Case Nos. 20-3665, 20-3663

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

John S. Hahn,
Special Master,

Bader Farms, Inc.,
Plaintiff-Appellee,

Bill Bader,
Plaintiff,

v.

Monsanto Company,
Defendant-Appellant,

BASF Corporation,
Defendant-Appellant.

OPENING BRIEF FOR DEFENDANT-APPELLANT MONSANTO COMPANY IN NO. 20-3665

Appeal from the United States District Court
For the Eastern District of Missouri, No. 16-cv-00299
Honorable Stephen N. Limbaugh, Jr., United States District Judge

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SUMMARY OF THE CASE

The court below erred in massively expanding Missouri's doctrine of proximate causation, contrary to bedrock federalism principles. Disregarding Missouri law, the court held that Monsanto Company was liable for damage to fruit trees caused by herbicides Monsanto did not even manufacture or sell. The purported basis for liability is that third-party farmers sprayed the herbicides over crops grown from Monsanto's seeds contrary to express warnings—and the herbicides then allegedly drifted onto Plaintiff Bader Farms, damaging peach trees.

This erroneous ruling, which the district court itself recognized was "unique" and not "conventional," led to a judgment against Defendants of $75 million, including $60 million in punitive damages. The compensatory damages award is contrary to longstanding Missouri precedent regarding damages for harm to fruit trees, and the punitive damages award is contrary to Missouri law and unconstitutionally excessive.

Given the importance of these issues and the significant errors below, Monsanto requests 30 minutes of argument time.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A, Defendant-Appellant Monsanto Company ("Monsanto"), a non-governmental entity, states that Monsanto is wholly owned by BCS US Holding LLC and is an indirect subsidiary of Bayer AG. Bayer AG, a publicly held German stock company, has no parent company and no publicly-held company owns 10 percent or more of its stock.

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INTRODUCTION

As this Court held in rejecting an analogous attempt to rewrite state tort law, a "federal court construing state law" should be "very reluctant to open Pandora's box" by engaging in unprecedented extensions of liability. *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009). Despite this admonition, the court below committed multiple remarkable errors, brushing aside or even ignoring state court precedent it did not like or considered too "aged." Collectively, these errors led to a shocking judgment of $75 million—including $60 million in punitive damages—for purported harm to marginally profitable peach trees.

First, the district court erred in massively expanding Missouri's doctrine of proximate causation, in rulings the court itself recognized were "unique" and not "conventional." *In re Dicamba Herbicides Litig.*, No. 16-cv-299, 2018 WL 2117633, at *2-3 (E.D. Mo. May 8, 2018). According to Plaintiff Bader Farms ("Bader"), Monsanto is liable for damage caused by third parties' spraying of dicamba herbicides that Monsanto did not manufacture or sell, because Monsanto manufactured seeds that were tolerant to dicamba. Plaintiff's novel theory is that it was "foreseeable that third-party farmers who purchased the seeds would *illegally* spray older

formulations of dicamba onto their own crops to kill weeds," and the dicamba could then drift and damage crops on neighboring farms, including Bader. A.56 (emphasis added).

Early in the case, the district court itself cogently explained why this attenuated theory fails as a matter of Missouri law: "[T]his is not a case in which a plaintiff's use or a third-party's use of a defendant's defective product caused damage to plaintiff, because Monsanto did not manufacture, sell or apply the dicamba." A.59. Rather, "plaintiffs' injuries stem directly from an intervening and superseding cause—the unforeseeable independent acts by the third-party farmers who unlawfully sprayed dicamba on their crops," in the face of a "prominently highlighted" warning on the seed bags stating "DO NOT APPLY DICAMBA HERBICIDE IN-CROP … IT IS A VIOLATION OF FEDERAL AND STATE LAW." A.59-60. Accordingly, Monsanto's "conduct was simply too attenuated to establish proximate cause." A.59.

But the court later erroneously reversed course, concluding it was "irrelevant" that "Monsanto did not manufacture, distribute, or sell the old dicamba herbicide," and that Bader never proved Monsanto's own herbicide caused its injury, because that was "not part of the causal link

under plaintiffs' theory of the claim." A.1044. The court held that the "product" at issue was a "dicamba-tolerant system"—comprised of Monsanto's seed and *any* manufacturer's dicamba herbicides—and that Monsanto was liable for selling the seed "component" of this system "without a safe, corresponding herbicide." A.1034, 1044. The court further held that third parties' illegal misuse of dicamba would not break the chain of causation if it was "foreseeable"—but then refused even to instruct the jury on foreseeability. A.1054-56.

These rulings are contrary to Missouri precedents holding (1) that a third party's illegal misuse of a product generally constitutes a superseding cause that breaks the chain of causation, *Finocchio v. Mahler*, 37 S.W.3d 300, 303 (Mo. Ct. App. 2000); *see also Ashley Cty.*, 552 F.3d at 671 (Arkansas law), and (2) that defendants cannot be liable for damages caused by products they did not manufacture or sell, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007) (per curiam). The court disregarded both doctrines.

Second, the district court rewrote Missouri law on compensatory damages. Longstanding Missouri precedents hold that lost profit damages for fruit-bearing trees are overly speculative, and that the proper measure

of damages is instead the change in the land's fair market value. *See Butcher v. St. Louis-S.F. Ry.*, 39 S.W.2d 1066, 1069 (Mo. Ct. App. 1931) (collecting cases). The court below rejected these precedents as "aged," even though no Missouri court has overruled them or called them into doubt. This ruling led to an award of $15 million in highly speculative "lost profits"—even though Bader's historical profits from the orchard were only $54,000 per year and Bader is still in the peach business, advertising that "customers can buy any amount they choose, from a quarter peck to a semitruck load." https://www.baderpeaches.com/where.php.

Third, the district court disregarded Missouri precedent on punitive damages. The Missouri Supreme Court has rejected punitive damages where, as here, the defendant complied with government regulations and the harm would not have occurred without the wrongful conduct of third parties. *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226, 248 (Mo. 2001), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013). But the district court failed even to cite this decision.

Compounding this error, the court below then misapplied this Court's punitive damages precedent and imposed an award that is

unconstitutionally excessive. The district court itself recognized the case does not involve "malice," only unintentional economic injury to Bader's fruit trees. A.708. Therefore, if Monsanto's conduct even measured on the reprehensibility scale at all, it would be on the lowest end of that scale. Yet, the district court imposed a punitive award more than double the largest award ever approved by this Court post-*Gore*.

The judgment below should be reversed.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Missouri had jurisdiction to hear this action pursuant to 28 U.S.C. § 1331. *See* A.46. After a jury trial, the court denied Monsanto's motions for a new trial and judgment as a matter of law and entered an amended final judgment on November 25, 2020.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §§ 1291 and 1294(1), because a district court within this Circuit entered final judgment, and Monsanto timely filed a notice of appeal on December 17, 2020.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that Bader could establish proximate causation and duty without proving that Monsanto manufactured or sold the herbicides causing Bader's alleged injury, and despite the illegal misuse of the herbicides by third parties, contrary to Monsanto's express warnings. *Ashley Cty.*, 552 F.3d at 671; *Finocchio*, 37 S.W.3d at 303; *Benjamin Moore*, 226 S.W.3d at 115.

2. Whether the district court erred in holding that speculative lost profits are recoverable as compensatory damages for harm to fruit-bearing trees, despite Missouri precedent to the contrary. *Butcher*, 39 S.W.2d at 1069 (collecting cases); *Doty v. Quincy, Omaha & Kan. City R.R.*, 116 S.W. 1126, 1128 (Mo. Ct. App. 1909); *Kelso v. C.B.K. Agronomics, Inc.*, 510 S.W.2d 709, 725-26 (Mo. Ct. App. 1974).

3. Whether the district court erred in entering a punitive damages award that is contrary to the applicable standard under Missouri law and that is unconstitutionally excessive. *Alcorn*, 50 S.W.3d at 248; *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo. 2000); *Ondrisek v. Hoffman*, 698 F.3d 1020, 1028 (8th Cir. 2012); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 427 (2003).

4. As Federal Rule of Appellate Procedure 28(i) permits, Monsanto adopts by reference BASF's statement of issues 3, regarding the joint venture and conspiracy rulings.

STATEMENT OF THE CASE

I. Factual Background

This case involves popular crop seeds—Monsanto's Bollgard II® XtendFlex® cotton and Roundup Ready 2 Xtend® soybean seeds (collectively, "Xtend seeds"). These "high-performing" seeds provide significant benefits to American farmers and consumers. A.290; A.303-04. First, the seeds have premium genetics and the "best germplasm" available, leading to increased crop yields. A.290; *see* A.360-61 (Xtend seeds "have outyielded anything that we have had so far … and compared to our competitors"). Second, they have an "exceptional disease package," offering protection against diseases including "bacterial blight." A.356-59. Third, they are tolerant to multiple herbicides, including dicamba. A.199-200; A.518; A.239-40.

Bader's claims center on the seeds' dicamba-tolerance trait. Dicamba herbicides have been on the market since the 1960s, and are sold by numerous different manufacturers. A.192. Dicamba is highly effective at

killing broadleaf weeds, including pigweed, and has long been used in a variety of applications. A.202-03; A.206-07, 219; A.418-19; A.317-20; A.499-500. However, dicamba herbicides can also be harmful to conventional soybean, cotton, and certain other crops, A.220; A.580, and older formulations of dicamba are volatile, prone to vapor drifting off target and potentially damaging neighboring crops. A.207-08; A.530. It is thus illegal to spray the older formulations over growing cotton and soybean crops (though not illegal to spray those formulations before the growing season begins or over certain other crops, such as corn and sorghum). 7 U.S.C. § 136j(a)(2)(G)(it is "unlawful for any person … to use any registered pesticide in a manner inconsistent with its labeling"); A.568.

