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 ON PUNITIVE DAMAGES OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL OR REMITTITUR[1]

[1] Monsanto requested leave to file a brief of up to 27 pages, and this brief meets that page limit when formatted in 12-point font for text and 10-point font for footnotes. The brief 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 astronomical punitive damages award cannot stand. Not only does it far exceed the amount that even Plaintiff requested, but it is *more than 20 times* larger than the largest punitive damages award ever upheld by the Eighth Circuit against constitutional challenge ($12 million). That case involved truly reprehensible conduct, including the intentional physical abuse of children. *Ondrisek v. Hoffman*, 698 F.3d 1020 (8th Cir. 2012). This case involves economic harm to fruit trees.

The Court should reject the jury's punitive damages award for multiple reasons. First, there should be no award at all because Plaintiff failed to meet Missouri's threshold requirement for punitive damages. Plaintiff presented no evidence of malice, as this Court already recognized, *see* 2/10/20 Trial Tr. 1687:4-5 ("I don't see any malice in this case"), and also failed to show that Monsanto's conduct was otherwise "outrageous." *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989).

Far from engaging in outrageous conduct, Monsanto legally sold seed that federal regulators had approved and that farmer advocacy groups had demanded. Significantly, the seed provided benefits to farmers—and the American public—that had nothing to do with dicamba, including increasing crop yields and providing tolerance to non-dicamba herbicides for weed control. Monsanto also included an explicit warning *not* to use dicamba herbicide with the product, did not charge a penny for the dicamba-tolerant feature, and implemented robust mitigation efforts in response to concerns of *third parties'* unlawful applications of dicamba. Further, Monsanto did not even sell any dicamba product during the relevant time period (2015-2016) and thus could not have profited from any illegal use of dicamba. 1/29/20 Trial Tr. 459:16-20, 517:7-21 (Carey).

Meanwhile, Monsanto actively engaged EPA to secure approval for a new low-volatility dicamba formulation to spray over the top of crops grown from the seed. Plaintiff simply has not shown the clear and convincing evidence of outrageous conduct that Missouri law requires for punitive damages. The Court should therefore strike the punitive damages award as a matter of law.

Second, even if punitive damages were warranted—and they are not—the amount of the award is grossly excessive under both the Due Process Clause and Missouri law. Monsanto's unintentional conduct and Plaintiff's purely economic harm clearly place this case at the lowest end of the reprehensibility scale, if it appears on the scale at all. Further, the $15 million compensatory damages award is already exceptionally high, and this amount covers conduct for the four-year period from 2015-2018, while this Court held that punitive damages could only be warranted for the two-year period of 2015-2016. *See* 2/13/20 Trial Tr. 2313:16-17; ECF #554 at 15 (Jury Instruction 14). Under the circumstances, a 1:1 ratio with the compensatory damages for 2015-2016, which are at most $7.5 million, is the highest amount of punitive damages that comports with Due Process. That the jury awarded 33 times more demonstrates that it was motivated by passion and prejudice—likely caused by the numerous inflammatory and inappropriate comments made by Plaintiff's counsel, as well as the cumulative impact of evidentiary and other errors, *see, e.g.*, Monsanto Mot. for JML on Liability at 78-84.

The Eighth Circuit held that a 1:1 ratio was proper for a case involving "a most painful, lingering death" from lung cancer and a "callous disregard" for public health. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005).

There is no basis for a higher ratio here. Thus, if the Court permits any punitive damages, a new trial is required. At the very least, the Court should order a reduction or remittitur of the unconstitutional punitive damages award.

LEGAL STANDARD

Under Missouri law, punitive damages may be awarded only with "clear and convincing evidence" of malicious or outrageous conduct, in other words "evil motive and reckless indifference to the plaintiff's rights." *Romeo v. Jones*, 144 S.W.3d 324, 334 (Mo. Ct. App. 2004). That "higher standard of proof is required" because a punitive damages award is "so extraordinary or harsh that it should be applied only sparingly." *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110-11 (Mo. 1996).

In addition, "[t]he Due Process Clause of the Fourteenth Amendment prohibits 'grossly excessive' civil punishment." *Ondrisek*, 698 F.3d at 1028 (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001)); *see also May v. Nationstar Mortg., LLC*, 852 F.3d 806, 815 n.5 (8th Cir. 2017) ("Missouri has adopted the federal standard for reviewing the constitutionality of a punitive damages award." (citing *Krysa v. Payne*, 176 S.W.3d 150, 156-57 (Mo. Ct. App. 2005))). "[P]unitive damages are grossly excessive if they 'shock the conscience of the court or . . . demonstrate passion or prejudice on the part of the trier of fact.'" *Ondrisek*, 698 F.3d at 1028 (omission in original). A court's review of punitive damages is "[e]xacting" in order to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (internal quotation marks omitted); *see also Alcorn v. Union*

Pac. R.R., 50 S.W.3d 226, 247 (Mo. 2001) ("Submission of a punitive damages claim to the jury warrants special judicial scrutiny" (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Cooper*, 532 U.S. 424)), *overruled on other grounds by Badaham v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013); *Cooper*, 532 U.S. at 436-37.

ARGUMENT

I. Plaintiff Failed To Show Monsanto's Conduct Is Outrageous.

Plaintiff's case for punitive damages does not clear the threshold requirement under Missouri law: clear and convincing evidence that Monsanto's conduct "is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others." *Burnett*, 769 S.W.2d at 789 (quoting Restatement (Second) of Torts § 908(2) (1979)). "[C]areful judicial scrutiny" is called for "to determine whether [Monsanto's] conduct was so egregious that it was 'tantamount to intentional wrongdoing.'" *Alcorn*, 50 S.W.3d at 248 (quoting *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. 2000)). At the same time, even an intentional tort does not automatically give rise to a submissible case for punitive damages. *Burnett*, 769 S.W.2d at 787 ("It is not so much the commission of the intentional tort as the conduct or motives—*the defendant's state of mind*—which prompted its commission that form the basis for a punitive damage award" (emphasis added)). "Plaintiff must prove that defendant's evil hand was guided by an *evil mind*." *Id.* (emphasis added); *see also Harris v. Jungerman*, 560 S.W.3d 549, 562 (Mo. Ct. App. 2018).

