

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

DALLAS SCHOTT and CORSON
COUNTY FEEDERS, INC.,

Plaintiffs/Appellants,

Appeal No. 28095

vs.

SOUTH DAKOTA WHEAT
GROWERS ASSOCIATION,

Defendant/Appellee

Appeal from the Circuit Court, Fourth Judicial Circuit
Corson County, South Dakota
The Honorable Michael Day, Presiding

APPELLANTS' BRIEF

Notice of Appeal was filed on January 18, 2017.

Melissa E. Neville
Justin M. Scott
Bantz, Gosch & Cremer, L.L.C.
305 6th Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
(605) 225-2232
(605) 225-2497 fax
jscott@bantzlzlaw.com

*Attorneys for Appellants
Dallas Schott and Corson County
Feeders, Inc.*

Michael L. Luce
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Ave., Ste. 400
P.O. Box 2700
Sioux Falls, SD 57101-2700
(605) 332-5999
(605) 332-4249 fax
mluce@lynnjackson.com

*Attorney for Appellee
South Dakota Wheat Growers
Association*

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JURISDICTIONAL STATEMENT¹

This is an appeal from the Summary Judgment, entered on December 13, 2016, by the Honorable Michael Day, Fourth Judicial Circuit Court. SR at 244. Notice of Entry was served on December 19, 2016. SR at 245-247. Notice of Appeal was served on January 12, 2017, and filed on January 18, 2017. SR at 248-249. This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

QUESTIONS PRESENTED

I. Whether the trial court erred in granting Summary Judgment on the basis that Appellants assumed the risk of injury to their sunflower crop.

The trial court found that Appellants had assumed the risk of their injury solely on the basis that Dallas Schott had failed to read the pesticide label prior to application of the chemical to Appellants' sunflowers, which the trial court found he was required to do because of his status as a licensed applicator, and dismissed Appellant's Complaint on that basis.

Authority on Point: *Stone v. Von Eye Farms*, 2007 S.D. 115, 741 N.W.2d 767; *Ray v. Downes*, 1998 S.D. 40, 576 N.W.2d 896; *Westover v. East River Elec. Co-op, Inc.*, 488 N.W.2d 892 (S.D. 1992); *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 260 (S.D. 1979).

STATEMENT OF THE CASE

This case involves damage to a sunflower crop owned by Appellees, Dallas Schott ("Dallas") and Corson County Feeders, Inc. ("Corson County Feeders"). The damage resulted Schott's application of an incorrect chemical prescribed by agronomist, Jason Fees, an employee of Appellee South Dakota Wheat Growers

¹ References to the Settled Record will be made as "SR at ____." References to the Summary Judgment Motions Hearing transcript will be made as "HT at ____."

Association (“SDWG”). SR at 2-8. SDWG moved for summary judgment based on the defenses of assumption of the risk and contributory negligence, which motion was heard in the Fourth Judicial Circuit before the Honorable Michael Day on November 29, 2016. The trial court granted summary judgment on the basis that Dallas and Corson County Feeders had assumed the risk of the damage to their crop. SR at 244.

STATEMENT OF FACTS

South Dakota Wheat Growers (SDWG) offers agronomy services to farmers or growers in north central South Dakota. SR at 236. In 2014, SDWG’s services included, but were not limited to “lin[ing] up their fertilizer, their chemical, their seed . . . look[ing] for what weeds are growing in the fields . . . deliver[ing] chemical, deliver[ing] seed” and soil sampling. Deposition of Craig Maher at 14-15, 18, SR at 155-156. SDWG prides itself on providing “superior service” to its customers. Deposition of Brent Haas at 15, SR at 151. “We just want to make sure they grow a good crop on whatever they are looking to do.” *Id.* As part of this “superior service”, SDWG agronomists make seed and chemical recommendations to growers. Maher at 21, SR at 157. These recommendations include what chemical to use on what crops, how to mix the chemicals with surfactants and other additives, and when to apply the chemicals. Maher at 41-42, SR at 161. While growers can preorder chemical, this is not required; it is merely one way to lock in a cheaper price. Maher at 23-24, SR at 158; Haas at 18, SR at 151; Deposition of Jason Fees at 22-23, SR at 167-168.