Beginning around 2005, farmers increasingly experienced difficulties controlling certain broadleaf weeds, especially pigweed, which in many places had grown resistant to the herbicide glyphosate. A.521-22. To combat pigweed, farmers resorted to "use of a handheld implement to chop out the weeds," "a very costly, labor-intensive process." A.202-03. To meet the need for better weed control, A.521-22, Monsanto began working on two types of products—first, soybean and cotton seeds that were tolerant to dicamba; and second, a low-volatility dicamba that could be

applied over dicamba-tolerant soybean and cotton crops during the growing season with less risk of vapor drifting to neighbors' fields. A.202-03.

Once developed, Monsanto sought the necessary regulatory approval for both products. Under federal law, seeds and herbicides are approved by different agencies. Genetically modified seeds, such as Monsanto's Xtend seed, must be approved by the U.S. Department of Agriculture ("USDA"). *See* 7 C.F.R. pt. 340. USDA "deregulates" a seed only "[a]fter several years of field testing" and "enough data has been gathered to demonstrate the new crop variety is not a plant pest, [and] poses no threat to agriculture or the environment." U.S. Dep't of Agric., *USDA's Biotechnology Deregulation Process* (Feb. 21, 2017), https://www.usda.gov/media/blog/2011/06/28/usdas-biotechnology-deregulation-process. After review of Monsanto's applications, USDA deregulated Monsanto's Xtend seeds in 2015, permitting their commercialization. A.224-26; A.400.

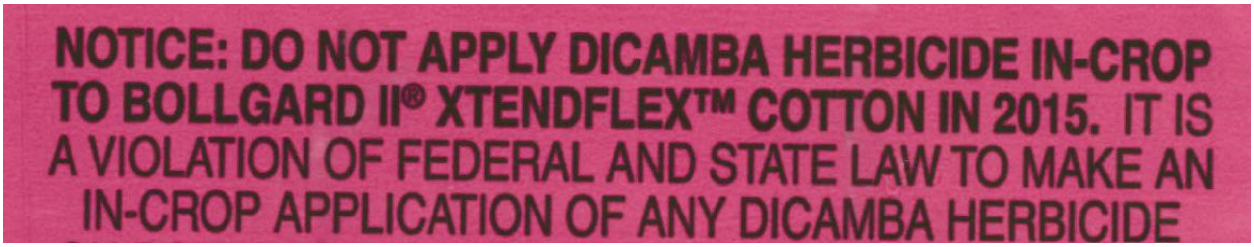
Herbicides are regulated by a separate agency, the U.S. Environmental Protection Agency ("EPA"). Monsanto and other manufacturers, including co-defendant BASF, applied for EPA approval of

low-volatility dicamba formulations. *See* A.1162. However, EPA had not ruled on those applications by 2015. A.400-01.

Thus, in 2015, USDA had approved the Xtend seeds but EPA had not yet approved a low-volatility dicamba herbicide that could be sprayed on crops grown from the seeds. Nonetheless, farmers and agriculture organizations, including the National Cotton Council, the American Soybean Association, and the United Soybean Board, strongly supported release of the Xtend seeds in 2015 and 2016, due to the seeds' other benefits, including their higher yield potential and tolerance to other herbicides. A.200-13; A.290; A.303-04; *see also* A.1222, 1228.

In response to the strong customer demand for the seed, Monsanto marketed Xtend cotton seeds beginning in 2015, and Xtend soybean seeds beginning in 2016. A.224-26; A.290-91; A.400. Monsanto did not manufacture or sell any dicamba herbicides during this period. A.263, 273.

To counteract the risk that farmers might illegally apply older dicamba formulations, Monsanto implemented a "robust communication plan." A.305-09; *see also* A.1222. Most prominently, each bag of Xtend cotton seeds carried a bolded warning on large, bright pink labels stating, in part:



A.1129 (further warning "[d]icamba will kill crops that are not tolerant to dicamba"); A.1146. Xtend soybean bags carried an equally prominent warning. A.1147.

In addition to those labels, Monsanto sent letters to everyone who had a license to use its technologies and to all dealers with Xtend seed inventory, warning that dicamba could not be used "over the top" of plants grown from such seed. A.306. Monsanto also took numerous other measures to communicate this message, including working with "strategic retail partners"; holding trainings for farmers and dealers; and adding inserts in the seed packaging and the dealer's bill of lading warning farmers not to use dicamba. A.307-08. Monsanto "did not charge for the value of the dicamba trait" in 2015 or 2016, and provided rebates to farmers for other available herbicides—including competitors' products—that were approved for use with the seeds. A.232-33; A.566-67; A.1224.

In November 2016, EPA finally approved Monsanto's low-volatility dicamba formulation, XtendiMax® with VaporGrip® Technology

("XtendiMax"), for use over Xtend crops. A.1162; A.242-43. EPA determined that Monsanto had "submitted satisfactory data pertaining to the proposed additional use" of XtendiMax and that approval "would not significantly increase the risk of any unreasonable adverse effect on the environment." 7 U.S.C. § 136a(c)(7)(B). EPA also approved low-volatility dicamba formulations made by other companies, including BASF's Engenia and a formulation called FeXapan, sold by Corteva. A.285-87. Monsanto sold both Xtend seeds and XtendiMax during 2017 and 2018. A.249, 286-87. Monsanto never sold XtendiMax in a package with Xtend seeds; buyers were free to purchase low-volatility dicamba from other manufacturers, or to use other herbicides such as glyphosate or glufosinate. *See* A.287-89; A.566.

II. Procedural History

A. The Complaint

In November 2016, Bader sued Monsanto, alleging that Monsanto negligently sold Xtend seeds in 2015 and 2016 "without an effective and safe herbicide for use with Xtend crops." Allegedly, neighboring farmers illegally sprayed older dicamba formulations made by other manufacturers

on Xtend crops, and the dicamba drifted onto Bader's property and damaged its peach trees. A.77-78.

Bader amended the complaint several times as the case proceeded, and added allegations regarding 2017 and 2018. As noted, by 2017, the EPA had approved several low-volatility dicamba formulations, including Monsanto's XtendiMax. According to Bader, these newer, approved formulations were "defective, unsafe, [and] volatile" and continued to drift and damage Bader's trees. A.78; *but cf.* A.100. Bader also claimed that Monsanto did not adequately warn purchasers of the risks of the "dicamba-based products," despite Monsanto's use of the EPA-approved labeling. A.108-11.

Significantly, the operative amended complaint was not limited to purported harm from Monsanto's dicamba herbicide. Instead, the complaint also alleged harm from co-defendant "BASF's Engenia herbicide" and "other dicamba herbicides" manufactured by non-parties, including older formulations of dicamba that were illegally used. *See* A.105-06. According to Bader, Monsanto is liable for all of the harm, irrespective of whose dicamba damaged the peach trees. *See* A.106.

B. Pre-Trial Rulings

1. *Rulings on the Pleadings*

Monsanto moved to dismiss the original complaint for, among other things, lack of proximate causation. The district court initially recognized that Bader's theory was contrary to Missouri law. The court held that "even if Monsanto was negligent in its release of the GE [genetically engineered] seeds without a corresponding herbicide, it appears that its conduct was simply too attenuated to establish proximate cause." A.59. Rather, "plaintiffs' injuries stem directly from an intervening and superseding cause—the unforeseeable independent acts by the third-party farmers who unlawfully sprayed dicamba on their crops." *Id*. The court explained that "this is not a case in which a plaintiff's use or a third-party's use of a defendant's defective product caused damage to plaintiff, because Monsanto did not manufacture, sell or apply the dicamba." *Id*. And "it is not as if plaintiffs otherwise have no remedy, because obviously they have a cause of action against the farmers, themselves, for unlawfully applying dicamba." A.60.

The court further held that "[t]o 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 seeds' product warning labels, prominently highlighted on all bags of cotton and soybeans sold." *Id*. The court explained, "[n]ot 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." A.61. However, the court concluded that "a final ruling on this issue is not appropriate until plaintiffs are given an opportunity to respond further." A.62.

The district court later changed its position and vacated this ruling after Bader added an incendiary allegation "that defendant's 'representatives made a practice of directing farmers who purchased the Xtend seeds to illegally spray dicamba to their Xtend crops.'" A.65. The opinion stated that "[a]lthough the Court maintains reservation about whether defendant's action or inaction proximately caused plaintiffs' injuries, the 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." A.67.

2. *Summary Judgment Rulings*

Bader ultimately had no evidence that Monsanto was encouraging farmers to illegally spray dicamba. Accordingly, Monsanto moved for summary judgment. But, instead of granting the motion, the district court changed course again, stating "[w]ith the benefit of a third round of briefing on the viability of plaintiffs' causes of action, this Court has reassessed its position." A.72.