Plaintiff has fallen far short of this burden. As an initial matter, the Court noted, "I don't see any malice in this case." 2/10/20 Trial Tr. 1687:4-5. Indeed, Monsanto

legally sold seed that federal regulators had approved, with strong demand from farmers and farmer advocacy groups. *See* 2/4/20 Trial Tr. (Borgmeyer Dep. 16:14-23) (ECF #476-2); 1/28/20 Trial Tr. (Magin Dep. 339:8-340:21) (ECF #422-2). Moreover, the seed provided benefits unrelated to dicamba, including increasing crop yields, and Monsanto explicitly warned against using dicamba herbicide with the product. *See, e.g.*, 1/28/20 Trial Tr. (Magin Dep. 329:13-330:18, 369:10-15, 370:11-371:11, 372:2-18, 392:25-393:11) (ECF #422-2); 2/6/20 Trial Tr. 1288:8-17 (Baldwin); M-1; M-346; M-348.

Further weighing against punitive damages are three factors identified by the Missouri Supreme Court: (1) "the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred"; (2) "prior similar occurrences known to the defendant have been infrequent"; and (3) "the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant." *Lopez*, 26 S.W.3d at 160. All three factors are present here.

First, "conformity with the regulatory process . . . negate[s] the conclusion that [Monsanto's] conduct was tantamount to intentional wrongdoing." *Alcorn*, 50 S.W.3d at 249. It is undisputed that Monsanto did not sell Xtend seeds until it received regulatory approval from USDA. *See* 2/4/20 Trial Tr. (Borgmeyer Dep. 16:14-23) (ECF #476-2). As in *Alcorn*, there is "not a submissible case for punitive damages" because of the defendant's "conformity with the regulatory process." 50 S.W.3d at 249.

This case is even less worthy of punitive damages than *Alcorn*. In *Alcorn*, the defendant did not promptly address the hazard when it could have, would not spend its

own money to address the hazard, did not warn of the hazard, and did not meet the technical industry standard. *Id.* at 248-49 (involving a car colliding with a train, which caused serious and permanent physical injury). Here, by stark contrast, Monsanto not only fully complied with the regulatory process, but it *also* affirmatively took numerous other steps to promptly warn of and reduce the risk of unlawful use of dicamba, including by spending its own money on rebates to encourage the lawful use of other herbicides. *See also infra* p. 7-8. Punitive damages are unavailable under Missouri law on this basis alone.

Second, there is no evidence that Monsanto knew of prior instances—*i.e.*, *before* the alleged damage to Plaintiff's trees—in which either the release of an herbicide-resistant seed without a corresponding herbicide, or illegal use of dicamba, had caused serious crop injuries. The record contains only two prior instances in which a seed was released without a corresponding herbicide, and there was no evidence of widespread injury to non-target crops. 1/31/20 Trial Tr. (Starling Dep. 61:14-62:17) (ECF #445-2) (Starling testifying that the PhytoGen cottonseed continues to be sold, as it has been for several years, without a corresponding herbicide, and that Stoneville cotton also has no herbicide approved for in-crop application). There is also no evidence in the record of crops being injured by illegal use of dicamba by third parties prior to 2015 (when Monsanto released the Xtend cotton seed).

In any event, even a "generalized knowledge of [a] danger is insufficient. The evidence must show that, at the time of the act complained of, the defendant had knowledge of a high degree of probability of injury to a specific class of persons." *Alack*

v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 339 (Mo. 1996) (rejecting jury instruction offered by plaintiff that "failed to include this necessary element of knowledge"); *see also Troknya v. Cleveland Chiropractic Clinic*, 280 F.3d 1200, 1209 (8th Cir. 2002) (Missouri law). There is no evidence as to prior-known harm to peach trees. Not only are prior similar occurrences infrequent in this case—they are non-existent.

Third, the injury here could have occurred only if a *third party* used dicamba *illegally*, which Monsanto actively sought to prevent. *See, e.g.*, 1/28/20 Trial Tr. (Magin Dep. 369:10-15, 370:11-371:11, 372:2-25, 373:3-20, 374:18-24, 375:2-22) (ECF #422-2); 1/30/20 Trial Tr. 691:24-697:8 (Carey). Monsanto did not charge for the dicamba-tolerant trait in the Xtend seed in 2015 and 2016, and it provided farmers with rebates to purchase one of the numerous other approved herbicides for use with the seed. 1/28/20 Trial Tr. (Magin Dep. 373:21-374:17) (ECF #422-2); 2/6/20 Trial Tr. 1404:18-1405:23 (Plaintiff's expert Dr. Baldwin testifying that he recommended glufosinate, one of the approved herbicides for use with Xtend cotton). Monsanto did not even sell any dicamba product during this time and thus could not have profited from illegal use of dicamba. 1/29/20 Trial Tr. 459:16-20, 517:7-21 (Carey). Thus, Monsanto did not profit from the dicamba-tolerant trait and paid money to encourage legal spraying of non-dicamba herbicides.

