessment damages on Plaintiffs' side."

15 **MS. SPLITTGERBER:** It should be Exhibit 2196.

16 **THE COURT:** "Second, can we see all evidence per
17 assessment damages? We want to see the numbers on the
18 Plaintiffs' side."

19 I don't know how you are going to deal with that.

20 **MR. MANDLER:** They can only see what was put into
21 evidence.

22 **MR. MILLER:** Right.

23 **MR. MANDLER:** There were other charts besides that
24 one, but I don't know if it's going to give them any more than
25 the chart.

1 **MS. GEORGE:** I can look at the other exhibits really
2 quickly that we used with Dr. Guenthner. That would be right
3 here.

4 **MR. MILLER:** Well, we would ask also that any charts
5 from our side go in too, Your Honor.

6 **MS. GEORGE:** That's not what they asked for.

7 **MR. MILLER:** I understand.

8 **MR. MANDLER:** Right, but then --

9 **MR. RANGLES:** I think it's hard to bound that second
10 question. I mean, I am not opposed to sending them a whole
11 bunch of stuff, but I don't know how you draw bounds around
12 it.

13 **MR. MILLER:** I'm not sure either.

14 **MS. GEORGE:** Well, we were comfortable submitting
15 them the chart in point one.

16 **THE COURT:** Okay. That's easy. I'm talking about
17 No. 2. "Can we see all evidence pertaining to the assessment
18 of damages?" And then it says, "We want to see the numbers on
19 the Plaintiffs' side."

20 So I suggest that whatever has been admitted in
21 damages that can be taken back, just gather it up and give it
22 to them.

23 **MR. MILLER:** I don't think we have anything other
24 than that chart, do you, that's in evidence?

25 **MR. RANGLES:** There were a few other visuals. I

1 don't know what you guys had.

2 **MR. MILLER:** Well, we had the two charts of -- the
3 profit and loss chart and the financial statements. That's
4 it.

5 **MS. GEORGE:** We have the timeline with the revenues
6 is what we --

7 **THE COURT:** Wait. One at a time.

8 **MS. RANGLES:** We also have the timeline, the
9 demonstrative that has the revenues from 2002 through 2014 and
10 then we have another one from '15 to '19.

11 **THE COURT:** I thought those were the charts that
12 they wanted.

13 **MR. MILLER:** I think the chart is that -- the one
14 that you showed --

15 **THE COURT:** Well, why don't you send all of that to
16 them then.

17 **MR. MANDLER:** Well, if we send the timeline, that's
18 their straight revenues.

19 **MR. MILLER:** Yeah, that's not damages.

20 **MR. MANDLER:** That's not damages.

21 **MS. GEORGE:** Well, neither are profits from the tax
22 returns. Those aren't damages either.

23 **MR. RANGLES:** If I may. If I may direct my comments
24 to them for a moment.

25 Here is what it seems to me. We know that specific

1 item was requested.

2 **MR. MILLER:** Right.

3 **MR. RANGLES:** We all agree. Two seems hard to put
4 bounds around without guidance.

5 **MR. MILLER:** I agree.

6 **MR. RANGLES:** So I would suggest sending that and of
7 course answering question three for them. That's what I would
8 suggest. Do you guys agree?

9 **MR. MILLER:** I think that's the best way to do it.

10 **THE COURT:** I agree.

11 **MR. MANDLER:** I assume the answer to three is yes.

12 **THE COURT:** Okay. Three is, "Can we award less than
13 the \$20.9 million that is being asked for or do we have to
14 only award the \$20.9 million?"

15 **MR. RANGLES:** The answer is "yes and no" to the two
16 questions.

17 **THE COURT:** That's not helpful.

18 **MR. RANGLES:** To the two questions in order.

19 **MR. MILLER:** You can assess less. It is up to you.
20 If you decide to -- if you decide to award damages, the amount
21 is up to you.

22 **THE COURT:** Satisfactory?

23 **MR. MOOK:** They didn't ask if they could award
24 damages.

25 **MR. RANGLES:** I would answer the two questions there

1 literally yes and no. In that order.

2 **MR. MOOK:** Or with the old standby, you must be
3 guided by the instructions in the case, and here are the
4 documents you requested.

5 **MR. MILLER:** Well, they asked a specific question.
6 I think they should get a specific answer.

7 **MR. RANGLES:** I would answer the question. I think
8 so, too.

9 **THE COURT:** So any objection for me to say, when it
10 says, "Can we award less than the \$20.9 million that is being
11 asked for," the answer is "yes."

12 "Or do we have to only award the 20.9 million? The
13 answer is, "no."

14 **MR. MANDLER:** Agreed.

15 **MR. MILLER:** Your Honor, I am curious. Are you
16 sending it back in writing or are you bringing them in?

17 **THE COURT:** No. I am sending it back in writing. I
18 will read this to you in a minute.

19 Okay. Here is what I propose that I have written on
20 their note:

21 "The chart is attached. Other assessment damages
22 evidence is being gathered and will be sent back soon. You
23 can award less than the 20.9 million and you do not have to
24 award only the 20.9 million."

25 Is that satisfactory?

1 **MR. MANDLER:** What other assessment?

2 **MR. RANGLES:** I thought we decided we weren't going
3 to send any assessment evidence back.

4 **THE COURT:** Oh, really?

5 **MR. RANGLES:** We all three agreed on that.

6 **THE COURT:** Oh, okay. I thought there was other
7 things.

8 **MR. RANGLES:** I'm sorry we weren't clear.

9 **THE COURT:** Just the chart only?

10 **MR. RANGLES:** We can't figure out how to bound the
11 rest of it.

12 **THE COURT:** Gee. I think I'm going to have to get a
13 new piece of paper then.

14 So what do you want me to tell them? That they
15 can't see evidence -- all evidence or just put it's not
16 available?

17 **MR. RANGLES:** Why don't we say we are not clear.
18 Because that is really what we are saying. We are not clear
19 what they are asking for and how to package -- we are not
20 clear exactly what they are seeking on No. 2.

21 **MS. ROSENBERG:** Perhaps, either we are not clear
22 what you are referring to or to ask them to be more specific.
23 I mean, we obviously want to send back whatever they are
24 asking for, but it's unclear what they are asking for.

