IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,	)	
	)	
Plaintiff,	)	**MDL No. 1:18-md-02820-SNLJ**
	)	
v.	)	**Indiv. Case No. 1:16-cv-00299-SNLJ**
	)	
MONSANTO COMPANY and BASF CORPORATION,	)	
	)	
Defendants.	)	

MONSANTO COMPANY'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL ON ALL CLAIMS[1]

[1] This brief meets the Court's 70-page limit when formatted in 12-point font for text and 10-point font for footnotes. It is formatted in 13-point font at the Court's request. In addition, transcript pages for all live trial testimony cited in this brief can be found in Exhibit A. All trial exhibits cited can be found in Exhibit B.

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The "novel" expansion of Missouri tort law in this case resulted in a shocking $265 million award against Monsanto for purported crop damage from an unidentified dicamba herbicide used by unidentified third parties. Under Plaintiff's unprecedented theory, Monsanto's commercialization of Xtend seeds was tortious because it led to third-party farmers unlawfully applying other manufacturers' dicamba herbicides over crops grown from the seed. But the U.S. Department of Agriculture expressly permitted the commercialization of Xtend seeds without an approved dicamba herbicide for use with the seeds, and farmer advocacy groups lobbied for the seeds due to their many other benefits, including increased yield potential, higher fiber quality, and tolerance to different herbicides. Even Plaintiff's weed science expert, Dr. Ford Baldwin, testified to the benefits of Xtend seeds and that they could be safely used with other herbicides. Moreover, Monsanto took numerous steps to prevent unlawful use of dicamba herbicide with the seeds, including placing a prominent warning on the seeds stating "DO NOT APPLY DICAMBA."

Under well-settled Missouri law, Monsanto is not legally responsible for the ***unlawful*** acts of a ***third party*** who improperly uses ***another manufacturer's product***. But that is precisely what happened here. Plaintiff did not even attempt to show that any damage to the orchards was caused by a Monsanto dicamba herbicide. Nor could it. Instead, Plaintiff relied solely on a novel theory of liability that no Missouri court has ever permitted. Because federal courts sitting in diversity should not expand state tort law, the Court must enter judgment for Defendants.

Moreover, even if the Court permits such a novel expansion of Missouri law, Plaintiff's case fails even under Plaintiff's own theory. Among other things, Plaintiff cannot show actual or proximate causation. Dicamba herbicides were put to many lawful uses around Bader Farms, which could have caused the alleged damage. Further, even if a third-party application of an unlawful, unapproved dicamba to an Xtend crop had caused the damage, it was not foreseeable because it was illegal and contrary to Monsanto's express warning provided with every bag of Xtend seeds. The evidence Plaintiff claimed would establish foreseeability despite those facts never materialized at trial. Missouri law does not permit liability based on an expectation that consumers will violate the law and misuse your product—let alone someone else's product.

The instructions submitting this unprecedented theory to the jury also deviated from established Missouri law in ways that were material and prejudicial. At Plaintiff's request, the instructions described "the product" as a "system" encompassing not just Monsanto's Xtend seeds, and other manufacturers' Xtend seeds, ***but also dozens of third-party dicamba herbicides which were unlawful to use with crops grown from Xtend seeds***. The jury was then asked whether Monsanto failed to use ordinary care with respect to the design of, and warnings for, that ***unlawful combination of products***—a prejudicial question that all but answers itself. The claims are also preempted by federal law because, among other issues, the jury's imposition of liability for selling the Xtend seeds without an accompanying approved dicamba herbicide conflicts with USDA's decision to permit commercialization of the seeds in 2015, prior to EPA's decision to register XtendiMax or any other dicamba herbicide for in-crop use.

Even setting aside these glaring and fatal deficiencies in Plaintiff's case, and the others discussed below, the compensatory damages award cannot stand. Missouri law does not permit an award of lost profits for crop damage—and especially not for future crop damage—because such damages are unduly speculative. Moreover, even if it were proper for a federal court sitting in diversity to expand state law, it should not do so here because Plaintiff's asserted damages are fundamentally speculative and based on an expert who made erroneous, counter-factual assumptions.

Plaintiff's novel and unprecedented theory in this case, and the jury verdict resulting from it, was legally and profoundly flawed from the start and in countless ways. Put simply, this case should never have gone to the jury, and the Court should enter judgment as a matter of law. At the very least, Monsanto is entitled to a new trial.

LEGAL STANDARDS

Federal Rule of Civil Procedure 50(b) states in pertinent part that "[i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a) [before the verdict], ... the movant may file a renewed motion for judgment as a matter of law" after the verdict. A motion for judgment as a matter of law presents a legal question to the district court whether there is a "legally sufficient evidentiary basis" to support a jury verdict. *Sip-Top, Inc. v. Ekco Grp., Inc.*, 86 F.3d 827, 830 (8th Cir. 1996). In ruling on a motion for judgment as a matter of law, the court "may not accord a party the benefit of unreasonable inferences or those at war with the undisputed facts." *Id.* (internal quotation marks omitted). "When the record contains no proof beyond speculation to support [a] verdict, judgment as a matter of law is appropriate." *Id.*

Rule 50(b) also provides that a party may file with the renewed motion an alternative motion for new trial under Rule 59. "[A] district court may grant a new trial when the first trial resulted in a miscarriage of justice, through a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial." *Barfield v. Sho-Me Power Elec. Coop.*, 2017 WL 4390272, at *1 (W.D. Mo. Sept. 29, 2017). "In determining whether a verdict is against the weight of the evidence, a trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *Ryan ex rel. Ryan v. McDonough Power Equip., Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) (internal quotation marks and citation omitted).

A new trial also is warranted "if a party's substantial rights are prejudiced by instructional error." *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 720 (8th Cir. 2008). Refusal to instruct on a defense supported by the evidence is an abuse of discretion requiring a new trial. *See Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494, 501 (8th Cir. 2010) ("The refusal to instruct the jury on a defense that was supported by sufficient evidence to create a triable issue was an abuse of discretion."). Jury instructions that misstate the burden of proof also may require a new trial. *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 714 (8th Cir. 2001).

ARGUMENT

Monsanto is entitled to judgment as a matter of law for several separate and independent reasons. Section I explains that Missouri law on causation bars Plaintiff's

negligence claims, which seek to hold Monsanto liable for injuries caused by third-party products it did not manufacture or sell. Moreover, even if Plaintiff's novel theory were recognized under Missouri law—and it is not—Plaintiff failed to offer the causation and other proof that its theory required.

Section II explains that Plaintiff's claims fail for the independent reason that Monsanto had no legal duty to protect Plaintiff from harms caused by third-parties' applications of third-party products that Monsanto did not manufacture or sell. Sections III and IV explain federal preemption, failures of proof, and instructional errors related to Plaintiff's negligent design and negligent failure to warn claims. Section V explains the inconsistency in the jury's joint venture and conspiracy findings and failures of proof and instructional error related to those claims. Section VI addresses errors relating to compensatory damages, and Section VII addresses prejudicial evidentiary errors.

To the extent the Court finds that any of Plaintiff's theories of liability—negligent design or negligent failure to warn for either time period (2015-2016 or 2017-present)—was improperly submitted to the jury, the Court must order a new trial on all issues because of the nature of the general verdict. The Court submitted two liability verdict directors against Monsanto, Instructions 9 and 10. ECF #554 at 9-10. Both were based on MAI 25.09, and each submitted a negligent design and a negligent failure to warn theory in the disjunctive, instructing the jury to award Plaintiff damages if it found for Plaintiff on either theory. *Id*. In such a circumstance, the Eighth Circuit has held that "when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand." *Dudley v. Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986); *see also Ross-*

Paige v. St. Louis Metro. Police Dep't, 492 S.W.3d 164, 175-76 (Mo. 2016) (reversing and remanding jury verdict when one of the disjunctive theories of liability was not supported by sufficient evidence); *Howard v. Mo. Bone & Joint Ctr., Inc.*, 615 F.3d 991, 996 (8th Cir. 2010) ("When, as here, a verdict-directing 'instruction is given in the disjunctive, there must be evidence to support the submission of each allegation.'"). For this reason, a finding that ***either*** negligence theory for ***either*** time period was improperly submitted to the jury requires the Court to order a new trial on all of Plaintiff's remaining claims.

I. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE ON CAUSATION.

A. The *Benjamin Moore* Causation Requirement Bars Plaintiff's Negligence Claims Because Plaintiff Cannot Prove Monsanto Manufactured the Herbicide Alleged to Have Caused the Harm.

Plaintiff alleged that, in 2015 and each year since, the peach orchards were harmed by exposure to a dicamba herbicide. Under Missouri law, to recover against Monsanto for this alleged harm, under any product liability theory, Plaintiff was required to prove that Monsanto manufactured or sold the dicamba herbicide that caused the alleged harm. At trial, Plaintiff failed to offer that proof. Thus, the Court correctly found that Plaintiff's strict product liability claims could not survive. But the Court incongruously and incorrectly allowed Plaintiff's negligent design and negligent failure to warn claims to proceed. Those claims are equally barred by Missouri's causation requirement for product-based claims, and Monsanto is entitled to judgment in its favor on those claims as well.

It is black-letter law that a threshold requirement for proving actual causation in a product liability case is proof that the defendant manufactured the injury-causing product. The Missouri Supreme Court has explained that "where a plaintiff claims injury from a product, 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); *see also Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243-47 (Mo. 1984) (plaintiffs could not meet proximate causation requirement without proof that the defendant manufactured the product alleged to have caused the injury). For the years 2015 and 2016, Plaintiff could not possibly prove that Monsanto manufactured the dicamba herbicide that allegedly harmed the orchards, because Monsanto did not sell dicamba herbicide in those years. 1/28/20 Trial Tr. 388:21-389:16 (Carey). Plaintiff also lacked the required proof that Monsanto's XtendiMax® with VaporGrip® Technology ("XtendiMax"), which became available in 2017, was the dicamba herbicide that allegedly harmed the orchards in later years. *See* 12/31/19 Mem. & Order (ECF #288) at 5 ("Plaintiffs suggest they do not need to prove it was XtendiMax that harmed their orchards."). Because Plaintiff failed to prove that Monsanto manufactured or sold the product (dicamba herbicide) that allegedly harmed the orchards, Monsanto was entitled to entry of judgment in its favor on all of Plaintiff's product-based claims—both strict liability and negligence—for lack of proof of causation.

After the close of evidence, the Court erroneously held that *Benjamin Moore*'s causation requirement ***did not apply*** to Plaintiff's negligence product liability claims. *See* 2/13/20 Trial Tr. 2344:23-2345:01 ("The other point, too, I would make is that I do think

that the lead paint case from 2007 is applicable to a products liability case. I don't think it's applicable to the straight negligence case."); *id.* at 2294:19-25 ("I am intimately familiar with the *Benjamin Moore* case, as you know. And I think it's distinguishable. As we discussed earlier, though, I do think it would have applied to the products liability claim. But, at this point, only negligence is being submitted. So I don't think it applies for the other reason that we are not talking about specific products that have to be identified anymore.").

But Missouri law is clear. When a plaintiff seeks to recover for injuries caused by a product, the causation proof required is the same regardless of the particular product-based liability theory (strict liability or negligence) asserted. Indeed, the Missouri Supreme Court has explained that "***where a plaintiff claims injury from a product***, actual causation can be established only by identifying the defendant who made or sold that product." *Benjamin Moore*, 226 S.W.3d at 115 (emphasis added). Thus, a plaintiff claiming injury from a product must prove that the defendant made or sold the product alleged to have caused the harm, regardless of the liability theory invoked.

The product-causation requirement applied in *Benjamin Moore* was first articulated by the Missouri Supreme Court in *Zafft*, which illustrates the point. In *Zafft*, the plaintiff "sought recovery on theories of breach of implied warranty; negligence per se in failing to comply with the federal drug laws; ***common law negligence*** in failing to test, or inadequately testing the product, and in failing to warn of its potential harm; ***and strict liability*** in tort." 676 S.W.2d at 244 (emphases added). "The trial court determined that under Missouri law the admitted inability of plaintiffs to identify which, if any, of the

defendants made the product that allegedly caused their injuries was fatal to their claims and granted summary judgment for defendant drug manufacturers" on all theories. *Id*. at 242. The Missouri Supreme Court affirmed. *Id*. More than two decades later, in *Benjamin Moore*, "[t]he defendants sought summary judgment, arguing that ***product identification was necessary to hold them liable under this or any tort theory***, citing to *Zafft v. Eli Lilly & Co*." *Benjamin Moore*, 226 S.W.3d at 113 (emphasis added). The trial court agreed, granting summary judgment in favor of the defendants, and the Missouri Supreme Court affirmed. *Id*. The same analysis applies here.

Monsanto is entitled to entry of judgment in its favor on Plaintiff's negligence claims because Plaintiff failed to prove that Monsanto manufactured or sold the dicamba herbicide alleged to have caused harm. For 2015-2016, Plaintiff could not possibly have offered the necessary proof because Monsanto did not sell any dicamba herbicide in those years. For 2017 forward, Plaintiff could not identify the particular application of dicamba herbicide that allegedly harmed the orchards and, thus, could not prove it was Monsanto's XtendiMax herbicide. The lack of required proof of causation entitles Monsanto to judgment as a matter of law.

B. Even if Plaintiff's "System" Theory Were Viable, Monsanto Still Would Be Entitled to Judgment as a Matter of Law on Plaintiff's Claims for Failure to Prove Causation.

As shown above in Section I.A., Monsanto is entitled to judgment as a matter of law because Plaintiff did not prove that Monsanto manufactured the allegedly injury-causing dicamba herbicide. Plaintiff argued that its claims should survive on the ground that Xtend seed and dicamba herbicide together formed a "crop system" that could be

treated as the injury-causing product. But even if Plaintiff's novel "system" theory were viable and Plaintiff's causation burden could have been met through proof that the injury-causing herbicide was applied to an Xtend crop, as Plaintiff argued contrary to Missouri law,[2] Monsanto is still entitled to entry of judgment in its favor because Plaintiff did not prove even that.

For all years, Plaintiff was required to prove that Monsanto's conduct was both a but-for and a proximate cause of the damage to the orchards. Plaintiff failed to adduce sufficient evidence on either front. At the close of Plaintiff's case, the Court recognized that Plaintiff's causation evidence was "thin," but ultimately decided that there was "just barely enough" to submit the claim for 2015-2016. 2/10/20 Trial Tr. 1675:21-23. Because the 2015-2016 negligence claims are the foundation for the $250 million punitive damage award entered against Monsanto, they warrant particularly close post-trial scrutiny. In fact, Plaintiff's "thin" causation evidence for 2015-2016 is insufficient to support the verdict.

[2] Plaintiff asked the Court to find the causation requirement satisfied, without evidence that Monsanto manufactured the injury-causing product, if Plaintiff could prove that the injury-causing dicamba herbicide was used in combination with a Monsanto product, namely Monsanto's Xtend seeds. The Court acquiesced. *See* 12/31/19 Mem. & Order (ECF #288). As noted above, Monsanto contends that that ruling was error. But Plaintiff failed to introduce evidence sufficient to support even that theory.

1. Plaintiff Failed to Make a Submissible Case of But-For Causation Under Its "System" Theory Because Plaintiff Did Not Offer Sufficient Evidence to Support a Finding that Its Orchards Were Damaged by Dicamba Herbicide Applied to an Xtend Crop

a. 2015-2016

Plaintiff's "system" theory required Plaintiff to prove that the dicamba herbicide that allegedly harmed the orchards was applied to an Xtend crop. Plaintiff failed to meet its burden of proof on causation because Plaintiff did not offer sufficient evidence to support a finding that the orchards were damaged by a dicamba herbicide applied to an Xtend crop. In 2015 when Monsanto launched Xtend cotton, and in 2016 when it launched Xtend soybeans (1/29/20 Trial Tr. 417:15-23 (Carey)), the application of dicamba to an Xtend crop was unlawful, but dicamba could lawfully be used in many other applications. At trial, there was evidence that many lawful applications of dicamba herbicide actually were made around Bader Farms. In contrast, for 2015, Plaintiff offered no evidence of any unlawful application of dicamba to Xtend cotton in the vicinity of Bader Farms. And for 2016 Plaintiff offered evidence of only ***a single*** unlawful application made to an Xtend crop, approximately one to two miles from Bader Farms. Plaintiff's 2015-2016 negligence claims fail because the jury's finding that the orchards were harmed by that single, distant application to an Xtend crop, as opposed to one of the many lawful dicamba applications made around Bader Farms, is pure speculation.