Moreover, Monsanto included on every seed bag a bright pink warning that instructed farmers: "DO NOT APPLY DICAMBA HERBICIDE IN-CROP," *i.e.*, over crops grown from Xtend seed. 1/28/20 Trial Tr. (Magin Dep. 369:10-15, 370:11-371:11,

372:2-18) (ECF #422-2); *see also* M-1; M-346; M-348. The company communicated the same warning to farmers through its sales force and in direct emails, 1/28/20 Trial Tr. (Magin Dep. 372:19-25, 373:3-20, 374:18-24, 375:2-22) (ECF #422-2),[2] as well as to its soybean dealers, 1/30/20 Trial Tr. 691:24-697:8 (Carey); Ex. M-379, and anyone licensed to use Monsanto technology, 1/29/20 Trial Tr. 641:3-642:1 (Carey). Plaintiff presented no evidence that Monsanto's warnings failed to inform farmers that dicamba use over Xtend seeds was illegal. To the contrary, the evidence showed that farmers did know of the illegality. *See, e.g.*, 2/6/20 Trial Tr. 1264:3-1266:13 (Baldwin); 2/5/20 Trial Tr. 1088:7-10 (Bader); 2/3/20 Trial Tr. 859:10-20 (Cravens). Moreover, Mr. Bader and Plaintiff's witness Dennis Cravens testified that they had no personal knowledge of any off-label application of dicamba over the top of any Xtend crop in 2015. 2/5/20 Trial Tr. 1058:20-1060:2 (Bader); 2/3/20 Trial Tr. 856:1-13, 859:10-20 (Cravens, further testifying that he understood that any application of dicamba over Xtend seed would be illegal).

Put simply, Monsanto's mitigation efforts—even if they failed to prevent the harm to Plaintiff in 2015 and 2016—"are not consistent with a company that is 'completely indifferent' to the safety of others." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993). For example, in *Bhagvandoss v. Beiersdorf, Inc.*, the Missouri Supreme Court held that punitive damages were not warranted when a defendant "gave serious attention to the problem and issued a warning." 723 S.W.2d 392, 398 (Mo. 1987).

[2] Indeed, Monsanto's employees were strongly advised to "comply with the law" and not "make any off-label recommendations or encourage any off-label use." 1/30/20 Trial Tr. 696:10-697:3 (Carey).

"Total inaction" is what supports a finding of "conscious disregard" or "complete indifference," *id.*, not the extensive mitigation efforts deployed by Monsanto. Similarly, in *Jone v. Coleman Co.*, in which the defendant's propane canister warning was inadequate because it did not use the words "carbon monoxide," the court held that the warning given nonetheless "indicates that [defendant] did not willfully or consciously disregard the safety of the consumers of its propane canisters." 183 S.W.3d 600, 610-11 (Mo. Ct. App. 2005); *Bhagvandoss*, 723 S.W.2d at 398 ("[I]nadequate communication cannot be equated to conscious disregard." (collecting cases)); *see also Ford v. GACS, Inc.*, 265 F.3d 670, 678 (8th Cir. 2001) (holding plaintiff could not show reckless indifference, even when manufacturer failed to implement safer alternatives, because it nonetheless developed and considered those alternatives).

Importantly, the fact "[t]hat [Monsanto's] efforts did not prevent all injuries is not the issue." *Drabik*, 997 F.2d at 510 (citing *Bhagvandoss*, 723 S.W.2d at 398). Instead, "[t]he point is that" Monsanto's mitigation and prevention efforts "belie an outrageous, wanton disregard for user safety which would support a punitive damages award." *Id.*; *see also Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) ("An award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue.") (Iowa law). Indeed, Monsanto spent considerable resources and time on the dicamba issue, while actively working towards EPA approval for a lower-volatility herbicide to accompany the already-approved seed. *See Ford*, 265 F.3d at 678.

Further, the high consumer demand for the Xtend seed weighs strongly against punitive damages. *See Drabik*, 997 F.2d at 511 (applying Missouri law to hold plaintiff could not recover punitive damages, explaining that "consumer demand is highly relevant to the manufacturer's state of mind and is probative to the issue of punitive damages"); *see also Ford*, 265 F.3d at 678 (same, explaining "[w]e do not suggest that a manufacturer may ignore safety concerns based on customer demand, but it does go to the wantonness required for a punitive damages award"). Farmer advocacy groups including the National Cotton Council, United Soybean Board, and American Soybean Association supported the commercial launch of the seed in 2015 without a dicamba herbicide. *See* 1/28/20 Trial Tr. (Magin Dep. 339:8-340:21) (ECF #422-2). Even Plaintiff's expert Dr. Baldwin testified about the benefits of increased yield for the seeds and that the seeds could be used safely with other herbicides. 2/6/20 Trial Tr. 1272:5-6 (Dr. Baldwin testifying, "I was all about the seed part of the technology."); *id.* at 1289:11-14; *id.* at 1404:18-22; *id.* at 1406:23-1407:03. The seed provided significant other benefits to farmers, including increasing crop yields and tolerance to *non-dicamba* herbicides for weed control. 1/28/20 Trial Tr. (Magin Dep. 329:13-330:18, 392:25-393:11) (ECF #422-2); 2/6/20 Trial Tr. 1288:8-17 (Baldwin); *see also* 2/13/20 Trial Tr. 2318:2-3 (this Court "acknowledg[ing] that there were legitimate reasons" for Monsanto to release the Xtend seed when it did).

In short, all of the *Lopez* factors confirm that punitive damages are inappropriate here. Plaintiff has failed to show the clear and convincing evidence of outrageous conduct that Missouri law requires for the "extraordinary" remedy of punitive damages.

Rodriguez, 936 S.W.2d at 110-11. Punitive damages are not warranted under Missouri law, *Alcorn*, 50 S.W.3d at 248, and they also violate federal Due Process requirements, *see Honda*, 512 U.S. at 434-35 ("A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment.").