25 **THE CLERK:** Judge, we can type that if you don't

1 want to print it out.

2 **THE COURT:** That's okay. I've got it.

3 Well, do you want me to say this: Other assessment
4 damages evidence can be gathered and will be sent back soon,
5 but it is unclear exactly what you are looking for or what?

6 **MR. RANGLES:** Or could be sent back soon, but we are
7 unclear what you are looking for.

8 **THE COURT:** Is that okay?

9 **MS. ROSENBERG:** That's okay.

10 **MR. MANDLER:** I don't know if it can be gathered
11 soon until we know what it is.

12 **THE COURT:** I will put "send back as soon as
13 possible." How about that?

14 **MR. RANGLES:** I think we need to make sure that we
15 are looking for clarification, though. Because we are not
16 actually gathering anything at this moment.

17 **MS. GEORGE:** It can be sent back with a more
18 detailed request or ... I don't know.

19 **THE COURT:** Okay. I'm going to have to use a
20 different piece of paper then.

21 Okay. So how do you want to say the answer to the
22 second point again? "It is unclear what evidence you are
23 seeking."

24 **MR. RANGLES:** Yes. I think saying it is unclear
25 what specific evidence you are seeking.

1 **THE COURT:** They say "all evidence."

2 **MR. RANGLES:** If you can be more specific, we will
3 be glad to gather the evidence.

4 **THE COURT:** Okay. How about that?

5 **MR. MILLER:** That's fine, Your Honor.

6 **MR. MANDLER:** That's fine, Your Honor.

7 **THE COURT:** Okay. So how about, "Can you be more
8 specific about the other assessment damages evidence you
9 seek?" Is that okay?

10 **MR. RANGLES:** Yes.

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

12 **MR. MANDLER:** Yes, Your Honor.

13 **THE COURT:** All right. Here it goes.

14 "The chart is attached."

15 "Can you be more specific about the other assessment
16 damages evidence you seek?"

17 "You can award less than the 20.9 million. You do
18 not have to only award the 20.9 million."

19 Signed by me, U.S. District Judge.

20 Is that okay?

21 **MR. MILLER:** Yes, Your Honor.

22 **MR. RANGLES:** Yes, Your Honor.

23 (Off the record)

24 **THE COURT:** Okay. Here is another one.

25 This is on my own stationery actually.

1 (Laughter)

2 "Can we see the spreadsheet evidence that the
3 professor used to calculate Table A summary of damages for
4 complete loss of peach operation."

5 So what are they talking about?

6 **MS. GEORGE:** They are talking about Guenthner's
7 underlying -- that 100-page spreadsheet. We didn't move it
8 into evidence because it wouldn't -- it's an Excel
9 spreadsheet, not usable really.

10 **THE COURT:** So do you want me to say that item is
11 not introduced into evidence?

12 **MR. MILLER:** That's all you can say, Your Honor.

13 **MR. MANDLER:** That is fine, Your Honor.

14 **THE COURT:** Okay. That's what I wrote, "That item
15 was not introduced into evidence," signed by me.

16 You can take it back. Thank you.

17 (Off the record)

18 **THE COURT:** Counsel, there is another question which
19 says, "On Verdict Form B, since we said 'yes' to both 1 and 2,
20 do we have to assess the percentage of fault to each company?
21 We did not understand the wording."

22 How do you want me to respond?

23 **MR. MILLER:** I think they have to assign an
24 allocation, Your Honor. It could be zero, but --

25 **MS. GEORGE:** Your Honor, no, the --

1 **MR. MILLER:** No?

2 **MS. GEORGE:** The Verdict Form B is if your answer is
3 no to both 1 and 2 above -- okay. Is there a question? Can
4 you repeat the question to make sure I am telling --

5 **THE COURT:** "On Verdict Form B, since we said 'yes'
6 to both 1 and 2, do we have to assess the percentage of fault
7 to each company? Did we understand the wording?"

8 **MS. GEORGE:** Yes. Then it's yes.

9 **THE COURT:** Everybody agree with that?

10 **MR. MILLER:** Yes, Your Honor.

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

12 **MR. MOOK:** One second, Your Honor.

13 **MS. GEORGE:** Sorry. We have a misunderstanding.

14 **MR. RANGLES:** What is the question again, Your
15 Honor, if you don't mind.

16 **THE COURT:** "Verdict Form B, since we said 'yes' to
17 both 1 and 2, do we have to assess a percentage of fault to
18 each company? We did understand the wording." I think it
19 means we did not.

20 **MR. RANGLES:** Well, it says underneath it there: If
21 the answer is "no" as to both 1 and 2, and if you found in
22 favor of Plaintiff Bader Farms and against the two defendants,
23 then you must assess the proportion of fault.

24 **MS. GEORGE:** So they don't have to if they said yes
25 to both.

1 **THE COURT:** Right. So there's no need to do it
2 then.

3 Now we have to cross out a yes.

4 Is should be "no," right?

5 **MS. GEORGE:** That's correct.

6 **THE COURT:** I am talking to them.

7 **MR. MILLER:** I don't think so, Your Honor.

8 **MR. MANDLER:** I think it should be "no," Your Honor.

9 **THE COURT:** What's that?

10 **MR. MANDLER:** I think it should be "no."

11 **THE COURT:** Yeah, it should be "no."

12 **MR. MILLER:** I agree, Your Honor.

13 **THE COURT:** That's not right. Counsel, come up.

14 (Counsel approached the bench and the following
15 proceedings were held:)

16 **THE COURT:** This is what it says:

17 "If you found in favor of Plaintiff Bader Farms,
18 Inc. on any claim in Verdict Form A:

19 "(1) Were the defendants acting in a joint venture?"

20 "Yes."

21 "Were defendants acting in a conspiracy?"

22 "Yes."

23 "If your answers is 'no,' then you --

24 **MS. GEORGE:** Right. So they don't have to fill it
25 out because their answers were yes. So they don't have to

1 fill it out.

2 **THE COURT:** Right.

3 **MS. GEORGE:** Because since there is joint and
4 several, they don't have to apportion.