The court recognized the absence of any case law supporting Bader: "This Court's initial hesitancy to acknowledge a sufficiently pled case for foreseeability is due in part to the *absence of any case* found that has featured not only illegal conduct by third-party actors but also express warnings to those third-party actors to refrain from that illegal conduct. Surely, one or the other factors, or both, would cut the chain of proximate cause going back to Monsanto." A.73 (emphasis added). The court also noted that "this is indeed a unique case, significantly different than conventional negligence and products liability cases," because it is "not a case in which

plaintiffs were damaged by a product plaintiffs purchased from Monsanto." A.72.

However, despite the absence of any precedent, the court concluded that "unlike the conventional cases, the fact that Monsanto did not manufacture, distribute, or sell the old dicamba herbicide that actually caused the damage is irrelevant—it is not part of the causal link under plaintiffs' theory of the claim." *Id.* Instead, "plaintiffs' claim is that the third parties' foreseeable misconduct was itself part of the chain of proximate cause and that there was nothing 'intervening' about it." *Id.* Accordingly, the court held that "whether Monsanto representatives told farmers that they could spray old dicamba" was "not dispositive" and "not necessary" to establish proximate causation. *Id.*

Despite Bader's lack of evidence that Monsanto's herbicide had damaged its trees, the court also refused to apply the general "threshold requirement for a products liability action … that the plaintiff identify the manufacturer or supplier responsible for placing the injury-causing product into the stream of commerce" on summary judgment. *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 720 (E.D. Mo. 2019). The court held that "causation could be established if it is proved that

Monsanto marketed and sold its dicamba-resistant seed to third-party farmers knowing that they would spray dicamba that may harm nearby, non-resistant crops." A.143.

The court next ruled on summary judgment motions regarding damages. Monsanto contended that under Missouri law, lost profit damages for "future crop losses are unavailable because they are too speculative," and instead "the measure of damages for future crop loss in fruit trees in Missouri is the difference in the value of the land before and after the destruction of the trees." A.133 (emphasis omitted). The court found that there is "ample" "Missouri authority" setting forth that rule, but disregarded it as "aged." *Id*. The court held that it would use the "general damages instruction," rather than the "Missouri Approved Instruction" specific to property damage. A.134. The court also noted its "concern" with the "glaring discrepancy" between Bader's claim for $20 million in lost profits and Bader's tax returns reflecting a thin annual profit (for all crops, not just peaches) of approximately $100,000, but concluded that was a "credibility" issue for the jury. A.139.

C. The Trial

The case proceeded to trial.

1. *Causation Evidence*

In line with the court's causation rulings, Bader made no attempt to prove that Monsanto's herbicide damaged Bader's trees. For 2015 and 2016, it was uncontested that Monsanto had no dicamba herbicide on the market. A.263, 273. For 2017 and 2018, Bader did not introduce evidence that XtendiMax damaged its trees. Indeed, Bader's expert testified that he "had no clue [as to] the specific source of the dicamba," A.614, and Bader introduced scant evidence whether dicamba was applied over crops grown from Xtend seeds at all (as opposed to unrelated uses, such as spraying before the growing season begins or spraying on cornfields). *See, e.g.*, A.317-19, 346; A.457. Instead, Bader focused on the overall local increase in dicamba use beginning in 2015, *see* A.537-38, 623, which it characterized as a "cloud" of dicamba and an "ecological disaster," A.552-53; A.81.

Bader also "did not put on evidence that defendants had told farmers to illegally spray dicamba." A.1053. To the contrary, the evidence showed widespread awareness among farmers that they should not spray dicamba over Xtend crops in 2015 or 2016. For example, Mr. Cravens—a local farmhand—explained that "everybody knew at the time [that they] weren't supposed to go spraying dicamba in 2016 over the top of soy and cotton."

A.372. Although some farmers nonetheless used dicamba illegally, they took measures such as spraying dicamba "after dark" so "neighbors wouldn't see," or concealing dicamba in other pesticide containers. *E.g.*, A.370-72; A.1218. Evidence further showed some farmers continued to use an "older illegal form of dicamba" in 2017 and 2018. A.590; A.779.

2. *Compensatory Damages Evidence*

Regarding damages, Bader relied on the testimony of Dr. Guenthner. Guenthner testified about his estimates of the expected profits for the useful life of the trees, which he stated was twenty years. A.629-30. Guenthner calculated total damages as $20.9 million. A.634; A.1085.

This figure was untethered from Bader's historical levels of revenue or profit. Instead, Guenthner speculated that Bader's peach revenue would have doubled from its historical level, while he assumed only half of the costs alleged in Bader's own complaint. A.652-64; A.1083; A.96. For 2011-2014—before the alleged dicamba damage—Bader's financial documents showed average annual peach profits of approximately $54,000, with peaches accounting for about half of the farm's total profits. A.676-78; A.1197-99. At that rate, it would take hundreds of years to make the $20.9 million profits calculated by Guenthner. A.467. In addition, evidence

showed that Bader had filed insurance claims asserting that unrelated causes, including hail and frost, had damaged the orchard between 2015 and 2018. A.429-30; A.448-50.

3. *Jury Instructions*

The court overruled significant objections to jury instructions. First, despite the court's prior recognition that "foreseeability" was a central and "hotly contested" factual issue, A.145, the court refused to give an instruction on it. The court overruled Monsanto's objection, A.764-65; A.820-21, and rejected Monsanto's proposed instruction, which stated "[i]f you find that unlawful actions of any third-party who applied dicamba to an Xtend crop" were "not reasonably foreseeable," then "you must find for Defendant Monsanto." A.772; *see also* A.843-44 (jury instructions given).

Monsanto also objected to the jury instruction stating that the "dicamba-tolerant system" was the allegedly defective product at issue, on the ground that it "would impermissibly permit Monsanto to be held liable for damages caused by dicamba herbicide products it did not manufacture or sell." A.766. Further, Monsanto objected that "Plaintiff does not define the term 'dicamba-tolerant system' in its proposed instructions, creating tremendous ambiguity." A.765. Monsanto argued that the jury

instructions should identify the specific products, "Monsanto Xtend seed or Monsanto XtendiMax herbicide." A.769, 771. The court overruled this objection and rejected Monsanto's proposed instruction. A.804, 812-13, 820-21.

Finally, the court refused to give a compensatory damages instruction based on "the general rule for crop damage," "the 'before' and 'after' valuation of the property." A.134; A.770; A.806. Instead, the jury was instructed to award "such sum as you believe [Bader] sustained and is reasonably certain to sustain in the future." A.845.

The jury returned a verdict in favor of Bader, and awarded $15 million in compensatory damages. A.847-48.

4. *Punitive Damages*

The court found "I don't see any malice in this case," A.708, and "acknowledge[d] that there were legitimate reasons to release the product" in 2015. A.785, 790. As noted, farmers and agricultural groups advocated for the release of Xtend seed because of its higher yield potential and tolerance to other herbicides. However, the court held that punitive damages were nonetheless permissible for the 2015-2016 period, on the theory that there was "reckless indifference by the early rollout of the

Xtend seeds without the corresponding [dicamba] herbicide," A.785, even though the delay in releasing the herbicide was due to EPA's regulatory process, and other herbicides were available. The court held that Bader did not have a submissible case for punitive damages for the 2017-2018 period. A.785.

Bader's arguments during the punitive damages phase focused heavily on Monsanto's net worth. Plaintiff's counsel argued that $200 million in punitive damages was necessary because a lesser amount would be "change in the couch cushions" to Monsanto. A.858; *see also* A.866 ("You are going to have to aim lower for their wallet to get a real reaction."). Although plaintiff's counsel stated that "15 million [dollars] is fine to compensate Bill Bader," he stressed that "15 million doesn't mean beans to Monsanto." A.865. The jury awarded $250 million in punitive damages. A.847-48.

D. Post-Trial Rulings

Monsanto filed motions for judgment as a matter of law and for a new trial, which the district court denied. The court again held: "[T]he product is the dicamba-tolerant system. That is plaintiff's theory of the case, and that is the case that was submitted to the jury." A.1031. On that

ground, and disregarding "the conventional cases," the court held that Bader "was not required to prove which dicamba landed on plaintiff's orchards" for any of the years at issue in the case. A.1043.

The court next held that the third-party illegal misuse of dicamba did not break the chain of causation, even though Bader "did not put on evidence that defendants had told farmers to illegally spray." A.1053. The court held "the only test of any of plaintiff's claims is foreseeability—all roads in Monsanto's causation arguments lead back to foreseeability." *Id.*

The court also held there was no error in failing to instruct the jury on foreseeability. The court acknowledged "it is a conundrum … whether the seemingly critical issue of foreseeability is a disputed ultimate issue" warranting a jury instruction. A.1056. But it held that "[e]ven assuming" a jury instruction on foreseeability "was warranted," "the tendered instruction here did not pass muster," and it was "not feasible" to revise the instructions "during a mammoth late-night, closing-argument-eve instructions conference." A.1056-57.

The court upheld the $15-million compensatory damages award, concluding the evidence was not overly speculative and again rejecting the argument "that the proper measure of damage to fruit trees is the

difference between the market value of the land immediately before and after any alleged injury." A.1015.