II. The $250 Million Punitive Damages Award Violates Due Process and Is Excessive.

Even if punitive damages were permissible (and they are not), the amount of the award vastly exceeds the limits imposed by the Due Process Clause and Missouri law. *State Farm*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."). The jury awarded $250 million in punitive damages—$50 million more than requested—in a case of unintentional, purely economic injury to fruit trees, after Plaintiff had already received a robust $15 million in compensatory damages. This astronomical award is over twenty times greater than the largest punitive damages award ever upheld or approved by the Eighth Circuit post-*Gore*.[3]

The ratio also vastly exceeds anything the Eighth Circuit has permitted in cases involving multi-million dollar compensatory damages awards. In such cases, the Eighth Circuit has permitted punitive ratios ranging from 0.5:1 to 4.8:1, with the higher end of

[3] Pre-*Gore*, there was a $25 million award in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 732 (8th Cir. 1986), but the defendant did not challenge the award on appeal, aside from contending that the if the actual damages award were reversed, so must the punitive damages. The ratio in that case was approximately 2.3:1.

the range reserved exclusively for far more reprehensible conduct, with far lower compensatory damages. *Ondrisek*, 698 F.3d at 1030-31 (reducing a $30 million punitive damages award to $12 million, a 4:1 ratio with compensatory damages, in a case involving the repeated beating of children, who then contemplated suicide). Here, simply comparing the $15 million compensatory damages award to the $250 million punitive damages award gives a staggeringly high ratio of 16.7:1. But the true ratio is higher still, because only the damages from 2015-2016 are relevant to the punitive damages award. The ratio should be 1:1 at most, and the punitive damages award should be reduced to $7.5 million at most.

A. The $250 Million Punitive Damages Award Violates Due Process.

Three factors guide a court's determination of whether a punitive damages award violates Due Process: (1) the degree of reprehensibility of defendant's conduct; (2) the ratio between compensatory damages and punitive damages; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). These guideposts show that "this case is neither close nor difficult." *Id.* The punitive damages award is plainly unconstitutional.

1. This Case Involves a Low Degree of Reprehensibility.

The degree of reprehensibility of a defendant's conduct is the most important guidepost when assessing the reasonableness of a punitive damages award. *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575). Relevant factors include whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an

indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* Courts also look to whether "a particularly egregious act has resulted in only a small amount of economic damages." *Id.* at 425 (quoting *Gore*, 517 U.S. at 582). These factors are not present here.

Instead, the record establishes a very low degree of reprehensibility. The harm is "purely economic in nature." *Gore*, 517 U.S. at 576 (emphasizing that not "all acts that cause economic harm [translate] into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages"). Plaintiff did not suffer a physical injury, and public health and safety were not remotely at risk. To the contrary, the seeds offered premium genetics to increase yields, as well as tolerance to various herbicides other than dicamba for weed control. These features benefitted farmers and the American public.

Moreover, the harm to Plaintiff resulted from illegal use of dicamba by third parties, despite Monsanto's efforts to prevent their unlawful acts and mitigate the resulting harms. Monsanto's extensive mitigation efforts, including warnings and rebates, and its engagement with regulatory agencies, belie a finding of "intentional malice, trickery, or deceit" on the part of the company. *State Farm*, 538 U.S. at 419; *supra* Section I. The absence of these factors "renders any award suspect," and constitutionally bars the $250 million punitive award. *State Farm*, 538 U.S. at 419. Further, Plaintiff already received $15 million in compensatory damages for a purely

economic injury, and "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages." *Id.*

In short, Monsanto's conduct—commercializing a legal seed—sits squarely on the low end of the reprehensibility spectrum, if it appears on the spectrum at all. This Court previously acknowledged the lack of malice, 2/10/20 Trial Tr. 1687:4-5, and recognized that Monsanto had "legitimate reasons" for releasing the Xtend seed when it did, 2/13/20 Trial Tr. 2318:2-3. If the Court does not vacate the punitive damages award entirely, the award should at least be significantly reduced.

2. High Compensatory Awards Warrant a Low Ratio, Especially Absent Extremely Reprehensible Conduct.

The ratio of punitive to compensatory damages is the "most commonly cited indicium of an unreasonable or excessive punitive damages award . . . ." *Gore*, 517 U.S. at 580. "[F]ew awards exceeding a single-digit ratio . . . will satisfy due process." *State Farm*, 538 U.S. at 425. "When compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* at 425 (emphasis added).

The compensatory damages here—$15 million—easily qualifies as "substantial" for purposes of this analysis. *See, e.g.*, *Ondrisek*, 698 F.3d at 1029 (citing cases and noting rarity of multi-million dollar punitive awards with ratios greater than 1:1); *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019) (collecting cases and noting that appellate courts have found compensatory awards of $400,000 to $1 million to be "substantial" under *State Farm*, requiring a 1:1 ratio), *petition for cert. filed*

sub nom. Saccameno v. Ocwen Loan Servicing, LLC, No. 19-1120 (U.S. Mar. 13, 2020). A 1:1 ratio is therefore the presumptive limit of what federal due process allows. A higher ratio "alerts the courts to the need for special justification." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004). "Thus, because [Plaintiff] received a large compensatory award in this case . . . in the 'absence of *extremely* reprehensible conduct against the plaintiff or some special circumstance' the large exemplary award cannot stand unmodified." *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (emphasis added) (quoting *Williams*, 378 F.3d at 799) (Missouri law).

Here, even considering the entirety of the $15 million compensatory damages award, the ratio of punitive damages to compensatory damages would be an extraordinary 16.7:1. However, that is not the proper comparison. The Court held that only conduct from 2015-2016 could support punitive damages, granting judgment against Plaintiff's punitive damages claim for 2017-2018. *See* 2/13/20 Trial Tr. 2313:16-17; ECF #554 at 15 (Jury Instruction 14). The precise ratio is difficult to calculate because—among other flaws in Plaintiff's compensatory damages evidence, *see* Monsanto Mot. for JML on Liability at 68-84—Plaintiff never made clear what portion of damages it attributed to the 2015-2016 timeframe. Nonetheless, there is no evidence that the damages attributed to 2015-2016 should be more than half the damages for the entire four-year period. That would mean the relevant compensatory damages are no higher than $7.5 million, or half Plaintiff's actual damages award, *resulting in a 33:1 ratio*. In

fact, the compensatory damages for 2015-2016 should be much lower—around $1 million.[4] *See also id.*