It is undisputed that dicamba has been used for years in many applications, including in corn, wheat, and for pre-plant burndown. 1/30/20 Trial Tr. 672:3-674:4, 756:5-17 (Carey). Prior to the launch of Xtend seeds, dicamba was the fifth most used

chemical class for weed control in the United States. 1/28/20 Trial Tr. (Magin Dep. 336:17-337:1) (ECF #422-2). Dicamba is applied not only to cereal crops, but also to pastures and other grass crops. 2/6/20 Trial Tr. 1263:15-1264:2 (Baldwin). Dicamba lawfully may be applied during the growing season for post-emergence applications in corn and wheat, and for burndown applications prior to planting double-crop soybeans. 1/30/20 Trial Tr. 674:1-675:8 (Carey). The evidence also established that farmers around Bader Farms actually did make lawful dicamba applications in 2015 and 2016. Plaintiff's causation expert, Dr. Baldwin, testified that he knew there was corn planted around Bader Farms in 2015 and 2016. 2/7/20 Trial Tr. 1478:16-19. Bill Bader, owner of the orchards and of Bader Farms, testified that, in 2015, the orchards were exposed to dicamba that had been applied for burndown or applied in corn. 2/5/20 Trial Tr. 1045:16-22, 1050:11-1051:5. Mr. Bader and Dr. Baldwin alike testified that dicamba can legally be used for these purposes—unrelated to Xtend seed—as late as July. 2/5/20 Trial Tr. 1040:21-1041:7 (Bader); 2/6/20 Trial Tr. 1409:5-1410:15 (Baldwin). And, Dennis Cravens, a local farm hand, testified that farmers around the orchards applied dicamba in corn, and used it in pre-plant applications and for burndown. 2/3/20 Trial Tr. 856:17-857:8.

In contrast, at trial Plaintiff failed to introduce evidence that Xtend seeds were actually planted in any of the fields near the orchards in 2015, much less Monsanto's Xtend seeds. Plaintiff did not introduce any planting records for any nearby fields for 2015. Instead, it relied solely on evidence that some Xtend seed sales were ***registered*** to addresses within a ***15-mile*** radius of Bader Farms. 2/6/20 Trial Tr. 1298:18-1300:6, 1316:5-1317:5 (Baldwin). But the undisputed trial testimony established that the

shipping addresses for Xtend seeds do not identify where (or if) the seeds were actually planted. 1/31/20 Trial Tr. (Starling Dep. 261:25-263:22) (ECF #445-3). Thus, Dr. Baldwin conceded that he could not deduce from the seed sale information in what fields Xtend seeds were actually planted. 2/6/20 Trial Tr. 1300:1-6, 1403:5-8.

But even if Plaintiff had introduced sufficient evidence that Xtend seeds were planted in fields near the orchards in 2015, it still would have needed evidence that a farmer made an unlawful application of dicamba to an Xtend field, and that such unlawful application caused the harm. But Plaintiff introduced no herbicide application records, nor any other evidence that any neighboring farmer made an unlawful application of dicamba to an Xtend crop in 2015. In fact, only three witnesses testified about dicamba applications in the vicinity of Bader Farms in 2015, none of whom supplied this necessary causal link.

- *First*, Dennis Cravens testified that he was ***unaware of any application*** of dicamba over-the-top of any Xtend crop during 2015. 2/3/20 Trial Tr. 856:7-13.
- *Second*, Dr. Baldwin testified that he did not visit Bader Farms in 2015, did not visit any non-Xtend soybean field in Missouri in 2015, and had ***no evidence of any application*** of dicamba over-the-top of any Xtend crop in 2015. 2/6/20 Trial Tr. 1300:20-21, 1428:11-16; 2/7/20 Trial Tr. 1487:9-11; *see also* 2/6/20 Trial Tr. 1403:25-1404:4 (admitting he did not have spray records or farmer statements to confirm what herbicide any farmer was spraying on any specific field).
- *Third*, Bill Bader testified that he could only speculate that an unlawful application was made. 2/5/20 Trial Tr. 1055:12-1056:18. In fact, he testified that he has ***no personal knowledge of any application*** of dicamba over-the-top of any Xtend crop in 2015. *Id.* at 1058:20-1060:2.

In short, there is no evidence in the record to support a finding that any unlawful application of dicamba was made to an Xtend crop in the vicinity of the orchards in 2015,

much less that any such unlawful application moved off-target and harmed the orchards.

Plaintiff's evidence was equally insufficient for 2016. Mr. Bader again testified that, as with 2015, he had no support for his speculation that neighboring farmers unlawfully applied dicamba over Xtend crops and caused Plaintiff's damage. 2/5/20 Trial Tr. 1065:8-18 (agreeing assertions were solely "speculation"). The only evidence that an unlawful application of dicamba was made to an Xtend crop anywhere in the general vicinity of the orchards in 2016 was the testimony of Dennis Cravens. But Mr. Cravens testified that the single unlawful application he witnessed was at least one or two miles away from Bader Farms, and he did not know whether that application moved off-target. 2/3/20 Trial Tr. 852:15-853:22, 865:3-6. Nor did he provide any details that might support an inference of possible off-target movement onto the orchards. For instance, he did not provide the date on which he allegedly observed the unlawful application or the wind or weather conditions at the time of application.

In short, Plaintiff offered no evidence to prove, or even justify an inference, that any dicamba that injured the orchards in either 2015 or 2016 came from an unlawful application to an Xtend crop, rather than from any of the number of lawful uses of dicamba by neighboring farmers. Under Missouri law, "[i]f the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show ***with reasonable certainty*** that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action." *Zafft*, 676 S.W.2d at 246 (emphasis added) (citation omitted).

Plaintiff's evidence fails to clear this bar, entitling Monsanto to judgment as a matter of law on its 2015-2016 negligence claims.

b. 2017-present

Plaintiff's claims for 2017-present fare no better on but-for causation. Plaintiff did not prove the dicamba that allegedly harmed the orchards was XtendiMax, as required by Missouri law, or that it was applied to an Xtend crop, as required by Plaintiff's novel "system" theory.

First, Plaintiff failed to provide legally sufficient evidence that an application of XtendiMax to a nearby crop volatilized, moved onto the orchard, and caused its alleged damage. Dr. Baldwin, Plaintiff's sole causation expert, did not testify that Plaintiff's alleged exposure was due to an application of XtendiMax. Instead, Plaintiff relied solely on Dennis Cravens' testimony that he saw "packaging with the brand name XtendiMax" on Chad Fullerton's farm in 2017, which was two and a half miles from the closest point of Bader Farms. *See* 2/3/20 Trial Tr. 853:25-855:9. That testimony is insufficient to provide the requisite evidentiary basis, because Mr. Cravens offered no information that could plausibly allow the jury to infer that any application of XtendiMax made by Mr. Fullerton volatilized and caused Plaintiff's harm. Indeed, Mr. Cravens did not even testify that Mr. Fullerton applied XtendiMax prior to the time that Mr. Bader discovered the alleged dicamba symptomology. Without this testimony, the jury could only speculate that the orchards were harmed by Chad Fullerton's application. Put simply, Plaintiff sought to carry its entire evidentiary burden for its 2017-present claims with testimony from one individual, who claims he saw a package labeled "XtendiMax" on a

farm two-and-a-half miles away from Plaintiff's orchards at an unspecified time during the 2017 growing season. *See id.* This evidence is woefully insufficient as a matter of law. *See Nolte v. Pearson*, 994 F.2d 1311, 1316 (8th Cir. 1993).

In an effort to overcome this fatal deficiency in its proof, Plaintiff argued that its but-for causation burden could be satisfied with expert testimony regarding "atmospheric loading" of dicamba. 2/7/20 Trial Tr. 1316:17-1317:5, 1504:16-24 (Baldwin). But this "cloud" theory—that dicamba from unknown manufacturers, possibly including Monsanto and possibly not—does not save Plaintiff's claims. A "cloud" theory does nothing to identify the products at issue. Multiple manufacturers sold Xtend seed, so any dicamba sprayed over Xtend seed—approved or unapproved—was not necessarily used over a Monsanto product. *See* 2/7/20 Trial Tr. 1513:21-1514:13 (Baldwin); 2/11/20 Trial Tr. 2098:6-2099:8 (Emanuel).[3] Similarly, four different manufacturers sold dicamba approved for use with Xtend seed, two of which are not defendants, and numerous other manufacturers sold dicamba formulations that were not approved for use with Xtend seeds, but that could be used lawfully in other applications. 1/29/20 Trial Tr. 619:15-622:21 (Carey). Dicamba use in many of these permutations bears ***zero relationship to Monsanto***, or even to any so-called "crop system." Plaintiff's liability theory attempts to shift the burden of proof and require Monsanto to prove that it was a dicamba application unrelated to any Monsanto product that caused Plaintiff's injury. Missouri law does not

[3] This same fact dooms Plaintiff's 2015-2016 claims as well. Even if the seed, rather than the dicamba, were the relevant product (it is not), and even if Plaintiff had offered legally sufficient evidence that dicamba applied to an Xtend crop volatilized and move to Bader Farms (it did not), it still would not have identified any Monsanto product because not all Xtend seed is a Monsanto product.

allow Plaintiff to shift its product-identification burden to Monsanto and require Monsanto to prove that its products did not cause the harm.[4] *See*, *e.g.*, *Zafft*, 676 S.W.2d at 245-46 (rejecting causation theory under which plaintiff would identify manufacturers whose products might have caused the alleged harm and "[t]he burden then shifts to each defendant to exonerate itself").

2. Plaintiff Failed to Present the Necessary Admissible Expert Causation Testimony.

Plaintiff's actual causation evidence was insufficient in other ways as well. To make a submissible case that the alleged symptomology in the orchards was actually caused by dicamba, and not some other factor, Plaintiff was required to introduce competent expert testimony on that point. *See Arias v. DynCorp*, 752 F.3d 1011, 1016 (D.C. Cir. 2014) (expert testimony required on issue of specific causation in case alleging that herbicide caused crop damage). Plaintiff's only causation expert was Dr. Baldwin. But Dr. Baldwin could not provide the necessary diagnostic testimony for various reasons. First, he did not visit the orchards or otherwise observe the symptomology reported by Plaintiff in 2015 or 2016. Thus, he was incapable of diagnosing the cause of the alleged symptomology in those years. *See* Fed. R. Evid. 702 (expert testimony must

[4] Plaintiff's failure to identify a specific field and dicamba application as the alleged source of its harm deprived Monsanto of the opportunity to identify potential defenses relating to the alleged source. For instance, Monsanto had no ability to explore whether the alleged source field was actually planted with Xtend seeds sold by Monsanto, whether the dicamba herbicide allegedly applied to the field was XtendiMax and, if so, whether it was applied according to label requirements, and whether the weather conditions at the time of application supported Plaintiff's theory of off-target movement onto the orchards. The jury likely would have come to a different result if they knew the cause of dicamba moving off-target was an applicator illegally applying dicamba aerially as part of burn-down.

be "based on sufficient facts or data" and be "the product of reliable principles and methods"); *DMS Imaging, Inc. v. Dwyer Instruments, Inc.*, 2010 WL 11618964, at *3 (W.D. Mo. July 12, 2010) (expert causation testimony stricken under Rule 702 when the expert did not inspect the subject product during the relevant time period, and based his opinion solely on the statements of the company's engineers).

Second, Dr. Baldwin's causation opinions for all years should have been excluded, and should be disregarded for the reasons set out in Monsanto's *Daubert* motion. ECF #217 & #260. Monsanto renews and incorporates its arguments in those pleadings in support of this motion.

Third, Dr. Baldwin impermissibly assumed causation and supplied the facts on which his opinions were based. *See Craddock v. Greenberg Mercantile, Inc.*, 297 S.W.2d 541 (Mo. 1957) (affirming post-trial judgment as a matter of law for defendant because the opinions of plaintiff's expert lacked sufficient evidentiary basis independent of the expert's own testimony and assumed causation). Dr. Baldwin supplied his own "facts" to support causation, testifying only that his opinions would "make sense" or "stand to reason." *See, e.g.*, 2/6/20 Trial Tr. 1300:1-12, 1496:13-14, 1402:19-24. Not only that, but he impermissibly assumed causation from the start. *See Craddock*, 297 S.W.2d at 548 ("[t]o start with an assumption or conclusion that [incident] occurred, and then to give expert opinion as to its cause and mechanics, is almost to lift one's self by his own bootstraps"). He submitted an affidavit in April 2017 stating "unequivocally … that it was dicamba that was causing the problems even though his only visit to Bader Farms was in February 2017 when, as he admitted, there were no peach tree leaves, row

crops, or other vegetation to inspect. 2/6/20 Trial Tr. 1379:19-1383:1. He also testified that the first time he ever drove to Bader Farms he decided, driving there, that "if Bader Farms is setting [sic] where I think it's setting [sic], then it's going to be very, very difficult for him to live in—in a world, so to speak, that's going to have very high uses of dicamba." *Id.* at 1303:17-1304:21; *see also id.* at 1388:15-21 (testifying that he "felt like there was a high percentage chance that [the] farm had been exposed to dicamba" before ever visiting).[5]

And, fourth, even if Dr. Baldwin were qualified to diagnose dicamba symptomology and had actually observed and analyzed the symptomology reported in 2015 and 2016, his opinions still could not support the verdict because he failed to testify to the facts necessary to link any dicamba exposure to an application made to an Xtend crop. Plaintiff's causation case was, in essence, that dicamba volatilizes. But that is not causation. To make a submissible case on causation for 2016, for example, Dr. Baldwin needed to testify that the single unlawful application Mr. Cravens witnessed (i) could have moved off-target in sufficient quantity to cause yield loss on the orchards one or two miles away, and (ii) that it in fact did so. Dr. Baldwin offered neither opinion. He failed to offer testimony regarding the distance or amount of dicamba that could move off-target, the amount of dicamba required to cause yield loss in peach trees, or evidence of the dicamba levels on Bader Farms. *Cf. Bland v. Verizon Wireless, LLC*, 538 F.3d 893,

[5] There are many examples of Dr. Baldwin simply assuming causation because it "stood to reason" or was "common sense" or he decided before his first inspection. *See, e.g.*, 2/6/20 Trial Tr. 1326:1-6; 1394:25-1395:1; 1359:16-1360:7.

898-99 (8th Cir. 2008) (affirming exclusion of expert causation opinion and grant of summary judgment to defendant where plaintiff ingested Freon and immediately suffered symptoms of asthma, because expert did not testify regarding the amount of Freon necessary to cause asthma or the amount to which plaintiff was actually exposed); *Marsch v. Exxon Mobil Corp.*, 2005 WL 2246006, at *11 (E.D. Mo. Sept. 15, 2005) (excluding causation opinion where plaintiff's exposure to benzene was established, benzene was known to cause reduced platelet count, plaintiff's platelet count dropped while he was in defendant's employ and improved when he was away from work, but expert did not quantify exposure levels).

Plaintiff bears the burden on causation. Courts have granted judgment as a matter of law for defendants under similar circumstances in cases involving alleged off-target movement of a pesticide. And they have done so even where plaintiffs' experts offered substantially more complete opinions on causation—*e.g.*, including transport distances and herbicide exposure levels—than Dr. Baldwin offered here. For instance, in *Kleiss v. Cassida*, 696 N.E.2d 1271 (Ill. App. 1998), the plaintiffs had failed to show sufficient evidence of causation—despite uncontroverted evidence that the dicamba there had been sprayed within a mile of plaintiffs' farm during the relevant period, and plaintiffs' expert with 20-30 years of weed science experience testified that dicamba could travel that far—because the only scientific studies in evidence did not support finding that dicamba moving that far could adversely impact yield. *Id.* at 1276-77 (affirming judgment notwithstanding the verdict for manufacturer of dicamba herbicide alleged to have moved off-target to injured plaintiffs' crops).

An expert in an off-target pesticide case cannot support causation without showing how far the pesticide can travel, how much traveled, and how much could cause the alleged injury *See, e.g.*, *Bauer v. Bayer AG*, 564 F. Supp. 2d 365, 367-68 (M.D. Pa. 2008) (granting summary judgment for a pesticide manufacturer despite expert opinion proffered by the plaintiffs that their honeybees had been exposed to defendant's insecticide product, because the only testing of exposure did not find levels that had been shown by scientific studies to cause the adverse effects alleged—*i.e.*, death and decreased production). Here, such opinions are utterly lacking. *See, e.g.*, 2/6/20 Trial Tr. 1398:8-13 (Baldwin) (no testing measured dicamba levels at Bader Farms); *id.* at 1428:17-20 (agreeing that no research ties a certain amount of dicamba exposure to yield loss in peach trees); 2/7/20 Trial Tr. 1482:2-4 (Baldwin) (testifying that he does not even know the concentration of vaporized dicamba that would be absorbed through peach stomates); *id.* at 1470:5-19 (admitting that "[t]here's no data or studies" on peach trees that multiple exposures to low doses would lead to a cumulative effect). As such, Dr. Baldwin's opinions are insufficient, as a matter of law, to support causation. Monsanto is entitled to judgment in its favor because Plaintiff failed to introduce the expert testimony necessary to support a finding that dicamba herbicide applied to an Xtend crop caused the harm.

