**Nos. 20-3663, 20-3665**

IN THE

# United States Court of Appeals for the Eighth Circuit

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JOHN S. HAHN,

*Special Master*,

BADER FARMS, INC.,

*Plaintiff-Appellee*,

BILL BADER,

*Plaintiff*,

V.

MONSANTO COMPANY,

*Defendant-Appellant*,

BASF CORPORATION,

*Defendant-Appellant*.

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On Appeal from the United States District Court
for the Eastern District of Missouri, 1:16cv299-SNLJ
District Judge Stephen N. Limbaugh, Junior

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## OPENING BRIEF FOR DEFENDANT-APPELLANT BASF CORPORATION IN NO. 20-3663

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## SUMMARY OF THE CASE

The judgment below made Defendants BASF Corporation and Monsanto Company jointly and severally liable to Plaintiff Bader Farms for $15 million in compensatory damages and $60 million in punitive damages. These awards, following a jury verdict, are based on a claim that Defendants' lawful sales of seeds and herbicides led to the illegal, off-label use of unidentified manufacturers' herbicides by area farms, which eventually harmed the Plaintiff's peach trees.

The District Court relied on multiple, novel interpretations that expand tort liability far beyond Missouri's precedents. It ruled that a products-liability plaintiff can recover even if he cannot identify the injurious product, and even if independent actors' illegal use of a product caused his injury. It wholly ignored Missouri's specific rule for calculating fruit tree damage, one rooted in a century of case law. It allowed the jury to decide that Defendants formed a joint venture, though Defendants explicitly repudiated any joint-venture relationship and Missouri precedent prohibits that finding given the specific agreements Defendants made here. And it allowed a punitive damages award that did not assess Defendants' culpability individually, contrary to federal due process requirements and Missouri state law.

Oral argument, with 20 minutes per party, is warranted because these novel legal errors will have major repercussions for Missouri businesses, because of the size of the awards, and because of the unconstitutional punitive damages award.

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant BASF Corporation hereby discloses the following information:

BASF Corporation is a Delaware Corporation whose shares are not publicly traded. BASF Corporation is a wholly owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly owned subsidiary of BASF Nederland BV, a Dutch limited liability company. BASF Nederland BV is a wholly owned subsidiary of BASF SE (Societas Europaea – "SE"), a publicly traded European company. Further, no publicly held corporation owns 10% or more of BASF Corporation's stock.

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## INTRODUCTION

This case concerns two innovations that have sustained modern agriculture: herbicides designed to destroy harmful weeds and seeds modified to increase crop yield. Since its 1958 discovery, dicamba has been known as a particularly efficient herbicide. As weeds grew resistant to other herbicides, Defendants BASF Corporation and Monsanto Company worked separately to create improved dicamba-based herbicides to fill the need for an herbicide to control those weeds.

Eventually, with express federal regulatory approval, Defendants released separate products to meet the new market demand. In 2015-2016, Monsanto released genetically modified cotton and soybean seeds that, among many other benefits, were dicamba-resistant. In 2017, Monsanto and BASF each released competing dicamba-based herbicides that were less volatile, and thus less susceptible to off-site movement, than previous formulations. Unlike previous formulations, these herbicides were approved by the U.S. Environmental Protection Agency (EPA) for "over the top" or "in crop" use—meaning they could be sprayed directly on live crops—including over crops grown from Monsanto's dicamba-resistant seeds.

The use of these and other dicamba-based herbicides benefitted thousands of farmers and their customers; however, they prompted plaintiffs' lawyers to file a slew of lawsuits alleging that dicamba had damaged crops. This is one of those suits.

The Plaintiff, Bader Farms Inc. (Bader) sued Defendants based on negligent design and failure-to-warn theories, claiming that dicamba improperly applied by third parties moved onto its land and damaged its peach trees. Bader has no evidence that it was injured by a nearby farmer's use of a BASF product—as opposed to a product from the many other dicamba manufacturers. Nor can it show whether area farms used dicamba in compliance with the detailed, EPA-approved labels. Indeed, the evidence was "thin" that dicamba had damaged Bader's crops at all. Insurance claims Bader itself had filed, among other evidence, pointed to other culprits, such as fungal infections and weather.

Even so, the District Court upheld a jury verdict of liability and entered judgment against Defendants, holding them jointly and severally liable for $75 million in compensatory and punitive damages. The court justified this result on the legal theory that BASF and Monsanto were responsible for any farmer's (illegal) use of dicamba simply because they released products that generally encouraged dicamba use. It justified the damages figures based on Bader's representation of its lost profits, even though the farm's profits have *improved* since 2015. And it made Defendants jointly liable for the constitutionally excessive punitive award that the jury imposed on Monsanto based on a joint-venture theory, even though Defendants' contracts disclaimed any joint venture and contained no provisions that meet the state-law test for an implied joint venture, such as shared profits and losses.

If all of this sounds like tort law run amok, it is. At every turn, the District Court contorted or disregarded long-established rules governing products liability claims. Missouri law requires a plaintiff to trace its injury to a defendant's product, not to any product that resembles it, and also specifies that an intervening cause, such as a third party's illegal action, cuts off proximate cause. For over a century, the law has also required that damage to fruit trees be assessed by diminished land value, not lost profits. And the law requires that a joint venture cannot be implied when corporations expressly adopt a different business form. Finally, both constitutional law and Missouri statute make clear that a defendant cannot be liable for punitive damages without an individualized assessment of wrongdoing—much less when those damages are unconstitutionally excessive.

This Court should reject the District Court's common-law adventurism and adhere to the bedrock federalism principle that a federal court applying state law cannot substitute its own views. The judgement should be reversed.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331. Appx46-52. It entered a final judgment on November 25, 2020, Appx1079, and BASF timely noticed its appeal on December 17, 2020, Appx1080-1082. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that Bader could satisfy causation for negligence claims without proving it was injured by a BASF product.

*City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (per curiam); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

2. Whether the District Court erred in concluding that Bader could establish damages through alleged lost profits rather than diminished land value.

*Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975 (8th Cir. 2019); *Cooley v. Kansas City, P. & G.R. Co.*, 51 S.W. 101 (Mo. 1899).

3. Whether the District Court erred in concluding that a joint venture and conspiracy between BASF and Monsanto could be established where Defendants expressly disclaimed a joint venture; did not share profits, losses, or control over each other's products; and had no specific intent to unlawfully injure the Plaintiff.

*W. Blue Print Co. v. Roberts*, 367 S.W.3d 7 (Mo. 2012); *Rosenfeld v. Brooks*, 895 S.W.2d 132 (Mo. Ct. App. 1995).

4. Whether the District Court violated the Due Process Clause and Mo. Rev. Stat. § 537.067.2 when it made BASF jointly liable for punitive damages absent any determination of BASF's individual culpability and upheld a punitive damages award roughly eight times the size of the compensatory damages award.

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

## STATEMENT OF THE CASE

### A. BASF Seeks To Improve Dicamba Herbicides.

Since 1967, farmers across the nation have used dicamba to combat broadleaf weeds that steal sunlight, water, and nutrients from crops. Appx499, Appx501. Dicamba, when combined with salts and acids to create an herbicide, works by increasing the target plant's growth rate so that it outgrows its nutrient supplies and dies. Appx498-499, Appx575-576. The herbicide was traditionally used by spraying over corn, pasture, and wheat, as a burndown after harvesting, and in pre-planting. Appx571.

Dicamba is tremendously effective, and in recent years, as weeds have become resistant to other herbicides, it has become indispensable. *See* Appx499, Appx713. Today, millions of acres across the United States are treated with dicamba. Appx346. As with any product, there are best practices when using dicamba, specifically to mitigate harm to neighboring plants. One potential harm is off-target spray drift, which occurs when the wind picks up dicamba droplets and moves them to another field. Appx278-279. This issue—inherent to all herbicides—is controlled through special nozzles and use restrictions during certain weather. Appx279-280. Another potential harm is volatilization, which occurs when dicamba molecules

vaporize and move off target. Appx282-283. This issue is controlled by regulating how dicamba can be used. *E.g.*, Add. 2.

In the early 2000s, companies—including Defendants—worked to further mitigate these risks, including by minimizing volatilization so that dicamba *could* be applied over the top of crops. BASF, Monsanto, the University of Nebraska, and a company called Syngenta, also sought to bring dicamba-tolerant (DT) seeds to market. *See* Appx724-725. Those efforts generated intellectual-property litigation, *id.*, which eventually settled, Appx725-726. As part of that settlement, BASF relinquished the rights to its DT seed technology, and, in return, Monsanto agreed to pay BASF royalties on future seeds Monsanto might develop. Appx726, Appx1380 (¶ 5.1). As Monsanto continued to pursue DT seeds, BASF turned its focus to low-volatility dicamba. Appx727-728.