The court upheld the award of punitive damages, while reducing the amount from $250 million to $60 million. The court repeated its finding that "this case did not involve actual malice, but instead a conscious disregard … , which obviously constitutes less egregious conduct." A.1039. The court also noted the harm "involved only economic damages as opposed to physical harm." *Id.* Monsanto argued that compensatory damages for the 2017-2018 period could not be included in calculating the ratio, because the punitive damages claim proceeded only for the 2015-2016 period. Although the court declined to "definitively decide" this issue, A.1039 n.2, it calculated a "four-to-one" ratio based on the entirety of the compensatory damages award. A.1038-39. The court further held that "Monsanto's wealth was relevant" and that a lower ratio "d[id] not appear to be sufficiently punitive for a $7.8 billion company like Monsanto." A.1040.

The court entered final judgment, and this appeal followed.

SUMMARY OF ARGUMENT

The ruling below contravenes the fundamental federalism principle that "[i]t is not the role of a federal court to expand state law in ways not foreshadowed by state precedent." *Ashley Cty.*, 552 F.3d at 673. The district court erred in concluding that Bader's "unique" theory of the case justified an unprecedented expansion beyond "conventional" liability under Missouri law. A.73-74.

First, the district court erred in holding Monsanto responsible for the illegal actions of third parties. Initially, the court correctly held that the illegal actions of farmers who sprayed herbicides contrary to Monsanto's warnings broke the chain of proximate causation. But the court later reversed itself, disregarding the Missouri state-court "consensus," *Finocchio*, 37 S.W.3d at 303, and this Court's decision in *Ashley County*, 552 F.3d at 671. The district court then compounded this "conundrum" by refusing even to instruct the jury on foreseeability. A.1056-57.

The court further erred in holding that Bader was not required to prove that Monsanto's product caused Bader's injury, instead allowing Bader to establish that damages were caused by the amorphous "dicamba-tolerant system." This decision contradicts rulings of the Missouri

Supreme Court that defendants are not liable for harm caused by other manufacturers' products. *Benjamin Moore*, 226 S.W.3d at 115.

Second, the district court's rulings on compensatory damages likewise contradict Missouri law. Long-standing Missouri precedent holds that lost profits damages for fruit trees are impermissibly speculative; the proper measure of damages is instead the change in the fair market value of the land. *See Butcher*, 39 S.W.2d at 1069 (collecting cases). A federal court may not disregard state rulings as "aged," A.133, when no state court has called the cases into question. *M&I Marshall & Ilsley Bank v. Sunrise Farms Dev., LLC*, 737 F.3d 1198, 1202 (8th Cir. 2013). Again, this roving expansion of state law by a federal court is contrary to bedrock federalism principles.

Third, the punitive damages award violates both Missouri law and the Due Process Clause. Under Missouri law, any award of punitive damages is inappropriate where, as here, the defendant complied with applicable regulations and the harm would not have occurred but for the misconduct of third parties. *Alcorn*, 50 S.W.3d at 248; *Lopez*, 26 S.W.3d at 160.

The $60-million award is also unconstitutionally excessive. The district court recognized that this case does not involve "malice," but rather

unintentional and purely economic harm to fruit trees. The court's holding that a massive punitive award was nonetheless justified by Monsanto's wealth is contrary to Supreme Court precedent. *See Campbell*, 538 U.S. at 427. Finally, the court erred in holding that the relevant ratio was to the entirety of the compensatory damages award, even though the punitive damages claim was only for half of the period at issue. Under the proper ratio analysis, the award here is far higher than this Court has ever upheld "when multi-million dollar compensatory damages award are involved" — even in cases of "extreme reprehensibility." *Ondrisek*, 698 F.3d at 1029-30.

STANDARDS OF REVIEW

This Court reviews a district court's denial of a motion for judgment as a matter of law *de novo*. *Ford v. GACS, Inc.*, 265 F.3d 670, 676 (8th Cir. 2001). It reviews the denial of a motion for a new trial for abuse of discretion, including "where [the court's] judgment rests on an erroneous legal standard." *Nassar v. Jackson*, 779 F.3d 547, 552 (8th Cir. 2015). It reviews *de novo* "a district court's interpretation of state law." *Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975, 979-80 (8th Cir. 2019). It also reviews a punitive damages award *de novo*, and its review is "[e]xacting." *Campbell*, 538 U.S. at 418.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT MONSANTO PROXIMATELY CAUSED HARM TO BADER.

The district court's initial conclusion regarding proximate causation was correct: This case "feature[s] not only illegal conduct by third-party actors but also express warnings to those third-party actors to refrain from that illegal conduct. Surely, one or the other factors, or both, would cut the chain of proximate cause going back to Monsanto." A.73.

Moreover, the district court required no showing that Monsanto manufactured or sold the dicamba that allegedly damaged Bader's peach trees—and it is undisputed that Monsanto did not manufacture or sell dicamba in 2015 or 2016, and that multiple other manufacturers sold dicamba in 2017 and 2018. Thus, the district court traveled at least two bridges too far—imposing liability on Monsanto for third-party farmers' illegal use of fourth-party manufacturers' products. This Court should reverse this unprecedented decision.

Monsanto also adopts by reference Section IV of BASF's Opening Brief, joining BASF's arguments regarding the joint venture and conspiracy

claims. *See* Fed. R. App. P. 28(i); *In re Target Corp. Customer Data Sec. Breach Litig.*, 855 F.3d 913, 915-16 (8th Cir. 2017).

A. Under Missouri Law, Monsanto Is Not Liable For Illegal Misuse Of Dicamba By Third Parties.

1. *Third-Party Illegal Misuse of Dicamba Broke the Chain of Causation.*

In Missouri, it is blackletter law that a defendant cannot be liable when an intervening or superseding action by a third party disrupts the chain of causation between the defendant's alleged negligence and the plaintiff's injury. *See Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661 (Mo. Ct. App. 1989). In particular, Missouri courts are in "consensus that liability should not be lightly assessed when the injury would not have happened but for criminal conduct" by a third party. *Finocchio*, 37 S.W.3d at 303 (noting, for example, the "overwhelming weight of authority holds that the owner of an automobile who parks the car in a public area with the keys in the ignition is *not* liable to a motorist or a pedestrian injured by the negligent driving of a thief").

Here, it is undisputed that any farmers who sprayed dicamba over crops grown from Xtend seeds in 2015 and 2016 were acting illegally, and that illegal dicamba spraying continued in 2017 and 2018. *See* p. 19, *supra*; 7

U.S.C. § 136j(a)(2)(G).[1] Furthermore, Monsanto included an express warning "prominently highlighted on all bags of cotton and soybeans sold" in 2015-2016, A.60, stating: "**DO NOT APPLY DICAMBA HERBICIDE IN-CROP** … IT IS A VIOLATION OF FEDERAL AND STATE LAW TO MAKE AN IN-CROP APPLICATION OF ANY DICAMBA HERBICIDE." A.1146-47. Bader's trees would not have been damaged "but for criminal conduct" by third parties who unlawfully sprayed dicamba contrary to these express warnings. *Finocchio*, 37 S.W.3d at 303. Accordingly, Monsanto's conduct of selling Xtend seeds was, as a matter of law, "simply too attenuated" from Bader's injury to establish proximate cause. A.59.

The court below erred in reversing course, and holding that illegal spraying was not a superseding cause because it was "foreseeable" that

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[1] While EPA had approved certain dicamba formulations, including XtendiMax, for use with Xtend seeds in 2017 and 2018, *see* p. 11-12, *supra*, Bader's theory for those years was "not limited to legal spraying—but to all spraying, whether it was legal or not legal." A.779; A.1213-14. Because the jury could have found liability on the invalid basis of third-party illegal spraying for 2017-2018, the verdict for those years also fails. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 482 n.3 (2008); *see* A.590. At the very least, a new trial is required.

farmers "would spray dicamba that may harm nearby, non-resistant crops." A.143. This ruling is not supported by Missouri precedent. Indeed, the court acknowledged "the absence of any case" finding proximate causation in similar circumstances, but erroneously concluded that this "unique" case justified departing from "conventional negligence and product liability" doctrines. A.72.

As this Court has held, "[p]roximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions." *Ashley Cty.*, 552 F.3d at 671. Accordingly, a "federal court construing state law" must be "very reluctant to open Pandora's box" by extending liability further than state courts have done, especially when a product has beneficial uses and the harm is due to the illegal conduct of third parties. *Id.* (cold medicine); *see Ford*, 265 F.3d at 681 (federal court should not "extend the reach of Missouri's products liability law" in the absence of "any Missouri cases"); *Kingman v. Dillard's, Inc.*, 643 F.3d 607, 615 (8th Cir. 2011) ("As a federal court, our role … is to interpret state law, not to fashion it.").

Ashley County is highly instructive here. The plaintiffs in that case alleged that manufacturers of cold medications could be held liable for the

foreseeable misuse of their products to make illegal drugs. The plaintiffs alleged that defendants knew of such illegal misuse and "knew of measures they could have voluntarily taken to reduce the availability of their products to methamphetamine cooks but consciously chose not to … in order to continue reaping large profits." *Ashley Cty.*, 552 F.3d at 664. The federal government warned defendants of the illegal usage, and one industry executive even admitted partial responsibility for the country's methamphetamine problems. *Id*.