Dallas and Corson County Feeders farm about 12,000 acres of land in north central South Dakota and have been customers of SDWG for more than two decades, doing over \$1 million in business with SDWG annually. Maher at 26, 42, SR at 158, 161; Deposition of Dallas Schott at 12, 23, SR at 178-179. In March of 2014, Jason Fees, an SDWG agronomist, conducted a “Listen and Learn” customer service survey with Dallas and Corson County Feeders, who were one of SDWG’s “top tier” customers. SR at 241; Haas at 12, SR at 150; Fees at 16-17, SR at 166. In the survey, Schott specifically mentioned how important it was to him and his company that SDWG was “willing[] to help on agronomy.” SR at 241; Fees at 17-18, SR at 166. Agronomy services provided by SDWG to Schott and Corson County Feeders included, but were not limited to the following: making chemical recommendations, seed variety recommendations, fertilizer recommendations, field scouting, seed and chemical sales, and soil testing. Fees at 10-12, 17-18, SR at 164-166. Schott asked SDWG agronomists for direction on “what to spray and what to fertilize” and it is undisputed that he followed the recommendations provided by SDWG agronomists. Maher at 29, SR at 159; Fees at 17-18, SR at 166. Schott testified that “[w]henver I went in for spraying, I went a hundred percent on what I was told to spray with from Wheat Growers.” Schott at 28, SR at 180. He further stated that “[w]hatever they told me to do, I did.” Schott at 32, SR at 181.

In the soil testing done by SDWG for Dallas and Corson County Feeders each year, SDWG determined what had been planted before and what would be

planted the following growing season, so that SDWG could make recommendations to the grower for each parcel of land, all of which was provided to Schott and Corson County Feeders in a large binder. Fees at 12-13, SR at 165; Haas at 23, SR at 153. Soil tests for previous years are all maintained electronically by SDWG and can be accessed at any time by its agronomists. Fees at 13, SR at 165. When Dallas and Corson County Feeders completed planting in 2014, they also provided Fees with aerial maps and a color-coded list of what crops were planted in what locations, all based on the recommendations of Fees. Deposition of Mike Buechler at 20-21, SR at 192; SR at 240; SR at 226-228. SDWG used dispatching mapping software to code its customers' fields. Fees at 31, SR at 170. Sometimes, the grower-given nicknames for the fields are even added to the descriptions. Fees at 32, SR at 170. SDWG customers' field lists and aerial maps are maintained by SDWG and could be accessed by Fees whenever growers called for prescriptions or for directions when spraying certain crops or locations. Fees at 35, SR at 171. Fees admitted he did not double check the SDWG-maintained lists, maps or soil tests before giving spraying prescriptions or directions to Dallas and Corson County Feeders in 2014. Fees at 38, SR at 171.

Sunflower seeds come in confection, con-oil and oil varieties, which names are designated by their intended market use. Fees at 28, SR at 169. Each of these varieties of sunflower seeds also comes in traditional seed, as well as GMO variations, including Express and Clearfield. Fees at 21-22, SR at 167. All of these seeds are sold by SDWG. Maher at 29, SR at 159. The sunflower plant

variations are not distinguishable when they are growing. The difference is only observable in the harvested seed. Buechler at 18, SR at 191; Maher at 39, SR at 161. SDWG agronomists, including Jason Fees, know the difference between confection, con-oil, and oil sunflower seeds, as well as the different GMO variations available for each, and the proper chemical to be paired with each GMO. Maher at 22-23, 29, SR at 157-159; Haas at 22, SR at 152. Crop technology changes from year to year, sometimes faster than growers can keep up. Fees at 10, SR at 164. For this reason, growers rely on agronomists for advice in what to plant, what chemicals to apply, and when to apply them. Deposition of Gerald Smith at 33, 47, SR at 194, 196; Deposition of Hugh Randall at 64, SR at 204. In 2014, Dallas did not know what Clearfield sunflowers were, nor the distinction between Clearfield sunflowers and traditional sunflower seeds. Schott at 32-33, 35, SR at 181-182; Buechler at 10, SR at 190.

Dallas and Corson County Feeders initially only grew crops that could be fed to their cattle, which did not include sunflower seeds, but at Fees's and Maher's direction, they started growing sunflowers in 2008 or 2009. Schott at 9-10, 27, SR at 177, 180. These sunflowers were limited to traditional oil sunflower seeds. Schott at 26-27, SR at 179-180. In 2012, Fees introduced Dallas to Tim Petry and Dahlgren Seed and set up the mix or inclusion of both con-oils and confections in Appellants' sunflower crop. Schott at 28-29, 65, SR at 180, 185; Fees at 20, 49, SR at 167, 174. In 2013, however, Dahlgren Seed/SunOpta pulled its business from SDWG, along with several of SDWG's bigger seed-purchasing

customers, which eliminated a significant portion of Fees's income. Maher at 35-36, SR at 160; Fees at 19-21, SR at 167. Fees was forced to make up that income in other areas. When Dahlgren pulled its contract from SDWG, Maher advised Dallas and Corson County Feeders to stay with the contracts offered by Dahlgren/SunOpta because they were more lucrative than anything offered by SDWG. Schott at 65-66, SR at 185; Maher at 28, SR at 159.