Defendants then entered into a more detailed Dicamba Tolerant System Agreement (DTSA). Appx728, Appx1312-1331. Because they remained "[f]ierce" competitors in the market, Appx724, the DTSA contained many provisions to safeguard their distinct intellectual-property rights. The most important preserved each Defendant's control over all aspects of development and commercialization of their own products. *E.g.*, Appx1320 (¶ 3.1) ("Monsanto shall, in its sole discretion and its sole expense, determine when and how to Commercialize any DT Seed Product."); *see also* Appx1321-1324 (¶¶ 3.3, 3.4.8, 6.5). Thus, BASF managed

development, testing, and sales of its low-volatility dicamba herbicide (Engenia), while Monsanto oversaw development of its DT seeds (Xtend seeds).

The DTSA incorporated the previously negotiated settlement royalties. Under it, BASF received a set sum for each acre of DT seeds that Monsanto sold, regardless of the actual profit Monsanto made on the sale. Appx1325-1327 (¶ 7.1-7.3.3) (detailing "value share" payments). It also disclaimed any partnership-like relationship between the two companies, Appx1330 (¶ 16.7), insisted on written modifications of the agreement, Appx1328 (¶ 16.3), and included a merger clause, Appx1330-1331 (¶ 16.13).

In late 2013, Monsanto disclosed to BASF that it had been developing a competing low-volatility dicamba herbicide (XtendiMax). *See* Appx732. Another dispute arose due to BASF's concerns that Monsanto had misappropriated its intellectual property, and the two companies reached another settlement. This led to the 2014 Amended and Restated Dicamba Tolerant System Agreement (ARDTSA). *See* Appx1332-1378. The ARDTSA restructured the royalty payments to reflect the most recent settlement, *see* Appx1344-1374 (¶¶ 5.1-7.3), but generally preserved the structure of the DTSA, *see*, *e.g.*, Appx1340-1342, Appx1367-1368 (¶¶ 3.1, 3.3, 3.4.9,

6.5) (sole control over respective products); Appx1377 (¶ 16.7) (joint-venture disclaimer); Appx1378 (¶ 16.13) (merger clause).[1]

### B. BASF And Monsanto Bring Pioneering Products To Market.

The risks due to dicamba are known, and an extensive regulatory scheme has developed over the years to address them. *See* Appx286 (discussing weed resistance and potential damage to target and neighboring crops). The EPA, for example, requires extensive testing of safety and efficacy when new dicamba products come to market. *See* Appx326-327, Appx414-415. And many states—including Missouri—mandate that persons seeking to apply dicamba receive a specialized applicator license and training. *See Dicamba Facts*, Mo. Dep't of Agric., https://agriculture.mo.gov/plants/pesticides/dicamba-facts.php (last visited Mar. 12, 2021) (requiring applicators to complete dicamba-specific training on an annual basis).

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[1] BASF's parent corporation, BASF SE, had previously entered into an Umbrella Agreement with Monsanto that contemplated a profit-sharing arrangement, without specific mention of dicamba. Appx1247-1293. BASF was *not* a party to the Umbrella Agreement, and the DTSA and ARDTSA disclaimed any relationship to it. Appx1330-1331 (¶ 16.13) ("This Agreement . . . supersedes all prior or other contemporaneous understandings or agreements, . . . including any such understandings or agreements set forth in the Umbrella Agreement . . . ."); Appx1378 (¶ 16.13) (same). The Umbrella Agreement expired in 2015 and has not been renewed.

BASF's low-volatility Engenia was—and remains—a pioneering product. To prepare for its release, BASF conducted thousands of safety tests, using several sophisticated laboratory methodologies, and many field tests. *E.g.*, Appx1241, Appx1294-1298, Appx1299-1301, Appx1302-1306, Appx1307-1311, Appx1382-1383, Appx758-763. Although different test conditions resulted in different figures, all showed a marked decrease in volatility compared to earlier dicamba formulations. Appx1241 (41% less volatile than Clarity under the C14 test; 98% less volatile than Clarity under the incubator test). These values were confirmed through independent academic investigations. *See, e.g.*, Appx1232 (University of Georgia analysis finding Engenia 90% less volatile than the original formulation).

Low-volatility is of course not no-volatility; and like all herbicides, Engenia remained susceptible to some physical drift. EPA therefore required an extensive label that detailed how, when, and where Engenia could be used. *See* Appx180 (Plaintiffs' lead-off witness admitting that the "the label is the law" and that all applicators are taught to follow the label as part of their license training); *see also* Appx462 (Bader's owner agreeing that "if someone does something off label with a herbicide or pesticide, . . . they ought to be responsible for that"). BASF solicited and incorporated farmers' concerns to compile information for that label. Bader's own witness—and head of an organization dedicated to protecting crops from herbicides—testified that his interactions with BASF representatives were always

"refreshing" and that several of his "suggestions ended up [on] the ultimate label for Engenia." Appx173, Appx187.

BASF did not stop at warnings. It trained—free of charge—tens of thousands of applicators on best Engenia practices. Appx751-752, Appx411-412. It gave away hundreds of thousands of nozzles that minimized dicamba drift. Appx748-749, Appx408-409. It sent out field representatives. Appx753. And it implemented a thorough complaint-handling process. Appx752-753.

Due to this extensive testing and preparation, Engenia was not ready for EPA approval until 2017. When finally released, the label spanned 34 pages. It contained detailed instructions on, among other things, safe spraying height, temperatures, humidity, wind speed, and distance from dicamba-sensitive crops. Appx1086-1119.

In the interim, Monsanto had developed Xtend cotton and soybean seeds, which were released in 2015 (cotton) and 2016 (soybean). The seeds had advantages beyond dicamba tolerance, such as superior yield, *see* Appx290, and improved disease resistance, Appx291. These benefits led organizations such as the American Soybean Association, the National Cotton Council, and the Missouri Farm Bureau Federation to ask Monsanto to release the seeds as soon as the EPA approved them. Appx169. Monsanto initially offered the seeds at a discount because, though farmers would benefit from the seeds' increased yields and resistance, they could not benefit from their dicamba tolerance until a low-volatility dicamba was released. *See*

Appx1150. It also included a comprehensive label with each seed packet that warned several times that it was illegal to spray existing dicamba herbicides over crops grown from the seeds. *See, e.g.*, Appx1146 ("NOTICE: Do not apply dicamba herbicide in-crop to Bollgard II® 7 XtendFlex™ cotton in 2015" (capitalization altered)); *see also* Appx1147 (same for soybean seeds).

BASF was not involved in Monsanto's decision to release its DT Xtend seeds in 2015. Indeed, Monsanto told BASF it was releasing the seeds just before they hit the market. Appx401, Appx409-410 (explaining that BASF learned of Monsanto's decision to release Xtend seeds "around the same time" as the market did, shortly before their release to the market); *see also* Appx746-747 (explaining that the release of Xtend seeds was "a big surprise" for BASF). BASF responded by instructing its employees, partners, and customers that it was illegal to spray any existing dicamba formulation over the top of crops that were grown from the Xtend seeds. *See* Appx1120.

### C. Plaintiff Sues Defendants Based On A Theory Of Damage From Other Farmers' Illegal Dicamba Use.

Bader sued Monsanto in 2016. In 2017, Bader amended its complaint to include BASF and to allege that the two companies "conspired" to release the DT seeds without a corresponding low-volatility dicamba herbicide. *See* Second Amended Compl., ECF No. 77. Its theory was that Monsanto and BASF expected farmers who purchased the Xtend seeds to illegally spray traditional dicamba

herbicide, spurring demand for more Xtend seeds and yet-to-be-released low-volatility dicamba herbicides. Add. 1-2. Bader claimed that its peach orchards in Southeast Missouri had been harmed by other farmers' use of traditional dicamba in 2015 and 2016—brought on by Monsanto's release of the Xtend seeds—and by Defendants' negligently designed low-volatility dicamba in 2017 and 2018. *Id*. Bader's 2015-2016 claims against BASF rested solely on joint-venture and conspiracy theories. Add. 20.[2]

Before trial, the District Court dismissed certain claims, including "for joint liability for any punitive damages award." Appx128. The only claims that went to a jury were negligence claims for design defect and failure to warn. Add. 20. Bader sought to hold BASF and Monsanto jointly liable for each claim but did not "claim[ ] anything as to any defect in the Engenia herbicide … independent of the" overall DT "system"—that is, of using dicamba herbicide with DT seeds. Appx712.

The trial on the negligence claims lasted three weeks. Bader presented almost no evidence against BASF. As Bader's counsel put it, they "designated three hours and 24 minutes to put on [their] entire case against" BASF. Appx351.

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[2] This case was consolidated with similar cases into a multi-district litigation, No. 1:18-MD-2820-SNLJ (E.D. Mo.), but Bader did not join the Master Crop Damage complaint, which focused on soybean growers. Add. 2-3.

Bader presented no evidence that BASF had any voice—let alone an equal voice—in Monsanto's decisions to release Xtend seeds. Instead, Monsanto stipulated that BASF had no involvement. Appx743-744. And every witness to testify on the topic agreed. Appx342 (Carey); Appx730-731, Appx742 (Emanuel); Appx409-410 (Borgmeyer); Appx746-747 (Kay).