3. In the Alternative, a New Trial Is Required Because the Verdict Was Against the Weight of the Evidence on Causation.

If the Court does not grant judgment in Monsanto's favor, it should grant a new trial because the verdict was against the weight of the evidence as to actual causation. First, Dr. Baldwin's opinions, discussed above, are too tenuous to support a verdict. *See*

Brown ex rel. Brown v. Syntex Labs., Inc., 755 F.2d 668, 673 (8th Cir. 1985) (affirming grant of defendant's motion for new trial where lab tests did not prove theory of plaintiff's expert, expert took "several unscientific analytical shortcuts," and "dismissed too quickly the possibilities" that the alleged injury was the result of other causes). Second, the overwhelming weight of the evidence was that armillaria root rot was the actual cause of any tree death on Bader Farms. Dr. Baldwin himself admitted that armillaria root rot was present on Bader Farms (2/6/20 Trial Tr. 1423:25-1424:2; 2/7/20 Trial Tr. 1454:21-23), a fact that was confirmed by genetic testing (2/10/20 Trial Tr. 1885:7-1886:16 (Brannen); 2/12/20 Trial Tr. 2162:3-5 (Schnabel)). Two plant pathologists with expertise in peach trees testified that the armillaria root rot found in the peach orchards will kill peach trees, and entire orchards, independent of any herbicide exposure. *See* 2/10/20 Trial Tr. 1870:15-1871:21; 1888:1-1889:1 (Brannen); 2/12/20 Trial Tr. 2150:6-13 (Schnabel). They were further able to confirm from aerial photographs that the root rot had been present on Bader Farms since ***long before*** the sale of Xtend seed. *See, e.g.*, 2/10/20 Trial Tr. 1889:3-1897:6 (Brannen). Dr. Baldwin did not refute this. *See* 2/6/20 Trial Tr. 1426:2-15 (Baldwin).[6] The weight of the evidence is

[6] Instead, Dr. Baldwin conjectured—despite no prior experience with armillaria, much less in peach trees—that the armillaria root rot attacked Plaintiff's peach trees because they were weakened by dicamba exposure. *See* 2/6/20 Trial Tr. 1424:9-19; 2/7/20 Trial Tr. 1454:13-16, 1458:1-9. This is not only inconsistent with empirical evidence, but unsupported by the literature. *See* 2/12/20 Trial Tr. 2151:7-9 (Schnabel) (testifying that the sole source on which Dr. Baldwin relied had been discredited on this point); *see also* 2/6/20 Trial Tr. 1359:6-15 (Baldwin); 2/7/20 Trial Tr. 1455:6-1459:11 (Baldwin) (admitting that he did not conduct a literature review for his one source).

manifestly against Plaintiff and the Court should order a new trial due to the resulting prejudice to Monsanto and manifest injustice that would result absent a new trial.

4. Monsanto Is Entitled to Judgment as a Matter of Law or New Trial Because of Failures of Proof and Errors Related to Proximate Causation

Even if Plaintiff could meet its actual causation burden with evidence that the injury-causing dicamba was applied to an Xtend crop—which it could not—and had offered that evidence—which it did not—Monsanto still would be entitled to judgment as a matter of law for the separate reason that the unlawful application of dicamba to an Xtend crop would be an intervening and superseding cause of Plaintiff's alleged harm. Alternatively, Monsanto is entitled to a new trial because the Court refused to instruct the jury on Monsanto's intervening and superseding cause defense even though there was evidence in the record to support it.

a. The Alleged Unlawful Application of Dicamba to Xtend Crops Constituted an Intervening and Superseding Cause of the Alleged Harm as a Matter of Law.

In 2015 and 2016, no dicamba herbicide was approved for use over Xtend crops and, thus, any such use was unlawful. 1/29/20 Trial Tr. 517:7-11 (Carey). In addition, the undisputed evidence showed that Monsanto specifically warned users in 2015 and 2016 that any application of dicamba to Xtend crops would violate federal law and instructed users ***not*** to make such applications. *Id.* at 445:4-9, 514:15-22; M-346; M-348. Thus, ***even if*** Plaintiff had shown that the orchards were damaged by dicamba that was applied over an Xtend crop in 2015 or 2016, the unlawful use of the herbicide—contrary to both seed-bag warnings and herbicide-label instructions—would be an intervening and

superseding cause of Plaintiff's alleged harm as a matter of law. As this Court initially explained:

> To the extent that the third-party farmers' unlawful conduct was at all foreseeable because dicamba was an available herbicide and the new GE seeds were dicamba-resistant, that foreseeability was wholly negated by the GE seed's product warning labels . . . . Not only do the labels expressly forbid in bold print the application of dicamba to the GE seed crops, they also make clear that to do so is a violation of federal and state law. In view of these warnings and prohibitions, it was not foreseeable that the farmers would resort to the unlawful use of dicamba.

4/10/17 Mem. & Order (ECF #50) at 8-9; *but see* 5/8/18 Mem. & Order (ECF #134) at 6 (reversing prior ruling).

The Court's initial ruling on the issue was correct. Here, the harm was allegedly caused by the unlawful use of a non-Monsanto dicamba herbicide with Monsanto's product (if the seed was even Monsanto's product at all, on which there is a failure of proof). On those facts, Monsanto's product was not the proximate cause of the alleged harm as a matter of law. The Eighth Circuit and courts across the country have held that a third party's unlawful misuse of a product in a manner that causes harm is an intervening and superseding cause that cuts off the liability of the product manufacturer as a matter of law. *See*, *e.g.*, *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663 (8th Cir. 2009) (manufacturer of cold medicine did not proximately cause damages when purchasers used product unlawfully to make methamphetamine); *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1315 (W.D. Okla. 1996) (manufacturer of fertilizer did not proximately cause damages when third-party used product unlawfully to blow up a building), *aff'd*, 160 F.3d 613 (10th Cir. 1998); *City of Chicago v. Beretta*

U.S.A. Corp., 821 N.E.2d 1099, 1136 (Ill. 2004) (gun manufacturers did not proximately cause injuries resulting from the illegal misuse of firearms). Moreover, Monsanto did not even manufacture or sell the product that third parties used unlawfully. Thus, Plaintiff's theory of liability here is even more attenuated than the ones rejected in these cases. Accordingly, Monsanto is entitled to judgment in its favor on proximate cause.

Similar issues exist for 2017 forward, because Plaintiff could not identify the particular application of dicamba herbicide that allegedly harmed the orchards and, thus, could not prove it was XtendiMax herbicide rather than another dicamba herbicide being used unlawfully. The lack of proof of proximate causation entitles Monsanto to judgment as a matter of law.

b. Plaintiff Failed to Introduce the Evidence It Claimed Made the Unlawful Use Foreseeable Despite Monsanto's Warnings.

After initially ruling that Xtend seeds were not the proximate cause of Plaintiff's alleged harm as a matter of law, the Court later reversed itself in light of Plaintiff's allegation that Monsanto employees had advised farmers to disregard its product labeling and make unlawful applications in 2015 and 2016. The Court explained:

> Although the Court maintains reservations about whether defendant's action or inaction proximately caused plaintiff's injuries, the [new] allegation that defendant's representatives instructed seed-purchasing farmers to illegally spray dicamba on the defendant's seeds, if true, would seemingly negate the effectiveness of the product use labels attached to defendant's seeds in addition to altering the proximate causation analysis of this case.

6/29/17 Mem. & Order (ECF #61) at 5. Thus, Plaintiff argued, and the Court agreed, that the question of foreseeability was one for the jury. *See* Pls.' Mem. in Opp. to BASF Mot.

to Dismiss (ECF #118) at 11 (arguing that whether an intervening act was foreseeable, and thus not a superseding cause, "is a fact question for the jury"); Pls.' Mem. in Opp. to BASF & Monsanto's Mot. for Summ. J. (ECF #243) at 20 (arguing that whether illegal applications were foreseeable is a "question[] that must go to the jury"); 12/31/19 Mem. & Order (ECF #288) at 3-5. In fact, Plaintiff's new allegations were so unsupported that Plaintiff conceded a motion in *limine* to preclude it from even mentioning those allegations at trial. *See* 1/24/20 Tr. 32:20-33:4. At trial, there was no evidence that any Monsanto employee ever advised or suggested that anyone make unlawful applications of dicamba to Xtend crops in 2015 or 2016.

In fact, Plaintiff failed to introduce any evidence that it was foreseeable to Monsanto that farmers would disregard the law, Monsanto's product labeling, ***and*** the dicamba herbicide labeling,[7] and make illegal applications of dicamba in 2015 and 2016. None of the evidence Plaintiff offered was probative of the actual foreseeability issue presented in this case, *i.e.*, whether it was foreseeable to Monsanto that—***despite both state and federal law prohibiting such applications, and express warnings instructing farmers not to make such applications because it was*** illegal—farmers would apply dicamba over-the-top of Xtend crops in 2015 and 2016. Rather, Plaintiff's evidence showed, at most, that it was foreseeable to Monsanto that farmers might make unlawful

[7] Monsanto also was entitled to rely on the federally-approved warnings that accompanied any dicamba herbicides that might have been applied to crops grown from Xtend seeds, which would have governed the appropriate use of those herbicides. *S. Nat'l Mfg. Co. v. EPA*, 470 F.2d 194, 200 (8th Cir. 1972) ("'A statute which is primarily a regulation of labels necessarily assumes that the general public does heed warnings.'") (citation omitted).

applications ***if they were not warned*** of its illegality. *See, e.g.*, 1/29/20 Trial Tr. 445:4-9 (Carey) (testifying that in response to an article warning of potential illegal dicamba use, Monsanto "prepared a very aggressive communications plan to warn people that they could not do that, that it was illegal").

Under Missouri law, using a product in a manner ***expressly prohibited*** by the manufacturer does not constitute foreseeable misuse. *See Erkson ex rel. Hickman v. Sears, Roebuck & Co*., 841 S.W.2d 207, 211 (Mo. App. 1992) (using riding lawnmower in manner prohibited by instructions "do[es] not constitute a misuse or abnormal use which is objectively foreseeable"). Product manufacturers are entitled to expect that purchasers of their products will comply with their product use instructions. *See Moore v. Ford Motor Co*., 332 S.W.3d 749, 762 (Mo. 2011) ("[T]he 'presumption that plaintiffs will heed a warning assumes that a reasonable person will act appropriately if given adequate information.'") (quoting *Arnold v. Ingersoll-Rand Co*., 834 S.W.2d 192, 194 (Mo. 1992)); Restatement (Second) of Torts §402A, cmt. j ("[w]here warning is given, the seller may reasonably assume that it will be read and heeded"); *Caplaco One, Inc. v. Amerex Corp.*, 572 F.2d 634, 635 n.2 (8th Cir. 1978) (applying presumption from cmt. j to negligence product liability claim under Missouri law). Monsanto is entitled to judgment in its favor because, even if the issue could not be resolved as a matter of law, Plaintiff failed to introduce evidence sufficient to support a finding that the alleged unlawful use of dicamba with Xtend seeds in 2015 and 2016 was foreseeable to Monsanto. And, again, Plaintiff failed to introduce sufficient evidence for 2017 forward, because the harm could have been caused by unforeseeable unlawful use of dicamba

herbicides other than XtendiMax. The lack of proof of proximate causation entitles Monsanto to judgment as a matter of law.

c. Even if Plaintiff's "System" Theory Were Viable, Modification of a "Dicamba-Tolerant System" by End Users Is a Superseding and Intervening Cause as a Matter of Law.

A superseding cause is a "new and independent force which so interrupts the chain of events initiated by defendant's negligence as to become the responsible, direct, proximate cause of the injury." *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661 (Mo. App. 1989). Here, the Court described the product at issue, *i.e.* the "system" in Plaintiff's liability theory, as consisting of "the dicamba-tolerant seeds, plus the low-volatility corresponding herbicides." 2/13/20 Trial Tr. 2293:17-18. Thus, even if the "system" theory were viable, the illegal use of older dicamba formulations with the seed would constitute an alteration of the "system," as would any physical change to the approved formulations. This dooms Plaintiff's negligent design and negligent failure to warn claims. *Jasinski v. Ford Motor Co.*, 824 S.W.2d 454, 455 (Mo. App. 1992) (to prove causation element of product liability defect claim, plaintiff "must produce evidence that neither he nor any third person has made alterations to the product, which would create a defect that could be the proximate cause of the damages incurred").

The foreseeability of these alterations is irrelevant. "When a third party's modification makes a safe product unsafe, the seller is relieved of liability even if the modification is foreseeable." *Jones v. Ryobi, Ltd.*, 37 F.3d 423, 425 (8th Cir. 1994) (affirming district court's grant of judgment as a matter of law on strict liability claim and

affirming refusal to permit a negligent design claim on this ground) (citing *Gomez v. Clark Equip. Co.*, 743 S.W.2d 429, 432 (Mo. App. 1987)). Missouri law does not impose a duty on a manufacturer to "'warn[] of unreasonable risks and dangers associated with the use of its product in modified condition'" or ensure the safety of the product in a modified condition, even where the manufacturer has affirmative "'knowledge a modification of a given nature would more than likely occur.'" *Hill v. Gen. Motors Corp.*, 637 S.W.2d 382, 385-86 (Mo. App. 1982); *see also id.* at 386 ("[n]otwithstanding that these modifications were foreseeable, a manufacturer does not have a duty to warn in anticipation that a user will alter its product so as to make it dangerous"). This forecloses Plaintiff's 2015 and 2016 claims, where it is a certainty that any use of dicamba over-the-top of Xtend crops was an illegal and dangerous modification of the alleged "system." And, the same is true for 2017 forward. The evidence was that illegal use of dicamba continued after 2017. *See* 2/6/20 Trial Tr. 1436:11-23 (Baldwin). Not only that, but XtendiMax also was subject to after-market modification through improper tank-mixing, contrary to warnings, which increased volatility. *See* Pltf-373.0055 ("Do not tank mix products containing ammonium salts … . AMS (ammonium sulfate) … can significantly increase the risk of dicamba volatility."); *see also* Pltf-218.003. Thus, Monsanto is entitled to judgment on all of Plaintiff's product claims, in all years, as a matter of law.

d. In the Alternative, a New Trial Is Required Because the Court Improperly Refused to Instruct the Jury on Monsanto's Intervening and Superseding Cause Defense.

After the Court's initial ruling that unlawful use was an intervening and superseding cause as a matter of law, Plaintiff repeatedly argued that the defense

presented an issue for the jury because the foreseeability of the illegal applications was a disputed factual issue. *See, e.g.*, Pls.' Mem. In Opp. To BASF Mot. To Dismiss (ECF #118) at 10-12; Pls.' Mem. in Opp. to BASF & Monsanto's Mot. for Summ. J. (ECF #243) at 20 (intervening cause is a "question[] that must go to the jury"). The Court eventually agreed. *See, e.g.*, 12/31/19 Mem. & Order (ECF #288) at 3-5 (denying summary judgment because the foreseeability of illegal applications was a "hotly contested issue"). But when it came time to instruct the jury, Plaintiff reversed its position and argued that submitting Monsanto's proposed affirmative converse instruction on its intervening and superseding cause defense would violate Missouri's prohibition against "sole cause" instructions. The Court agreed. *See* ECF #544, Monsanto tendered and rejected Instruction U. That ruling was erroneous and prejudicial to Monsanto, because it left the critical defense of intervening and superseding cause undecided, warranting a new trial.

First, the Court was not bound by the strict terms of the MAI when determining whether to submit Monsanto's affirmative converse instruction. *Bersett v. K-Mart Corp*., 869 F.2d 1131, 1134-35 (8th Cir. 1989) ("Although a federal judge is not required to use MAI, these instructions may be referred to for guidance.") (citation omitted); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112-13 (8th Cir. 1988) ("Although we recognize that Missouri does not allow a defendant to submit a sole cause instruction, M.A.I. 1.03 (1981), this does not prevent a defendant from requesting such an instruction from a federal court sitting in diversity ...."). It was error under applicable Eighth Circuit law to not give Monsanto's proffered affirmative converse instruction. *See Hale v. Firestone*

Tire & Rubber Co., 756 F.2d 1322, 1331 (8th Cir. 1985) ("Where there is evidence ... to support a party's theory of a case, he is entitled to have the jury charged regarding the claim or defense.") (finding reversible error for failure to instruct on defense).