In 2014, Fees was busier than usual because SDWG's McLaughlin site was short one agronomist. Maher at 20, SR at 157. Fees was also the only agronomist farming "on the side" at that time. Maher at 22, SR at 157. In 2014, Fees was attempting to service 30-40 full-time clients, up to 100 total clients, and still farm his own land in Meade and Perkins County, up near Bison, South Dakota. Fees at 6-7, 10, SR at 163-164.

When Fees did the preplanning for Appellants' 2014 crop in December 2013, his notes reflect a plan to plant about 3,200 acres of sunflowers. SR at 237. This was essentially the same as previous years, though a bit overestimated. SR at 238; Fees at 49, 51, SR at 174-175; Schott at 66-67, SR at 185-186. Only the con-oil sunflowers were Clearfield sunflowers, though this is not identified on the seed contracts or the seed labels. SR at 232-233; Deposition of Gerald Smith at Exhibits 6-7, SR at 199-202. One would need to look up the seed hybrid number to make that determination. Smith at 41-42, SR at 195.

At the time of preplanning in December 2013, Fees knew Dallas and Corson County Feeders would have at least *some* non-Clearfield sunflowers,

because TapOut, the herbicide used for the non-GMO seed, was included in Appellants' preplanning list. SR at 237. But Fees contends that on or about January 24, 2016, when he was completing their preordering form, Dallas told Fees he had changed his planting plan, stating his sunflowers were "all Clearfield." SR at 235, 239; Fees at 27-30, SR at 169. However, Fees also admitted he does not remember exactly what terminology was used in this conversation, and he agreed that terminology is important when Dallas did not know what a Clearfield sunflower was. Fees at 28-29, SR at 169.

SDWG also contends that the absence of TapOut on Appellants' preorder form is proof that they changed their planting plan. However, Fees agreed that Dallas could have still been planning to order and use TapOut (the herbicide used on non-GMO sunflowers), but simply chose not to preorder or prepay for that chemical. Fees at 30-31, SR at 169-170. Dallas contends that he would not have prepaid for TapOut if Fees had been fairly confident that the price would remain stable, as he would have had to borrow money from the bank to do so. Schott at 72, 74-75, SR at 187-188.

Dallas and Corson County Feeders farm over 12,000 acres of land and Dallas did not memorize each and every chemical he had used in previous years, let alone the crops with which those chemicals were paired. Schott at 31-32, SR at 181. Dallas stated, "I only used what Wheat Growers prescribed . . . I didn't keep track of that. Whatever they told me to do, I did." Schott at 12, 32, 37, SR at 178, 181-182. Dallas also denies that he ever told Fees he was planting "all Clearfield"

sunflowers because: (a) his contract with Dahlgren had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving remained the same as 2012 and 2013 (1200 acres each), which was set up by Fees himself; and (c) Dallas had no idea what a “Clearfield” sunflower was. Schott at 24-26, 35, 64, 66-68, SR at 179, 182, 185-186.

In June of 2014, Dallas contacted Fees requesting a herbicide prescription for spraying his sunflowers. Schott at 36-37, SR at 182; SR at 197. Mike Buechler went into McLaughlin and picked up the prescription, as well as the chemical for that prescription. SR at 197. Even if Dallas had told Fees in January 2014 that he was planning to plant “all Clearfield sunflowers”, Fees knew by June 2014 that Plaintiffs *had actually planted* at least *some* non-Clearfield sunflowers because Fees, himself, sold approximately 300 acres of traditional, non-GMO, oil sunflower seeds to Dallas and Corson County Feeders. Fees at 49-50, SR at 174; Schott at 77-78, SR at 188.

At Fees’ direction (prescription), Dallas sprayed ***all*** of his sunflowers with the same herbicide in July 2014. Schott at 36-37, SR at 182. Within hours, Dallas noticed a change in the color of his confection sunflowers and contacted Fees via telephone. Schott at 40, SR at 183. Fees told him, “maybe they need a little time, because sometimes spraying Beyond on Clearfield tolerant sunflowers causes them to yellow flash for a while.” Fees at 44, SR at 173. Dallas next called Tim Petry at Dahlgren/SunOpta, who told Dallas he had two different sunflower types

and if they were all sprayed with the same herbicide, half of them would be dead. Schott at 41, SR at 183.

Appellants lost 1,200 acres of non-Clearfield confection sunflowers, which turned black and died within days of being sprayed with Beyond. Fees at 45, SR at 173; Schott at 14, SR at 178. No replacement crop was planted because it was too late in the growing season and there was some concern about the compatibility of the pre-emergent chemical used in the field. Fees at 46, SR at 173; Schott 52-53, SR at 184. Fees admitted he told Schott he was concerned about losing his job over this incident. Fees at 48, SR at 174; Schott at 53-54, SR at 184. Fees testified, “[I]f a producer comes in and says you owe me a half a million dollars and I just tell him, ‘Yep, I just screwed up, go pay him,’ I’ll probably lose my job.” Fees at 48, SR at 174.