5 **THE COURT:** So the answer is -- do you have to
6 assess? And the answer is no.

7 **MS. GEORGE:** No.

8 **MR. RANGLES:** Correct, Your Honor.

9 **THE COURT:** You all said yes.

10 **MR. MILLER:** We changed --

11 **MS. GEORGE:** Yeah, we got confused. We got confused
12 at first too. So the jury is right to be confused, but it is
13 a no. It is a for-sure no.

14 **MR. MILLER:** Yes. Yes, it's a no.

15 **MR. RANGLES:** Correct.

16 (The proceedings returned to open court.)

17 **THE COURT:** The answer is "no."

18 We will be in recess again.

19 (Off the record.)

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

22 VERDICT

23 (On February 14, 2020, at 4:09 p.m., the jury
24 returned its verdict.)

25

1 **THE COURT:** I will ask the foreperson to give the
2 instructions and the verdict forms to the clerk.

3 The verdict forms state as follows:

4 Part 1: Negligence design or failure to warn,
5 2015-2016.

6 On the claim of Plaintiff Bader Farms, Inc. for
7 negligent design or failure to warn Instruction No. 9 against
8 Defendant Monsanto Company, we, the undersigned, find in favor
9 of Plaintiff Bader Farms, Inc.

10 On the claim of Plaintiff Bader Farms, Inc. for
11 negligent design or failure to warn Instruction No. 10 against
12 Defendant Monsanto Company, we, the undersigned, find in favor
13 of Plaintiff Bader Farms, Inc.

14 On the claim of Plaintiff Bader Farms, Inc. for
15 negligent design or failure to warn Instruction No. 10 against
16 Defendant BASF Corporation, we, the undersigned, find in favor
17 of the Plaintiff Bader Farms, Inc.

18 Part 2: We, the undersigned jurors, assess the
19 damages of Plaintiff Bader Farms, Inc. as follows: For actual
20 damages, \$15 million.

21 Part 3: If you find in favor of Plaintiff Bader
22 Farms, Inc. and Defendant Monsanto Company on the claim of
23 negligent design and failure to warn, 2015 to 2016, complete
24 the following paragraph by writing in the words required by
25 your verdict.

1 We, the undersigned jurors, find that Defendant
2 Monsanto Company is liable for punitive damages pursuant to
3 Instruction No. 14.

4 Signed by the foreperson dated today.
5 Counsel, do you want to poll the jury?

6 **MR. MILLER:** Yes, please, Your Honor.

7 **THE COURT:** All right.

8 **THE CLERK:** I'll start with Juror No. 1.

9 Is the verdict or verdicts that have just been read
10 your true and correct verdict?

11 **JUROR 1:** It is.

12 **THE CLERK:** Juror No. 2, are the verdicts that have
13 just been read your true and correct verdicts?

14 **JUROR 2:** Yes.

15 **THE COURT:** Juror No. 3, are the verdicts that have
16 just been read your true and correct verdicts?

17 **JUROR 3:** Yes.

18 **THE CLERK:** Juror No. 4, are the verdicts that have
19 just been read your true and correct verdicts?

20 **JUROR 4:** Yes.

21 **THE CLERK:** Juror No. 5, are the verdicts that have
22 just been read your true and correct verdicts?

23 **JUROR 5:** Yes, ma'am.

24 **THE CLERK:** Juror No. 6, are the verdicts that have
25 just been read your true and correct verdicts?

1 **JUROR 6:** Yes.

2 **THE CLERK:** And Juror No. 7, are the verdicts that
3 have just been read your true and correct verdicts?

4 **JUROR 7:** Yes.

5 **THE COURT:** Counsel, approach the bench.

6 (Counsel approached the bench and the following
7 proceedings were held:)

8 **THE COURT:** So it's relatively early. Do you want
9 to try and do punitives now or wait until tomorrow as
10 discussed?

11 **MR. MANDLER:** Are you going to read the second form?
12 We have an objection. They are both yes.

13 **THE COURT:** I understand. But I am just -- when do
14 you want to do the punitives?

15 **MS. GEORGE:** I have the instruction form MAI, so I
16 want you to know that.

17 **MR. MILLER:** I suggest we just do it now.

18 **MS. GEORGE:** Are you ready?

19 **MR. RANGLES:** We have to put in the financial
20 information.

21 **MR. MOOK:** I don't think we are ready to put
22 evidence on. We talked about doing it Saturday.

23 **THE COURT:** Yeah, I know. That's why I am calling
24 you up because we finished a little bit earlier.

25 **MR. RANGLES:** I think we have to confer with them on

1 whether there's a stipulation on the finances.

2 **THE COURT:** So bring them back at 9:00 tomorrow?

3 **MR. MANDLER:** Because the punitives were limited to
4 the activity for '15 and '16, Monsanto will take the position
5 that the financials are not at issue. Not that we aren't on
6 the hook for the JV, but we don't think our financials are at
7 issue.

8 **MR. RANGLES:** Do you want us to just argue a general
9 number?

10 **MR. MANDLER:** No. We don't think that BASF is
11 relevant to it.

12 **THE COURT:** So we need to have them come back
13 tomorrow because of these issues, don't you think? 9:00?

14 **MR. MILLER:** Sure.

15 **MR. RANGLES:** Yeah.

16 **MR. MANDLER:** Are you going to -- are you still
17 going to read the second portion of Form B? You haven't head
18 Form B yet.

19 **MR. RANGLES:** Yes.

20 **MR. MANDLER:** We are going to want to put an
21 objection on the record. It's an inconsistent verdict.

22 **THE COURT:** Oh, I'm sorry. I'll read that now to
23 them and then let --

24 **MR. MANDLER:** Yeah, and then allow us time to make
25 an objection.

1 (The proceedings returned to open court.)

2 **THE COURT:** I neglected to read Verdict Form B, so I
3 will do that now.

4 It says, "If you found in favor of Plaintiff Bader
5 Farms, Inc. on any claim in Verdict Form A:"

6 "(1) Were Defendants acting in a joint venture?"

7 "Yes."

8 "(2) Were Defendants acting in a conspiracy?"