Second, even if the Court ***were*** bound by the MAI, it still was error to not give Monsanto's proffered affirmative converse instruction. Missouri law requires courts to instruct on any defense supported in the record. *See* MAI 32.01 Committee Comment (2010 New). Missouri courts may use an affirmative converse instruction to instruct on such a defense when "the verdict director assumes as true or omits a disputed ultimate issue," and the converse instruction "presents a hypothetical ultimate issue which, if true, renders it impossible for the jury to find" for the plaintiff. *Blackstock v. Kohn*, 994 S.W.2d 947, 951 (Mo. 1999). Applying this rule, Missouri courts have found that an intervening and superseding cause defense can be submitted to the jury through an affirmative converse instruction. *See, e.g.*, *Gathright v. Pendergraft*, 433 S.W.2d 299, 308 (Mo. 1968) ("A defendant may submit the issue of an intervening cause by a converse of the submission of proximate cause in plaintiff's instruction, and the supporting facts may be argued to the jury."); *Clark v. Sears, Roebuck & Co.*, 731 S.W.2d 469, 472 (Mo. App. 1987) ("proximate cause may be conversed by an affirmative converse instruction where the evidence supports that an intervening cause ... is the direct cause of the injury"); *Fowler v. Robinson*, 465 S.W.2d 5, 11 (Mo. 1971) ("If such an efficient intervening cause is supported by the evidence, it may be submitted in a converse instruction ... and argued to the jury.").

The *Blackstock* requirements for submitting an affirmative converse instruction were present here. The verdict director omitted a requirement that the jury find that third-parties' illegal dicamba applications were foreseeable before holding Monsanto liable for Plaintiff's alleged harm caused by those applications. *See* ECF #554 at 9-10. And as the Court has held, illegal dicamba applications constituted an intervening cause barring Plaintiff's recovery unless the jury were to find that those applications were foreseeable to Monsanto. *See* 12/31/19 Mem. & Order (ECF #288) at 4-5. Monsanto's proposed affirmative converse instruction was thus required under the MAI, and the Court committed prejudicial error by failing to submit it to the jury. *See* MAI 32.01 Committee Comment (2010 New); *Blackstock*, 994 S.W.2d at 951.[8]

II. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S NEGLIGENCE CLAIMS BECAUSE THE DUTY ASSERTED IS NOT RECOGNIZED UNDER MISSOURI LAW.

Judgment in Monsanto's favor is also warranted for the independent reason that Monsanto had no legal duty to protect Plaintiff from harms caused by products that

[8] The MAI's prohibition on "sole cause" instructions is irrelevant to this analysis. "Sole cause" instructions are prohibited because the MAI discourages defense instructions that merely recite and refute the elements of plaintiff's claim already found in the verdict director. *See Hiers v. Lemley*, 834 S.W.2d 729, 734 (Mo. 1992) (the MAI aims to "submit only affirmative elements of plaintiff's case and to avoid the duplication and confusion involved in submitting other propositions that are merely inconsistent with the propositions the plaintiff must prove"); *see also* MAI 1.03 Committee Comment (1981). Affirmative converse instructions, on the other hand, are permissible under the MAI because they aim to focus the jury on an ultimate issue ***assumed as true or omitted*** from the verdict director. *Hiers*, 834 S.W.2d at 735. As addressed above, Monsanto's proposed instruction did not simply direct the jury's attention to an element already encompassed in the verdict director. The proposed affirmative converse instead raised the ultimate question of whether the illegal applications were foreseeable to Monsanto—a question that was omitted entirely from the verdict director.

Monsanto did not manufacture or sell. "In any action for negligence, the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." *Lopez v. Three Rivers Elec. Coop., Inc*., 26 S.W.3d 151, 155 (Mo. 2000). "Whether a duty exists is purely a question of law." *Id*.

Plaintiff asserted two product-liability claims sounding in negligence—negligent product design and negligent failure to warn. These claims were predicated on an alleged duty of Monsanto to use ordinary care to "design a reasonably safe dicamba-tolerant system" and to "adequately warn of the risks of off-target movement" of "dicamba herbicides." *See* ECF #554, Instructions 9 & 10. Monsanto has never sold an integrated product called a "dicamba-tolerant system," it sold no dicamba herbicide in 2015-2016, and from 2017 forward it sold only one of dozens of dicamba herbicides on the market. In short, Plaintiff claimed Monsanto had a duty, as a seed manufacturer, to act as an insurer of any company's herbicide that can be used with its seeds (or any other companies' dicamba-tolerant seeds). Monsanto is entitled to judgment in its favor because Missouri law does not impose a duty on Monsanto with respect to design or warnings for products it did not manufacture or sell.

A. Missouri Law Limits the Duties Regarding Product Design and Warnings to Those Responsible for Placing the Product in the Stream of Commerce.

Missouri law limits the imposition of common law duties with respect to a product's design and warnings to those responsible for placing the product in the stream of commerce. *See Baker v. Bridgestone/Firestone Co*., 966 F. Supp. 874, 875 (W.D. Mo.

1996) ("In Missouri, a Plaintiff alleging strict liability and negligence in a product liability case must show that the defective product was placed in the stream of commerce by the defendant ...."). Missouri law does not impose a duty on a defendant product manufacturer to prevent injuries caused by another manufacturer's product, ***even if that product foreseeably may be used with the defendant's own product***. *See, e.g.*, *Ford v. GACS, Inc.*, 265 F.3d 670, 682 (8th Cir. 2001) ("we cannot say 'that the Missouri Supreme Court would create a common law duty' on GM's part to protect [the plaintiff] from injuries sustained while using the ratchet system," which GM did not manufacture or sell, even though GM influenced the system's design and approved its use in transporting GM vehicles); *Long v. Cottrell, Inc.*, 265 F.3d 663, 669 (8th Cir. 2001) (same); *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 347 (Mo. 1964) ("Since practically any product, regardless of its type or design, is capable of producing injury when put to particular uses, 'a manufacturer has no duty so to design his product as to render it wholly incapable of producing injury[.]'") (citation omitted).

Missouri's limitation on the duties owed by product manufacturers is consistent with product liability law across the country. As the courts have explained, imposing a duty on product manufacturers to prevent injuries caused by other manufacturers' products over which they have no control, but which may be used in connection with their own products, would expose product manufacturers to near-limitless liability:

> [T]he court can find no case law that supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer.

> For example, if a customer buys a car from a manufacturer that does not manufacture or install bicycle roof racks, is the car manufacturer under a duty to (1) warn the customer of all potentially defective brands of roof racks and (2) suggest which brands of roof racks it believes are the safest? If the manufacturer doesn't "warn and suggest," is it liable for damage caused by a defective roof rack purchased by the customer? What if the manufacturer does "warn and suggest," and the customer disregards this advice, is the manufacturer shielded from liability? Or was the manufacturer required to follow-up to ensure the customer followed its advice? Plaintiffs offer no cases, treatises or answers to these questions. The court refuses to blaze a new trail unaided by some law or common sense, neither of which plaintiffs have provided.

In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005).[9] The Court erred in ruling that Monsanto had a duty to prevent injuries caused by products it did not manufacture.

B. Even Under Plaintiff's "System" Theory, Missouri Law Would Limit Monsanto's Duties to Products It Actually Manufactured or Sold.

Plaintiff contended that "the product" at issue in the case was not Monsanto's Xtend seeds or Monsanto's XtendiMax herbicide—or even those two products combined.

[9] *See also Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 171 (4th Cir. 1994) ("As Wyeth has no duty to the users of other manufacturers' products, a negligent misrepresentation action cannot be maintained against it on the facts of this case."); *Barnes v. Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005) ("Although a product manufacturer generally has a duty to warn of the dangers of its own products, it does not have a duty to warn of the dangers of another manufacturer's products."); *O'Neil v. Crane Co.*, 266 P.3d 987, 998 (Cal. 2012) ("[N]o case law ... supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer."); *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 616 (Tex. 1996) ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products.").

Instead, Plaintiff argued that the product at issue was "Defendants' entire defective crop system," which it defined more broadly. *See, e.g.*, 12/22/17 Pls.' Mem. in Opp. to BASF's Mot. to Dismiss (ECF #118) at 7. But Plaintiff's "system" theory was so convoluted and untethered that it was a moving target even the Court struggled to follow. During the trial, the Court initially defined the "crop system" as Monsanto's Xtend seeds plus all ***low-volatility*** dicamba herbicides. *See, e.g.*, 2/13/20 Trial Tr. 2293:11-18 ("The system is the dicamba-tolerant seeds, plus the low-volatility corresponding herbicides."); *id*. 2337:10-2338:06 ("[Plaintiff's] theory of liability ... is based on a system that consists of both dicamba-tolerant seed and low-volatility corresponding herbicide.").[10] Yet, when it came time to charge the jury, the Court allowed Plaintiff to expand the definition of "the crop system" so that it could include not only low-volatility dicamba formulations that lawfully could be applied to Xtend crops, but ***any*** dicamba herbicide – even those that could not lawfully be used with Xtend seeds. *See* ECF #554, Instructions 9 & 10. That definition was impermissibly broad as it imposed product-design and product-warning duties on Monsanto that extended beyond Monsanto's products. Monsanto is entitled to judgment as a matter of law because Plaintiff's negligence claims were predicated on duties not imposed by Missouri law.

[10] The undisputed evidence established that only four low-volatility dicamba herbicides on the market are approved to be applied over Xtend crops. *See* 1/29/20 Trial Tr. 620:15-621:2 (Carey).

1. Monsanto Does Not Sell a Unified "Crop System" and Sells Only One of Many Dicamba Herbicides.

The undisputed evidence at trial established that Monsanto does not sell an integrated "crop system" comprised of seed and herbicide combined, and sells only one of the many dicamba herbicides on the market. Monsanto's Boyd Carey testified that Xtend seeds and XtendiMax herbicide are separate products that Monsanto sells only separately. *See* 1/29/20 Trial Tr. 622:18-623:12. There is no contrary evidence in the record.

The undisputed evidence also established that dicamba herbicide and Xtend seeds have independent uses and each may be used successfully without the other. Dicamba herbicides were on the market for decades before Xtend seeds were even developed. *See*, *e.g.*, 1/28/20 Trial Tr. (Magin Dep. 106:2-10) (ECF #422-2); 2/6/20 Trial Tr. 1264:23-1266:13 (Baldwin). Xtend seeds also have uses independent from dicamba herbicides. Plaintiff's own expert Dr. Baldwin testified that Xtend seeds can be used effectively ***without dicamba herbicide*** and that he, in fact, ***recommended*** such independent use of the seeds. 2/6/20 Trial Tr. 1404:18-22, 1406:14-1407:7; *see also id*. at 1288:18-1289:14. Other evidence showed that, prior to the launch of Xtend cotton in 2015, when everyone expected there to be an approved dicamba herbicide available for in-crop use with the seeds, only about half of potential purchasers planned to apply dicamba to their Xtend cotton crops. *See* Pltf-510.0009 (Nov. 2014 Monsanto PowerPoint). The seeds and herbicides are separate products that need not be used in combination.

2. Even if an Integrated "Dicamba-Tolerant System" Were Available, Monsanto's Duties Would Extend Only to the Components It Manufactured.

Because Xtend seeds and dicamba herbicides are separate products that are sold only separately, and not as a single integrated product, Missouri's component-parts case law does not apply. Cases that consider product claims in the context of a "system" under Missouri law do so only where there is actually an integrated "end product ... designed, assembled and sold by" some entity, even if it is not the named defendant. *Farkas v. Addition Mfg. Techs., LLC*, 2018 WL 6434776, at *7 (E.D. Mo. Dec. 7, 2018), *aff'd*, 2020 WL 1160679 (8th Cir. Mar. 11, 2020). But even if another company did sell an integrated "dicamba-tolerant system" that included both Xtend seeds and a dicamba herbicide (no company does), Missouri law still would not impose product design or warning duties on Monsanto with respect to the integrated product ***or*** the components of the system Monsanto did not manufacture or sell. Rather, Monsanto's product design and warning duties would extend only to the components manufactured and sold by Monsanto.

Thus, it was error for the Court to impose product design and warning duties on Monsanto with respect to "the dicamba tolerant system," which included dicamba herbicides Monsanto does not sell. As the Missouri Court of Appeals has explained:

> The obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not -- at least yet -- extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can become potentially dangerous dependent upon the nature of their integration into a unit designed, assembled, installed, and sold by another.

Welsh v. Bowling Elec. Mach., Inc., 875 S.W.2d 569, 574 (Mo. App. 1994) (citation omitted); *see also Sperry v. Bauermeister, Inc.*, 786 F. Supp. 1512, 1517-18 (E.D. Mo. 1992). "Indeed, '[t]he alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer because imposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems.'" *Donner v. Alcoa Inc.*, 2011 WL 207972, at *4 (W.D. Mo. Jan. 21, 2011). As the Eighth Circuit has explained:

> To impose responsibility on the supplier of the [component part] in the context of the larger defectively designed machine system would simply extend liability too far. This would mean that suppliers would be required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing. Suppliers would be forced to provide modifications and attach warnings on machines which they never designed or manufactured. Mere suppliers cannot be expected to guarantee the safety of other manufacturer's [products].

Crossfield v. Quality Control Equip. Co., 1 F.3d 701, 704 (8th Cir. 1993). The same rule applies for failure-to-warn claims. *Id.* at 703.

To hold a defendant manufacturer of a component part liable for injuries caused by the integrated product, Plaintiff must prove that the specific component manufactured by the defendant contained a defect which caused the injury. *Welsh*, 875 S.W.2d at 574 (holding component supplier "was not liable as a matter of law under a theory of strict liability for designing or furnishing these component parts" because "there is no evidence in the instant case that the parts supplied by Bowling were defective"); *Crossfield*, 1 F.3d

at 703 (supplier of chain integrated into larger machine system was not liable where "[t]he chain did not break or snap due to a defective condition" but instead "operated as it was meant to"); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) ("suppliers of inherently safe 'component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component part supplier did not design or build'" (quoting *Sperry v. Bauermeister, Inc.*, 4 F.3d 596, 598 (8th Cir. 1993)). Monsanto is entitled to judgment as a matter of law on Plaintiff's negligence claims because it had no duty to protect Plaintiff from harms caused by products manufactured and sold by other companies.

III. JUDGMENT AS A MATTER OF LAW OR NEW TRIAL IS REQUIRED BECAUSE PLAINTIFF'S CLAIMS ARE PREEMPTED.

A. Plaintiff's Design Claim Is Preempted by the Federal Plant Protection Act and APHIS's Deregulation Decision.

Monsanto is entitled to judgment as a matter of law on Plaintiff's claim that Xtend seeds were negligently designed because the claim is both expressly and impliedly preempted by federal law. Plaintiff's design theory, in essence, is that Xtend seeds' dicamba-tolerance is a design defect. That theory of liability is expressly preempted by the federal Plant Protection Act ("PPA"), 7 U.S.C. §§ 7756(b)(1) & 7756(b)(2)(A). The PPA reflects a congressional determination that the regulation of genetically modified seeds warrants a uniform, national approach. *See id.* § 7701. It authorizes the Secretary of Agriculture and, by delegation, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS"), to regulate the dissemination of genetically-modified seeds within the United States. *Id.* § 7712(a). To promote its goal of national

uniformity, Congress included an express preemption provision, which preempts state law when: (1) the state law would "regulate the movement in interstate commerce of an[] article, ... plant, ... [or] plant pest;" (2) the state law is imposed "in order to control ..., eradicate ... or prevent the introduction or dissemination of a … plant pest;" and (3) the Secretary has "issued a regulation or order to prevent the dissemination of the … plant pest … within the United States." *Id.* § 7756(b)(1). Any purported state law duty not to sell Xtend seeds in 2015 and 2016 satisfies all three conditions for express preemption, as further explained in Monsanto's summary judgment briefing on this issue, which is incorporated herein by reference. *See* ECF #226 at 20-23. The Court's prior decision on the scope of express preemption reads a non-existent requirement into the statute that APHIS asserted jurisdiction over the seed to make a determination regarding whether it could be commercialized ***and*** decided not to allow commercialization.

Plaintiff's design defect claim is also impliedly preempted by the regulatory decision of APHIS's decision to permit commercialization of Xtend seed in the United States. APHIS issued its regulatory decision prior to the EPA's regulatory decision to register XtendiMax for in-crop application to Xtend crops. The negligent design theory asserted that the seeds' dicamba tolerance was a design defect without the availability of a dicamba herbicide formulation approved for use over Xtend crops. Plaintiff's negligent design theory imposed a duty on Monsanto either (1) to have released XtendiMax in 2015, simultaneous with its commercialization of Xtend seed, or (2) not to have sold Xtend seed in 2015 or 2016 at all. That state law duty is preempted by federal law

because Monsanto had APHIS approval to market Xtend seed in 2015, but could not market XtendiMax in 2015 without prior EPA approval.