Nonetheless, this Court held that the plaintiffs could not establish proximate causation under Arkansas law because the "criminal actions of the methamphetamine cooks and those further down the illegal line of manufacturing and distributing methamphetamine … are totally independent of the Defendants' actions of selling cold medicine to retail stores, even if the manufacturers knew that cooks purchased their products to use in manufacturing methamphetamine." *Id.* at 670 (internal quotation marks and citation omitted). Imposing liability despite third-party illegal conduct would lead to an "avalanche of actions" against a wide variety "of commercial enterprises—manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games—in order to address a myriad of societal

problems regardless of" the degree of attenuation. *Id*. at 671-72 (quoting *District of Columbia v. Beretta*, 872 A.2d 633, 651 (D.C. 2005)). Regardless of whether the criminal behavior could have been predicted, and indeed was well known, the Court rejected proximate cause as a matter of law.

Missouri law is in accord with *Ashley County*. *Finocchio* notes that "[m]any opinions place great emphasis on foreseeability," but concludes that it cannot be applied expansively in this context because "almost anything may be foreseeable" and "criminal conduct can hardly be said to be unforeseeable in this day and age." 37 S.W.3d at 303. While a "defendant is not invariably excused from liability when the chain of causation includes a criminal act," such liability cannot be "lightly assessed" in the absence of some special relationship. *Id.*; *see First Nat'l Bank v. Goodnight*, 721 S.W.2d 122, 126 (Mo. Ct. App. 1986) (negligence in leaving section of appraisal blank not proximate cause of purchaser's illegally filling blank with fraudulent misinformation); *State ex rel. Mo. Highway & Transp. Comm'n v. Dierker*, 961 S.W.2d 58 (Mo. 1998) (negligence

in maintaining and securing overpass not proximate cause of criminal action on it).[2]

This understanding comports with the consensus of courts from around the country. For instance, the Illinois Supreme Court held that firearms manufacturers could not "reasonably foresee that the guns they lawfully sell would be illegally taken into the city" and used to commit crimes, despite "the nature of the product they sell" and allegations that the "entire object of the scheme alleged in the complaint is to exploit the demand for illegal firearms within Chicago." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1135-36 (Ill. 2004); *see also 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-

[2] While Missouri cases have found proximate causation despite third-party criminal acts in rare instances, the district court itself recognized that these cases are inapposite because they involve "factor[s] not present here." *In re Dicamba Herbicides Litig.*, 2018 WL 2117633, at *2. Most are cases of premises liability, where the owner of the premise has a special duty to protect tenants or guests, was on notice of crimes, and failed to take protective measures. *E.g.*, *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976); *Harris v. Hillvale Holdings LLC*, No. 4:15–cv–1854, 2016 WL 3194364, at *2 (E.D. Mo. June 6, 2016).

party used product unlawfully to blow up a building), *aff'd*, 160 F.3d 613 (10th Cir. 1998).

Further, the district court erred in reversing its initial ruling that any "foreseeability" of illegal misuse was "negated" by the express warnings "prominently highlighted on all bags of cotton and soybeans sold" not to use dicamba with Xtend seeds. A.60. Under Missouri law, a defendant is entitled to "assume[] that a reasonable person will act appropriately if given adequate information," *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. 1992), and is not liable where the product's user is aware of the danger and acts anyway. *Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107, 1112 (8th Cir. 2007); *Erkson ex rel. Hickman v. Sears, Roebuck & Co.*, 841 S.W.2d 207, 211 (Mo. Ct. App. 1992) (using product in manner prohibited by instructions "do[es] not constitute a misuse or abnormal use which is objectively foreseeable"); *see Lindholm v. BMW of N. Am., LLC*, 862 F.3d 648, 652 (8th Cir. 2017) (disregard of express warning not foreseeable as a matter of law, even though manufacturer had received reports of similar misuse occurring) (South Dakota law) (quoting Restatement (Second) Torts § 402A, cmt. J (1965) ("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.")).

Here, Monsanto "prepared a very aggressive communications plan to warn people" against using dicamba with Xtend seeds in 2015-2016, placing prominent warnings on the seed bags and also employing numerous other channels of communication. A.256; *see* p. 10-11, *supra*. Moreover, the evidence showed widespread awareness among local farmers that using dicamba with Xtend crops was illegal in 2015-2016, and using older dicamba formulations was illegal in 2017-2018. *See* p. 19, *supra*. Illegal misuse contrary to these express warnings was objectively unforeseeable as a matter of law. *Ashley Cty.*, 552 F.3d at 670; *Menz*, 507 F.3d at 1112.

2. *At a Minimum, the District Court Erred in Refusing to Give an Intervening-and-Superseding Cause Instruction.*

At a minimum, the district court erred in refusing to give an instruction on Monsanto's intervening-and-superseding cause defense—or any instruction regarding foreseeability. The court recognized that the foreseeability of third-party illegal misuse of dicamba was a "hotly contested matter" at the heart of this case. A.145; A.1058 ("[A]ll roads lead

to foreseeability."). Yet the court refused to instruct the jury on the issue. Instead, the causation instruction stated only that the jury must find Monsanto's "failure [to use reasonable care] directly caused or directly contributed to cause damage to Plaintiff Bader Farms." A.843-44.

The district court recognized that its refusal to give any instruction on "the seemingly critical issue of foreseeability" created a "conundrum." A.1056. However, the court did not want to continue working on jury instructions during a "late-night" conference. *Id*. The court also stated that the Missouri Approved Instructions (MAI), which apply in Missouri state court, did not permit a separate instruction on the superseding cause defense, A.813, but Missouri precedent is clear that such instructions are allowed in these circumstances. *See, e.g.*, *Fowler v. Robinson*, 465 S.W.2d 5, 11 (Mo. Ct. App. 1971); *Clark v. Sears, Roebuck & Co.*, 731 S.W.2d 469, 472 (Mo. Ct. App. 1987); *Gathright v. Pendegraft*, 433 S.W.2d 299, 308 (Mo. 1968). Regardless, federal courts "are not required to give the precise instruction set out in an MAI." *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 720 (8th Cir. 1982); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988).

Monsanto's proposed instruction accurately reflected Missouri substantive law. A.772. But, even if the district court felt that Monsanto's instruction "did not pass muster," that was no basis to adopt Bader's erroneous instruction, which failed to instruct the jury on foreseeability at all. That was reversible error. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1331 (8th Cir. 1985) (failure to instruct on defense is reversible error because "[w]here 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"); *see also* MAI 32.01 Committee Comment (2010 New) (same).

B. Under Missouri Law, Monsanto Cannot Be Held Liable For Damages Caused By Products It Did Not Manufacture Or Sell.

1. *The Court Erred in Holding That Monsanto was Liable for Damages Caused by Other Companies' Products.*

The district court also erroneously expanded Missouri law by holding that Monsanto was liable for damages caused by other companies' products. Again, the court initially recognized this problem, stating "this is not a case in which a plaintiff's use or a third-party's use of a defendant's defective product caused damage to plaintiff, because Monsanto did not manufacture, sell or apply the dicamba." A.59. Again, the district court

later erroneously reversed course, concluding it is "irrelevant" that "Monsanto did not manufacture, distribute, or sell" the dicamba herbicide that injured Bader's trees because it is "not part of the causal link under plaintiffs' theory of the claim." A.1043-44.[3]

But "plaintiffs' theory of the claim," *id.*, was legally invalid. No Missouri precedent supports the district court's decision to depart from "conventional negligence and product liability cases." A.72. To the contrary, the Missouri Supreme Court has expressly held 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). This rule applies even if the injuring product was foreseeably used with the defendant's product. *Hill v. Gen. Motors Corp.*, 637 S.W.2d 382, 383-86 (Mo. Ct. App. 1982) (affirming dismissal of negligence claims against truck manufacturer

[3] As noted, in 2015-2016, Monsanto did not manufacture or sell any dicamba herbicide. *See* p. 10, *supra*. In 2017-2018, Monsanto's XtendiMax herbicide was only one of several dicamba formulations on the market, A.284-85; A.180-83, and the district court did not require Bader to prove that XtendiMax damaged the trees, A.1043-44.

for injuries caused by suspension system that defendant allegedly knew was dangerous when used with its truck).

Thus, until now, federal courts applying Missouri law have uniformly dismissed claims against product manufacturers who did not sell the specific product that allegedly caused the plaintiff's injury. *See, e.g.*, *Ford*, 265 F.3d at 681; *Mouser v. Caterpillar, Inc.*, No. 98-cv-744, 2000 WL 35552637, at *11 (E.D. Mo. Oct. 6, 2000); *Emmons v. Bridgestone Americas Tire Ops., LLC*, No. 1:10CV41, 2012 WL 6200411, at *3-4 (E.D. Mo. Dec. 12, 2012).

The district court agreed that *Benjamin Moore* barred Bader's strict liability claims, but erroneously concluded that this rule does not apply to negligence claims. A.1010-11, 1030-32; A.778. In fact, the Missouri Supreme Court has applied the same rule to negligence claims, holding that "Missouri tort law … requires that [plaintiffs] establish a causal relationship between the defendants and the injury-producing agent." *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984). And *Benjamin Moore* applies to *any* suit "where the plaintiff seeks to hold the defendants liable on the basis that their products caused harm to the plaintiff." 226 S.W.3d at 115.

This Court and other Missouri courts likewise have applied *Benjamin Moore* and *Zafft* to negligence claims. *See, e.g.*, *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 351-52 (Mo. Ct. App. 2012); *Ford*, 265 F.3d at 682 (rejecting both strict liability and negligence claims because the defendant "did not manufacture or design" the allegedly defective product); *Brough v. Ort Tool & Die Corp.*, 149 S.W.3d 493, 495-98 (Mo. Ct. App. 2004) (similar). The district court erred in not doing the same.