Bader also offered no evidence that BASF encouraged unlawful dicamba use. *See* Appx166-167 (conceding a motion *in limine* that precluded Bader from mentioning those allegations at trial); *see also* Appx1120 (internal BASF email instructing employees not to "show or hint at any off label applications"). Indeed, BASF's sales of Clarity—a traditional dicamba herbicide—went *down* during 2015 and 2016 in the ten states where cotton and soy are grown. Appx 737; *see also* Appx1384-1409 (audited 2014-2017 Clarity sales); Appx1410-1411 (audited 2014-2017 private label Clarity sales); Appx1125 (trial demonstrative). So did BASF's production of dicamba. Appx733-736; Appx1122-1124 (trial demonstrative showing that renovations of the Beaumont Plant reduced BASF's dicamba production from 20.5 million pounds in 2014 to 14.5 million pounds in 2015 to 10.3 million pounds in 2016).[3]

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[3] Nor did Bader offer any evidence that BASF's Engenia was negligently designed: Its only dicamba expert acknowledged that BASF "never advertised" the new formula as "*non*volatile." Appx531 (emphasis added).

Nor did Bader introduce evidence that it was damaged by BASF's Engenia. To the contrary, its expert testified that he "had no clue [as to] the specific source" of any dicamba that damaged Bader's trees. Appx614. And the expert acknowledged that nearby use of herbicides—of whatever origin—could have been exactly as the label required. Appx571-574 (admitting that dicamba could have drifted from nearby *legal* applications on *corn* fields, not fields with DT seeds).

Indeed, the only evidence that *any* dicamba herbicide had damaged Bader was thin, at best. Bader's expert asserted that the peach trees *looked* as if they had been affected because the tree leaves cupped and curled. *See, e.g.*, Appx544. The expert, however, took no samples and conducted no tests. Appx596-598. He formed his preliminary conclusions—later delivered to the District Court—in February, when there were *no* leaves on the peach trees. Appx560-561. And he had never worked with peach trees before. Appx593. As Defendants' experts explained, peach-tree leaves are *always* cupped and curled during certain seasons. Appx716. Rather, dicamba injury in peach trees manifests as deterioration at the ends of the branches where new buds grow. Appx714-715. After several visits to the Bader farm, Defendants' experts found no evidence of such deterioration. *Id.*

At trial, Bill Bader, the farm's owner, admitted that other, unrelated events had damaged his farm. In 2015, he filed an insurance claim, alleging that 100% of the damage for that year was caused by hail. Appx429-430; *see also* Appx1130-

1132. He filed another claim later that same year for damage to half of his peach yield from an *unknown* herbicide sprayed by a *crop duster*. Appx430. And in 2018, he claimed that frost caused 75% of his yield to be lost. Appx448-450, Appx1138-1143. During these years, Mr. Bader twice invited government agencies to test his trees for dicamba—and twice they found no dicamba traceable to over-the-crop application. Appx422-424 (Missouri Department of Agriculture); Appx453-454 (FDA).[4]

Along with the alternative causal explanations the *Plaintiff's* actions provided, Defendants' experts added another: armillaria root rot. Appx719-720. This fungal infection causes pockets of dead trees throughout an orchard. *Id.* And that is exactly what satellite pictures showed at Bader, going back to 2003. Appx722, Appx1151-1161. Two expert plant pathologists then conducted soil tests, *see* Appx718-719, and DNA analyses, Appx755-756, and concluded that "the predominant cause of peach tree death at Bader Farms is Armillaria root rot." Appx719; *see also* Appx755.

Bader's blinkered finger-pointing carried through to its damages calculations. It did not even attempt to show its farm had lost any value due to dicamba damage but instead claimed lost profits. Its damages expert ignored any alternative cause.

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[4] The Missouri Department of Agriculture found traces of dicamba, but because the exposure occurred in April—months before the growing season—it did not come from application over crops grown from Xtend seeds. Appx423-424.

Appx682-684 (expert admitting that he did *not* remove from his calculations loss due to hail, the dust cropper incident, or frost). He calculated mitigation costs based solely on Bill Bader's assertions, unsupported by receipts or invoices. Appx688-693. Finally, he assumed that Bader would go out of business by 2019. Appx684-685.

Bader's lost profits calculation belied reality. Bader is still in business. Appx396. Its peach production *increased* by over 400% from 2018 to 2019. Appx1084. Its profits rose, too. Bader's average annual profit during 2011-2014 was $109,000; it increased to $175,000 in 2015-2018. Appx491-492. And its average peach-specific profit rose from $54,000 to $87,000 over those same years. Appx678-679.

**D. The Jury's Liability And Damages Verdicts.**

The jury returned a verdict in Bader's favor, finding Defendants liable on Bader's negligence theories and awarding $15 million in lost-profits compensatory damages. Appx847-848. The jury also found that Monsanto was liable for punitive damages for 2015-2016. *Id.* And that BASF and Monsanto took part in a joint venture and a conspiracy. Appx849.

The District Court then held a second phase of the trial to determine the amount of punitive damages. Before doing so, the District Court suggested in an off-the-record discussion of the jury instructions that, in the court's view, BASF may

be vicariously liable for punitive damages as a joint venturer. Still, the court never vacated the pre-trial order that had dismissed "plaintiffs' claim for joint liability for any punitive damages award." Appx128. And during the liability phase, it directed the jury, over BASF's objection, not to allocate fault at all between Monsanto and BASF. *See* Appx844-845, Appx849. It also directed the jury to consider *only* Monsanto's conduct when deciding whether punitive damages are warranted. Appx846 (referring to "the conduct of Defendant Monsanto Company" and permitting a finding "that Defendant Monsanto Company is liable for punitive damages").

During the punitive damages phase, only Monsanto presented a defense. Appx851. The only additional evidence presented to the jury was a stipulation of Monsanto's value, *id.*, and all instructions mentioned only Monsanto. *See, e.g.*, Appx846. The jury awarded $250 million in punitive damages against Monsanto. Appx870 ("We, the jury, assess punitive damages against Defendant Monsanto Company at [$250,000,000] ….").

Bader then proposed a judgment under which *both* Defendants would be jointly and severally liable for the compensatory and punitive damage awards. Appx871-883. The District Court adopted that proposal over BASF's strenuous objection. *Compare* Appx919 (explaining that "this Court was not asked to address an alternative theory of *joint venture* liability" when it "dismissed the plaintiff's *joint*

liability claim for punitive damages" (emphases added)), *with* Appx127-128 (dismissing "claim for joint liability for *any* punitive damages award" because "Missouri's statute regarding joint and several liability explicitly states that a defendant 'shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.' " (emphasis added) (quoting Mo. Rev. Stat. § 537.067.2)).

**E. Post-Trial Proceedings.**

Defendants moved for judgment as a matter of law or, in the alternative, for a new trial. *See* Add. 1. BASF argued, among other things, that (1) Bader failed to establish a causal link between BASF's release of Engenia—or even Monsanto's release of Xtend seeds—and the alleged damage to Bader's peach trees; (2) Bader's joint-venture theory failed as a matter of law because "existence of a different type of express contract is in itself inconsistent with . . . joint venture," *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 16 (Mo. 1970), and because there was no evidence of an implied joint venture; (3) BASF could not be liable for conspiring with Monsanto because it played no role in Monsanto's decision to release Xtend seeds, did not encourage farmers to spray traditional dicamba on those seeds, and did not agree to develop defective herbicides; (4) the jury inappropriately awarded lost-profits damages because the correct standard for fruit-tree damage is the change in land value and because the lost-profits evidence was entirely speculative; and (5) the

punitive damages award violated Missouri law and the federal Due Process Clause. Add. 3-30, 48-51.

The District Court upheld the liability verdict. It dismissed BASF's causation arguments, reasoning that "conclusive proof that Engenia and not some other dicamba herbicide caused Bader's damage is not required." Add. 20. It was enough for the court that the jury could have concluded that BASF "participated in the development, regulatory approval process, and broad promotion of a system it knew and intended would damage third parties." Add. 21.

On the joint-venture claim, the court was undeterred by Missouri law that "the unequivocal existence of a definite business form is the most reliable expression of the relationship," and it held that the jury could infer a joint venture despite contractual clauses disclaiming such an arrangement. Add. 4-5 (quoting *Rosenfeld v. Brooks*, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995)). It ruled that a joint venture could be implied from the settlement royalty payments, the Defendants' one joint testing expense, coordinated communication strategies, and a smattering of documents prepared by low-level employees that used the phrase "joint venture." Add. 9-13. The District Court also concluded that Bader offered sufficient evidence to find that BASF and Monsanto conspired to create an "ecological disaster"—not because they specifically intended to do so, but because they " 'expected' that the dicamba would drift." Add. 16, 18-19.

As for the damages verdict, the District Court ruled that lost profits were the proper measure of harm suffered and that the lost-profits claim was not impermissibly speculative. Add. 23-24. And it approved joint-and-several liability for punitive damages on the theory that joint venturers are automatically liable for all punitive damages against other joint venturers. Add. 28-30. Finally, the District Court decreased the amount of punitive damages from $250 to $60 million, concluding that the lower amount was constitutionally permissible by mechanically applying a 4:1 ratio with the total compensatory damages award. Add. 50-51.