State law duties are impliedly preempted where a private party cannot "independently do under federal law what state law requires of it," or state law otherwise conflicts with federal law. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618-20 (2011) (citing *Wyeth v. Levine*, 555 U.S. 555, 620 (2009)). Thus, when an entity is not permitted under federal law to unilaterally comply with duties imposed by state tort law claims, those state law claims are preempted by federal law. Here, Monsanto could not unilaterally commercialize XtendiMax in 2015 along with Xtend seeds, because XtendiMax had not yet received EPA approval. 7 U.S.C. § 136a(a). And the United States Supreme Court has rejected the "stop-selling rationale" as a means of avoiding preemption, reasoning that it "would render impossibility pre-emption a dead letter" and is "incompatible with ... pre-emption jurisprudence." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 475, 488 (2013); *see also Yates v. Ortho-McNeil-Janssen Pharm., Inc.*, 808 F.3d 281, 300 (6th Cir. 2015) (noting there is no logical distinction between the "stop-selling rationale" and a "never-start-selling rationale"). Monsanto was not required to pull its federally-approved products -- Xtend cotton seed and Xtend soybean seed—"from the market altogether" to avoid liability "under both state and federal law." *Bartlett*, 570 U.S. at 488; *see also id.* at 489 n.5 ("the mere fact that a manufacturer may avoid liability by leaving the market does not defeat a claim of impossibility"). Plaintiff's contention that Monsanto could not lawfully sell the Xtend seeds conflicts with APHIS' approval of the seeds.

The Western District of Missouri recently applied the Supreme Court's *Mensing* and *Bartlett* precedents to a fact pattern in which, like here, the plaintiff alleged that the safety of one product depended on the commercialization of a second product, which in turn required regulatory approval. *See Ridings v. Maurice*, 2019 WL 4888910 (W.D. Mo. Aug. 12, 2019). The two products at issue in Ridings were (1) an anticoagulation mediation and (2) a medication that reversed its effects. The plaintiffs' claims included a negligence count for "[f]ailing to design and/or manufacture a product that could be used safely due to the lack of a known reversal agent." *Id*. at *2. Five years elapsed between commercialization of the first and second products. At the time of the plaintiff's injury from the first product, it was impossible for the manufacturer to have released the second product because testing was incomplete and the FDA had not yet approved it. The court found that, under these circumstances, any Missouri state-law design defect claim based on the notion that the first product was unreasonably dangerous without the second product was preempted. *Id*. at *6. The same analysis applies here. Monsanto is entitled to judgment in its favor on Plaintiff's 2015-2016 negligent design claim, because federal law preempts the claim. Because the negligent design and negligent failure to warn claims were submitted together, the improper submission of the negligent design claim requires a new trial on all issues. *See New York Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, 761 F.3d 830, 836 (8th Cir. 2014) ("A general verdict cannot be upheld if the jury might have based that verdict 'in whole or in part on an invalidly submitted theory of liability.'").

B. Plaintiff's Failure-to-Warn Claims Based on XtendiMax and Xtend Cotton Seeds Are Preempted by FIFRA.

Federal requirements for herbicide labeling are set out in the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and its implementing regulations. *See, e.g.*, 7 U.S.C. § 136a; 40 C.F.R. § 156.10 *et seq*. Congress determined that the federal requirements for pesticide labeling should be exclusive, and thus included an express preemption provision in FIFRA, which directs that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). Interpreting that provision in the context of common law failure to warn claims, the U.S. Supreme Court held that the statute preempts all claims that seek to impose labeling requirements other than those set out in FIFRA and its implementing regulations. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005) ("The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations."). Thus, a plaintiff's exclusive path to proving a failure to warn claim for a federally-registered pesticide is to establish a violation of the federal labeling requirements set out in FIFRA. *Id*. at 454 ("[A] manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA."); *id*. at 451 (allowing state law claims "***that enforce federal misbranding requirements***") (emphasis added).

Here, Plaintiff's failure to warn claims directed to XtendiMax are preempted in their entirety because Plaintiff failed to introduce any evidence that Monsanto sold

XtendiMax without its federally-approved labeling, or that its federally-approved labeling failed to comply with FIFRA. Dr. Baldwin was not qualified to—and did not—offer the opinion that the XtendiMax label violates FIFRA requirements. And EPA has already determined that the XtendiMax label meets all federal labeling requirements imposed by FIFRA. *See* 40 C.F.R. § 152.112 ("EPA will approve an application [for pesticide registration] … only if: … (f) The Agency has determined that the product is not misbranded as that term is defined in FIFRA sec. 2(q) and part 156 of this chapter, and its labeling and packaging comply with the applicable requirements of the Act, this part, and parts 156 and 157 of this chapter[.]"). Monsanto is therefore entitled to judgment as a matter of law on Plaintiff's 2017-present failure to warn claim with respect to an alleged inadequate warning on the XtendiMax label.

FIFRA's preemption provision also preempts Plaintiff's failure to warn claims relating to Xtend cotton seed because the seed is likewise a pesticide regulated by EPA and subject to its labeling requirements.[11] *See In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1208 (D. Kan. 2015) (applying FIFRA's express preemption provision to seed that was subject to FIFRA regulations to preempt implied failure-to-warn claims); *In re Syngenta Mass Tort Actions*, 272 F. Supp. 3d 1074, 1089-90 (S.D. Ill. 2017) (same). "Because such warnings might ordinarily be included in materials accompanying the products, plaintiffs' complaints do appear to include a claim that seeks

[11] Xtend cotton seed is engineered with genetic material that is toxic to certain insects. *See* EPA Reg. No. 524-522. The insecticidal protein expressed in the cotton is known as a plant-incorporated protectant, and is a pesticide regulated by FIFRA, to which FIFRA's preemption provision applies. *See* 40 C.F.R. § 152.3; 7 U.S.C. § 136v(b) (applying to all federally registered pesticides).

to impose a labeling requirement not found among FIFRA's statutory requirements." *In re Syngenta Corn*, 131 F. Supp. 3d at 1208.

C. In the Alternative, a New Trial Is Warranted Because Instruction 10 Impermissibly Ignored FIFRA Preemption.

Instruction 10 required the jury to find in Plaintiff's favor if it found, *inter alia*, that "*Second*, dicamba-based herbicides have a propensity to move off target, and *Third*, such defendant … failed to use ordinary care to … adequately warn of the risks of off-target movement." ECF #554, Instruction 10.

Monsanto objected to Instruction 10 on the basis that it was contrary to FIFRA (ECF #540 at 20), and tendered an instruction that was consistent with FIFRA preemption (ECF #537-1 at 17; ECF #544 at 7, Instruction G). Instruction G cited *Bates*, 544 U.S. at 454, which holds that "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add context to those standards."

In *In re Dicamba Herbicides Litigation*, 359 F. Supp. 3d 711, 735 (E.D. Mo. 2019) the Court discussed *Bates* at length, and granted in part and denied in part Monsanto's motion to dismiss based on FIFRA preemption. The Court noted that FIFRA preempts any state-law negligence claim that would premise liability on a theory that the label should have included language that was "in addition to or different from" the approved label. *Id*. at 734 (quoting 7 U.S.C. § 136v(b)). The Court stated: "[s]uffice it to say plaintiffs will not be allowed to submit failure to warn labeling claims that exceed the parameters of FIFRA." *Id*. at 736. But the failure to warn theory submitted to the jury in

Instruction 10 permitted the jury to hold Monsanto liable for an inadequate warning on the XtendiMax label. The instruction broadly imposes liability on Monsanto if it did not "adequately warn of the risk of off-target movement," without specifying which product's label the jury was permitted to analyze. ECF #554, Instruction 10. The instruction thus improperly permitted the jury to find in favor of Plaintiff on the 2017-present negligence claim if the jury believed, for any reason, that the XtendiMax label did not adequately warn of the risks of off-target movement, a claim that is preempted by FIFRA. That error requires a new trial because, in fact, Plaintiff's counsel argued exactly this to the jury. *See* 2/14/20 Trial Tr. 2467:16-22, 2546:12-14; *see also Williams v. Bayer Corp.*, 541 S.W.3d 594, 613 (Mo. App. 2017) (plaintiff cannot recover on a claim that "***could allow*** recovery for negligence that Congress has preempted") (emphasis added) (quoting *Estate of LeMay v. Eli Lily & Co.*, 960 F. Supp. 183, 186 (E.D. Wis. 1997)).

IV. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL ON PLAINTIFF'S NEGLIGENCE CLAIMS FOR ADDITIONAL REASONS.

A. Plaintiff's Negligent Design Claims Fail for Lack of Required Proof.

1. Plaintiff Failed to Make a Submissible Case that the Design of Xtend Seeds Was Defective.

Monsanto is entitled to judgment as a matter of law on Plaintiff's design defect claim because Plaintiff failed to introduce expert testimony that the design of Monsanto's Xtend seeds was defective. First, Plaintiff's only liability expert, Dr. Baldwin, was not disclosed or qualified as an expert in the design of genetically modified soybean or cotton

seeds and, thus, could not ***and did not*** offer expert design testimony at trial.[12] Second, to the extent Dr. Baldwin testified regarding the seed at all, he stated that the seed had "very good germplasm" (2/6/20 Trial Tr. 1405:10-13), and that he had no problem with the seed (*id.* at 1272:5-7 ("So, I mean, I was all about the seed part of the technology.")). In fact, Dr. Baldwin recommended the use of Xtend seeds with other herbicides for weed control in 2015 and 2016. *Id.* at 1404:18-22; 1406:23-1407:7. He did not testify that the seed design was defective after 2016 either. The Court should enter judgment in favor of Monsanto on Plaintiff's negligent design claim based on the seed.

2. Plaintiff Failed to Present Admissible Expert Testimony that the Design of XtendiMax Was Defective.

As shown above, Plaintiff's negligent design claim requires a finding that the product that allegedly caused Plaintiff's harm contained a design defect. *See supra* Section II. Plaintiff's claim with respect to XtendiMax must be supported with expert testimony, because herbicides are the type of complex product for which expert testimony about a design defect is required. *See Bachtel v. TASER Int'l, Inc.*, 2013 WL 317538, at *5 (E.D. Mo. Jan. 28, 2013), *aff'd*, 747 F.3d 965 (8th Cir. 2014). Dr. Baldwin, the only expert Plaintiff offered in support of its liability theories, was neither disclosed nor qualified to offer expert testimony regarding herbicide design. While Dr. Baldwin testified that XtendiMax was volatile to an unspecified degree, that testimony

[12] Missouri law requires expert testimony to prevail on a design defect claim where, as here, the design issues are complex and beyond the knowledge of a lay jury. *See, e.g.*, *Bachtel v. TASER Int'l, Inc.*, 2013 WL 317538, at *5 (E.D. Mo. Jan. 28, 2013) ("Under Missouri law, however, expert testimony is required to support a design defect claim involving accidents where, as here, (1) a complex product and (2) multiple possible causes are in issue."), *aff'd*, 747 F.3d 965 (8th Cir 2014).

fails to establish a design defect. Instead, there must be proof that the risks presented by the design are unreasonable. Product manufacturers have no duty to design products that are risk-free. *See Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990) ("A manufacturer is not obliged to market only one version of a product, that being the very safest design possible."). In any case, because Dr. Baldwin was not qualified to offer herbicide design opinions, his testimony cannot meet Plaintiff's burden of introducing qualified expert testimony that XtendiMax contained a design defect. *See* ECF #217, #275 (Monsanto's Baldwin *Daubert* briefs). That Dr. Baldwin is a weed scientist does not render him qualified to offer expert testimony regarding the design features of dicamba herbicides as they relate to volatility. *See Weisgram v. Marley Co.*, 169 F.3d 514, 520-21 (8th Cir. 1999) (reversing district court's failure to exclude expert testimony on the design defects in a baseboard heater, when the proposed expert was a metallurgist who had no knowledge of the design or operation of the heaters), *aff'd*, 528 U.S. 440 (2000).

Apart from his lack of qualifications in connection with herbicide design, Dr. Baldwin's testimony regarding XtendiMax's volatility should have been excluded because he merely parroted wholesale the opinions of other scientists who were not disclosed and did not testify in this case, and, whom Monsanto did not have an opportunity to cross-examine or challenge. Dr. Baldwin specifically testified that other scientists conducted studies to determine the degree to which XtendiMax and Engenia improved upon the volatility levels of older dicamba products. *See* 2/6/20 Trial Tr. 1369:16-1373:2. Dr. Baldwin took no part in the studies that he discussed during his

testimony. Adopting another expert's opinion wholesale without conducting any studies on the topic is not a reliable basis for an expert opinion under the *Daubert* standard. *See Hill v. Fikes Truck Line, LLC*, 2012 WL 5258753, at *3 (E.D. Mo. Oct. 24, 2012); *Sims v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 3511712, at *1 (E.D. Ark. Jan. 13, 2016). Indeed, Dr. Baldwin was simply a mouthpiece for these other scientists' opinions; any layman could have similarly taken the witness stand and recited these expert's studies. For the same reason, Dr. Baldwin's testimony regarding XtendiMax's alleged defect should have been excluded as hearsay. While experts may rely on hearsay evidence when formulating their opinions, "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of the testimony." *Sims*, 2016 WL 3511712, at *1.

> Federal Rule of Evidence 703 permits an expert to rely on otherwise inadmissible hearsay if experts in the field would reasonably rely on that kind of facts or data in forming an opinion. Where, however, an expert does not simply rely upon data or facts collected by another expert for use in forming an opinion but, instead, adopts wholesale the opinion of another expert, Rule 703 does not render the testimony admissible.

Id. (citation omitted). Dr. Baldwin's testimony on the volatilization of XtendiMax is a classic example of this impermissible parroting of another's opinion. His opinions with respect to the purported design defects in XtendiMax should have been excluded.

B. Plaintiff Did Not Make a Submissible Case on Its Failure-to-Warn Claims.

In Missouri, "[u]nder a theory of failure to warn, a plaintiff must show that 1) the defendant sold the product in the course of [its] business; 2) the product was unreasonably dangerous at the time of sale when used as reasonably anticipated without

knowledge of its characteristics; 3) the defendant did not give an adequate warning of the danger; 4) the product was used in a manner reasonably anticipated; and 5) the plaintiff was damaged as a direct result of the product being sold without an adequate warning." *Jaurequi v. John Deere Co.*, 971 F. Supp. 416, 427 (E.D. Mo. 1997), *aff'd sub nom*. *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076 (8th Cir. 1999). Plaintiff failed to make a submissible case on several elements of the claim.

1. The Warning on Xtend Seeds Was Adequate as a Matter of Law.

Initially, Plaintiff produced no evidence to support a conclusion that the warnings provided by Monsanto were inadequate. All Xtend seed sold in 2015 and 2016 was accompanied by a warning that it was illegal to apply dicamba over-the-top of Xtend crops and instructed growers, "DO NOT APPLY DICAMBA HERBICIDE IN-CROP." 1/28/20 Trial Tr. (Magin Dep. 369:10-15; 370:11-371:11; 372:2-18) (ECF #422-2), M-1, M-346, M-348. The warning is adequate as a matter of law because, if heeded, it would have prevented the alleged harm.

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, ***which is safe for use if it is followed***, ***is not in defective condition,*** nor is it unreasonably dangerous.

Restatement (Second) of Torts §402A cmt. j (emphasis added). The Eighth Circuit has applied cmt. j to product liability claims under Missouri law sounding in negligence. *See Caplaco One*, 572 F.2d at 635 n.2. This alone establishes the adequacy of Monsanto's

warnings.[13]

Any argument that Monsanto had a duty to warn of the risks of dicamba herbicides fails because the federally-approved labeling for dicamba herbicides adequately warned of those risks, and those risks were well known. Dr. Baldwin testified that the risks of dicamba have been well-known since the 1960s, that farmers have historically limited their use of dicamba because "it's known to be a volatile compound," and that even after the introduction of Xtend seed some farmers "didn't want to spray dicamba ***for risk of affecting a neighbor***." 2/6/20 Trial Tr. 1264:3-1266:13; 2/7/20 Trial Tr. 1476:18-1477:4 (emphasis added). Indeed, Dr. Baldwin's theory was not that farmers illegally sprayed dicamba because they did not understand the risks, but rather because they were chose to do so ***in spite of the known risk*** in order to control glyphosate-resistant weeds. 2/6/20 Trial Tr. 1288:3-7.

Moreover, even if the Court were to conclude that Monsanto had a duty to warn of the possible ***consequences*** of illegal use of dicamba herbicide, the seed bags warned, "Dicamba will kill crops that are not tolerant to dicamba" (M-1) and dicamba labels warn of sensitive crops, including fruit trees. *See* 2/7/20 Trial Tr. 1493:15-20 (Baldwin). Additionally, as to Plaintiff's failure to warn claim for 2017 forward, the evidence is that Monsanto voluntarily provided free training to over 50,000 applicators prior to the 2017 spray season for XtendiMax, which included specific warnings and information about the volatility of dicamba, the routes and dangers of off-target movement, and the sensitivity

[13] The adequacy of the warnings may be decided as a matter of law. *See, e.g., Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 235-36 (Mo. App. 2012) (affirming summary judgment in favor of defendant on failure to warn claim).

of fruit trees to dicamba. *See* 1/30/20 Trial Tr. 697:18-707:15 (Carey); 1/28/20 Trial Tr. (Magin Dep. 351:22-352:18) (ECF #422-2); M-379. The XtendiMax label also warned that it is a violation of federal law to use the product inconsistent with its labeling and that contact with fruit trees "could result in severe plant injury or destruction." M-543. The Court should enter judgment in favor of Monsanto because Xtend seed warnings were adequate as a matter of law.