For similar reasons, Monsanto also did not have a legal duty under Missouri law to protect Bader from harms caused by products Monsanto did not manufacture or sell. As this Court has explained, "[t]here is a 'link between the questions of the existence of a duty and the existence of legal cause.'" *Ashley Cty.*, 552 F.3d at 670 (quoting *Beretta*, 821 N.E.2d at 1136). As with proximate cause, courts have repeatedly concluded that Missouri law does not impose a duty on a defendant to prevent injuries caused by another manufacturer's product, even if that product foreseeably may be used with the defendant's product.

For example, in *Ford v. GACS*, this Court held that Missouri law did not impose a duty on GM to prevent injuries caused by a product it did not manufacture, even if the plaintiff's injures were "foreseeable to GM

because GM continued to reject safer tie down systems, despite its awareness of driver injuries." 265 F.3d at 682; *see also Long v. Cottrell, Inc.*, 265 F.3d 663, 670 (8th Cir. 2001) (same); *Emmons*, 2012 WL 6200411, at *5; *Barnes v. Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005) (similar, under Tennessee law). Thus, Bader failed to establish either a duty or proximate cause in the absence of evidence that any Monsanto dicamba product caused plaintiff's alleged damage.

2. *The Court Erred in Holding that Monsanto was Liable for Manufacturing a "Component" of a "Dicamba-Tolerant System."*

The district court also erred in defining the "product" at issue as the "dicamba-tolerant system," which the court found consists of "the dicamba-tolerant seeds, plus the low-volatility corresponding herbicides designed and intended to be used with the seeds." A.1031.

This judicial re-definition of the "product" does nothing to cure the central problem of holding Monsanto liable for products it did not manufacture or sell. In 2015 and 2016, it is undisputed that Monsanto sold *only* the Xtend seeds; Monsanto did not sell any dicamba herbicides, and *no* manufacturer sold "low-volatility corresponding herbicides designed and

intended to be used with the seeds." A.1031; *see* p. 9-12, *supra*. There was therefore no "dicamba-tolerant system" on the market at all.

Even in 2017 and 2018, when Monsanto had a dicamba herbicide on the market, the seed and herbicide were made and sold separately. *See* A.286-87. Farmers could choose to use Xtend seeds with Monsanto's dicamba product, with another manufacturer's dicamba product, with a different type of herbicide altogether, or with no herbicide at all. A.287.

Further, it is undisputed that Xtend seeds had several other benefits, wholly apart from dicamba tolerance. They incorporated superior germplasm, making them the "highest yielding seed" Monsanto offered; they had an "exceptional disease package"; and they had tolerance to other types of herbicide. A.199-200, 239-40; A.356-59; p. 7, *supra*. These are the reasons farmer organizations called for the release of the seeds in 2015 and 2016, despite EPA's delay in approving a corresponding low-volatility dicamba formulation. A.287. A low-volatility dicamba herbicide, though compatible with the Xtend seeds, was not an indispensable part of a "system."

At the very least, the district court erred in refusing to define "dicamba-tolerant system" in the jury instructions, and erred in instructing

that Monsanto could be held liable if it "sold any one or more component" of the "system." A.843. The instruction did not contain any limitation—as the court's own opinions did, *see* A.1031—that the "system" only included low-volatility herbicides designed and intended for use with the seeds. To the contrary, the instructions improperly allowed the jury to hold Monsanto liable for third parties' use of unapproved herbicides that were never intended for use with Xtend seeds, on the basis that Monsanto sold the non-defective seed "component" of a "system." A.843; *see Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134, 1140 (E.D. Mo. 1992) ("a component parts manufacturer cannot be held liable for the incorporation of its non-defective component part(s) into a defectively designed larger mechanical system"), *aff'd*, 4 F.3d 596 (8th Cir. 1993); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1056 (8th Cir. 1996).

In short, the district court erred in holding that Bader could establish proximate causation based on a "unique" theory unsupported by "conventional" case law. The judgment below should be reversed.

II. THE DISTRICT COURT IMPERMISSIBLY EXPANDED STATE LAW TO PERMIT SPECULATIVE FUTURE LOST PROFIT DAMAGES.

In another novel extension of state law, the district court allowed a measure of damages—lost profits for fruit trees—which is legally unavailable in Missouri. "No Missouri court has endorsed use of the [lost profits] formula" for damages "in this context," and the court should not have allowed such recovery "given [the] specificity" of the Missouri rule for fruit trees. *See Keller*, 944 F.3d at 982.

A. Missouri Has Long Prohibited Recovery Of Lost Profit Damages For Fruit Trees As Overly Speculative.

Missouri law "is well settled that the measure of damages" for harm to fruit-bearing trees "is the difference between the market value of the land immediately before and immediately after" the injury. *Butcher*, 39 S.W.2d at 1069 (collecting cases). This is so because recovery of lost profit crop damages, particularly for hypothetical future crops, depends on "an element too contingent and speculative to afford a basis for the assessment of damages." *Adam v. Chi., Burlington & Quincy Ry.*, 122 S.W. 1136, 1137 (Mo. Ct. App. 1909).

Hypothetical profits from farming operations are "too far into the realm of speculation and uncertainty," *Boggs v. Mo.-Kan.-Tex. Ry. Co.*, 80

S.W.2d 141, 144 (Mo. 1934), due to "the uncertainties of farming like the 'vagaries and whims of weather and pestilence, yield and demand' and the cyclic and unpredictable income generated," *In re Hoel*, 617 B.R. 636, 640 (W.D. Bankr. Wis. 2020). Indeed, in this case, even calculating a few years of *past* damages raised numerous issues regarding the impact of other factors on the peach crop, including frosts and freezes, hailstorms, a fungal infection causing root rot, and drift from non-dicamba herbicides. Bader itself recognized the substantial economic impact of these factors, as it collected insurance for damage caused by these forces—without adjusting for them in its damages calculation. A.429-32; A.682-84 (non-dicamba issues affected anywhere from 30% to 75% of Plaintiff's yields in 2015-2018); A.1083; A.419, 429; A.423, 484, 442, 447-49. Lost profits that could be incurred in the future are yet more speculative. *See* § II.B., *infra*.

An unbroken line of Missouri precedent holds that a plaintiff cannot recover "for future crops because of the uncertainty and speculative nature" of crop profits. *Beaty v. Nw. Elec. Power Co-op., Inc.*, 312 S.W.2d 369, 372 (Mo. Ct. App. 1958). For crops from fruit-bearing trees specifically, the Missouri rule is that "[r]ecoverable damages for the injury to [fruit trees] consists *alone* of the effect of such injury had on the market value of the

land." *Doty*, 116 S.W. at 1128 (emphasis added); *Steckman v. Quincy, Omaha & Kan. City R.R.*, 165 S.W. 1122, 1124 (Mo. Ct. App. 1914) (same).

The court below acknowledged that "the general rule for crop damage may well be the 'before' and 'after' valuation of the property." A.134. However, it refused to follow this authority on the ground that it is "aged," instead concluding that the "closest case" was one that did not involve damage to fruit-bearing trees or crops at all. *Id.* (citing *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28 (Mo. Ct. App. 1995)). On this basis, the court allowed recovery for lost profits, including twenty years of future lost profits. A.845.

This ruling was erroneous. A federal court may not disregard "ample" state precedent as "aged." A.133. Absent a "clear and persuasive indication" that state decisions are no longer good law, federal courts may not predict that future state courts "would rule [differently] in a case with 'the right set of facts,'" and depart from precedent. *M&I*, 737 F.3d at 1201-02. Here, while the key cases establishing the damages rule are not recent, they have never been over-ruled or called into doubt and their reasoning to avoid speculative claims of loss remains sound. Indeed, more recent state

decisions have continued to apply the rule, as has this Court. *See Kelso*, 510 S.W.2d at 725-26; *Keller*, 944 F.3d at 982.

The fact that a property's market value may be impacted by "the potential for future profits" does not support the district court's ruling. A.134. Although the potential for profits may "factor[] into … the lost fair market value," "[s]eparate damages for loss of use are not available … because the property is treated as having changed hands," and a "plaintiff is unable to suffer from a loss of use of land he no longer had the legal right to use." *Akers v. City of Oak Grove*, 246 S.W.3d 916, 920 (Mo. 2008). Moreover, there is a fundamental distinction between the value of land and the potential value of a business conducted on that land. *See Atkinson v. Corson*, 289 S.W.3d 269, 279 (Mo. Ct. App. 2009).

Here, Bader specifically disclaimed making any before-and-after valuation of the peach orchard. A.671-72. Instead, the jury awarded twenty years' worth of highly speculative future "lost profits." *See* p. 22, *supra*. This damages award is reversible error. *Racicky v. Farmland Indus, Inc.*, 328 F.3d 389, 397-400 (8th Cir. 2003).

B. Even If Future Lost Profits for Crop Damage Were Cognizable Under Missouri Law, Bader's Damages Model Was Impermissibly Speculative.