This appeal followed, and this Court consolidated it with Monsanto's appeal (No. 20-3665).

## SUMMARY OF THE ARGUMENT

**I.** The District Court's novel causation theories rolled through two clear guardrails Missouri places on tort liability. *First*, any plaintiff alleging injury from a product must identify the product that caused the injury and show that the defendant made or sold it. Bader did not even attempt to satisfy this requirement. *Second*, a plaintiff must prove that the defendant proximately caused its injury, and an intervening third-party act will cut off the causal chain. Bader's theory of liability expressly incorporated such acts—illegal over-the-top use of dicamba by third-party farmers—and yet the court excused these deficiencies.

**II.** The District Court ignored over a century of Missouri law that measures harm to fruit-bearing trees by the lowered market value of the land. Instead, it allowed Bader to claim lost profits. In doing so, it entered a speculative—and implausibly large—damages award totaling over a century's worth of Bader's profits.

**III.** Bader's joint-venture claim fails as a matter of law because Defendants' contracts disclaim a joint venture. What's more, the contracts entirely lack features that Missouri *requires* to find an implied joint venture. Under Missouri law, express disclaimer of a joint venture is the end of the matter. Nor can implied joint venture exist where, as here, defendants do not share profits, losses, or control over each other's products.

The District Court also erred in upholding the conspiracy verdict. Missouri law requires a specific unlawful *objective*, and BASF merely sought to sell an EPA-approved product. The court's theory that Defendants somehow conspired to create an "ecological disaster" because hypothetical misuse of dicamba by farmers was foreseeable finds no support in law or common sense.

**IV.** Both the Due Process Clause and Missouri law require an individualized determination of culpability before punitive damages can be imposed, yet the jury considered *only* Monsanto's conduct. BASF cannot be jointly liable for the award based on this verdict. The award is also unconstitutionally excessive—roughly eight times the relevant compensatory award, even though the Supreme Court and this

Court have instructed that a 1:1 ratio is the constitutional limit where compensatory damages are substantial and there is no evidence of malice.

## ARGUMENT

### I. STANDARD OF REVIEW.

This Court reviews de novo (1) the denial of a motion for judgment as a matter of law, "viewing the evidence and reasonable inferences in the light most favorable to the non-moving party"; (2) the "interpretation of the applicable state law"; and (3) whether a punitive damages award comports with state law and federal due process. *Hople v. Wal-Mart Stores*, 219 F.3d 823, 824 (8th Cir. 2000); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 831 (8th Cir. 2004).

### II. BADER FAILED AS A MATTER OF LAW TO SATISFY ITS BURDEN TO SHOW THAT BASF CAUSED ITS INJURIES.

#### A. The District Court Erred As A Matter Of Law By Ignoring Missouri's Product-Identification Requirement.

Bader claimed its peach orchards were harmed by exposure to dicamba and that BASF was responsible. *See* Add. 20. The District Court did not find that Bader introduced any evidence that a BASF product caused its injuries. Instead, it held Bader did not need to do so because "the product at issue in this case is the DT system, not the specific products that comprise the system." *Id.* Bader was thus relieved of an obligation to present "proof that Engenia and not some other dicamba herbicide caused Bader's damage." *Id.* The District Court called Bader's causation

theory "novel." Appx706. It is far more than that—it contravenes clear Missouri precedent on the causation requirement in a products liability case.

### 1. Under Missouri law, a plaintiff must show that the defendant's product actually caused its injury.

"[W]here a plaintiff claims injury from a product," as here, "actual causation can be established *only* by identifying the defendant who made or sold that product." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007) (per curiam) (emphasis added); *see also Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. 1984) (under "any" "tort theory," a "plaintiff must establish some causal relationship between the defendant and the injury-producing agent"). This is the majority view, *see Zafft*, 676 S.W.2d at 244, and for good reason: If a plaintiff does not identify the injury-causing product, it cannot establish that the defendant actually and proximately caused its injuries, *Benjamin Moore*, 226 S.W.3d at 113-115. A contrary rule would risk "exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability." *Id.* at 116.[5]

Bader did not attempt to satisfy that product-identification requirement. The District Court recognized that the evidence was "thin" that *any* dicamba product

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[5] Product identification is also required when a product component is alleged to cause injury, so even if BASF's herbicides were used as part of an agricultural "system," Bader still had to prove that the BASF *component* harmed its farm. *See, e.g.*, *Sperry v. Bauermeister, Inc.*, 4 F.3d 596, 598 (8th Cir. 1993).

caused Bader's injuries. Appx704; *see supra* pp. 14-15. Proof that a *BASF* dicamba product caused the injuries was non-existent. Bader's expert forthrightly admitted that he generally "had no clue" about the "specific source" of dicamba. Appx614. The culprit dicamba could have come from any number of area farms using any of the dicamba products produced by dozens of manufacturers. Because Bader could not identify a BASF product as the cause of any injuries, BASF was entitled to judgment as a matter of law on the product-liability claims. The rest of the verdict against BASF, which rests on these claims, should be vacated.[6]

**2. Missouri law does not permit liability based on the District Court's "system" theory of tort liability.**

The District Court's "system" holding was plainly a way to sidestep Missouri's product-identification requirement. The court reasoned that because "BASF designed, manufactured, and sold its Engenia herbicide as part of the DT system," BASF could be blamed for "usher[ing] in the use of over-the-top dicamba" and held liable irrespective of what "specific type of dicamba" caused Bader's injuries. Add. 21. The District Court candidly acknowledged that, on this theory, it was "not essential to liability" to even show that "Engenia was in fact used in close proximity to [Bader's] farm." *Id.* Thus, because BASF made one type of dicamba

[6] Because Bader's claims against Monsanto also have fatal causation problems, the vicarious-liability claims against BASF also fail.

herbicide for use with DT seeds, it was responsible for *all* injuries suffered from *any* dicamba product—even if those other products were defective, other manufacturers gave deficient warnings, or other farmers willfully misused those products.

The Missouri Supreme Court has repeatedly rejected this type of extraordinary causation theory. In *Zafft*, plaintiffs sued a handful of manufacturers and distributors of a drug they claimed caused their cancer, even though "as many as 300 drug companies" marketed the drug and the plaintiffs could not "identify which of the defendants manufactured, sold or distributed" the specific drugs that injured them. 676 S.W.2d at 243. The Missouri Supreme Court held categorically that "to recover under strict liability, *as with any other tort theory*, plaintiff must establish some causal relationship between the defendant and the injury-producing agent." *Id.* at 244 (emphasis added). And the court refused to use "industry-wide" or market-share liability as a proxy for causation, explaining that a plaintiff's difficulty in satisfying the product-identification requirement was no reason to abandon it. *Id.* at 244-246.

The Missouri Supreme Court confirmed that ruling two decades later in *Benjamin Moore*. There, the City of St. Louis sought to recover the cost of lead-paint abatement from paint manufacturers and distributors even though "[t]he city could not connect any specific defendant to any specific abatement project." 226 S.W.3d at 113. It was *not* enough to "show[ ] that the defendant substantially

contributed . . . via evidence of community wide marketing and sales." *Id.* at 115 (internal quotation marks omitted). The dissent pushed for a relaxed causation standard because of the "widespread" "hazard" to which the defendants had allegedly contributed. *Id.* at 116. The majority was unmoved: "[W]here a plaintiff claims injury from a product, actual causation can be established *only* by identifying the defendant who made or sold that product." *Id.* at 115 (emphasis added).

The District Court's loose causation theory runs headlong into both *Zafft* and *Benjamin Moore*. Admitting that it cannot show which dicamba product actually injured it, Bader seeks to hold two industry participants responsible for all dicamba use. If anything, *Zafft* and *Benjamin Moore* offered a stronger case for liability because of the similarity between the drugs or paint manufactured in those cases, whereas the likelihood of injury to Bader turns on the specifics of whether a dicamba product is an older formulation or a newer lower-volatility formulation and whether it was applied in a manner consistent with the label and law.

The District Court's abbreviated efforts to distinguish *Benjamin Moore* and *Zafft* are unavailing. *First*, the court distinguished negligence claims as "focuse[d] on the conduct of the defendants" rather than "on the product." Add. 21 (quoting *Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23, 31 (Mo. Ct. App. 2009)). But both *Zafft* and *Benjamin Moore* were clear that the causation rule applies to *all* product-liability torts, and *Zafft* specifically applied it to negligence claims. *See*

*Zafft*, 676 S.W.2d at 244. Even the *Martin* case invoked by the District Court required the jury to find that the defendant "manufactured" the defective product. *Martin*, 298 S.W.3d at 31.

*Second*, the District Court said that "*Benjamin Moore* is distinguishable, as it was based on a market share theory of liability." Add. 41. But *Benjamin Moore* discussed the market-share theory only after reaffirming *Zafft*'s strict product-identification rule. 226 S.W.3d at 115-116. And the defect of the market-share theory applies just as well to Bader's claims: It cannot "establish that the particular defendant actually caused the problem." *Id.* at 116.