2. Plaintiff Failed to Make a Submissible Case of Warnings Causation.

"[T]he causation elements are the same for both strict liability and negligent failure to warn." *Moore*, 332 S.W.3d at 764 (citation omitted); *Mothershead v. Greenbriar Country Club, Inc.*, 994 S.W.2d 80, 89 (Mo. App. 1999) ("Missouri law applies the same two-pronged causation test in all cases involving failure to warn."). "The causation element involves two separate requirements. 'First, the plaintiff's injuries must be caused by the product from which the warning is missing.' 'Second, plaintiffs must show that a warning would have altered the behavior of the individuals involved in the accident.'" *McMahon v. Robert Bosch Tool Corp.*, 2019 WL 5727340, at *2 (E.D. Mo. Nov. 5, 2019), *appeal docketed*, No. 19-3637 (8th Cir. Dec. 10, 2019) (quoting *Arnold*, 834 S.W.2d at 194); *see also Bachtel v. TASER Int'l, Inc.*, 747 F.3d 965, 972 (8th Cir. 2014). To establish causation in a failure to warn case under Missouri law, plaintiffs must show, *inter alia*, that an adequate warning "would have altered the behavior of the individuals involved." *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 232 (Mo. App. 2012); *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. 1994); *Arnold*, 834 S.W.2d

at 194. To be entitled to a presumption that the product user would have heeded a different warning, Plaintiff first must present some evidence that the product-user lacked knowledge of the product's danger. *See Arnold*, 834 S.W.2d at 194.

Plaintiff did not provide this evidentiary basis at trial; nor could it, without identifying the specific third party (or parties) whose application(s) of a dicamba herbicide over an Xtend crop caused its damage. *See, e.g.*, *Williams v. Ford Motor Co.*, 2013 WL 3874751, at *8 (E.D. Mo. July 25, 2013) (granting summary judgment because plaintiff could not prove that "unidentified mechanic" would have altered his behavior faced with a warning, nor could the heeding presumption apply, as it would require evidence regarding absent mechanic's knowledge of product danger); *Am. Auto. Ins. Co. v. Omega Flex, Inc.*, 2013 WL 2628658, at *14 (E.D. Mo. June 11, 2013) ("Because the installing contractor has not been identified, there is no evidence on the record from which the jury could conclude that the installer did not already know of the danger associated with TracPipe or that a warning different from that [provided] would have altered the installer's actions.") (granting summary judgment); *Tuttle v. Steris Corp.*, 2014 WL 1117582, at *7 (E.D. Mo. Mar. 20, 2014) (granting summary judgment on negligent failure to warn claim in pesticide case where plaintiff offered no evidence that an additional warning would have altered relevant person's behavior or prevented her injuries).

This failure to identify the product user made it impossible for Plaintiff to offer evidence that the product user lacked knowledge of the danger or that, even if he had lacked knowledge, he would have heeded additional warnings about the product's

danger—despite not having heeded the warning not to apply dicamba at all because it was illegal. Applying a heeding presumption to unidentified third-party product users here not only ignores the requirement that Plaintiff prove third-party users lacked knowledge of the danger, but also impermissibly deprives Monsanto of an opportunity to rebut the presumption. *See Moore*, 332 S.W.3d at 763 (heeding presumption is rebuttable, and product user is subject to cross-examination on whether he read warnings and would have acted differently if he had).[14]

As addressed above, Plaintiff presented testimony from Dennis Cravens suggesting that Chad Fullerton—who owned a farm two and a half miles from Bader Farms—had XtendiMax on his farm during the 2017 growing season. *See* 2/3/20 Trial Tr. 853:25-855:9. But there was no evidence showing that Chad Fullerton applied the dicamba herbicide that caused Plaintiff's alleged harm. And even if there was, there was no evidence that he lacked awareness of the risks associated with XtendiMax, or that a different warning label would have altered his behavior in a manner that prevented Plaintiff's harm. Because Plaintiff failed to introduce the evidence required to support its failure to warn claim, the Court should enter judgment in favor of Monsanto on that claim. *See Bachtel*, 747 F.3d at 971-72; *Williams*, 2013 WL 3874751, at *8.

[14] If Plaintiff had actually provided legally sufficient evidence that (i) any dicamba that caused it harm came from Murphy Farms and (ii) that the applicators at Murphy Farms did not know of the danger of off-target movement from illegal dicamba use over-the-top of Xtend crops, then (and only then) would the burden have shifted to Monsanto to rebut the heeding presumption—a rebuttal that Monsanto could easily have met because Murphy Farms burned all evidence of the illegal application. 2/3/30 Trial Tr. 857:13-859:23 (Cravens).

In fact, Plaintiff not only failed to prove that a different warning would have prevented its harm, but Plaintiff's counsel also conceded that the XtendiMax label was ***not*** inadequate. During his closing argument, Plaintiff's counsel stated that Monsanto commercialized XtendiMax with "a label that is ***as good as can be done*** to try to limit risk." 2/14/20 Trial Tr. 2466:16-24 (emphasis added). The XtendiMax label approved by EPA warns users of both the volatility of dicamba and of the specific dangers of off-target movement at issue here. M-543 (XtendiMax label warning that it is a violation of federal law to use the product inconsistent with its labeling and that contact with fruit trees "could result in severe plant injury or destruction"). As Plaintiff failed to show the Xtend seed bag or XtendiMax label was inadequate, or that a different label would have prevented its harm, Monsanto is entitled to judgment on the failure to warn claims.

3. Plaintiff Failed to Introduce Admissible Expert Testimony that the Warnings Monsanto Provided Were Inadequate.

Monsanto is entitled to judgment as a matter of law for the additional reason that Plaintiff failed to introduce expert testimony on warnings causation. "A failure to warn claim requires admissible expert testimony that additional or other warnings might have altered the behavior of the plaintiff." *Davidson v. Besser Co.*, 70 F. Supp. 2d 1020, 1023 (E.D. Mo. 1999). "Missouri courts have ... concluded that '[w]arnings and how people react to warnings are arguably subjects about which persons having no particular training are incapable of forming accurate opinions.'" *McMahon*, 2019 WL 5727340, at *3 (quoting *Bachtel*, 747 F.3d at 970) (collecting cases). Because Plaintiff did not introduce that evidence, Monsanto is entitled to judgment in its favor as a matter of law.

C. In the Alternative, Monsanto Is Entitled to a New Trial on Plaintiff's Negligent Design and Failure-to-Warn Claims Due to Instructional Errors.

1. Instructions 9 and 10 Improperly Endorsed Plaintiff's View of Disputed Facts and Gave the Jury a Roving Commission, Requiring a New Trial.

In the alternative, Monsanto is entitled to a new trial because of prejudicial errors in Instructions 9 and 10, the verdict directors for Plaintiff's negligence claims. *See* ECF #540 at 1-9, 14-17 (Monsanto objections to proposed jury instructions). "Prejudicial and reversible error occurs when an instruction is proffered to a jury that gives the jury a roving commission." *McNeill v. City of Kansas City*, 372 S.W.3d 906, 909 (Mo. App. 2012) (citation omitted). "A 'roving commission' occurs when an instruction ***assumes a disputed fact or*** submits an abstract legal question that ***allows the jury 'to roam freely through the evidence*** and choose any facts which suited its fancy or its perception of logic' to impose liability." *Seitz v. Lemay Bank & Tr. Co.*, 959 S.W.2d 458, 463 (Mo. 1998) (emphasis added); *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. 1997) ("The purpose of the verdict directing instruction is to hypothesize propositions of fact to be found or rejected by the jury. … Assuming a disputed fact is error."). Instructions 9 and 10 improperly did both—granted the jury a roving commission and assumed disputed facts.

First, the Court's reference to "the dicamba-tolerant system" in Instructions 9 and 10 improperly gave the jury a roving commission because "the dicamba-tolerant system" was not defined. Instead, the jury was left to guess which products were included as "components" of the referenced "system." The instructions allowed the jury to choose to

base liability on any facts that suited its fancy with respect any number of different products.

Second, the instructions also improperly assumed disputed facts. Instruction 9 assumed there was a dicamba-tolerant system on the market in 2015-2016, over Monsanto's objection, and despite the fact that there was no dicamba that could lawfully be used with Xtend seeds, and Monsanto instructed consumers not to apply dicamba to Xtend crops. Instruction 10 improperly assumed that older formulations of dicamba were part of the "dicamba-tolerant system" from 2017-present, even though those formulations could not lawfully be used with Xtend seeds and other formulations that could lawfully be used with the seeds were available. "A proper instruction submits only the ultimate facts, not evidentiary details, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another." *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 463-64 (Mo. 2017). Instructions 9 and 10 violated those requirements and prejudiced Monsanto by endorsing Plaintiff's theory that there was a "dicamba-tolerant system" on the market and that it included dicamba herbicides that could not lawfully be used with Xtend seeds, both of which Monsanto disputed (*see* ECF #540 at 3-6, 14-21). Baking these assumptions into the verdict director was prejudicial error requiring a new trial. *Lasky*, 936 S.W.2d at 800 (in a verdict director, "[a]ssuming a disputed fact is error"). These errors prejudiced Monsanto and require a new trial.

Instructions 9 and 10 were also incorrect and unfairly prejudiced Monsanto because they asked the jury whether Monsanto breached a duty to use reasonable care to "design a reasonably safe dicamba-tolerant system," a product Monsanto did not sell.

The Court erred in adopting Plaintiff's theory of the product as a "system" ***comprised of products that could not lawfully be used together***, that Monsanto did not sell together and even products Monsanto did not sell at all, and that Monsanto expressly instructed consumers not to use together. With the Court's adoption of Plaintiff's framing of the issues, the jury's verdict was a foregone conclusion.

2. Monsanto Is Entitled to a New Trial Because Instructions 9 and 10 Failed to Hypothesize All Required Elements of Plaintiff's Claims.

Instructions 9 and 10 also incorrectly instructed the jury that its verdict should be in favor of Plaintiff if it found a set of facts that—even if true—would be legally insufficient to prove liability. To prove either its design or failure to warn claim, Plaintiff was required to prove every element of the claim with respect to a single product. Instructions 9 and 10 did not require that proof. The instructions did not require a finding that Monsanto designed, manufactured, or sold a specific product ***and*** that Monsanto failed to use ordinary care to design ***that same product***, or adequately warn of the risks of ***that same product***, ***and*** that such failure as to ***that product*** caused or directly contributed to cause damage to Plaintiff. *See* MAI 25.09 (requiring these elements). Elimination of the requirement that Plaintiff prove all elements of its negligence claims as to a single product manufactured and sold by Monsanto was error. "[S]ubmission of a verdict director that did not hypothesize all essential elements of the plaintiff's claim was prejudicial error …." *DeWalt v. Davidson Serv./Air, Inc.*, 398 S.W.3d 491, 504 (Mo. App. 2013) (citing *Hervey v. Mo. Dep't of Corr.*, 379 S.W.3d 156, 163 (Mo. 2012)).

In addition, Plaintiff's 2017 to present claims are legally viable only to the extent Plaintiff showed that XtendiMax was unreasonably dangerous when put to its reasonably anticipated use, or that it contained an inadequate warning. Because the verdict director for these years did not ask the jury to render a finding on these issues or whether ***XtendiMax*** caused Plaintiff's harm, the verdict director did not "fairly and adequately" submit the issues to the jury, and a new trial is warranted. *See Vaidyanathan v. Seagate US LLC*, 691 F.3d 972, 978 (8th Cir. 2012); *DeWalt*, 398 S.W.3d at 504.

V. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR NEW TRIAL ON THE JOINT VENTURE AND CONSPIRACY CLAIMS.

A. Inconsistent Joint Venture and Conspiracy Findings Require a New Trial.

Plaintiff alleged that BASF and Monsanto were partners in a joint venture, and *also* alleged that they were engaged in a civil conspiracy with each other. Plaintiff chose to submit both of these alternative theories to the jury. The jury returned a verdict in Plaintiff's favor on both claims, finding that BASF and Monsanto were (1) joint venture partners ***and*** (2) co-conspirators. Because partners cannot conspire with each other as a matter of law, the jury's verdict was irreconcilably inconsistent, and a new trial is required.

Under Missouri law, a "joint venture is a type of partnership." *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 217 (Mo. App. 1987); *see also Johnson v. Pac. Intermountain Express Co.*, 662 S.W.2d 237, 241 (Mo. 1983) ("A joint venture is a species of partnership."); *Binkley v. Palmer*, 10 S.W.3d 166, 169 (Mo. App. 1999)

(same); 12/31/19 Mem. & Order at 11 ("[A] joint venture is a partnership that is limited to a single business purpose."). As such, joint ventures are "governed by the same legal rules" as partnerships, including Missouri's Uniform Partnership Act. *Binkley*, 10 S.W.3d at 169 ("There is generally no essential difference between a partnership and a joint venture, and they are governed by the same legal rules.") (citation omitted); *Terre Du Lac Ass'n*, 737 S.W.2d at 217 ("[a] joint venture is … governed by Missouri's Uniform Partnership Act") (citation omitted); *accord Bracht v. Grushewsky*, 2005 WL 8176790, at *4 (E.D. Mo. Mar. 24, 2005) (same).

Missouri's Uniform Partnership Law provides that "[e]very partner is an agent of the partnership." § 358.090.1, RSMo; *see also Baker v. McCue-Moyle Dev. Co.*, 695 S.W.2d 906, 911 (Mo. App. 1984) ("[e]ach partner is at once a principal and an agent of the partnership and the other partners in matters pertaining to the partnership business"). Because joint ventures are governed by the same legal rules as partnerships, this principle applies equally to partners in a joint venture. *Firestone v. VanHolt*, 186 S.W.3d 319, 324 (Mo. App. 2005) ("There is a mutual agency among the venturers for activities within the scope of the venture ….") (citing *Johnson*, 662 S.W.2d at 241).

To establish a civil conspiracy under Missouri law, the plaintiff must prove, among other elements, that "two or more persons" committed the allegedly conspiratorial act. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. 1996). If, as the jury found, BASF and Monsanto were joint-venture partners, then they were not "two or more persons" who could have conspired with each other. As the Missouri Court of Appeals has explained, "***an identity between agent and principal leads to a legal impossibility in the context of***

conspiracy [because t]wo entities which are not legally distinct cannot conspire with one another." *Creative Walking, Inc. v. Am. States Ins. Co.*, 25 S.W.3d 682, 688 (Mo. App. 2000) (emphasis added) (internal quotations marks and citations omitted). Put another way, under Missouri law, partners cannot conspire with each other because they are the same entity—the partnership—and thus "are not legally distinct." *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 176 (Mo. App. 1996); *accord Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 871 (8th Cir. 2002); *see also Saliba v. Exxon Corp.*, 865 F. Supp. 306, 313 (W.D. Va. 1994) (two general partners could not be co-conspirators: "Where the alleged co-conspirators are the two general partners in a partnership, acting within the scope of partnership affairs, only one entity exists—the Partnership."), *aff'd*, 52 F.3d 322 (4th Cir. 1995); *cf. Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 356 (1982) (in joint ventures "the partnership is regarded as a single firm").

The jury's verdict was thus irreconcilably inconsistent. *See* 2/14/20 Trial Tr. 2573:24-2574:2; 2/15/20 Trial Tr. 3006:24-3007:5 (Defendants objecting to inconsistency of the verdict). It is "a legal impossibility" for BASF and Monsanto to be both joint-venture partners and co-conspirators with respect to the same alleged underlying conduct. If the alleged joint venture partnership existed, as the jury found, then Defendants were "not legally distinct" and could not also have been "two or more persons" with respect to conduct within the scope of the joint venture as required to support Plaintiff's civil conspiracy claim.

The inconsistency of the verdict requires a new trial. "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). Here, the jury's findings that BASF and Monsanto were joint-venture partners *and* two distinct co-conspirators amount to a legal impossibility and are thus irreconcilably inconsistent. As such, a new trial is required. *See Braboy v. Fed. Express Corp.*, 238 S.W.3d 690, 697 (Mo. App. 2007) (remanding for new trial because contradictory verdict was "inconsistent and a nullity"); *Basso v. Manlin*, 865 S.W.2d 431, 434 (Mo. App. 1993) (noting Missouri courts "remand[] cases for a new trial where the jury return[s] two logically inconsistent verdicts, even though each verdict, upon independent review, appear[] to be supported by sufficient evidence").