Eighth Circuit case law addressing multi-million dollar punitive damages awards confirms that the ratio here far exceeds constitutional limits, and that the proper ratio should be at most 1:1. In *Boerner*, 394 F.3d 594, for instance, a widower of a brand-loyal smoker who died of lung cancer sued the manufacturer of the brand's cigarettes that were substantially more addictive and carcinogenic than its competitors'. The court noted the manufacturer's "callous disregard for the adverse health consequences of smoking," and that this "highly reprehensible" conduct "relate[d] directly to the harm suffered by Mrs. Boerner: a most painful, lingering death following extensive surgery." *Id.* at 602-03. Even so, the court reduced the $15 million in punitive damages to approximately a 1:1 ratio with compensatory damages: $5 million. *Id.*; *see also Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 784, 790 (8th Cir. 2009) ($1.15 million in compensatory and

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[4] Plaintiff's best evidence in the record shows that 2015-2016 damages could be approximately $1.4 million—a 178.5:1 ratio. This figure assumes the highest revenue in the record for any year ($2.4 million, *see* Pltf-2194) for 2015 and 2016, for a total of $4.8 million in expected revenue; then subtracting actual revenue for 2015 and 2016 ($3.97 million, *see* Pltf-2195), for a total of approximately $900,000 in lost revenue; and adding mitigation costs ($500,000, *see* Guenthner Suppl. & Rebuttal Report at 10 tbl. E), for total damages of $1.4 million. *See also* Bader Pet. at ¶ 128 (alleging "$1.5 million *gross* loss of sales" in 2015 (emphasis added)). Or, alternatively, since the damage award accounted for four historical years plus twenty years of future lost profits, 2/7/20 Trial Tr. 1533:5-1535:20 (Guenthner), the damages number for 2015-2016 would be $1.25 million ($15 million divided by twenty-four years, times two). Again, the rationale behind Plaintiff's compensatory damages numbers are flawed and difficult to discern—a fact that should provide significant cause for concern when attempting to assess the reasonableness of punitive damages. *See* Monsanto Mot. for JML on Liability at 68-78.

punitive damages, a 1:1 ratio, where insurer denied a claim in bad faith without conducting an adequate investigation and accusing the insured of fraud).

In *Conseco*, the appellate court reduced punitive damages from $18 million to $7 million—a 2:1 ratio—in a case involving conduct significantly more reprehensible than the conduct asserted here. 381 F.3d at 825. There, former employees of a mortgage company stole customers' confidential loan information, went to a competitor, and then the competitor used that information as part of a scheme and actively "encouraged others in its offices to replicate the ['model'] scheme." *See id.* at 815-16. The reprehensible conduct was "widespread and systematic" and involved illegality at multiple levels, stealing customer information and a business's trade secrets. *Id.* at 824. Even then, the Eighth Circuit did not find "some special circumstance" to justify the jury's $18 million award or a ratio any larger than 2:1. *Id.* at 825.

In a more recent commercial-fraud case, the Eighth Circuit affirmed a $10 million punitive damages award—less than half the $21.3 million in compensatory damages. *See Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051 (8th Cir. 2014) (after defendant company's affiliate performed confidential research for plaintiff, defendant stole plaintiff's trade secrets to acquire and manage a competitor of plaintiff's). The ratio was thus below 0.5:1. And the defendant there "ignored numerous litigation holds, destroyed records, erased computers, and generally sought to avoid liability for its wrongdoing in whatever way it could." *Id.* at 1060.

Higher ratios are reserved exclusively for far more reprehensible conduct, and even those ratios are less than 5:1. In *Ondrisek*, punitive damages were awarded for the

defendant's abuse of multiple children, including: "repeated ritualistic and savage beatings; forced unpaid labor; denial of food; denial of formal education; complete isolation from the outside world; and threats of damnation if they tried to escape." 698 F.3d at 1027. Even on these facts, which were "exceptionally reprehensible," the court determined that based on "the larger compensatory damage award," the "punitive damages should not exceed a 4:1 ratio" to comply with Due Process. *Id.* at 1030-31. Accordingly, the court reduced a $30 million per-plaintiff award to $12 million. *Id.* at 1031; *see also Lee ex rel. Lee v. Borders*, 764 F.3d 966, 969-70, 975-76 (8th Cir. 2014) (upholding $3 million in punitive damages, with $1 million in actual damages, where a resident in a state mental-health facility was raped by an employee of the facility).

Eden Electrical, Limited. v. Amana Company likewise involved far more reprehensible conduct, and lower compensatory damages, than at issue here. 370 F.3d 824 (8th Cir. 2004) (affirming district court's remittitur of punitive damages from $17.875 million to $10 million, a 4.8:1 ratio with compensatory damages). The sole purpose of the defendant's actions was to trick the plaintiff company into buying $2.4 million worth of "junk" inventory, which the defendant never even delivered to the plaintiff. *Id.* at 828. In *Eden*, "[the defendant]'s agents expressed the desire to 'f* * *' and 'kill' [plaintiff] after taking its $2.4 million." *Id.* at 829. Indeed, "this was an extraordinarily reprehensible scheme to defraud," *id.*, and "the Court can hardly think of a more reprehensible case of business fraud," *id.* at 828 (quoting district court). And *Eden* represents the highest ratio (4.8:1) ever approved by the Eight Circuit, post-*Gore*, in a case involving a substantial compensatory award, marking the current "constitutional

boundary when multi-million dollar compensatory damages award[s] are involved." *Ondrisek*, 698 F.3d at 1030.