*Third*, the District Court found causation because BASF's Engenia helped to "usher[ ] in" the use of over-the-top dicamba spraying. Add. 42. But *Benjamin Moore* rejected this exact argument. 226 S.W.3d at 115 (causation cannot rest on "showing that the defendant substantially contributed to the" general "hazard" through "community wide marketing and sales" (internal quotation marks omitted)).[7]

[7] Under Rule 28(i), BASF adopts by reference the arguments in Section I.B of Defendant-Appellant Monsanto's opening brief regarding Missouri's product identification requirement.

### B. Bader Could Not Establish Proximate Cause For The Additional Reason That Its Alleged Injury Stemmed From Independent Third-Party Conduct.

Bader's negligence claims failed as a matter of law for a second, independent reason. It did not establish proximate cause. "Proximate cause is such cause as operates to produce a particular consequence *without the intervention of an independent cause* . . . ." *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661 (Mo. Ct. App. 1989) (emphasis added).

There was a glaring independent cause here, one written into Bader's theory of the case: area farmers using dicamba illegally and against Defendants' product labels. Missouri law "presum[es] that a warning will be heeded" when analyzing proximate cause. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762 (Mo. 2011) (internal quotation marks omitted). And common-law courts around the country, including this court, have held that illegal third-party activity cuts off proximate cause. *E.g.*, *Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 673 (8th Cir. 2009) (illegal methamphetamine manufacturing cuts off proximate cause for pseudoephedrine sales); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004) (injuries from illegal gun use not proximately caused by gun manufacturers).

The District Court reasoned that any foreseeable result would do, Add. 62-64, a proposition Missouri law forecloses. "Missouri, like many other states, has not applied a pure foreseeability test" and recognizes that "events with potential

intervening causes . . . may cut off liability." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865 (Mo. 1993) (footnote omitted). This makes sense: For any widely used product, it is almost always foreseeable that *somebody* will use it improperly.

Applying the correct proximate cause standard is fatal to Bader's claims. Bader did not attempt to show which dicamba product injured it or how, *see* Appx614, and so it could not exclude the possibility that it was injured by *illegal* use of *other* manufacturers' products. The proximate cause problem is especially glaring for the 2015-2016 period because over-the-top dicamba use with any of Defendants' products (and any other manufacturers' dicamba product) was both illegal and contrary to the product labels. *See* Add. 2 (observing that older dicamba formulations cannot be used over the top of crops); Appx339 (explaining that "the label is the law"). Specifically, Monsanto's Xtend seeds had clear warnings not to spray over-the-top dicamba on the seeds, Appx1146 (cotton-seed label); Appx1147 (soybean-seed label), and it was similarly unlawful to use BASF's Clarity over-the-top, Appx183, Appx287, Appx293; *see supra* pp. 9-11.[8]

[8] The 2015-2016 period is the only time period for which punitive damages were assessed. Appx848.

Because Bader did not establish proximate cause as a matter of law, BASF cannot be liable on the negligence claims, and the judgment should be reversed.[9]

## III. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ENTERING A DAMAGES AWARD BASED ON A LOST-PROFITS THEORY INSTEAD OF THE DIMINISHED-VALUE THEORY MISSOURI LAW REQUIRES.

After contorting Missouri's causation principles, the District Court allowed Bader to recover damages based on a lost-profits theory. But since the nineteenth century, Missouri courts have specifically held, over and over, that the proper measure of damage to fruit trees is the difference between the market value of the land immediately before and after any alleged injury. *See, e.g.*, *Cooley v. Kansas City, P. & G.R. Co.*, 51 S.W. 101, 104 (Mo. 1899) (in suit for "damages for the destruction of" trees, "the measure of damages of the owner of the land . . . is the difference in the value of the land before and after the destruction of the trees"); *Matthews v. Missouri Pac. Ry. Co.*, 44 S.W. 802, 807 (Mo. 1897) (same). The reason for the rule is that the "chief value" of fruit trees "depend[s] on their attachment to the land," and so "[r]ecoverable damages for the injury to them consists alone of the effect such injury had on the market value of the land." *Doty v. Quincy, Omaha & Kansas City R.R. Co.*, 116 S.W. 1126, 1128 (Mo. Ct. App. 1909). Missouri has a

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[9] Under Rule 28(i), BASF adopts by reference the arguments in Section I.A of Defendant-Appellant Monsanto's opening brief regarding Missouri's proximate cause requirement.

specific jury instruction carrying out these precedents, which tells the jury to evaluate "the difference between the fair market value of the [property] before it was damaged and its fair market value after it was damaged." Mo. Approved Jury Instr. (Civil) 4.02 (8th ed. 2020 update) (footnotes omitted).

Bader presented no evidence whatsoever of a change in land value. *See supra* pp. 15-16. Discarding Missouri precedent, the District Court gave the jury Missouri's instruction for combined personal and property injury, and it allowed the jury to determine damages from Bader's alleged lost profits. Add. 24-25. Its rationale was based on a single case in which a plaintiff was permitted to recover lost profits when runoff from the defendant's construction project into the plaintiff's lake caused the plaintiff "to close both its wholesale fish hauling and fee fishing businesses." *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28, 30 (Mo. Ct. App. 1995). Whether or not that is the rule for fisheries, it says nothing about Missouri's longstanding rule that damage to *fruit trees* should be assessed as a property injury. The District Court had no basis to overturn 120 years of Missouri law that is exactly on point.

There is good reason for Missouri's longstanding rule. Guessing the before-and-after value of crop yields enters "the realm of speculation and uncertainty." *Boggs v. Missouri-Kansas-Texas Ry. Co.*, 80 S.W.2d 141, 144 (Mo. 1934). This case bears that out. Bader's average annual profits *rose* 60% from 2011-2014 to

2015-2018, Appx491-492, and its total peach production quadrupled from 2018 to 2019, Appx1084. Bader's damages expert incorrectly assumed that Bader would be out of the peach business by 2019, Appx684-685, whereas Bader actually purchased an additional $1.1 million in land in 2018 and planted 2,000 more trees in 2020, Appx471-472. And there were numerous other causes of crop damage on Bader's land throughout the relevant time period. *See supra* pp. 14-16. Without any actual losses to evaluate, the jury's award of $15 million in damages could only be pure speculation, especially since it would take Bader more than a century to make that much profit at the level of its pre-2015 financial results. *See* Appx491-492.

Because the District Court erred in permitting Bader to proceed on an improper theory of loss, BASF is entitled to judgment as a matter of law. *See, e.g.*, *Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975, 981, 985 (8th Cir. 2019) (affirming directed verdict for defendant where plaintiff failed to offer sufficient evidence of diminished land value following spray drift). In the alternative, the damages award should be vacated and remanded for determination by a properly instructed jury.[10]

[10] Under Rule 28(i), BASF adopts by reference the arguments in Section II of Defendant-Appellant Monsanto's opening brief regarding compensatory damages.

## IV. BADER'S JOINT VENTURE AND CONSPIRACY CLAIMS FAIL AS A MATTER OF LAW.

The District Court misread Missouri law in yet another way: It dramatically relaxed the requirements to prove a joint venture and conspiracy. Its legal rule makes co-defendants liable for each other's every action simply because they have some common economic interests and it was foreseeable that third parties may use their products illegally despite warnings. Such far-reaching joint liability would impose enormous litigation risks on anybody doing routine business in Missouri. Unsurprisingly, it is not what Missouri law requires or allows.

### A. BASF And Monsanto Were Not In A Joint Venture.

#### 1. A joint venture cannot exist where the parties disclaim it by contract.

It is basic Missouri law that a joint venture exists only where the parties "intend to, and in fact do, create a contract of joint venture." *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 387 (Mo. Ct. App. 1999). Here, the parties could not be clearer: BASF and Monsanto were explicit that they did *not* agree to a joint venture. All contracts governing their cooperation in developing dicamba products—the Dicamba Agreement, the DTSA, and the ARDTSA—disclaimed any partnership or joint venture: Nothing in the agreements was "intended, explicitly or implicitly, or is to be construed, to constitute Monsanto or BASF as partners in the legal sense," and "[n]either Party shall have any . . . right or authority to assume or create any obligations on behalf of or in the name of the

other."[11] Appx1330 (¶ 16.7), Appx1377 (¶ 16.7); *see* Appx1381 (¶ 13.9). And each contract contained a merger clause indicating it was the "entire agreement" on the same subject matter. *E.g.*, Appx1330-1331 (¶ 16.13), Appx1378 (¶ 16.13); *see CIT Grp./Sales Fin. Inc. v. Lark*, 906 S.W.2d 865, 868 (Mo. Ct. App. 1995) ("[A] merger clause is a strong indication . . . that the writing is intended to be complete.").

The District Court and Bader did not dispute any of that. Rather, despite acknowledging that "the intent of the parties is the primary factor for determining whether a partnership exists," the District Court allowed evidence of an *implied* agreement to trump the express—and repeated—manifestations of BASF and Monsanto's will. Add. 12 (internal quotation marks omitted).