Because of its joint venture and conspiracy findings, the jury did not apportion fault between the parties. Counsel informed the jury that both parties would be liable for the amount of any punitive damages award if the jury found a joint venture or conspiracy. 2/14/20 Trial Tr. 2527:09-24. Thus, the elimination of the joint venture and conspiracy findings requires a new trial on all issues. *See, e.g., Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 555-56 (1899) (where a verdict of joint liability cannot be sustained as to one of the defendants, it cannot be sustained as to any defendant if a different verdict might have resulted without consideration of all defendants); *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 411 (8th Cir. 1976) ("Inasmuch as the issues of liability, actual damages and punitive damages are intertwined, the new trial should encompass all issues."). Monsanto incorporates by reference the arguments set forth in

its Brief Regarding Entry of Judgment on the Punitive Damages Award (ECF #569) in further support of a new trial.

B. Plaintiff Failed to Make a Submissible Case on Its Joint Venture and Conspiracy Claims.

Monsanto is entitled to judgment as a matter of law on Plaintiff's joint venture claim because Plaintiff failed to make a submissible case as to all elements of the claim. To establish a joint venture, Plaintiff must show by clear and convincing evidence: (1) an agreement among members of the association, (2) a common purpose to be carried out by the members, (3) a community of pecuniary interest in that purpose, and (4) an equal voice among members in determining the direction of the enterprise. *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 387 (Mo. App. 1999); *Cutcliff v. Reuter*, 889 F.3d 491, 495-96 (8th Cir. 2018) (clear and convincing standard). Plaintiff must also prove that the parties intended to create a joint venture, and the parties' intent must be "given significant, if not controlling, weight in a joint-venture analysis." *Riley v. A.K. Logistics, Inc.*, 2017 WL 2501138, at *8 (E.D. Mo. June 9, 2017). Plaintiff failed to prove these elements.

"Corporations may become members of joint ventures only by express agreement or contract." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1027 (E.D. Mo. 2009); *Rosenfeld v. Brooks*, 895 S.W.2d 132, 135 (Mo. App. 1995) ("[I]t is possible for a corporation to exist as an arm of a joint venture. However, courts will not *imply* such arrangements."). Plaintiff's claim fails because it was submitted as an implied joint venture (ECF #554, Instruction 17), which is contrary to Missouri law. *See Rosenfeld*,

895 S.W.2d at 135 ("courts will not *imply* such arrangements"); *see also* B-673 ¶ 16.7 (expressly disclaiming any intent to create a joint venture between Defendants).

Even if Plaintiff's implied joint venture claim did not fail as a matter of law, the evidence was insufficient to support a finding as to the required element that Monsanto and BASF had an equal voice in any enterprise. To the contrary, the evidence was that BASF had no role in Monsanto's decision to release Xtend seed in 2015 or 2016. *See, e.g.*, 1/30/20 Trial Tr. 717:18-23 (Carey). Thus, Plaintiff's counsel argued in closing that there was no requirement of shared control, but rather that each Defendant's control over its own business was sufficient: "They had an equal voice. The agreements were Monsanto would take the lead on the seed, send it out when it wanted to, BASF could do its own herbicide." 2/14/20 Trial Tr. 2548:12-15. Accepting Plaintiff's "equal voice" theory was error. In fact, Plaintiff was required to offer evidence that each Defendant had "the right to control the operations of the other," in order to make a submissible case. *See Ritter*, 987 S.W.2d at 387 ("although the facilities are shared for mutual benefit, the agreement does not give either institution the right to control the operations of the other; therefore the agreement did not form a joint venture").

Finally, there was no evidence that BASF and Monsanto agreed to share the profits and losses of any joint enterprise. Instead, the Court ruled that "it doesn't have to be profit sharing of 100 percent of the whole production or the system because you have two separate revenue streams, one going to Monsanto for the dicamba seeds and the other going to BASF for the dicamba herbicide." 2/13/20 Trial Tr. 2307:11-20. That ruling also was incorrect. *See Riley*, 2017 WL 2501138, at *11 (evidence that the parties "both

benefitted financially" is insufficient; proof of shared profits and losses is required). Moreover, evidence of royalty payments related to sales of dicamba-tolerant seed, which the Court found could support the shared-pecuniary-interest element of a joint venture, was offered ***only for 2016 and 2017***. *See* Pltf-1014 (Dec. 4, 2017), Pltf-1016 (Dec. 14, 2016); *see also* 2/10/20 Trial Tr. 1704:9-22. Plaintiff offered no proof of any shared pecuniary interest in 2015, or 2018 forward.

Monsanto is likewise entitled to judgment as a matter of law on Plaintiff's conspiracy claim. "To establish a conspiracy, plaintiffs must show the following elements: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) plaintiff was thereby damaged." 12/31/19 Mem. & Order (ECF #288) at 17. Civil conspiracy is not a separate tort in itself, but a means to hold conspirators liable for an underlying wrong. *See Higgins v. Ferrari*, 474 S.W.3d 630, 642 (Mo. App. 2015). Thus, Plaintiff's conspiracy claim fails along with its negligence claims. Further, Monsanto is entitled to judgment as a matter of law on Plaintiff's conspiracy claim because Plaintiff offered no proof of any agreement between Monsanto and BASF other than their business agreement to engage in ***lawful*** conduct. This negates a finding of conspiracy as a matter of law. *Olivier Family Interests Ltd. v. Wright*, 2012 WL 12893873, at *5 (W.D. Mo. Jan. 24, 2012), *aff'd on other grounds*, 527 F. App'x 596 (8th Cir. 2013). Moreover, the predicate tort underlying a conspiracy claim must be an intentional tort. "It is common sense that '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)) (dismissing civil conspiracy count because "the only claims remaining in this case are all based on negligence"); *accord In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d at 731 ("parties cannot conspire to commit negligence"). At a minimum, there was no evidence that would support a finding that Monsanto and BASF intentionally agreed to engage in misconduct.

C. The Joint Venture and Conspiracy Instructions Contained Errors Requiring a New Trial.

If the Court does not grant judgment as a matter of law in favor of Monsanto on Plaintiff's joint venture and conspiracy claims, it should grant a new trial due to errors in the instructions for those claims.

Errors in the joint venture instruction include that it: (1) omitted the clear and convincing evidence standard (*see* ECF #544, Monsanto tendered and rejected Instruction X); (2) was based on implied joint venture, which is not recognized between two corporations under Missouri law; (3) omitted the requirement of a duty to share profits and losses; (4) failed to define which "acts" were allegedly within the joint venture; and (5) omitted the intent requirement.

The conspiracy instruction likewise contained significant errors, including that it: (1) omitted the requirement that Defendants agreed to perform an unlawful act (*see id.*, Monsanto tendered and rejected Instruction Y); (2) omitted the requirement that Defendants acted with intent to perform an unlawful act; and (3) omitted the requirement that the objective of the parties' agreement be unlawful. In addition, the second element included in the instruction is not an element of the claim and did not substitute for the

missing elements identified above.

VI. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL ON PLAINTIFF'S COMPENSATORY DAMAGES CLAIM.

A. Monsanto Is Entitled to Judgment as a Matter of Law Because Plaintiff Introduced No Evidence of the Value of the Peach Orchards Before and After the Alleged Damage, the Measure of Damages Under Missouri Law.

Plaintiff sought compensatory damages based on lost profits expected for crop years 2015 through 2036. Plaintiff's damages expert, Dr. Joseph Guenthner, based his model on the premise that Bader Farms would have to cease its peach-farming operations by 2019 and attempted to calculate its lost profits thereafter. Dr. Guenthner's incorrect assumption that Bader Farms would be out of business by 2019 is one of several flaws that render his opinion impermissibly speculative. And, an even more fundamental problem exists with his damages model in that it does not comport with the well-established measure of damages under Missouri law for harm to fruit trees. The Court should have excluded Dr. Guenthner's testimony, or stricken it. *See* Defs' Joint Mot. to Exclude Dr. Joseph Guenthner (ECF #213 & #214); Monsanto's Mot. to Strike Dr. Guenthner's Testimony (ECF #504). As a result, Plaintiff has failed to satisfy its burden of proof, and judgment as a matter of law is appropriate.

1. Damages for Harm to Fruit Trees Must Be Measured by the Market Value of the Land Immediately Before and After the Injury.

For more than 120 years, it has been established in Missouri that damages for harm to fruit trees are measured by the market value of the real estate before and after the

injury—and not by purported lost profits. *See, e.g.*, *Matthews v. Mo. Pac. Ry.*, 44 S.W. 802, 807 (Mo. 1897) (diminution in market value of property is "the measure of damages when ornamental or fruit-bearing trees have been destroyed").[15] This is so because the "essential value" of fruit trees "arises from their connection with the soil." *Shannon v. Hannibal & St. J. Ry.*, 54 Mo. App. 223, 226 (1893); *see also Doty v. Quincy, O. & K.C. R.R.*, 116 S.W. 1126, 1128 (Mo. App. 1909) (apple trees "were a part of the land—were real, and not personal, property"); *Steckman v. Quincy, O. & K.C. R.R.*, 165 S.W. 1122, 1124 (Mo. App. 1914) (fruit trees "are attached to the soil and depend upon such attachment for life, sustenance, and utility").

Missouri courts have applied the market-value damages measure consistently, frequently reversing judgments in favor of plaintiffs when the evidence or instructions addressed an inappropriate damages theory. *See, e.g.*, *Shannon*, 54 Mo. App. at 226 (reversing because plaintiff's evidence addressed value of apple trees, not value of land); *Doty*, 116 S.W. at 1128 (reversing because instructions permitted plaintiff to recover for both change in market value of land and harm to trees); *Butcher v. St. Louis-S.F. Ry.*, 39 S.W.2d 1066, 1069 (Mo. App. 1931) (reversing because instructions permitted alternative recovery if land had no market value).

[15] When an annual crop is at issue, as opposed to tree crops, hypothetical lost profits are impermissibly speculative, and the plaintiff must instead establish the lost rental value of the land. *Boggs v. Missouri-Kansas-Texas Ry.*, 80 S.W.2d 141, 144-45 (Mo. 1934) (wheat); *Couch v. Kansas City S. Ry.*, 158 S.W. 347, 349 (Mo. 1913) (hay meadow); *Beaty v. N.W. Elec. Power Coop., Inc.*, 312 S.W.2d 369, 373 (Mo. App. 1958) (bluegrass pasture). The more specific rule for perennial fruit trees controls here. *See Beaty*, 312 S.W.2d at 371 (noting that fruit-tree cases "must be distinguished"). But even if the annual-crop standard applied, Monsanto would be entitled to judgment as a matter of law as Plaintiff did not attempt to demonstrate the rental value of the orchards.

The same damages standard applies in a statutory trespass case under § 537.340, RSMo., when a defendant removes trees with no substantial value as timber. *See Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975, 982 (8th Cir. 2019); *Ridgway v. TTnT Dev. Corp.*, 126 S.W.3d 807, 817 (Mo. App. 2004); *Barnes v. Arkansas-Missouri Power Co.*, 281 S.W. 93, 95 (Mo. App. 1926) (discussing fruit trees). Many other states apply the same standard. *See, e.g., Missouri & N.A. R.R. v. Phillips*, 133 S.W. 191, 191-92 (Ark. 1910); *Louisville, E. & St. L. Consol. R.R. v. Spencer*, 36 N.E. 91, 93 (Ill. 1894); *Short v. Jones*, 613 P.2d 452, 457 (Okla. 1980) (damage to pecan trees from herbicide drift); *Kolberg v. Sherwin-Williams Co.*, 269 P. 975, 977 (Cal. App. 1928) (damage to orange trees from pesticide application); *Kansas Zinc Mining & Smelting Co. v. Brown*, 57 P. 304, 305 (Kan. Ct. App. 1899) (damage to apple trees from chemical drift).

2. Plaintiff Introduced No Evidence of the Land Value, Either Before or After the Alleged Dicamba Damage.

Bill Bader did not testify as to the value of the orchard land before or after the dicamba incidents, any weather events, or any other incidents that may have affected the value of the land. Dr. Guenthner, who analyzed the lost profits of Plaintiff's business, specifically disclaimed any opinion on the change in value of the real estate. *See* 2/7/20 Trial Tr. 1606:9-1607:6. And no other witness or document filled the gap left by these two witnesses. Because Plaintiff did not satisfy its burden on compensatory damages, judgment should be entered in favor of Monsanto.

B. Even if Lost Profits Were a Permissible Measure of Crop Damages, Plaintiff's Evidence Was Impermissibly Speculative.

Missouri law requires proof of before-and-after property values because estimating future crop yields and associated expenses is inherently speculative. *See Boggs*, 80 S.W.2d at 144 ("To hold that in such case he may recover the value of a crop which he might have planted and raised, less cost of production, etc., would be going too far into the realm of speculation and uncertainty."); *Adam v. Chicago, B. & Q. Ry.*, 122 S.W. 1136, 1137 (Mo. App. 1909) ("Crops that might have been grown in the future are an element too contingent and speculative to afford a basis for the assessment of damages ….").

Plaintiff nevertheless asked the jury to award damages for four years of lost profits in the past, and eighteen years of projected future lost profits. This is impermissible as a matter of law. *See, e.g., id.* Further, even if lost profits for crop damage could ever be permissible, they should not be allowed here because Plaintiff fell well short of "the 'exacting' requirements of competent and substantial evidence to support an award of lost profits." *Williams v. Medalist Golf, Inc.*, 2018 WL 1046889, at *4 (E.D. Mo. Feb. 26), *aff'd on other grounds*, 910 F.3d 1041 (8th Cir. 2018) (quoting *Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 918 (8th Cir. 2004)). Instead, Plaintiff offered only "speculation as to probable or expected profits," which Missouri courts have long held is unacceptable. *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968).

1. Evidence of Past Damages Was Not Supported by a Substantial Basis.

Plaintiff's proof of lost profits for 2015 through 2018 was not "made reasonably certain by proof of actual facts." *Id.* To the contrary, Plaintiff's evidence was riddled with suppositions and assumptions that lacked a factual grounding. For example:

- Bill Bader acknowledged that Bader Farms' average profit from 2015 to 2018 was $65,000 higher than it was in 2011 through 2014 (2/6/20 Trial Tr. 1214:18-1215:20);[16]

- As a result, he appropriately conceded that Bader Farms did not have lost profits for those years (*id*. at 1215:13-20);

- Dr. Guenthner projected that Plaintiff's peach revenue should have nearly doubled in three years, from approximately $2.4 million in 2014 to $4.4 million in 2017 (2/7/20 Trial Tr. 1577:12-1579:19);

- Dr. Guenthner did not calculate Plaintiff's actual costs of producing peaches or review its records to develop a cost model based on Plaintiff's historical experience (*id.* at 1580:2-21);[17]

- Instead, Dr. Guenthner adopted hypothetical production costs using a Georgia-based study, resulting in a per-acre cost that was approximately half of that alleged in Plaintiff's complaint (*id.* at 1586:3-1588:3);

- Dr. Guenthner included more than $1.2 million in "mitigation expenses" that were based only on conversations with Bill Bader and not supported by receipts or other

[16] Plaintiff cannot avoid this problem by arguing that its multi-crop financial results are not representative of its peach-related results. Plaintiff has the burden of establishing variable expenses—those that are "tied directly to the unit of business or property damaged as a result of the defendant's actions." *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 56 (Mo. 2005). This Court has previously rejected a plaintiff's attempt to collect lost profits without such precision. *See Williams*, 2018 WL 1046889, at *4 (plaintiff's evidence supporting lost profits "related to the entirety of plaintiff's sod operation—not the Meyer Zoysia crop alone").

[17] *See Coonis*, 429 S.W.2d at 714 ("The cost and expense of operation, including depreciation (wear and tear), is a considerable item and in a suit for lost profits is an essential item in the proof of damages.").

documentation (*id.* at 1624:2-1627:12);

- Dr. Guenthner also did not adjust for unrelated sources of harm to the peach crop from 2015, including spraying of 2,4-D and glyphosate, or hail (*id.* at 1617:9-1619:23).

Each of the above assumptions by Dr. Guenthner—higher revenue, lower costs, unsubstantiated out-of-pocket expenses, no harm attributed to other causes—dramatically increased the hypothetical lost profits, to Plaintiff's benefit. Thus, Plaintiff's lost profits evidence failed to meet the requirements of Missouri law. *See Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. 2005) (Missouri law has "stringent requirements" for the evidence required to support a claim for lost profits, "refusing to permit speculation" and "requiring a substantial basis" for the awards) (quoting *Coonis*, 429 S.W.2d at 713-14); *Wandersee v. BP Prods. N. Am., Inc.*, 263 S.W.3d 623, 633 (Mo. 2008) (lost profits calculation must be based upon the income, expenses, and net profits of the business in the time period preceding the injury); *Jarman v. Griggs*, 31 S.W.3d 465, 467 (Mo. App. 2000) (finding insufficient basis to support amount of cocktail lounge's lost profit damages where plaintiff's expert speculated that the lounge would have increased its sales over a two-year period, and could not testify that the lost profits resulted directly from the leaking roof).