Monsanto's conduct here involves far lower reprehensibility than any of these cases. As the Court already recognized, this is not a case of malice or intentional misconduct. *See supra* Section I; 2/10/20 Trial Tr. 1687:4-5 (Court: "I don't see any malice in this case"). Among other things, Monsanto expressly and extensively warned users not to apply dicamba to the seeds, it did not charge a penny for the dicamba-tolerant feature, and it provided rebates to farmers to incentivize legal herbicide use. *See supra* Section I. (explaining these mitigation efforts, as well as others). The regulatory approval of the Xtend seed and consumer demand for it further show that Monsanto's conduct was hardly reprehensible. *See Conseco*, 381 F.3d at 825 (requiring "extremely reprehensible" conduct for higher ratio); *see also* 2/13/20 Trial Tr. 2318:2-3 (Court recognizing Monsanto had "legitimate reasons" for releasing the Xtend seed when it did). Given the low degree of reprehensibility, the purely economic loss, and the multi-million dollar compensatory damages award, punitive damages in a 1:1 ratio with the compensatory damages award for 2015-2016 "reach[es] the outermost limit of the due process guarantee" in this case. *State Farm*, 538 U.S. at 425. The compensatory damages for 2015-2016 are—at most—$7.5 million, so the punitive damages should be reduced to that amount or less.

3. $250 Million Is Astronomical Compared to Other Penalties.

The third factor, "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct" under relevant state

statutes, confirms that the award here is grossly excessive. *Gore*, 517 U.S. at 583. A Missouri statute authorizes double damages for the *intentional* destruction of crops. Mo. Rev. Stat. § 537.353(1). Here, however, the jury's finding was negligence, not intentional destruction, and the Missouri code authorizes only compensatory damages for the negligent destruction of crops. *See id.* § 537.353(2). The statute further directs courts to consider actual damages in calculating an appropriate penalty. *Id.* § 537.353(3)(2). Another statute provides treble damages if a person "injure[s] or destroy[s]" trees. *Id.* § 537.340(1). However, treble damages under this statute again require an *intentional* trespass. *Fondren v. Redwine*, 905 S.W.2d 156, 157 (Mo. Ct. App. 1995) ("[P]laintiffs failed to make a submissible case under RSMo § 537.340, in that there was no evidence that defendant intentionally entered plaintiffs' property and injured plaintiffs' tree"). In addition, damages under this statute are based only on the underlying market value of the trees themselves, and not lost profit damages. Mo. Rev. Stat. § 537.340(1) (allowing for damages "treble the value of the things so injured"); *Breiding v. Wells*, 800 S.W.2d 789 (Mo. Ct. App. 1990). Finally, the Court ruled in the MDL that Plaintiff does not have a claim for trespass under Missouri law, because "courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 727 (E.D. Mo. 2019) (quoting *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989)).

Thus, the most comparable civil penalties either support no punitive damages at all, or at most a 1:1 ratio with compensatory damages.

B. The $250 Million Punitive Damages Award Is Grossly Excessive Under State Law.

In Missouri, courts consider similar factors to *State Farm* and *Gore* in assessing whether a punitive damages award is excessive. *See Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997) (including the outrageousness of defendant's conduct, aggravating or mitigating circumstances, type of injury, the defendant's financial status, character of both parties, and the relationship between the parties); *see also May*, 852 F.3d at 815 n.5 (noting Missouri courts apply the federal due-process analysis). For the same reasons explained above in Sections I and II.A, the $250 million punitive damages award is excessive under Missouri law as well.

III. A New Trial Is Necessary Because The $250 Million Punitive Damages Award Is The Result of Passion And Prejudice, The Court Provided Erroneous Instructions, And It Cannot Be Determined What Conduct Provided The Basis For The Verdict.

A. The Punitive Award Is Invalid Because It Resulted From Passion And Prejudice.

The staggering and unprecedented size of the jury's $250 million punitive award is powerful evidence that it impermissibly resulted from passion and prejudice. Plaintiff's request for actual damages was grossly inflated, but the jury nonetheless awarded $50 million more than requested for punitive damages—after deliberating less than an hour. In addition, Plaintiff's counsel made numerous inflammatory and prejudicial remarks throughout the trial, clearly stoking the jury's passions. "Excessiveness because of bias and prejudice vitiates the entire verdict and judgment and requires a new trial." *Deaner v. Bi-State Dev. Agency*, 484 S.W.2d 232, 233 (Mo. 1972). Remittitur cannot cure this

problem. *See id.*; *see also Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1210 (8th Cir. 1999); 11 Wright & Miller, *Federal Practice and Procedure* § 2815 (3d ed. 2019 update). The dramatic disparity between actual and punitive damages shows that this is not a case of "an honest mistake as to the nature and extent of the injuries," *Moore v. Mo.-Neb. Express, Inc.*, 892 S.W.2d 696, 714 (Mo. Ct. App. 1994), thus necessitating a new trial. Indeed, there were "error[s] committed[] of such a nature as to engender bias, passion or prejudice." *McConnell v. Pic-Walsh Freight Co.*, 432 S.W.2d 292, 301 (Mo. 1968); *see also Kan. City Diesel Power Co. v. Kirloskar, Inc.*, 647 S.W.2d 841, 848 (Mo. Ct. App. 1983) (finding such error when inadmissible, irrelevant evidence was introduced).

Prejudicial remarks from Plaintiff's counsel abound in the record, improperly inflaming the jury. *See Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. 1994) (holding that error in permitting plaintiff to make specific damages request for first time in closing argument was prejudicial, and "the size of this verdict forecloses us from avoiding a remand on the basis that the error was not prejudicial"). Plaintiff's arguments concerning harm to others, the overriding focus on Monsanto's net worth, and repeated comparisons of Monsanto with violent criminals were all fundamentally improper and infected the jury with bias. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353-54 (2007) (holding that the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"); *State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (citing *Gore*, 517 U.S. at 585)).