Even if future lost profits could be available for fruit trees in some circumstances, the $15-million damages award here would still be unduly speculative as a matter of law. "Under Missouri law, lost or anticipated profits of a commercial business are generally deemed 'too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery.'" *EnerJex Res., Inc. v. Haughey*, 453 S.W.3d 830, 835 (Mo. Ct. App. 2014). "Missouri courts," therefore, "have been strict in their review" of such damages. *Thoroughbred Ford, Inc. v. Ford Motor Co.*, 908 S.W.2d 719, 735 (Mo. Ct. App. 1995). Plaintiffs must "make[] it reasonably clear by competent proof what [lost profits] would have been." *Id.* And "[i]t is *indispensable* that" plaintiff's "proof include the income and expenses of the business for a reasonable anterior period, with a consequent establishing of the net profits." *Id.* (emphasis added). As the Eighth Circuit has recognized, "Missouri courts have consistently rejected projections when they are based upon assumptions or hopeful expectations." *Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 919 n.6 (8th Cir. 2004) (collecting cases).

Here, such "hopeful expectations" are central to Bader's claimed damages, *id.*, which cannot be squared with the business's "actual figures," *Gesellschaft Fur Geratebau v. GFG Am. Gas Detection, Ltd.*, 967 S.W.2d 144, 147-48 (Mo. Ct. App. 1998). For the period before the orchard was allegedly damaged by dicamba, 2011-2014, Bader's records show an average annual profit from peaches of $54,000. A.678-79. The $15-million award supposedly covers four historical years of lost profits plus twenty future years, the average useful life of a peach tree. A.672, 680. But $15 million in profits for this period would require yearly profits averaging $625,000—*more than ten times* the business' historical yearly profits. Indeed, based on historical figures, it would have taken Bader hundreds of years to make $15 million in peach profits. A.467; A.680-81.

There is no evidence to support the assumption that the business would have seen such explosive growth in profitability. Rather, Guenthner testified that Bader's historical reported profits were "irrelevant," because businesses have an incentive to understate profitability to "reduce their tax liability." A.644, 699. Bader presented no evidence, however, to demonstrate that it had drastically understated its profitability to avoid paying taxes, or to otherwise bridge what the district court called a

"glaring discrepancy" between Bader's financial records and its claimed damages. A.139; *see Wandersee v. BP Prods. N. Am., Inc.*, 263 S.W.3d 623, 633-34 (Mo. 2008) (looking to tax returns to establish historical profitability).

Further, Guenthner's damages calculations were based on the "hopeful expectation" that Bader's future revenues would have doubled, and its costs halved, from the levels reflected in its past records. *Tipton*, 373 F.3d at 919 n.6; A.653-56; A.662-64; A.96. Guenthner's damages calculation also assumed that Bader's orchard was "doomed by dicamba," and would be out of business by 2019. A.684-89; A.1013-14. It is 2021, however, and Bader continues to produce "Quality Peaches by the Bushel or Truckload!" *See* A.990; https://www.baderpeaches.com.

The district court nonetheless held that the damages were not impermissibly speculative, on the ground that future lost profits do not "require perfect certainty," and that a court must defer to "the jury's weighing of the evidence." A.1014, 1016. This deferential analysis is incompatible with the "strict ... review" of future lost profits required by Missouri law. *Thoroughbred*, 908 S.W.2d at 735.

III. THE PUNITIVE DAMAGES AWARD IS UNWARRANTED UNDER MISSOURI LAW AND UNCONSTITUTIONALLY EXCESSIVE.

A. Punitive Damages Are Unwarranted Under Missouri Law.

"The test for punitive damages in Missouri is a strict one." *Ford*, 265 F.3d at 677. State law requires "clear and convincing evidence" of "evil motive and reckless indifference to the plaintiff's rights." *Romeo v. Jones*, 144 S.W.3d 324, 334 (Mo. Ct. App. 2004). "Ordinarily [punitive] damages are not recoverable in actions for negligence," such as this one, "because negligence … is the antithesis of willful or intentional misconduct." *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Prods., Inc.*, 700 S.W.2d 426, 435 (Mo. 1985). "[C]areful judicial scrutiny is needed to determine whether the conduct was so egregious that it was 'tantamount to intentional wrongdoing.'" *Alcorn*, 50 S.W.3d at 248.

Applying Missouri's high bar, this Court has repeatedly reversed awards for punitive damages in negligence and products liability cases. *E.g.*, *Ford*, 265 F.3d at 677-78; *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510-11 (8th Cir. 1993); *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1290-93 (8th Cir. 1991); *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 782 (8th Cir.

1984). This case likewise does not meet Missouri's stringent threshold requirements for punitive damages.

The Missouri Supreme Court has identified three factors indicating when punitive damages are unwarranted in negligence cases: (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 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, and Bader did not demonstrate that Monsanto otherwise violated—much less "knowingly violated," *id*. at 248—any statutes or regulations. Indeed, Monsanto's options were driven by the federal regulatory process: USDA timely approved the high-yielding Xtend seed desired by farmers, but EPA took far longer to approve the low-volatility XtendiMax herbicide. *See*

A.400.[4] Because Monsanto followed the regulatory process, as in *Alcorn*, "[t]here was not a submissible case for punitive damages." 50 S.W.3d at 249.

Indeed, this case is even less worthy of punitive damages than *Alcorn*, where a railroad's actions were "not a model for crossing safety." *Id.* at 248. There, the risk of an accident was well known, and the defendant had "the option immediately to upgrade the crossing," but chose not to do so and "never spent its own money." *Id.* at 249. Consequently, the plaintiff was seriously injured in a car accident. *Id.* at 234.

Monsanto, by contrast, took numerous mitigation measures. It prominently placed warnings on the seed bags stating "DO NOT APPLY

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[4] The district court erroneously found that punitive damages were warranted because Monsanto "blocked testing" by academics that "could interfere with" EPA's regulatory approval of XtendiMax. A.1072. However, Monsanto fully complied with EPA's requirements, including providing the agency with extensive product testing. A.381-82, 386-87, 390-91.

In any event, the testing of XtendiMax had nothing to do with the punitive damages, which were awarded only for the two years (2015-2016) when XtendiMax was *not* on the market. The only theory of punitive damages permitted by the district court was that Monsanto released a seed without a corresponding low-volatility herbicide. *See* p. 22-23, *supra*. Thus, the district court's holdings on punitive damages are internally inconsistent.

DICAMBA HERBICIDE IN-CROP." A.1128; A.1146-47. Similar warnings were communicated to farmers, retailers, and others through several channels. *See* p. 10-11, *supra.* Moreover, in 2015-2016, Monsanto did not charge for the dicamba-tolerance trait and paid rebates on other herbicides to actively discourage illegal dicamba use. *Id.*; A.232-33; A.566-67. Especially considering Monsanto's significant mitigation measures, *Alcorn* cannot be distinguished. Yet the court below failed to even mention this critical Missouri Supreme Court authority.

Second, as Bader admitted below, "prior instances of off-target dicamba injury were minimal," A.985; *see Lopez*, 26 S.W.3d at 160; A.369, despite the fact that dicamba could be lawfully sprayed before the growing season for soybeans and cotton and even during the growing season for other crops, *see* p. 8, *supra*. A "generalized knowledge of [a] danger is insufficient," *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 339 (Mo. 1996), so the district court's broader focus on "sensitive-crop farmers" is misplaced, A.1069. Here, Bader's expert admitted "[t]he tree situation with dicamba has ... been [ ] learn as you go." A.545.

Third, the alleged injury here could have occurred only through the misconduct of third parties, who disregarded prominent warnings. *Lopez*,

26 S.W.3d at 159. Monsanto communicated these warnings through a variety of channels, *see* p. 10-11, *supra*, and ample evidence showed farmers understood them, *see* p. 19-20, *supra*. Missouri law precludes imposing punitive damages in such circumstances. *Lopez*, 26 S.W.3d at 160; *see Hughs v. Union Pac. R.R.*, No. 5:15-06079-CV-RK, 2017 WL 1380482, at *6 (W.D. Mo. Apr. 14, 2017).

The district court concluded Monsanto's conduct was nonetheless "outrageous" because Monsanto was aware that selling the seed without a corresponding herbicide involved risks. *See* A.1067-71. But selling a beneficial product despite known risks (and warning of them) does not demonstrate even simple negligence, much less outrageous conduct warranting punitive damages. *Pree v. Brunswick Corp.*, 983 F.2d 863, 868 (8th Cir. 1993) ("[W]e do not hold manufacturers liable [for negligence] simply because the use of their products involve some risks."). Here, the district court acknowledged "there were legitimate reasons" for Monsanto to release the Xtend seed when it did, A.790: the seeds were in high demand due to their significant benefits, including improved yield potential and tolerance to other herbicides. *See* p. 7, 10, *supra*. This Court has held that such consumer demand is "highly relevant" to punitive

damages for marketing a product, *Drabik*, 997 F.2d at 511, because it undermines "the wantonness required for a punitive damages award," *Ford*, 265 F.3d at 678.

At most, "room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue," but "[a]n award of punitive damages is not appropriate" in this circumstance. *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993); *Drabik*, 997 F.2d at 511 (the Court "must consider [Monsanto's] assessment of the [seed's] risk in conjunction with its assessment of the [seed's] utility"); *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 74 (Mo. 1990), *overruled on other grounds by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996). And even if Monsanto's mitigation efforts "did not prevent all injuries," they still "belie an outrageous, wanton disregard for user safety which would support a punitive damages award." *Drabik*, 997 F.2d at 510; *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 398 (Mo. 1987).[5]

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[5] The district court also faulted Monsanto for not investigating and penalizing illegal spraying. However, it was not unreasonable for the company to leave such actions to government regulators with the authority to enforce state and federal prohibitions. *See* Mo. Rev. Stat. § 281.005 *et seq.*;

B. The Punitive Damages Award Is Unconstitutionally Excessive.

Finally, even if any punitive damages were warranted (and they are not), the amount of the award exceeds the limits imposed by the Due Process Clause and Missouri law. *See Campbell*, 538 U.S. at 416-17; *May v. Nationstar Mortg., LLC*, 852 F.3d 806, 815 n.5 (8th Cir. 2017) (Missouri law incorporates the federal due-process analysis). Even after the remittitur, the $60-million punitive award is over two times greater than the largest punitive award ever approved by this Court after *Gore*. *Ondrisek*, 698 F.3d 1020.