Yet Missouri courts have held time and again that when parties have an express agreement to form a business relationship *other* than a joint venture or partnership, that is dispositive on the issue—especially when the parties are corporations. *See, e.g.*, *Jeff-Cole Quarries*, 454 S.W.2d at 16 ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint venture by implication."); *Ritter*, 987 S.W.2d at 387 ("[C]ourts will not imply a joint venture where the evidence indicates that the parties created a different

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[11] Because a "joint venture is a species of partnership," *Johnson v. Pac. Intermountain Exp. Co.*, 662 S.W.2d 237, 241 (Mo. 1983), disclaiming a partnership necessarily disclaims a joint venture.

business form."); *Rosenfeld*, 895 S.W.2d at 135 (Mo. Ct. App. 1995) (same); *see also, e.g.*, *Barfield v. Sho-Me Power Elec. Coop.*, No. 11-CV-04321-NKL, 2013 WL 12145822, at *3 (W.D. Mo. Apr. 15, 2013) ("[C]ourts applying Missouri law have been especially hesitant to imply the existence of a joint venture where the parties are corporations.").

The District Court acknowledged that wealth of Missouri authority, *see* Add. 4-5, yet it "reject[ed]" those opinions because—in its view—they "misread Missouri Supreme Court precedent." Add. 8. For support, it turned to *Denny v. Guyton*, 40 S.W.2d 562 (Mo. 1931). *See* Add. 6-7. *Guyton* did observe that the *lack* of a written agreement does not definitively preclude an implied venture. 40 S.W.2d at 583, 585. But that says nothing about what to do when there *is* an express agreement disclaiming a joint venture. *Guyton* did not reach that question because the plaintiff "was able to show an *express* agreement of a joint venture." *Rosenfeld*, 895 S.W.2d at 135 (citing *Guyton*, 40 S.W.2d at 581).[12]

[12] The other cases the District Court cited in passing are no different. *See* Add. 7-8. In *TooBaRoo, LLC v. W. Robidoux, Inc.*, there was sufficient evidence of "an express joint venture agreement" for the claim to go to a jury, and no written agreement disclaiming a joint venture. 614 S.W.3d 29, 39 (Mo. Ct. App. 2020). And in *Jeff-Cole Quarries*, the "controlling consideration" was that "the parties entered into a detailed contract," which was found to be "inconsistent with a claimed relationship of a joint venture by implication." 452 S.W.2d at 16.

Looking foremost to the parties' express agreements makes sense. A joint venture creates a "single business enterprise" in which the joint venturers "combine their property, money, effects, skill, and knowledge." *Jeff-Cole Quarries*, 454 S.W.2d at 14 (internal quotation marks omitted). Joint venturers relinquish control to each other and accept duties to share in profits, losses, and liabilities, even for activities they may not actively supervise. *Ritter*, 987 S.W.2d at 387; *see Blanks v. Fluor Corp.*, 450 S.W.3d 308, 402 (Mo. Ct. App. 2014). Reflecting those burdens, a joint venture only arises where the parties intend it, *Ritter*, 987 S.W.2d at 387, and the law thus honors an express decision *not* to create a joint venture. A contrary rule would disincentivize corporations from ever cooperating for fear of creating joint enterprises and liabilities.

**2. The agreements lack the required provisions that could support finding an implied joint venture.**

Even if Missouri law permitted courts to look past an express disclaimer of a joint venture, Bader failed as a matter of law to show that BASF and Monsanto created an implied joint venture. A joint venture is only created if the members share "a community of pecuniary interest in that purpose" and "each member has an equal voice or an equal right in determining the direction of the enterprise." *Id.* No evidence at trial showed those necessary elements.

*No Community of Pecuniary Interest.* There was no community of pecuniary interest in commercializing a "DT system." That requires more than "both parties

having an economic interest in the activity." *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126, 138 (Mo. Ct. App. 1999). Rather, the parties must "have a right to share in the profits *and* a duty to share in the losses." *Id.* (emphasis added). There was no evidence that BASF and Monsanto had such a relationship.

The District Court pointed to *no* evidence that BASF and Monsanto agreed to share losses. *See* Add. 13-14. It side-stepped the issue by holding that "losses need not be shared equally" and that joint venturers can make alternative "arrangements they think are appropriate." Add. 13. But there was no evidence that BASF and Monsanto shared in losses *at all*, equally or unequally, or that they agreed to some particular division. If BASF had lost money on Engenia—for instance, had a natural disaster interrupted Engenia's manufacture—Monsanto would have had no duty to share in those losses.

The lack of a duty to share losses is enough to doom the joint-venture claim, but there also was no right to share in profits. Indeed, the ARDTSA disclaimed any profit-sharing rights in the sale of each other's low-volatility herbicides. *See* Appx1332-1378. To overcome that, the District Court pointed to so-called "value share payments" that Monsanto paid to BASF as a fixed amount for each acre of DT seeds planted. *See* Add. 13-14. These were royalty payments to compensate BASF for intellectual property used in Monsanto's products. Appx726-727; *see supra* pp. 6-7. And they were the same regardless of whether Monsanto made any profit

whatsoever from the sale of DT seed. Appx1373-1374 (¶¶ 7.1-7.3). "Profit is defined as the excess of income over expenditures," and a fixed payment independent of income and expenditures is not sharing profits. *Hatch*, 990 S.W.2d at 138; *see Jones v. St. Charles County*, 181 S.W.3d 197, 202 (Mo. Ct. App. 2005) (share of gross revenues not profit-sharing). The District Court provided no authority for its conclusion that a mere licensing or royalty arrangement can give rise to joint-venture liability.

The District Court also pointed to BASF and Monsanto's agreement to share access to certain testing data, to share some of the costs of that testing, and to make certain capital expenditures. Add. 14. But agreeing to certain fixed expenses is no more dependent on the excess of income over expenditures than are royalties, and BASF's obligations would have been the same regardless of whether either party made a profit. Although they cooperated on certain regulatory approvals, BASF and Monsanto were actually "[f]ierce" competitors, because every farmer who decided to use Engenia was one who didn't use XtendiMax. Appx724. In the District Court's formulation, if neighboring McDonald's and Burger King restaurants agreed to split the costs of re-paving a shared driveway and to cooperate on getting a municipal license to do so, they would become implied joint venturers—even though they are actually each other's principal rivals. That bizarre result cannot be found in Missouri law.

*No Joint Control*. "In order to form a joint venture the parties must have equal control over the enterprise." *Ritter*, 987 S.W.2d at 388. Without the "right to control the operations of the other," an "agreement d[oes] not form a joint venture." *Id.* at 387. Here, BASF and Monsanto unequivocally did *not* have the right to control each other's operations. This holds true for the decision when to release the Xtend seeds. As the District Court recognized, "the ARDTSA reserved to Monsanto alone the decision of whether, when, and how to commercialize DT seed, and Monsanto stipulated that BASF had no involvement." Add. 16; *see also* Appx342, Appx1340 (¶ 3.1).

In finding sufficient evidence of joint control, the District Court relied principally on the 2010 Umbrella Agreement, which set up a management team of BASF and Monsanto executives to develop and coordinate various research projects. *See* Add. 12-13. BASF Corporation, a defendant here, was not a party to that agreement; BASF SE, its parent corporation, and not a defendant here, was. *See* Appx1247. Moreover, the Umbrella Agreement expired in 2015, *see* Appx1283, so it is a flimsy basis to impose joint-venture liability on BASF or Monsanto from 2016 onward. Finally, the management team's coordination was limited to certain contractually defined tasks, under the Umbrella Agreement and later under the ARDTSA. *See* Appx738-740; *see supra* p. 8 n.1. None of these tasks included giving BASF any sort of control over Monsanto's seeds and herbicide, and certainly

not over *when* Monsanto released its seeds. Put simply, it did not give BASF equal voice.

### B. BASF And Monsanto Were Not In A Conspiracy.

Even more deficient is the notion that BASF and Monsanto engaged in a *conspiracy* through their lawful marketing of government-approved seeds and herbicides. A conspiracy requires "an unlawful objective." *W. Blue Print Co. v. Roberts*, 367 S.W.3d 7, 22 (Mo. 2012). Thus, the underlying tort must be *intentional*; "one cannot conspire to commit a negligent or unintentional act." *A.O.A. v. Rennert*, 350 F. Supp. 3d 818, 846 (E.D. Mo. 2018) (quoting *United States v. Sdoulam*, 398 F.3d 981, 987 (8th Cir. 2005)). Insufficient care in pursuing the lawful end of selling government-approved products cannot suffice.[13]

The District Court found unlawfulness in evidence showing that "defendants sold the products expecting that damage to third parties would increase their sales." Add. 18. In essence, the District Court said that it was enough that BASF could foresee that third-party farmers may illegally spray old dicamba over-the-top, and that BASF might benefit if that happened to be a BASF herbicide or if other farmers responded by planting a DT system defensively. *See* Add. 18-19. Knowing that it

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[13] A conspiracy claim depends entirely on an underlying tort. Because Bader's negligence tort claims should have failed for lack of causation, "the conspiracy claim fails as well." *W. Blue*, 367 S.W.3d at 22 (internal quotation marks omitted); *see supra* Part II.

could benefit from unlawful activity, though, is far from "intend[ing] harm" to Bader. *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1064 (8th Cir. 2005).