First, Plaintiff's counsel specifically stated that Monsanto had no "concern for innocent third parties," and "the only way to make them care is to make them pay." 2/15/20 Trial Tr. 3023:22-24:1; *see also id.* at 3031:13-18 (asking the jury to consider what Monsanto "made off of this, just in the [Missouri] bootheel. Just in Dunklin County").[5] These statements, in combination with Plaintiff's hearsay evidence of harm to others in Phase I, inflamed the jury and led to the $250 million punitive damages award. 2/14/20 Trial Tr. 2466:25-2467:4 (supposed findings of thousands of "[dicamba] claims, 3.6 million acres damaged"). Plaintiff also relied on alleged harm to others from 2017 onward in closing, despite this Court's instruction that punitive damages would be limited to 2015-2016. *See, e.g.*, *id.* at 2467:16-21, 2468:9-23, 2469:9-17, 2551:12-13. This contravenes what the Supreme Court has made "clear," i.e., "the potential harm at issue" is the harm that the defendant "caused *the plaintiff*" from the relevant conduct. *Philip Morris*, 549 U.S. at 354; *cf. Williams*, 378 F.3d at 793, 796 (reducing a punitive damages award from $6 million to $600,000 because it was based upon "evidence of misconduct by [defendant company] unrelated to [plaintiff]'s claim").

Second, Plaintiff's argument in Phase II centered on Monsanto's net worth. *See, e.g.*, 2/15/20 Trial Tr. 3020-21 (stating that $200 million in punitive damages would be like taking 25 cents from "a person who has $10 in their pocket"); *id.* at 3021:8-11

[5] *See also* 2/15/20 Trial Tr. 3030:10-11("Did you see any sympathy for the Baders *or anyone else*" (emphasis added)); *id.* at 3031:7-9 (asserting that Monsanto put "innocent farmers" at risk and went ahead with a product that would "damage people"); *id.* at 3032:9-10 (referring to "destroying farms" (plural)); *id.* at 3032:19 ("Taking advantages of driftees" (plural)).

(discouraging the jury to award less than $200 million because "essentially to this defendant, it is going to be change in the couch cushions. It's not going to make any difference."); *id.* at 3023:14-17 ("Those numbers ['in the tens of millions'] don't matter to [Monsanto]. Not when you are worth $7.8 billion, net worth."); *id.* at 3033:7-8 (telling the jury "to cut into that profit with a number that makes some sense"); *id.* at 3034:1-2 ("You are going to have to aim lower for their wallet to get a real reaction."). During the punitive damages phase, Plaintiff's counsel conceded that the harm to Plaintiff was no more than $15 million and that Monsanto's net worth was the only thing requiring a higher punitive damages award. *Id.* at 3033:9-10 ("15 million is fine to compensate Bill Bader. But 15 million doesn't mean beans to Monsanto.").

This argument clearly swayed the jury and violates Due Process. Under the Due Process Clause, "courts must ensure that the measure of punishment is . . . proportionate to the amount of *harm to the plaintiff* and to the general damages recovered." *State Farm*, 538 U.S. at 426 (emphasis added). A defendant's net worth "cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427; *Zazú Designs v. L'Oreal, S.A.,* 979 F.2d 499, 508 (7th Cir. 1992) (holding that net worth does not justify increasing a punitive damages award "as if having a large net worth were the wrong to be deterred"); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) ("A defendant's wealth is not a sufficient basis for awarding punitive damages. That would be discriminatory and would violate the rule of law . . . by making punishment depend on status rather than conduct." (citation omitted)). This astronomical award far exceeds anything that could be justified based on the conduct at issue at the level of compensatory

damages. The fact that the jury awarded $50 million more than requested further reflects that Plaintiff's counsel successfully stoked the passions of the jury.

What is more, Plaintiff's counsel laced his argument with inflammatory statements comparing Monsanto to violent criminals. *See, e.g.*, 2/15/20 Trial Tr. 3033:3-6 ("Monsanto is like an armed robber standing in front of the Court saying, I'm sorry, I've learned my lesson. But the gun and ski masks are still sitting in his car outside."); *see also id.* at 3030:24-3031:1 ("They have the sympathy of a criminal who is caught and is standing in front of the Court waiting [for] punishment."); *id.* at 3034:22-24 ("[I]t's going to be like the thief who runs out of the house and maybe drops one or two items. It is still a profitable crime."). Monsanto sold a legal seed product, approved by USDA, and actively worked with EPA on approval for a low-volatility herbicide. Plaintiff's counsel's sole purpose in describing Monsanto as a "thief," "armed robber," and "criminal" was to inflame the passions of the jury, which it plainly did. This strategy requires a new trial because "the argument was so prejudicial that [Monsanto] did not receive a fair trial." *Giddens v. Kan. City S. Ry.*, 937 S.W.2d 300, 307 (Mo. Ct. App. 1996). The $250 million punitive damages verdict resulted from passion and prejudice, and a new trial is needed. 2/15/20 Trial Tr. 3035:16-3036:12 (Monsanto moving for mistrial on these grounds).

B. A New Trial Is Required Based on Instructional Error.

Instructions 9, 14, and 20 further compounded the problems. "The instructions were confusing" because they were "contradict[ory]" and "legally misleading." *Bening v. Muegler*, 67 F.3d 691, 697 (8th Cir. 1995) (applying Missouri law). Instruction 20

permits the jury to assess punitive damages "for the conduct for which [the jury] found that Defendant Monsanto Company is liable for punitive damages," and in Instruction 14 that conduct included "harm to others." ECF #554, ECF #559. Neither Instruction distinguished between the 2015-2016 and 2017-present timeframes. In fact, Instruction 20 referenced Verdict A, which included the *2017-present* claims against Monsanto *and BASF*. Particularly given that Plaintiff's argument blended the two timeframes and each defendant's conduct to justify punitive damages, it cannot be "assur[ed] that [the] jur[y] [was] not asking the wrong question," that is, punishing Monsanto "for harm caused [to] strangers," or for acts it did not do, or acts in the irrelevant 2017-present period. *Philip Morris*, 549 U.S. at 355. A new trial is necessary to fix these errors. *Bening*, 67 F.3d at 697.