1. *The Three Constitutional Guideposts All Demonstrate that the $60-Million Award is Excessive.*

The Supreme Court has established three guideposts to determine whether a punitive damages award is unconstitutionally excessive: the reprehensibility of the defendant's conduct; the ratio of punitive to

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id. §§ 281.060, 281.105, 281.120; Mo. Dep't of Agric., *Missouri Department of Agriculture Has Issued and Collected First Round of Fines Resulting From 2016 Dicamba Investigations* (Dec. 14, 2017), https://agriculture.mo.gov/news/newsitem/uuid/80faff7c-31ba-43cf-ad35-3b933b4c402b/missouri-department-of-agriculture-has-issued-and-collected-first-round-of-fines-resulting-from-2016-dicamba-investigations.

compensatory damages; and the penalties for comparable misconduct. *Campbell*, 538 U.S. at 419. All three factors demonstrate that the $60-million award here is excessive.

Reprehensibility. The degree of reprehensibility of a defendant's conduct is the most important guidepost. *Id.* 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.*

Monsanto's conduct—commercializing USDA-approved seeds with utility apart from dicamba tolerance—sits squarely at the low end of the reprehensibility spectrum, if it appears on the spectrum at all. As the court itself recognized, this is plainly not a case of "malice," and it involves "only economic damages." A.1039.

The district court instead seems to have relied on the "repeated conduct" factor. *See* A.1039 (noting that Monsanto continued to sell seeds in 2016). As this Court has explained, however, this factor must be

"applied cautiously" and cannot by itself justify a large punitive award, because it may result in punitive damages "for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). This concern is in full force here, given the existence of a related multi-district litigation. *See In re Dicamba Herbicides Litig.*, No. 1:18-md-2820 (E.D. Mo.).

Ratio. The ratio of punitive to compensatory damages is the "most commonly cited indicium of an unreasonable or excessive punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). The district court seriously erred here in calculating the ratio based on the entirety of the compensatory damages award, when the punitive damages claim related only to 2015-2016, half of the four years of conduct at issue. A.1073-75. The ratio should be calculated based only on the amount of damages underlying the punitive damages claim. *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 874-77 (8th Cir. 2008) (upholding approximately 1:1 ratio for one claim, while striking down higher ratio for another claim); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (holding that the "appropriate way of calculating the ratios"

when a defendant is liable for only a portion of damages is to consider "the individual *pro rata* shares of the actual damages"); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068-69 & n.26 (10th Cir. 2016) (similar); *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 n.16 (6th Cir. 2006) ("[A] ratio based on the full compensatory award would improperly punish" the defendant).

The district court held that it "need not definitively decide this issue." A.1039 n.2. That is wrong. The relevant compensatory damages bears directly on the ratio, a critical factor in assessing constitutionality. *Gore*, 517 U.S. at 580. Here, there is no evidence establishing that the damages attributable to 2015-2016 should be greater than half of the compensatory damages awarded for the entire four years at issue.[6] While the district court concluded that a "four-to-one ratio" is constitutionally permissible here, A.1040-41, the $60-million award is actually an 8:1 ratio or higher.

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[6] The precise ratio is difficult to calculate because, among other flaws in the damages evidence, Bader never made clear what portion of the damages it attributed to the 2015-2016 timeframe. Alternatively, since the damage award covered 24 years, A.635-37, the damages number for 2015-2016 would be $1.25 million ($15 million divided by twenty-four, times two). That calculation would make the ratio a staggering 48:1.

By any measure, Eighth Circuit case law confirms that the ratio here exceeds constitutional limits. This Court has held that higher ratios may be permissible when compensatory damages are low, because a low compensatory award can indicate "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Ondrisek*, 698 F.3d at 1029. By contrast, when "compensatory damages are substantial," —and particularly when multi-million-dollar awards are at issue —no such rationale applies, and ratios "greater than 1:1," *id.*, require "special justification." *Williams*, 378 F.3d at 799. The $15-million compensatory damages award here easily qualifies as "substantial," and no "special justification" warrants a ratio exceeding 1:1. *E.g.*, *id.* ($600,000 considered substantial); *Ondrisek*, 698 F.3d at 1029 (same for $3 million).

In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), for example, a cigarette manufacturer exhibited "callous disregard for the adverse health consequences of smoking," and 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. This Court reduced $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 punitive damages, a 1:1 ratio, where insurer denied claim in bad faith); *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051, 1060 (8th Cir. 2014) (affirming $10-million punitive award, a less than 0.5:1 ratio, where defendant stole trade secrets, and then "ignored ... litigation holds, destroyed records, erased computers, and ... sought to avoid liability ... in whatever way it could").

Higher ratios are reserved exclusively for extraordinarily reprehensible conduct. For instance, *Ondrisek* held a 4:1 ratio warranted in a case involving horrific child abuse, including "repeated ritualistic and savage beatings; forced unpaid labor; denial of food; … and threats of damnation if they tried to escape." 698 F.3d at 1027; *see also Lee ex rel. Lee v. Borders*, 764 F.3d 966, 975-76 (8th Cir. 2014) (upholding a 3:1 ratio, with $1 million in actual damages, where employee of state mental-health facility raped resident); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (affirming $10-million punitive award, a 4.8:1 ratio, in "an extraordinarily reprehensible scheme to defraud," where "[defendant]'s

agents expressed the desire to 'f* * *' and 'kill' [plaintiff] after taking its $2.4 million").

Monsanto's conduct here is not remotely comparable to these cases, as even the district court implicitly recognized. A.1039. Given the low degree of reprehensibility, the purely economic loss, and the multi-million-dollar compensatory damages award, a 1:1 ratio with compensatory damages for 2015-2016 "reach[es] the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425.

Penalties for Comparable Misconduct. The third factor, which "[c]ompar[es] the punitive damages award" to the "penalties that could be imposed for comparable misconduct" under relevant statutes, further confirms this award is grossly excessive. *Gore*, 517 U.S. at 583. The district court found this factor "largely irrelevant," A.1038-39, but in fact Missouri statutes authorize only compensatory damages for the negligent destruction of crops, Mo. Rev. Stat. § 537.353(2); *id.* § 537.353(3)(2). Higher damages require *intentional* destruction of crops, and this is a negligence case. *Id.* § 537.353(1), *id.* § 537.340(1); *see also Fondren v. Redwine*, 905 S.W.2d 156, 157 (Mo. Ct. App. 1995); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d

at 727. The court erred in ignoring these statutes, which either support no punitive damages at all, or at most a 1:1 ratio.

2. *The District Court Placed an Impermissible Emphasis on Monsanto's Net Worth.*

The district court also erred in relying on "the wealth of … Monsanto" to justify the excessive punitive damages award. A.1035-37, 1072-74. Due process mandates that courts "ensure that the measure of punishment is … proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426. A defendant's net worth "cannot justify an otherwise unconstitutional punitive damages award," *id.* at 427; if it could, "punishment [would] depend on status rather than conduct." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Nor can wealth "make up for the failure of other factors, such as 'reprehensibility,'" because it "provides an open-ended basis for inflating awards when the defendant is wealthy." *Campbell*, 538 U.S. at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)); *Zazú Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (holding that wealth does not justify increasing punitive damages, "as if having a large net worth were the wrong to be deterred").

Here the district court found Monsanto's conduct was "less egregious" than other punitive damages cases. A.1039; *see* p. 60, 63-65, *supra*. Yet it set both a high ratio and an extraordinarily high overall award, based primarily on Monsanto's net worth, and after erroneously admitting hearsay evidence regarding alleged dicamba damage to other farmers, which inflamed the jury and led to the hugely excessive punitive damages award. *See* A.837-38 (supposed findings of thousands of "[dicamba] claims, 3.6 million acres damaged"); *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (Due Process prohibits the "use of punitive damages awards for the purpose of punishing a defendant for harming others"). These multiple errors cannot stand. Punitive damages should be reduced or remitted to no more than a 1:1 ratio with compensatory damages for the 2015-2016 period. *See Ross v. Kan. City Power & Light Co.*, 293 F.3d 1041, 1049-50 & n.4 (8th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should reverse and direct the district court to enter judgment for Monsanto. In the alternative, the Court should vacate and remand for a new trial, or enter an order substantially reducing or remitting the punitive damages award.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant hereby certifies that the foregoing brief complies with the type and page limitation of Fed. Rules. App. P. Rule 32(1)(7)(B) in that the brief is set forth in Book Antiqua style and contains 12,993 words, excepting the Table of Contents, Table of Authorities, and Certifications of counsel, as measured by the word processing system (Microsoft Word) used to prepare the brief.

The electronic version of this brief has been scanned for viruses and has been found to be virus free.

Dated this 12th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on March 12, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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