9 "Yes"

10 And again signed by the foreperson and dated today.

11 Do you wish for the jury to be polled on this
12 verdict form?

13 **MR. MILLER:** Yes, Your Honor.

14 **THE COURT:** As to Verdict Form B.

15 **THE CLERK:** Juror No. 1, is the Verdict Form B your
16 true and correct verdict?

17 **JUROR 1:** Yes, it is.

18 **THE CLERK:** Juror No. 2, is the Verdict Form B your
19 true and correct verdict?

20 **JUROR 2:** Yes.

21 **THE CLERK:** Juror No. 3, is the Verdict Form B your
22 true and correct verdict?

23 **JUROR 3:** Yes.

24 **THE CLERK:** Juror No. 4, is the Verdict Form B your
25 true and correct verdict?

1 **JUROR 4:** Yes.

2 **THE CLERK:** Juror No. 5, is the Verdict Form B your
3 true and correct verdict?

4 **JUROR 5:** Yes, ma'am.

5 **THE CLERK:** Juror No. 6, is the Verdict Form B your
6 true and correct verdict?

7 **JUROR 6:** Yes, it is.

8 **THE CLERK:** Juror No. 7, is the Verdict Form B your
9 true and correct verdict?

10 **JUROR 7:** Yes.

11 **THE COURT:** All right. Ladies and gentlemen, we are
12 going to have to have another hearing. I've been advised by
13 counsel that it will not take long at all. But so my proposal
14 is to meet at 9:00 in the morning for the assessment of the
15 punitive damages award.

16 And, again, I've been advised by counsel for all
17 sides that this should not be a long evidentiary part of the
18 trial. And so we will very definitely finish that part of the
19 trial tomorrow and then we will be finished.

20 Anybody have a problem with coming tomorrow at
21 9:00 then?

22 Thanks for your understanding. Thanks for your
23 patience.

24 **MR. MANDLER:** Your Honor, before we release the jury
25 I have to put on the record that we object to the inconsistent

1 verdict on Verdict Form B for the reasons previously stated.

2 **THE COURT:** That's overruled.

3 So, anyway, you are excused for the day. Please
4 remember the admonition I have given you not to discuss the
5 case among yourselves or with others or permit anyone to
6 discuss it in your presence. Do not form or express any
7 opinion about the case until it's given to you to decide.

8 And that goes all the more now that half of the
9 verdict has been rendered. So please abide by that oath and
10 you are excused for the day. The Court security officers will
11 assist you to your vehicles. Thanks again for your patience
12 and attentiveness and we will reconvene at 9:00 a.m. tomorrow.

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

15 **THE COURT:** All right. Counsel, be seated.

16 How do you want to proceed tomorrow? What do you
17 propose?

18 **MR. RANGLES:** Your Honor, I understand that Monsanto
19 has a proposed stipulation to us on net worth. We have not
20 received it, have not been able to review it. I would like to
21 do so. BASF is taking the position their financial condition
22 is not relevant, so we have to discuss with them and perhaps
23 offer evidence in spite of that, depending on the Court's
24 ruling.

25 There are also portions of the Begemann deposition,

1 as chief operating officer of Monsanto, where I ask him
2 specifically financial questions. I think those would add up
3 to five minutes, maybe ten at the outside. So we will want to
4 discuss those with them and see where we are.

5 **THE COURT:** Now, on what you mentioned about --
6 that's a legal question that I don't know the answer to about
7 what -- whether the net worth of a party that is involved only
8 as a joint venture, to what extent that's admissible. So
9 you-all can work on that.

10 **MR. RANGLES:** Yes, sir. We will have to address
11 that. I don't know the answer either, to be honest with you,
12 and I am not going to pretend to.

13 **THE COURT:** So, anyway, why don't we meet at 8:30 in
14 the morning and go over these preliminary matters.

15 Mr. Hohn.

16 **MR. HOHN:** Your Honor, I might suggest we might want
17 to meet tonight. We have some -- I think we have to discuss
18 proposed jury instruction for Phase 2. I think we have this
19 issue of stipulation on net worth for Monsanto. And we are
20 going to oppose any request of them to play Mr. Begemann's
21 deposition since it was stipulated that his deposition would
22 not be played in this trial.

23 So we have a few issues. We probably need to talk
24 amongst counsel first and see if we can work through those,
25 but it may be we -- it might be better to meet a little bit

1 tonight because I am not sure it's going to be able to get
2 resolved.

3 **THE COURT:** Why not now?

4 **MR. HOHN:** That's fine.

5 **THE COURT:** In fifteen minutes or so?

6 **MR. HOHN:** That sounds good.

7 **MS. GEORGE:** I am emailing the proposed jury
8 instructions to everyone.

9 **THE COURT:** Okay. When you get that done, just
10 notify me.

11 **MR. HOHN:** All right.

12 **MR. RANGLES:** Thank you, Judge.

13 **THE COURT:** Court is in recess.

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

15 **THE COURT:** Cathy is handing out all copies of the
16 verdict forms to all parties.

17 So do you have your proposed verdict directors?

18 **MS. GEORGE:** I e-mailed them. I don't have a
19 printer, but I e-mailed them to Shane a minute ago.

20 **THE CLERK:** Can you e-mail them to me?

21 **THE COURT:** Or to Jessica.

22 **THE CLERK:** Do you have Jessica's e-mail?

23 **MR. HOHN:** Your Honor, we just filed a set of
24 proposed instructions.

25 **THE COURT:** For punitives?

1 **MR. HOHN:** Yes.

2 **THE COURT:** You just now filed them?

3 **MR. HOHN:** We did.

4 **THE COURT:** Okay.

5 **MR. HOHN:** I have a hard copy.

6 **THE COURT:** If you have a hard copy, I will take it.

7 **MS. GEORGE:** Do you have a hard copy for us?

8 **THE COURT:** What is all this stuff? Another 41
9 tendered and rejected?

10 **MR. HOHN:** Your Honor, we submitted instructions
11 that we think should be given. Obviously we have the
12 MAI instructions in there, but as has been recognized by
13 multiple courts, MAI is not sufficient to cover what's
14 constitutionally required to keep punitive damages within the
15 appropriate range and for the jury to be able to understand
16 what they are to do. So, yes, we believe those need to be
17 tendered and discussed.