In addition, the jury was not instructed on the factors to be considered in determining the amount of punitive damages, nor was the jury provided any instructions to cabin its discretion in setting the amount. *See* ECF #552 (Monsanto Tendered & Rejected Instrs. AAA-LLL). Thus, as the size of the award demonstrates, the jury was given inadequate guidance to determine the amount of the award. The instructional errors related to the punitive damages claim require a new trial on all issues. *See, e.g.*, *W. Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 293-94 (8th Cir. 1990) (finding that district court's flawed punitive damages jury instruction required reversal, and concluding that "the question of punitive damages is not sufficiently distinct from the [liability questions] to permit a new trial on the issue of punitive damages alone").

Instruction 9 also "failed to include th[e] necessary element of knowledge." *Alack*, 923 S.W.2d at 338-39 ("In a negligence case, punitive damages are awardable only if, at the time of the negligent act, the defendant 'knew or had reason to know that there was a *high degree of probability* that the action would *result in injury*,'" (quoting *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc.*, 700 S.W.2d 426, 436 (Mo. 1985))). *Alack* rejected an instruction that, as here, mirrored MAI 10.02. *Id.* at 339 (directing MAI 10.07 to be used to cure the absence of other instructions requiring knowledge). Instruction 9 effectively told the jury that punitive damages were awardable based on negligence alone. That is wrong and requires reversal. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 74 (Mo. 1990) ("Facts in addition to those relied on in the negligence submission must be established in order to recover punitive damages."), *overruled on other grounds by Rodriguez*, 936 S.W.2d 104.

C. A New Trial Is Necessary Because It Cannot Be Determined What Conduct Provided The Basis For The $250 Million Punitive Damages Verdict.

In addition, a new trial is needed because the same problems with the compensatory damages award, including the jury's general verdict and the joint venture claim, infected the punitive damages award as well. *See* Monsanto Mot. for JML on Liability at 5-6, 60-84; *Romeo*, 144 S.W.3d at 334 ("A plaintiff must prevail on his or her underlying claim to submit punitive damages to the jury."). Even if just one of Plaintiff's theories of liability is held to have been improperly submitted, the punitive damages award cannot stand because it cannot be determined whether the award was tied to conduct relating to the improper theory. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 405-07

(Mo. Ct. App. 2014) (reversing punitive damages award "because the instructions required the jury to consider undifferentiated conduct" between two theories, one of which was improper); *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1376 (8th Cir. 1989) ("The conduct of [defendant] relevant to an award of punitive damages necessarily differs according to the various theories of liability on which the jury based its verdict."). Instruction 9, for example, lays out the negligent design and failure to warn theories in the disjunctive, so that the jury did not specify under which theory they found Monsanto liable. *See Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 186-87 (Mo. 2019) ("A disjunctive instruction is prejudicial when substantial evidence does not support each disjunctive alternative because 'there is no way of discerning which theory the jury chose.'" (quoting *Ross-Paige v. St. Louis Metro. Police Dep't*, 492 S.W.3d 164, 176 (Mo. 2016))).

Any harmless-error argument is unavailing. Even if the different claims result in the same harm to plaintiff, that is relevant, if at all, only for compensatory damages. By contrast, the punitive damages analysis is based upon the defendant's conduct, which is different depending on the claim. *Blanks*, 450 S.W.3d at 405-07 (reversing the punitive damages award but upholding the compensatory damages award); *Robertson Oil*, 871 F.2d at 1375 ("Punitive damages are not intended to compensate an injured party, but to punish and deter conduct of the offending party."). If either one of the design or failure-to-warn claims fails, it is uncertain whether the jury would have awarded punitive damages based solely on the conduct that applies to the remaining theory. A new trial on all issues would be necessary. *See Slater v. KFC Corp.*, 621 F.2d 932, 938 (8th Cir.

1980) (holding "that the issues of damages and liability in this case are so interwoven as to require a new trial on both"); *accord Panjwani v. Star Serv. & Petroleum Co.*, 395 S.W.2d 129, 133 (Mo. 1965) (same, concluding "it was an abuse of discretion to not award a new trial on all issues"), *overruled on other grounds by Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 59-60 (Mo. 1973). The same issues apply to the jury's finding of joint venture and conspiracy. Because it cannot be determined the extent to which the punitive damages verdict rests on findings about Monsanto's conduct or BASF's conduct, if those rulings are reversed, the punitive damages award must fall as well, and a new trial is needed. *See* Monsanto Mot. for JML on Liability at 60-68, 75-76.

IV. Alternatively, An Order Substantially Reducing The Award Or A Remittitur Is Required.

At the very least, for the reasons discussed above the $250 million punitive damages verdict warrants a substantial reduction by the Court or at least a remittitur offering Plaintiff a choice between a reduced award and a new trial. *See supra* Sections I-II; Mo. Rev. Stat. § 537.068. The Court can unilaterally enter an order reducing the punitive damages verdict to the constitutional limit. *Ross v. Kan. City Power & Light Co.*, 293 F.3d 1041, 1049-50 & n.4 (8th Cir. 2002) ("The plaintiff's consent to a constitutional reduction of a punitive damages award is 'irrelevant' because the court must decide this issue as a matter of law."). Alternatively, the Court can enter a remittitur. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999) (explaining that "[a] remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award" on the basis that "the jury's award is

unreasonable on the facts," whereas "[a] constitutional reduction . . . is a determination that the law does not permit the award").

Punitive damages should be reduced or remitted to, at most, a 1:1 ratio with compensatory damages for the 2015-2016 period, which would be $7.5 million at most. *See Hallmark*, 758 F.3d 1051 (affirming a 0.5:1 ratio for punitive damages when faced with a $21.3 million compensatory award); *Boerner*, 394 F.3d at 603 (affirming approximately a 1:1 ratio for punitive damages when faced with a $4.025 million compensatory award).

CONCLUSION

For these reasons, Monsanto respectfully requests that this Court enter judgment as a matter of law in favor of Monsanto on punitive damages. In the alternative, Monsanto requests a new trial, remittitur, or an order from this Court substantially reducing the punitive damages verdict.

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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