### C. The Joint Venture And Conspiracy Verdicts Are Inconsistent And So Must, At The Least, Be Vacated.

"Special answers or findings by the jury must be consistent with each other," and "[i]f they are irreconcilably inconsistent, they destroy each other." *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 157 (8th Cir. 1978); *see also Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1344-45 (Fed. Cir. 2009) ("appropriate remedy" for irreconcilable verdicts "is ordinarily . . . to order an entirely new trial" (internal quotation marks omitted)). Missouri courts likewise will "remand[ ] cases for a new trial where the jury returned two logically inconsistent verdicts." *Basso v. Manlin*, 865 S.W.2d 431, 434 (Mo. Ct. App. 1993).

Here, the joint-venture and conspiracy verdicts are indeed irreconcilable and so should be vacated if they are not outright reversed. "[A] principal cannot conspire with its own agents," *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 871 (8th Cir. 2002), and "one member of a joint venture acting for the venture is acting as the agent of the other member." *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1310 (8th Cir. 1977). The District Court did not disagree that "the law says that simultaneous conspiracy and joint venture is a 'legal impossibility,' " but declined to vacate the verdict because there was "no risk of any double recovery." Add. 19-20. But the

problem is "single recovery"—BASF was held liable on the basis of these logically inconsistent verdicts, so the irreconcilable verdicts are not harmless.

## V. THE PUNITIVE DAMAGES AWARD VIOLATED DUE PROCESS AND MISSOURI LAW.

The punitive damages award rests on a fourth, independent category of errors: Neither the federal Due Process Clause nor Missouri statutes permit a judgment that holds BASF jointly liable for a punitive damages award that the jury arrived at based only on the acts of someone else—Monsanto. And the award was unconstitutionally excessive, to boot.

### A. Assigning Joint Liability To BASF For Punitive Damages Violated Both The Due Process Clause And Missouri Law.

#### 1. The jury did not assess BASF's conduct individually when arriving at the punitive damages award.

The federal Due Process Clause requires an individualized assessment of culpability. It ensures "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Fair punitive damages are necessarily individualized. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (noting that the interest in imposing a punitive damages award is based in a "meaningful *individualized* assessment of appropriate deterrence and retribution" (emphasis added)). That is because such awards do not compensate a plaintiff; instead, they "are aimed at deterrence and retribution" for

the defendant's particular actions. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Such deterrence necessarily requires evaluating the specific "reprehensibility of the *defendant's* conduct," as the award "should reflect 'the enormity of *his* offense.' " *Gore*, 517 U.S. at 575 (emphases added) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)).

Missouri statute comprises this principle of individualized liability, too. It provides that "defendants shall *only* be *severally* liable for the percentage of punitive damages for which fault is *attributed to such defendant by the trier of fact.*" Mo. Rev. Stat. § 537.067.2 (emphases added). It thus precludes joint punitive damages liability, and without individualized attribution by the jury, there is no basis for several liability, either. That reflects Missouri law that "[p]unitive damages require a showing, by clear and convincing proof, of a culpable mental state *on the part of the defendant*." *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. 2004) (emphasis added). Such subjective intent is necessarily individual.

There is no question that the jury did not assess BASF's culpability on an individualized basis when determining punitive damages because the instructions expressly directed the jury to consider *Monsanto*, not BASF.

After the first phase of trial, the jury instruction on "Punitive Damages"—which determined eligibility for a punitive award—directed the jury that "if you believe the conduct of *Defendant Monsanto Company* . . . showed complete

indifference or conscious disregard for the safety of others, then . . . you may find that *Defendant Monsanto Company* is liable for punitive damages." Appx846 (emphases added). The verdict form said that "*Defendant Monsanto Company* [is] liable for punitive damages." Appx848 (emphasis added). And the punitive damages were tied specifically to liability "against Defendant Monsanto Company" on the negligence claim for "2015-2016," *id.*, whereas the only claim presented to the jury against BASF was for "2017-Present," Appx847.

As to the amount of punitive damages, the jury was instructed to "assess . . . punitive damages . . . to punish *Defendant Monsanto Company* for the conduct for which you found that *Defendant Monsanto Company* is liable," Appx852 (emphases added). Likewise, the verdict form stated only that it "assess[ed] punitive damages against *Defendant Monsanto Company* at [$250,000,000]." Appx870 (emphasis added).

Only Monsanto presented defense arguments during the punitive damages phase of the trial. Appx851. Bader's counsel did not mention BASF. *See* Appx853-859, Appx862-867. And the only evidence introduced was of *Monsanto*'s net worth. *See* Appx851. That evidence would have been *inadmissible* if punitive damages had been sought against BASF. *See Blue v. Rose*, 786 F.2d 349, 353 (8th Cir. 1986) ("evidence . . . of the individual wealth of the separate defendants" is "inadmissible when a single submission as to punitive damages is made"). In fact, the District

Court's post-trial order upholding punitive damages spoke only in terms of whether *Monsanto*'s conduct was sufficiently outrageous. *See* Add. 78-82.

In sum, nothing in the instructions, verdict, or evidence permits an inference that the jury made an individualized assessment that BASF should be liable for punitive damages. The Due Process Clause and Missouri law thus both prohibited the imposition of joint and several liability on BASF for punitive damages.

**2. The District Court erred in allowing joint liability for punitive damages.**

The District Court did not dispute that the jury never made an individualized determination of BASF's culpability. *See* Add. 28-30. In fact, the District Court did not grapple at all with the constitutional requirement that the jury have done so. *See id.* The *post-hoc* justifications it *did* offer are incorrect.

*First*, the District Court suggested that Missouri law automatically imposes joint liability on all joint venturers, constitutional and statutory barriers notwithstanding. Add. 29; *see also* Appx919-920. Its support was a single court of appeals decision, which said that "Missouri recognizes that partners are vicariously liable for punitive damages based on acts of their copartners done in the course of partnership business." *Blanks*, 450 S.W.3d at 402. That does not mean joint punitive liability is automatic. In fact, the plaintiffs in *Blanks* "sought *separate* punitive-damage awards against *each* defendant." *Id.* at 399 (emphases added); *see id.* at 363-364 (jury imposed different punitive damages amounts on each defendant). The

question before the court was not whether all defendants in a partnership automatically share equally in an award against one partner; it was whether there was sufficient evidence to justify the individual awards for each partner. *See id.* at 399. And *Blanks* reversed the punitive damages awarded against one of the partners because the instructions allowed "the jury to consider undifferentiated conduct," whereas a proper "finding of liability" would have been "based solely on" the individual partner's "conduct as a partner." *Id.* at 405-406. If joint liability followed automatically from partnership, there would have been no need to reverse.[14]

Moreover, *Blanks* said nothing about the Due Process Clause or Section 537.067(2). That is not surprising, as the *Blanks* jury *did* make individualized determinations for each defendant. *Blanks* cannot be read to say anything about whether Missouri law or the U.S. Constitution would countenance a judgment where punitive damages were assessed against BASF even though the jury considered only Monsanto's conduct.

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[14] The District Court's interpretation of *Blanks* would, if correct, treat joint venturers more harshly than co-conspirators. *See Taylor v. Compere*, 230 S.W.3d 606, 611 (Mo. Ct. App. 2007) (co-conspirators can be jointly liable only for actual damages). That bizarre result would require an individual determination of reprehensibility for co-conspirators—who must evince a criminal mens rea—but would automatically hold joint venturers jointly liable even though joint ventures are not inherently suspect.

*Second*, the District Court said that Section 537.067.2 "is not in play," Add. 29, because the "section does not apply . . . where no allocation of fault was necessary." Appx920. Of course, the background requirements of the Due Process Clause require allocation of fault. The text of the statute, in any event, does not support the District Court's cramped reading. The first clause of the first subsection indicates that it applies "[i]n *all* tort actions for damages." Mo. Rev. Stat. § 537.067.1 (emphasis added). And the subsection on punitive damages says categorically that the "defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact." *Id.* § 537.067.2. Subsection 1 also allows joint liability for compensatory damages and allows parties to avoid joint liability if they are found to be less than 51% at fault. *Id.* § 537.067.1. But the fact that the jury did not determine comparative fault for the compensatory damages did not relieve Bader of its duty under subsection 2 to seek jury attribution if it wanted punitive damages against BASF.

Nor do the cases the District Court cited support its reading of the statute. *See* Add. 29. *Blanks* did not mention Section 537.067, and the jury there *did* allocate fault for punitive damages. The other case the District Court cited, *Blue v. Rose*, long predated both the 2005 enactment of Section 537.067.2 and the Supreme Court's landmark due process cases governing punitive damages. Moreover, even

*Blue* recognized that "some cases" would require "separate findings of punitive damages in varying amounts against partners." 786 F.2d at 353.

*Third*, the District Court suggested that BASF forfeited its objection to joint punitive liability because it did not "object[ ] to submitting the punitive damages questions without allocation." Add. 29. But it is the *plaintiff*'s burden to prove a defendant's culpable mental state with clear and convincing evidence to recover punitive damages. *See Werremeyer*, 134 S.W.3d at 635.