18 **THE COURT:** We need another day or two, or maybe I
19 should tell them to come back on Tuesday or something.

20 **MS. GEORGE:** Your Honor, I gave you three pages.
21 They are pasted out of the MAI and they are coming. Literally
22 pasted.

23 **MR. HOHN:** I think we gave you nine additional
24 instructions, Your Honor.

25 **MS. GEORGE:** There are 28 pages.

1 **MR. HOHN:** It's a clean and -- one with authority
2 and one clean set.

3 **MS. GEORGE:** I apologize.

4 **THE COURT:** Okay. What do you want to do about your
5 issue?

6 **MR. MANDLER:** We are still researching it, Your
7 Honor, but until then I will take the position --

8 **THE COURT:** Or maybe there's not an issue if --

9 **MR. MOOK:** It would save a lot of time. We aren't
10 going to try and put in BASF's financial information, if
11 that's going to slow you down any.

12 **MR. MANDLER:** It's not a question of speed. It's a
13 question of due process under the *BMW* case. It's not allowed.

14 **THE COURT:** He is just saying he's not going to do
15 it.

16 **MR. MANDLER:** But he said it was a question of
17 speed, and that's not what we are arguing. We are not arguing
18 it as a matter of --

19 **THE COURT:** Well, for whatever reason he is not
20 going to do it.

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

22 **THE COURT:** So that takes care of that issue.

23 I am still waiting for the others. Before we do
24 instructions, then, do you want to talk about mechanics
25 otherwise?

1 **MR. HOHN:** We did provide the proposed stipulation
2 to Plaintiffs' counsel on net worth of Monsanto.

3 **THE COURT:** That you use in other cases.

4 **MR. HOHN:** We have.

5 **THE COURT:** And is that satisfactory?

6 **MR. MOOK:** So, Your Honor, it is a start. We have
7 only one other document we would like to use, and we had it on
8 our jury -- rather on our list, on our exhibit list, Exhibit
9 No. 500. It talked about the sale price of Monsanto at the
10 time of purchase by Bayer. And we would propose admitting
11 that into evidence, in addition to the stipulation and the --
12 and the declaration that Mr. Hohn has provided us.

13 **MR. HOHN:** Your Honor, net worth is the relevant --
14 and I have the case law to provide to you. Net worth is the
15 relevant consideration for the financial wherewithal of the
16 defendant for purposes of punitive damages, not purchase
17 accounting or what another entity might have bought that
18 entity for.

19 And so that net worth is the -- and what is it,
20 \$7 billion is the net worth in the stipulation? I think
21 that's plenty of financial wherewithal for them to be able to
22 make their arguments, as opposed to putting the jury out to
23 speculate about what the actual worth of the company is based
24 on what it was bought for by Bayer.

25 **MR. MOOK:** Sure. And my response to that would be

1 that we have had conversations about this regarding
2 Mr. Bader's accounting, and the mechanics associated with what
3 happens when you start talking about net worth itself.

4 **MR. HOHN:** We -- go ahead, sorry.

5 **MR. MOOK:** So for that reason we are saying we
6 should be able to offer the sale price of the company,
7 \$66 billion, as opposed to the \$7 billion accounting number
8 that has been provided in the declaration.

9 **MR. HOHN:** Great. Then we will bring in a number of
10 experts to talk about how much the share price of Bayer has
11 dropped.

12 **THE COURT:** That is the problem.

13 **MR. HOHN:** We are talking about the constitutional
14 permissible limits here. And net worth under U.S. Supreme
15 Court case law is the appropriate inquiry, not what a company
16 was bought for.

17 **MR. MOOK:** And so the declaration that you have
18 provided to me and the -- up together with the stipulation is
19 what you propose using?

20 **MR. HOHN:** That's correct. As has been done in a
21 number of other cases, including Roundup cases.

22 **MR. MOOK:** Your Honor, we can agree to this.

23 **THE COURT:** You can?

24 **MR. MOOK:** Yeah, we can.

25 **THE COURT:** So that takes care of that.

1 **MR. HOHN:** That takes care of that.

2 **THE COURT:** Two big issues already taken care of.

3 **MR. HOHN:** And the other document you said you
4 wanted to use was -- oh, never mind. You are withdrawing that
5 request.

6 **MR. MOOK:** We will not offer it. We will use the
7 stipulation and the declaration provided. We will not try to
8 enter in Exhibit No. 500, which was the sale price document
9 that I mentioned.

10 **THE COURT:** Okay. So that -- that really shortens
11 things up.

12 **MR. MOOK:** I surely hope so.

13 **MR. HOHN:** Was there something else you guys were
14 planning to introduce?

15 **MR. MOOK:** No.

16 **MR. HOHN:** So really -- I mean as we have seen it
17 and has been done in other cases, Your Honor, I think it's the
18 stipulation on net worth, and then it's attorney argument
19 basically.

20 **THE COURT:** I think you agree with that.

21 **MR. MOOK:** We do, Your Honor.

22 **MR. HOHN:** Okay. So then I don't -- maybe we need,
23 you know -- let me talk to the team and figure out how much
24 time we want for argument, but I don't think it's substantial.

25 **THE COURT:** What are you-all thinking?

1 **MR. MOOK:** I don't think it's substantial either,
2 Judge. I don't have a specific number from Mr. Randles.

3 **THE COURT:** More like 20 minutes for you-all and 15
4 each or something? I don't know.

5 **MR. MANDLER:** We might -- I don't think our conduct
6 is at stake.

7 **THE COURT:** So you may not argue at all then?

8 **MR. MANDLER:** Correct.

9 **THE COURT:** Okay.

10 **MR. HOHN:** I think it should be an equal allotment
11 of time.

12 **THE COURT:** In that case, yeah, I would agree.

13 **MR. HOHN:** So let me talk to the team and make sure.

14 **THE COURT:** That's fine. We can work that out.

15 **MR. HOHN:** It's in the range of 20 to 30 minutes.