2. Evidence of Future Damages Was Even More Speculative.

The flaws identified above carried through to Dr. Guenthner's projections of future damages, where their impact was magnified as they compounded over a period of eighteen years. But the future projections suffered from additional problems as well:

- Dr. Guenthner incorrectly assumed that Bader Farms would be out of the peach business by 2019 (2/7/20 Trial Tr. 1619:24-1620:9);[18]

- In fact, Plaintiff purchased additional land for $1.1 million in 2018 and planted 2,000 more trees in 2020 (2/5/20 Trial Tr. 1130:6-1131:6);

- Dr. Guenthner suggested that if Bader Farms remained in the peach business, it would lose even more money than in his projections (2/7/20 Trial Tr. 1639:7-20), but he then acknowledged that a farmer would purchase $1.1 million in additional farmland only because they believe "it will be a profitable thing for them" (*id.* at 1642:4-11).

- The jury awarded $15 million in compensatory damages, an amount not supported by any subset of Dr. Guenthner's analysis or any other particular damages evidence presented by Plaintiff.

Dr. Guenthner calculated that Plaintiff lost approximately $21 million as a result of alleged dicamba damage to its peach trees. *Id.* at 1615:16-18. Bill Bader acknowledged that based on pre-2015 financial results, it would take 168 years for the entire Bader Farms operation—peaches and all other products combined—to produce $21 million in profits. *See* 2/5/20 Trial Tr. 1121:17-22. The $15 million in compensatory damages awarded by the jury would take Bader Farms 120 years to generate at the same rate. The absurdity of this result is further evidence that the "assumptions or hopeful expectations" that went into the formula do not meet Missouri's demanding standards for an award of lost profits. *Tipton*, 373 F.3d at 919 n.6.

[18] *See Gesellschaft für Geratebau v. GFG Am. Gas Detection, Ltd.*, 967 S.W.2d 144, 147 (Mo. App. 1998) (rejecting projections that were inconsistent with actual results).

C. Monsanto Is Entitled to a New Trial Because the Compensatory-Damages Instruction Was Erroneous.

Instruction No. 11 read as follows:

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

ECF # 554 (emphasis added). This instruction employs the wrong measure of damages. For the reasons discussed above in Section VI.A.1, Plaintiff's damages must be measured by the difference in market value of the orchard before and after the alleged dicamba damage. Monsanto's proposed instruction addressed that standard directly: "the difference between the fair market value of the peach orchard before it was damaged and its fair market value after it was damaged." *See* ECF #544, Monsanto tendered and rejected Instruction I (quoting MAI 4.02 [1980 Revision]).

Additionally, Instruction 11 improperly invites the jury to compensate Plaintiff for "occurrences" for which Monsanto bears no responsibility. At trial, the evidence included several "occurrences" that may have caused or, for purposes of lost profits, may in the future cause harm to the peach trees on Bader Farms: (1) application of dicamba herbicide over the top of non-Xtend crops (2/5/20 Trial Tr. 1040:18-1041:24, 1045:16-19 (Bader)); (2) application of dicamba herbicide during burndown operations (*id.* at 1045:20-22, 1050:20-1051:5, 1082:13-15, 1088:23-1089:1, 1175:8-19 (Bader)); (3) aerial spray of 2,4-D and glyphosate (*id.* at 1045:4-12, 1175:8-12 (Bader)); (4) hailstorms (*id.* at 1041:17-22, 1051:9-13 (Bader)); (5) multiple frost and freeze events (*id.* at 1064:17-19,

1069:10-14, 1070:21-1071:8 (Bader)); and (6) armillaria root rot (*id.* at 1111:12-1112:2 (Bader)). Even under Plaintiff's expansive theory of liability, Monsanto cannot possibly be held responsible for harm caused by these occurrences. Yet the jury was given no guidance in Instruction 11 or elsewhere about whether or how it should exclude them from its analysis.

The "occurrence in the evidence" formulation is appropriate only when the phrase unambiguously refers to something for which the defendant bears responsibility. When the evidence "reveals a number of occurrences for which defendants could not be liable," more specificity is required. *Vest v. City Nat'l Bank & Tr. Co.*, 470 S.W.2d 518, 521 (Mo. 1971). There was no such specificity here. Instead, there were two verdict directors, each encompassing multiple alleged acts and omissions, all revolving around a product called "the dicamba-tolerant system" that was not defined in the instruction or specified in the evidence. Tacking "the occurrence in the evidence" onto a roving-commission verdict director fails to confine or limit the jury's consideration to compensable causes of harm.

D. Monsanto Is Entitled to Judgment as a Matter of Law Because Plaintiff Presented No Evidence that It Holds a Legally Protected Interest in the Orchards.

As discussed above in Section VI.A.1, damages for harm to the peach orchards must be measured by the value of the real estate before and after the harm occurred. Because the undisputed evidence demonstrates that Plaintiff does not own any land on which peaches are grown, it cannot recover damages in this case. Alternatively,

Plaintiff's damages must be limited to the loss in value of its equipment established by Dr. Guenthner's testimony, $557,500.

1. Bill Bader Acknowledged that Bader Farms Does Not Own Peach-producing Land, and He Dismissed His Own Claims With Prejudice.

Bill Bader acknowledged on cross-examination that Bader Farms, Inc., the sole remaining plaintiff in this case, owns only one parcel of land. 2/5/20 Trial Tr. 1122:6-11. Bader Farms does not grow peaches on that parcel and has not for a number of years. *Id.* at 1127:19-1128:1. All peach-producing land at issue here is owned by Bill and Denise Bader or various trusts created for their estate-planning purposes. *See id.* at 1122:12-15, 1126:17-1128:1; 2/6/20 Trial Tr. 1197:21-1198:11.

Bill Bader was a plaintiff in this case from its inception until shortly before trial. On January 27, 2020, the Court granted his oral motion to dismiss his claims with prejudice. *See* ECF #420. Accordingly, there is no longer a plaintiff in this case that owns peach-producing real property and can pursue a claim for the loss in value of that property. *See, e.g., State ex rel. State Highway Comm'n v. Esselman*, 179 S.W.2d 749, 751 (Mo. App. 1944) ("One who makes a claim for damage to land … must prove such title or interest."); *Lambert v. Big Med. Drainage Dist. No. 1*, 261 S.W. 349, 350 (Mo. App. 1924) ("The injury occurred after plaintiff became the owner. Hence he, and not defendant, is entitled to receive the damages.").

2. Alternatively, Plaintiff's Compensatory Damages Should Be Limited to $557,500, the Amount Assigned by Dr. Guenthner to the Decrease in Value of the Equipment.

Dr. Guenthner's report and testimony identified a variety of equipment associated with tree-fruit production that would lose $557,500 in value as a result of dicamba damage to the peach orchards. 2/7/20 Trial Tr. 1570:18-1571:5, 1628:14-20; Pltf-2196. Although Monsanto believes that this evidence is speculative for the reasons described above, the equipment arguably is distinct from the real estate comprising the peach orchards. Accordingly, if the Court declines to grant Monsanto's motion in its entirety, it should nevertheless grant it to the extent that the compensatory damages awarded exceed $557,500.

VII. THE ERRONEOUS ADMISSION OF EVIDENCE REQUIRES A NEW TRIAL.

A district court should have "an opportunity, after all [its] rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to [the trial court] alone. [The court] is thus afforded 'a last chance to correct [its] own errors without delay, expense, or other hardships of an appeal.'" *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (quoting *Greer v. Carpenter*, 19 S.W.2d 1046, 1047 (Mo. 1929)). The Court should avail itself of this opportunity. Evidentiary rulings made in error warrant a new trial where they are sufficiently prejudicial that "[i]t is ***not possible to 'say with certainty*** that the jury's decision would have been the same absent [the] evidence.'" *Nichols v. Am. Nat'l Ins.*

Co., 154 F.3d 875, 889-90 (8th Cir. 1998) (emphasis added) (quoting *Hale*, 756 F.2d at 1333).

The Missouri Supreme Court has held a "'big league' verdict," as here, weighs in favor of finding that error was prejudicial. *Tune*, 883 S.W.2d at 22 ("Certainly the size of this verdict forecloses us from avoiding a remand on the basis that the error was not prejudicial."). The cumulative effect of inadmissible evidence is also critical to determining whether justice warrants a new trial. *See Nichols*, 154 F.3d at 889-90 (reversing and remanding for new trial based on the "cumulative effect" of evidence "inadmissible under Fed.R.Evid. 702 and 403"). As the Eighth Circuit has observed, error in individual evidentiary rulings may only become apparent when they are considered cumulatively after issues are examined "in relation to each other" and it is possible to see "the total picture." *Id.* at 890. Here, several evidentiary errors prejudiced Monsanto and require a new trial.

Evidence of Other, Non-Similar Incidents and Complaints. During trial, Plaintiff was permitted to rely upon and tell the jury about incidents, complaints, and/or inquiries by non-parties from across the country alleging that they experienced dicamba symptomology or that dicamba injured their crops. This was improper hearsay evidence, *see Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 981 (8th Cir. 2014), but Plaintiff, over objection, repeatedly side-stepped the hearsay rule by claims that the evidence was being offered for notice. But, to be admissible as an exception to the hearsay bar, such

notice evidence must meet threshold requirements for admissibility, which Plaintiff did not establish.[19]

For example, Plaintiff offered and the Court admitted maps and presentation slides purporting to reflect "estimates of dicamba-injured soybean acreage in the U.S. as reported by state extension weed scientists." Pltf-1364; Pltf-2019. This evidence—which changed the course of the trial—should only have been admitted as "notice" if Plaintiff first met its burden of showing that the alleged incidents were "substantially similar" to the one at issue here. *See Lovett ex rel. Lovett v. Union Pac. R.R.*, 201 F.3d 1074, 1081 (8th Cir. 2000) (affirming the exclusion of evidence of other incidents that were not "substantially similar"). It did not. There was no evidence that these complaints were even found to have involved dicamba. And they involved claims related to different crops with different sensitivities to dicamba, and herbicide applications that were not shown to have been made under circumstances similar to those at issue here. *See Schurman v. Davis*, 1997 WL 34626904, at *3 (N.D. Iowa Mar. 8, 1997) (excluding testimony about other cases of herbicide damage because it would require "mini-trial[s] of collateral issues to establish, in addition to what exact tank mix they used, ... manner of application, and with what damage to crop yields purportedly resulting"); *see also* 1/31/20 Trial Tr. (Orr Dep. 293:35-294:2) (ECF #474-2). Plaintiff made no showing that any of the other-incident evidence was similar, much less "substantially similar." *See, e.g.*, *Lovett*, 201 F.3d at 1080-81. Admission of this evidence was in error.

[19] The exhibits and testimony proffered by Plaintiff, which were improperly admitted as "notice" and should have been excluded on hearsay and other grounds, are identified in Exhibit C.

The admission of such evidence under the guise of "notice" was also erroneous because Missouri law is clear that the "notice" exception does not apply when the "notice" is received ***after*** the incident at issue occurred. *See Hale*, 756 F.2d at 1336 (finding that district court abused its discretion in allowing evidence of manufacturers' post-sale knowledge of the alleged product defect); *accord Bynote v. Nat'l Super Mkts., Inc.*, 891 S.W.2d 117, 120 (Mo. 1995); *Mason v. Wal-Mart Stores, Inc.*, 91 S.W.3d 738, 743-44 (Mo. App. 2002). Accordingly, for "notice" purposes, Plaintiff should not have been allowed to introduce any evidence to the jury of other incidents that Monsanto received notice of ***after*** 2015, the year Monsanto released Xtend cotton seed.

The cumulative effect of all of this—even assuming *arguendo* that some or all of it was properly admitted as hearsay "notice" evidence—was highly prejudicial to Monsanto and requires a new trial. *See Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508, 509 (8th Cir. 1993) (erroneous admission of other evidence "had a considerable unfair prejudicial effect on the jury" where plaintiff's closing argument "was able to allude to this other accident evidence which arguably inflamed the jury and contributed to its large punitive damages award").

Undisclosed "Expert" Opinions. Plaintiff's case rested heavily on the opinions of Dr. Bradley, who was not disclosed as a testifying expert in this case and who Monsanto had no opportunity to cross-examine or challenge. It is well-established that an expert witness cannot serve as the mouthpiece for the opinion of another expert. *See, e.g., Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 409-10 (6th Cir. 2006); *Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry.*, 1999 WL 12931, at *4 (4th Cir. Jan. 14,

1999). Yet, Dr. Baldwin did just that when he repeatedly parroted Dr. Bradley's opinions, presentations, maps, studies, and conclusions. In fact, while Dr. Bradley was not an expert in this case, his expertise was so critical to Plaintiff's case that Plaintiff's counsel mentioned him twice ***by name*** in closing argument. 2/14/20 Trial Tr. 2466:25-2467:5, 2540:3-5. But, Monsanto did not have the ability to cross-examine Dr. Bradley or the other phantom experts whose opinions Dr. Baldwin improperly testified about.[20]

Improper Admission of Documents Without Foundation. Prior to admission of a document, Plaintiff was required to "produce evidence sufficient to support a finding that the item is what [Plaintiff] claims it is." Fed. R. Evid. 901; *Schmidt v. City of Bella Villa*, 557 F.3d 564, 568-69 (8th Cir. 2009). Plaintiff failed to make even a minimal showing to support this finding for numerous exhibits at the center of its case.[21] For example, Plaintiff asked Dr. Carey, a Monsanto employee, if he was familiar with the slide presentation marked as Pltf-282. Dr. Carey responded that the exhibit was "not familiar[.]" 1/29/20 Trial Tr. 418:16-19. Yet, despite Dr. Carey's lack of knowledge and no attempt to otherwise authenticate the document, Pltf-282 was admitted into evidence and Plaintiff proceeded to question Dr. Carey about it.

In this, and many other instances, Plaintiff did not rely upon personal knowledge of the witness, but rather premised admissibility solely on the existence of a Monsanto Bates number signifying production. *See id.* at 540:1-3 ("Down at the bottom of the page

[20] Monsanto repeatedly objected to the use of Dr. Baldwin as a mouthpiece for other experts and renewed its objections during trial. *See, e.g.*, ECF #312, 313, 393, 473; 2/6/20 Trial Tr. 1181:8-1183:16.

[21] Exhibit C contains a list of the exhibits improperly admitted on this basis.

it lists a Monsanto Bates number. You see that?"), 488:24-489:1 ("Do you see the little Monsanto Bates Number on the very bottom right-hand corner?"). Indicia of production, such as a Bates number, is not a basis for authentication under Federal Rule of Evidence 901, or self-authentication under Rule 902. It is black letter law that a lay witness may testify only to matters for which the proponent demonstrates the witness has personal knowledge. *See* Fed. R. Evid. 602; *Kemp v. Balboa*, 23 F.3d 211, 213 (8th Cir. 1994); *Akins v. Zeneca, Inc.*, 1995 WL 452087, at *9 (6th Cir. July 27, 1995) (affirming exclusion of defendant's internal document, which was authenticated by stipulation, because plaintiffs attempted to introduce it through a witness with no personal knowledge of it).

The admission of documents lacking foundation substantially prejudiced Monsanto. These documents featured prominently in both Plaintiff's opening statement and closing arguments, and Plaintiff's counsel relied heavily on them in arguing punitive damages. For example, Plaintiff's counsel claimed—with no foundation—that handwritten notes on a document were written by a Monsanto employee, and were from 2014. Because the Court allowed the document to be used through a witness who lacked any foundation regarding the document, the jury was left to trust counsel's unsupported "testimony." 1/27/20 Trial Tr. 144:17-23 (stating with regards to Pltf-311: "And then in 2014 …. [t]hese are Monsanto's notes from a Monsanto note-taker."); *see also* 2/14/20 Trial Tr. 2460:12-18 (referring to same exhibit). Because no witness had personal knowledge regarding the document, Monsanto had no way to rebut Plaintiff's mischaracterizations. Plaintiff's counsel also twice in closing referred to an improperly

admitted document, about which no witness had knowledge, telling the jury it encapsulated the entire case. 2/14/20 Trial Tr. 2480:23-24; *see also id.* at 2550:20-25. The resulting prejudice to Monsanto from any of these improperly admitted documents warrants a new trial because the jury likely would have reached a different result absent such evidence.

CONCLUSION

For the foregoing reasons, Monsanto respectfully requests that this Court direct the entry of judgment as a matter of law in Monsanto's favor. Alternatively, the Court should grant Monsanto a new trial on all of plaintiff's claims. Monsanto further requests that the Court grant such other and further relief as it deems just and proper under the circumstances.

Dated: March 27, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of March, 2020, the foregoing was filed electronically via the ECF/CM system with the Clerk of Court which will serve Notice of Electronic Filing upon all counsel of record via electronic mail.

/s/ A. Elizabeth Blackwell