And there is an obvious reason why BASF did not ask for an allocation: In an explicit ruling, the District Court had taken joint liability for punitive damages off the table well before the trial, and the parties had prepared jury instructions under the shadow of that ruling. Months before trial, the District Court dismissed Bader's only claim that "allege[d] that defendants are jointly liable for an award of punitive damages." Appx127-128. That was *because* BASF and Monsanto argued that Section 537.067.2 required separate punitive damages determinations. Appx128. Bader had "no objection to a separate jury determination for assessment of punitive damages," so the Court dismissed "plaintiffs' claim for joint liability of any punitive damages award." *Id.* Only claims "for *several* liability for punitive damages remain[ed]." *Id.* (emphasis added). Then during the trial, the District Court held that it would not "allow [Bader] to submit on punitive damages for conduct that occurred from 2017 on"—thus eliminating the time period relevant for the tort

claims against BASF—and the court rejected Bader's proposed instruction for punitive damages against BASF. Appx785, Appx810. Those orders gave BASF every reason to expect punitive damages were being decided against Monsanto only.

The District Court did mention its potential view of *Blanks* in an off-the-record jury instruction conference after the close of evidence. *See supra* pp. 16-17. But the court entered no on-the-record order, so the only relevant orders in place during the charge conference were the ones that said only several liability was on the table. When Bader sought joint punitives liability in its proposed judgment *after* the verdict, BASF promptly objected. *See* Appx884-914; *see also* Appx975-978. Far from forfeiting its objections to the joint punitive damages award, BASF vociferously opposed it as soon as it was on notice that it had to.

If anything, the unusual process preceding the District Court's about-face introduced a separate due process violation by depriving BASF of notice that it would be subject to joint punitive damages and the chance to defend itself. *See Simon v. Craft*, 182 U.S. 427, 436 (1901) ("The essential elements of due process of law are notice and opportunity to defend."). Had BASF known, it could have requested a jury instruction to apportion punitive liability, presented oral argument at the punitive damages trial phase, and objected to the introduction of evidence of Monsanto's wealth. And because the District Court did not even hint at its new thinking on joint liability until after the close of evidence, BASF could not fully

develop evidence that it was not culpable for the alleged 2015-2016 conduct that supported the punitives award.[15] If nothing else, then, the judgment must be vacated to give BASF a fair opportunity to defend itself against the joint punitives award.

*Fourth*, and finally, joint liability was unsupported even under the District Court's erroneous theory that punitive damages are automatically joint if "the tortious acts were clearly performed within the scope of partnership authority and business" or "in the course of partnership business." Add. 29 (quoting *Blue*, 786 F.2d at 353, and *Blanks*, 450 S.W.3d at 402). All the District Court found was that "Monsanto's conduct in releasing the Xtend seed without a corresponding herbicide in 2015-2016" was "*in furtherance of* the joint venture," Add. 30 (emphasis added)—*not* that the release was within the scope of the partnership authority or business. To the contrary, the evidence was clear that Monsanto's decision about the release dates was independent of any authority BASF had, nor did any BASF

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[15] During the closing argument at the first phase of trial, and after the off-the-record conference where the District Court mentioned its novel interpretation of *Blanks*, BASF did address the possibility that a joint-venture verdict could lead to punitive damages liability for BASF. But far from acceding to such joint liability, BASF's counsel merely presented *Bader*'s position on joint liability and urged the jury not to go down that road by rejecting the joint venture claim to begin with. *See, e .g.*, Appx842. BASF can hardly be faulted for outlining what Bader might try to assert; the key question is what governing rulings by the court were in place at the time.

component of the "DT system" stand to benefit from the early release because BASF did not release the Engenia herbicide until 2017. *See supra* pp. 11, 39-40.

### B. The Amount Of Punitive Damages Is Unconstitutionally Excessive.

The punitive damages award itself also violated due process because it is unconstitutionally excessive. Recall that Bader's 970-acre farm, Appx396, generates under $200,000 in profits each year. *See supra* pp. 16, 31-32. And yet the jury initially awarded compensatory damages of $15 million, and a whopping $250 million judgment in punitive damages. Although the District Court reduced the punitive award to $60 million, Add. 51, that decision was itself arbitrary, and the amount remains grossly excessive.

Both "unlimited jury discretion" and "unlimited judicial discretion" "in the fixing of punitive damages may invite extreme results." *Haslip*, 499 U.S. at 18. For that reason, discretion must be cabined to provide a "definite and meaningful constraint." *Id.* at 22. The "traditional common-law approach" to satisfy this constitutional requirement is for a jury to make an initial determination and then for that determination to be searchingly "reviewed by trial *and appellate* courts to ensure that it is reasonable." *Id.* at 18 (emphasis added). Given appellate courts' independent role in the process, they should further reduce an award where due process requires, even if the trial court has already reduced it. *See, e.g.*, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir. 2002) ("we further

reduce the punitive damages award"); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 577-578 (8th Cir. 1997) (similar).

"[C]ourts reviewing punitive damages" must "consider three guideposts": (1) "the degree of reprehensibility of the defendant's misconduct"; (2) "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases," and (3) "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages." *State Farm*, 538 U.S. at 418. The District Court recognized that the "most important indicium," *Gore*, 517 U.S. at 575, "supports a reduction" because Monsanto's conduct "did not involve actual malice" and "involved only economic damages as opposed to physical harm." Add. 49. And on the civil-penalty guidepost, it found "there is no comparable civil penalty," but treated a violation of Missouri's Pesticide Registration Act, which carries a maximum fine of only $1,000, as the closest analogue proposed. *See* Add. 48-49; Mo. Rev. Stat. § 281.310.

Thus, the District Court's reasoning for sustaining a gigantic award came down to the ratio between punitive and compensatory damages. The extent of the court's analysis was to survey Eighth Circuit cases, determine that "a four-to-one ratio is likely to survive any due process challenge[ ]" on appeal, and then treat that as the appropriate ratio without explaining why it was appropriate in this case. Add. 51 (quoting *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009)).

Picking the largest number the court thinks will avoid reversal is hardly the kind of reasoned, case-specific, independent review of reasonableness that the Due Process Clause requires. *See Haslip*, 499 U.S. at 18.

To start, the ratio it imposed is closer to 8:1 than 4:1 because the punitive damages are based only on the 2015-2016 period, whereas the total compensatory damages covered a five-year span from 2015-2019. *See* Appx843-844, Appx846. Although Bader did not provide a basis to allocate damages by year, even assuming generously that half the compensatory damages can be attributed to 2015-2016, then a $60 million award would be *eight* times more than the compensatory award. Under the District Court's mechanical ratio logic, the award would need to be cut in half.

Nor is a 4:1 ratio permissible here. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-515 & n.28 (2008). The compensatory damages here were plainly substantial; in fact, 15 times higher than the award judged "substantial" in *State Farm*. 538 U.S. at 426. This Court has followed *State Farm*'s guidance and held to a 1:1 ratio in cases with substantial compensatory awards. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (enforcing 1:1 ratio in case involving a $4 million compensatory award for cancer claims against cigarette manufacturer); *Williams v.*

*ConAgra Poultry Co.*, 378 F.3d 790, 798-799 (8th Cir. 2004) (holding 1:1 ratio appropriate where compensatory award was $600,000). Higher ratios are appropriate only where "a particularly egregious act has resulted in only a small amount of economic damages," so that compensatory damages alone are an insufficient deterrent. *State Farm*, 538 U.S. at 425 (internal quotation marks omitted); *see also Ondrisek v. Hoffman*, 698 F.3d 1020, 1029 (8th Cir. 2012) (This Court has rarely reviewed an award "exceeding $1 million with a ratio to compensatory damages greater than 1:1.").

The District Court relied on cases in which this Court found ratios above 1:1 appropriate, Add. 51, but none is comparable. All involved either incredibly reprehensible intentional torts, much smaller compensatory awards, or both. *See Ondrisek*, 698 F.3d at 1023-24 (religious cult leader who had children severely beaten); *Quigley v. Winter*, 598 F.3d 938, 953-954 (8th Cir. 2010) (approximately $14,000 compensatory award for serial sexual harassment by landlord of a financially vulnerable tenant with small children); *Wallace*, 563 F.3d at 359-361 ($30,000 compensatory award for victim of sexual harassment fired for complaining); *see also Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 460-462 (8th Cir. 2020) ($20,201 compensatory award for "intentional deceit" in fraudulently selling car with safety hazards).

Given the substantial compensatory award in this case and the lack of any reprehensibility that would justify a uniquely high damages award, the Supreme Court's and this Court's precedents indicate that a 1:1 ratio is the outer limit of what is appropriate. The punitive damages award should therefore be reduced to no more than $7.5 million to reflect a 1:1 ratio with the share of compensatory damages plausibly attributable to the 2015-2016 period.[16]

[16] Under Rule 28(i), BASF adopts by reference the arguments in Section III of Defendant-Appellant Monsanto's opening brief regarding the unavailability of punitive damages and the unconstitutionally excessive punitive damages award.

## CONCLUSION

For these reasons, the judgment of the District Court should be reversed or, alternatively, vacated.

Respectfully submitted,

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