16 **THE COURT:** Whatever you-all want to do on that is
17 fine with me. So in that case, the only thing we need to do
18 is instructions.

19 **MR. HOHN:** That's correct.

20 **MR. MOOK:** Agreed.

21 **MR. HOHN:** Do you want to go back and talk
22 informally or just try and resolve it right here?

23 **MS. GEORGE:** Your Honor, I can tell you we object to
24 everything except for ours, which are straight out of MAI.
25 There's no reason for anything beyond that.

1 **THE COURT:** Have you looked at theirs?

2 **MR. HOHN:** No.

3 **MS. BLACKWELL:** We have an objection to the first
4 one.

5 The first ones are the same. The first one offered
6 by Plaintiff I think matches the first one offered by
7 Defendant Monsanto. It's the second one.

8 **THE COURT:** That's Instruction No. 20, MAI 35.19 and
9 MAI 10.04?

10 **MS. BLACKWELL:** Correct, Your Honor. And the
11 objection is just to one sentence that's included here. It's
12 the beginning of the second paragraph. And it reads: "You
13 may consider harm to others in determining whether Defendants'
14 conduct show complete indifference to or conscious disregard
15 of the rights of others."

16 That is the instruction, the portion of the
17 instruction that's relevant to the entitlement finding. Your
18 Honor has already --

19 **THE COURT:** To the what finding?

20 **MS. BLACKWELL:** The entitlement finding, which was
21 submitted to the jury in Phase 1. So they have already been
22 given that instruction.

23 The second part of that paragraph is the part that's
24 relevant to the amount.

25 **THE COURT:** You want the second sentence.

1 **MS. BLACKWELL:** So we do want the second sentence.
2 We don't want them to be reinstructed on the first sentence,
3 because the distinction that is made here is that it could be
4 considered for what they did in Phase 1, and it cannot be
5 considered for what they are doing in Phase 2. So we don't
6 think the jury should be instructed in Phase 2 on the part
7 that's not relevant for that phase.

8 **THE COURT:** Well, I am going to submit what is the
9 MAI-approved instruction. I understand your objections, so I
10 will overrule that.

11 **MS. BLACKWELL:** Thank you.

12 **THE COURT:** And, of course, you can explain what you
13 are talking about during argument to the jury.

14 What about the verdict form itself? That looks
15 like --

16 **MR. MANDLER:** In order to save time, we are just
17 joining in everything, all the objections that Monsanto
18 raises. We will not raise them.

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

20 Any problem with the form?

21 **MS. BLACKWELL:** I have not compared those, but I can
22 do it very quickly.

23 It needs a place for the jurors to sign but other
24 than that, no objection.

25 **THE COURT:** No, it's on there. Mine is. Signed by

1 the foreperson and dated.

2 **MS. GEORGE:** It says foreperson. It's on your form.
3 I can see it in your hand.

4 **MS. BLACKWELL:** Right. But there aren't lines for
5 all of the jurors to sign.

6 **MS. GEORGE:** That's only for Missouri.

7 **THE COURT:** No, no, no. You just have the
8 foreperson sign.

9 **MS. BLACKWELL:** Okay. You want to go through the
10 defense submission, Your Honor?

11 **THE COURT:** Yes, why don't we do that. Are you-all
12 prepared to -- okay. I have your packet here.

13 **MS. BLACKWELL:** So, Your Honor, in addition to the
14 MAI instructions that we submitted, so those are the first two
15 in the packet. The first instruction in our packet I believe
16 matches Plaintiffs' 19.

17 **THE COURT:** I'm on your page 6.

18 **MS. BLACKWELL:** Yes. The only difference I think is
19 they have identified only three of the instructions from
20 Phase 1 as being relevant, and I think the MAI calls for all
21 of those instructions.

22 **MS. GEORGE:** The MAI calls for the general
23 instructions to be included, but if you include all of them,
24 you are telling them to refer back to the -- like, for
25 example, the general burden, which is not even the burden for

1 this. You are telling them to refer to things that don't
2 relate to this.

3 So the MAI says to refer to the general
4 instructions, and the general ones that would pertain to this
5 are 1 through 3, and then 18 is the last instruction which
6 tells them their verdict has to be unanimous. So that's why
7 those are listed and not all of the instructions, because they
8 are not going to refer back to the burden of proof on the
9 claims they have already decided. They don't need to look
10 back on verdict directors or ...

11 **THE COURT:** So -- I see.

12 **MS. GEORGE:** See what I am saying?

13 **THE COURT:** So what's going to be included then in
14 the final packet? I think is what we are talking about;
15 right?

16 **MS. GEORGE:** Right.

17 **THE COURT:** Not just these, but what are the others?

18 **MS. GEORGE:** Well, just the 1 -- 1 through 3 and 18
19 are the only general instructions that apply to this -- the
20 termination of -- because otherwise you are asking them to
21 look back at the claims they have already decided, the general
22 burden of proof and --

23 **THE COURT:** I understand. So we -- we reread 1
24 through 3 and 18 then.

25 **MS. GEORGE:** Right.

1 **THE COURT:** But these, 19 and --

2 **MS. GEORGE:** And I don't even know, Your Honor, that
3 you have to reread them, other than to remind them that they
4 still apply, as long as they are available to them.

5 **THE COURT:** Well ...

6 **MS. GEORGE:** That's your call, but ...

7 **THE COURT:** So do you want to go over the exact
8 list?

9 **MS. GEORGE:** You want me to talk you through 1
10 through 3 and 18, you mean?

11 **THE COURT:** Yes. 1, 2, 3 --

12 **MS. GEORGE:** Sure. And 18.

13 **THE COURT:** 18. Well, 19 and 20.

14 **MS. GEORGE:** That's just the numbers for the
15 punitives right in front, right here. Those -- they are 19
16 and 20 which are --

17 **THE COURT:** Yeah.

18 **MS. GEORGE:** Yeah.

19 **MS. BLACKWELL:** So according to the MAI, Your Honor,
20 I think the footnote there is footnote 3, and it says --

21 **THE COURT:** What page -- you are looking at?

22 **MS. BLACKWELL:** MAI 2.05.

23 **THE COURT:** 35.19.

24 **MS. BLACKWELL:** And I believe what it is saying is
25 that the instructions that form the cause of action -- or that

1 govern the cause of action that provides the basis for
2 punitive damages, the jury should be referred to that because
3 the punitive damages obviously have to be based on the conduct
4 for which compensatory damages were awarded.

5 **THE COURT:** I have got an old book here. 2.05 is
6 multiple claim submissions.

7 **MS. GEORGE:** Your Honor, we don't object if they
8 want to look back at all of those, but I just -- it's just not
9 necessary to have them sit through rereading all of those
10 instructions again to make this decision. So that's -- we
11 were trying to just incorporate the general ones that are
12 applicable. I don't necessarily -- I am not going to argue an
13 objection over this if Your Honor feels like it's best to
14 include all of them.

15 **THE COURT:** Well, I -- I would like to see how that
16 looks. But why don't we -- you-all can probably agree on that
17 part, it sounds like. So why don't we take up the other
18 concerns that you have with the other tendered instructions.

19 **MS. BLACKWELL:** And before we move on, Your Honor, I
20 would just like to say because some of the instructions from
21 Phase 1 are incorporated here, and referred to for the jury,
22 we would reiterate our objections to those because they will
23 form also the basis for the punitive damages award.

24 **THE COURT:** I will give you a continuing objection
25 on all of that.

1 So I am on page 7. What are the ones that you -- we
2 really need to address, now that you know that they are going
3 to agree with what -- to repeat instructions that have already
4 been given?

5 **MS. BLACKWELL:** We would like to have all of these
6 given, Your Honor. As Mr. Hohn indicated, punitive damages
7 risk serious deprivation of property and rights of the
8 defendant. The MAI provides very limited instruction and
9 guidance for the jury. The U.S. Supreme Court has said
10 instructions that go even beyond those that are provided in
11 the MAI are insufficient to provide reasonable guidance for
12 the jury.

13 **THE COURT:** What is that? What did you just say?

14 **MS. BLACKWELL:** I said --

15 **THE COURT:** The Supreme Court said that MAI is no
16 good?

17 **MS. BLACKWELL:** It has said that instructions that
18 go even beyond what the MAI provides, even those are not
19 sufficient to provide enough guidance for the jury. For
20 example, the MAI doesn't include an instruction that says you
21 shouldn't award punitive damages on the basis of anger,
22 passion, prejudice. That's not anywhere in the MAI.

23 **THE COURT:** I am stuck with MAI. You know that.

24 **MS. BLACKWELL:** Well, no, Your Honor. I think you
25 are bound by the Supreme Court precedent, and it says --

1 **THE COURT:** Is there a Supreme Court case that says
2 this MAI instruction is no good?

3 **MS. BLACKWELL:** We are passed the MAI. I'm asking
4 for an additional instruction to cabin the jury's discretion
5 in an award of punitive damages in setting the amount. And so
6 the first one that we have tendered essentially, Your Honor,
7 is informing the jury as to the purposes, the proper purposes
8 of punitive damages. They can be awarded for punishment and
9 deterrence.

10 **THE COURT:** What page?

11 **MS. BLACKWELL:** We are on page 7.

12 **THE COURT:** Okay.

13 **MS. BLACKWELL:** So it's identifying the purposes of
14 punitive damages for the jury so they understand the purpose
15 of punitive damages is for punishment and deterrence.

16 And limiting that to punishing the conduct for which
17 compensatory damages are awarded.

18 **THE COURT:** I am on page 7. I am not getting that.

19 **MS. BLACKWELL:** Are you --

20 **THE COURT:** It's source MAI 10.02?

21 **MS. BLACKWELL:** Yes, Your Honor. It says, "In
22 addition to the compensatory damages you assessed in
23 Verdict A, you may assess an additional amount as punitive
24 damages in such sum as you believe is necessary to punish
25 Defendant Monsanto Company for the conduct for which you found

1 it liable for punitive damages under Instructions 9 and 14."

2 **THE COURT:** I didn't think that's much different
3 than ... That's exactly what 35.19 says. For the conduct for
4 which you found Defendant Monsanto Company is liable for
5 punitive damages.

6 **MS. BLACKWELL:** I apologize, Your Honor. That is
7 our version of the MAI 10.02.

8 **THE COURT:** Okay.

9 **MS. BLACKWELL:** But it omits the section that's
10 already been given to the jury on entitlement.

11 **THE COURT:** That first sentence that you spoke of
12 earlier?

13 **MS. BLACKWELL:** Correct.

14 **THE COURT:** Okay. Well, so --

15 **MS. BLACKWELL:** So you've overruled our objection I
16 think to that already.

17 **THE COURT:** Okay. So we can go to 8.

18 **MS. BLACKWELL:** Moving on to 8. 8 is dealing
19 with --

20 **THE COURT:** So do you-all -- why don't I go ahead
21 and mark this Instruction A? Is that the first one we need to
22 consider then?

23 **MS. BLACKWELL:** Yes, thank you.

24 **THE COURT:** Okay. I'm going to --

25 **MS. BLACKWELL:** On page 7?

1 **THE COURT:** I'm trying to think of all my lettering.

2 **MS. BLACKWELL:** AAA.

3 **THE COURT:** AAA. Good idea. I am going to mark
4 this Instruction AAA, tendered by Monsanto and rejected.

5 **MS. BLACKWELL:** Thank you, Your Honor.

6 **THE COURT:** Okay.

7 **MS. BLACKWELL:** Moving to page 8. This is the
8 instruction that is explaining the purposes, the different
9 purposes of punitive damages and compensatory damages.
10 Explaining to the jury that the compensatory damages fully
11 compensate the plaintiff for the injury, and that punitive
12 damages are intended to serve a different purpose.

13 **THE COURT:** The gist of that is already contained in
14 the MAI submission. So I will show that, mark that as
15 Exhibit BBB, tendered and rejected by Monsanto.

16 **MS. BLACKWELL:** Thank you, Your Honor.

17 The next instruction for Monsanto is on page 9.
18 This instruction informs the jury that even though they have
19 found the conduct meets the standard for an award of punitive
20 damages, that they are not required to impose punitive
21 damages.

22 **THE COURT:** Again, it's not an MAI so I will show
23 that marked as Exhibit CCC, tendered and rejected.

24 **MS. BLACKWELL:** Next on page 10, Your Honor, we have
25 offered an instruction that punitive damages should not be

1 awarded as a result of anger, passion or prejudice. And I
2 would note there, Your Honor, in the sources we have cited to
3 *State Farm Mutual Auto Insurance Company v. Campbell*, a U.S.
4 Supreme Court case that says "Vague instructions are those
5 that merely inform the jury to avoid passion or prejudice do
6 little to aid the decision-maker," essentially saying that
7 even giving this instruction isn't enough, that at a minimum
8 you should give this instruction.

9 **THE COURT:** Yeah. I will show this labeled
10 Instruction No. DDD, tendered and rejected by Monsanto.

11 Of course you can argue these matters to the jury.
12 So it's not necessary that there be a formal written
13 instruction, although I understand your position to the
14 contrary.

15 **MS. BLACKWELL:** Thank you.

16 The next one, Your Honor, on page 11, tendered by
17 Monsanto, "You may not impose punitive damages to punish the
18 defendant for conduct that occurred in other states and did
19 not produce harm in Missouri."

20 That's, again, a limitation that's been imposed by
21 the U.S. Supreme Court.

22 **THE COURT:** And I think that that's covered in the
23 MAI where it says you must not include damages for harm to
24 others who are not parties to the case. So I will show that
25 as EEE, tendered and rejected by Monsanto.

1 **MS. BLACKWELL:** The next on page 12, Your Honor,
2 states "You may not award punitive damages to punish Monsanto
3 for conduct that did not harm the Plaintiff."

4 **THE COURT:** Okay. That goes without saying really.
5 So I will show that marked as FFF, tendered and rejected then.

6 **MS. BLACKWELL:** On page 13, Your Honor, we've
7 tendered an instruction that says "You may not assess punitive
8 damages to punish lawful conduct."

9 **THE COURT:** Okay. I will mark it as GGG, tendered
10 and rejected.

11 **MS. BLACKWELL:** On page 14, Your Honor, this is an
12 instruction to the jury that they "may not impose larger
13 punishment, simply because a defendant is a large corporation
14 with substantial net worth income or revenues. Regardless of
15 a defendant's wealth, you should base the amount of punitive
16 damages awarded on the factors about which the Court has
17 instructed that being punishment and deterrence."

18 **THE COURT:** Okay. I will mark that then as HHH,
19 tendered and rejected.

20 **MS. BLACKWELL:** And then the final one, Your Honor,
21 on page 15, says "You may not award punitive damages solely on
22 the basis of a party's relative size or status. You should
23 consider a corporation as a member of equal standing in the
24 community of equal worth and holding the same or similar
25 station as any other person. A corporation is entitled to the

1 same fair trial," et cetera.

2 So just addressing the fact that we are dealing with
3 an individual versus a corporation.

4 **THE COURT:** Again, I think you can argue this --
5 these matters to the jury, but a formal written instruction is
6 not required. I will label this III, tendered and rejected.

7 **MS. BLACKWELL:** Then it's just our verdict form, and
8 that is the end, which is the same as the plaintiffs' verdict
9 form.

10 **THE COURT:** Well, except you have all of the jurors
11 sign it. So do you want to tender that or leave it alone?

12 **MS. BLACKWELL:** No, that's fine. We don't need to
13 tender that. Thank you.

14 And just note our objection for the record to the
15 rejection of all of those instructions.

16 **THE COURT:** Yes. And so I'm going to put these in a
17 packet and mark them as tendered and rejected. Tendered by
18 BASF -- I'm sorry, by Monsanto and rejected.

19 **MS. BLACKWELL:** And I think I said this, Your Honor,
20 but --

21 **MR. MANDLER:** By BASF, Your Honor.

22 **MS. BLACKWELL:** I think I may have said this at the
23 beginning, Your Honor, but we incorporate and reassert all of
24 our objections to the Phase 1 instructions because those
25 obviously --

1 **THE COURT:** Certainly.

2 **MS. BLACKWELL:** -- provide the basis for this.

3 **MR. MANDLER:** We will join in that as well.

4 **THE COURT:** Yes.

5 **MS. BLACKWELL:** I am assuming those are overruled.

6 **THE COURT:** Oh, yeah. I rejected them. Oh, the
7 objections are overruled.

8 **MS. BLACKWELL:** The restated objections.

9 **THE COURT:** Again, yeah. Okay. Thank you.

10 **MS. BLACKWELL:** I'm sorry. Did you say they were
11 overruled?

12 **THE COURT:** Yeah. "Again," is what I said.

13 What else do we need -- you've resolved the two big
14 issues, so ...

15 **MS. GEORGE:** I was just going to say, so I guess we
16 will confer on which instructions we think should be
17 referenced in this paragraph and then e-mail you a final set.

18 **THE COURT:** Yeah, whatever you-all agree on is fine
19 with me. And if you can't, we will deal with it first thing
20 in the morning.

21 **MS. GEORGE:** Do you need me to actually file these,
22 or is it okay to e-mail these and they will be filed when they
23 are used? Do you know what I mean? We haven't filed these.

24 **THE COURT:** Right. I need -- the same thing as you
25 have been doing already. I need the complete packet that you

1 agree on, one with sources and one clear.

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

3 **MR. MANDLER:** Your Honor, we'd just like to inquire
4 the status of your order barring contact with the press. Is
5 that still in place until after punitives or is it lifted now?

6 **THE COURT:** I really prefer that there be no comment
7 whatsoever until after the completion of the entire trial,
8 which should be soon. I think that's the fairest thing to all
9 parties involved.

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

11 **THE COURT:** Thank you.

12 Anything further then? All right. We will be in
13 recess until 8:45. That's probably all the time we will need.
14 Okay. Thank you-all.

15 I will make copies of these and submit it to
16 everybody.

17 (The proceedings concluded at 5:03 p.m.)

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CERTIFICATE

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

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

I further certify that this transcript contains pages 2439 through 2597 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