In granting SDWG’s Motion for Summary Judgment, the trial court ruled that “the sole legal cause of the loss sustained by Plaintiffs . . . was the misapplication of a chemical by Plaintiffs for which Defendant was not responsible and which represents assumption of the risk by Plaintiffs[.]” SR at 244. Dallas and Corson County Feeders appeal from that ruling.

STANDARD OF REVIEW

The South Dakota Supreme Court has set forth the following standard of review on summary judgment:

In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and

showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Peters v. Great Western Bank, Inc., 2015 S.D. 4, ¶ 5, 859 N.W.2d 618, 621

(quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d

800,804 (quoting *Pellegrino v. Loen*, 2007 S.D. 129, ¶ 13, 743 N.W.2d 140, 143)).

This Court is not bound by the trial court's findings of fact and must conduct an independent review of the record. *Lamp v. First National Bank*, 496 N.W.2d 581, 583 (S.D. 1993).

ARGUMENT AND AUTHORITIES

I. The trial court erred in finding that Appellants had assumed the risk of damage to their sunflower crop.

The trial court granted summary judgment based on its finding that Appellants *assumed the risk* of the damage to their sunflower crop by spraying it themselves. "A defendant asserting assumption of the risk must establish three elements: 1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time, knowledge, and experience to make an intelligent choice." *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772 (citing *Goepfert v. Filler*, 1997 S.D. 56, ¶ 6, 563 N.W.2d 140, 142).

“The failure to establish *any one* of the three elements negates the defense.” *Id.* (emphasis added). “It is only where the essential elements are conclusively established that the plaintiff may be charged with assumption of the risk as a matter of law.” *Smith v. Community Co-op. Ass'n of Murdo*, 87 S.D. 440, 443, 209 N.W.2d 891, 892 (1973). This Court has stated that successful application of this defense on summary judgment only occurs in “rare cases” in the absence of a factual dispute. *Ray v. Downes*, 1998 S.D. 40, ¶ 10, 576 N.W.2d 896, 898; *Westover v. East River Elec. Co-op, Inc.*, 488 N.W.2d 892, 896 (S.D. 1992).

The trial court erred because it granted summary judgment based on assumption of the risk without determining whether the necessary elements of the defense had been conclusively established. The trial court made no findings regarding: 1) the extent of Dallas’s *knowledge* regarding the risk; 2) whether Dallas *knew* the full scope and magnitude of his actions; and 3) whether Dallas and Corson County Feeders *knowingly and voluntarily* accepted the risk. This was error, particularly when there were factual disputes regarding whether Appellants even had the requisite knowledge of the risk, let alone whether they could have appreciated and accepted the risk.

A. Appellants did not have actual knowledge of the risk.

Remember that sunflower seeds come in confection, con-oil and oil varieties, which are designated by the seeds’ intended market use. Fees at 28, SR at 169. But each of these varieties of sunflower seeds *also* come in traditional seed, as well as GMO variations, including Express and Clearfield. Fees at 21-22,

SR at 167. SDWG agronomists, including Jason Fees, know the difference between confection, con-oil, and oil sunflower seeds, as well as the different GMO variations available for each seed type, and the proper chemicals to be paired with each GMO. Maher at 22-23, 29, SR at 157-159; Haas at 22, SR at 152. But growers do not often know this distinction. Crop technology changes from year to year, sometimes faster than growers can keep up. Fees at 10, SR at 164. For this reason, growers rely on agronomists for advice in what to plant, what chemicals to apply, and when to apply them. Smith at 33, 47, SR at 194, 196; Randall at 64, SR at 204. Indeed, even Fees's agronomy manager and the facility manager did not know the differences between these GMO varieties. Haas at 22, SR at 152; Maher at 22, SR at 157. Moreover, the word "Clearfield" did not appear on the seed contract, order forms, or seed bags. SR at 198-200, 232, 234. Only Fees knew that Dallas's and Corson County Feeders' con-oil sunflowers were Clearfield sunflowers, while their confection sunflowers were traditional non-GMO seed, *because he was the one who initially set up this seed plan/split*. Schott at 28-29, 65, SR at 180, 185; Fees at 20, 49, SR at 167, 174.

Dallas relied on SDWG agronomists for direction on "what to spray and what to fertilize" and it is undisputed that he followed the recommendations provided by SDWG agronomists. Maher at 29, SR at 159; Fees at 17-18, SR at 166. SDWG was aware of this reliance and prided themselves on their "superior service." SR at 151, 157, 166, 241; Fees at 17-18; Haas at 15; Maher at 21.

Dallas stated, "[w]hen I went in for spraying, I went a hundred percent on

what I was told to spray with from Wheat Growers.” Schott at 28, SR at 180.

Dallas further stated, “[w]hatever they told me to do, I did.” Schott at 32, SR at 181.

When Dallas and Corson County Feeders completed planting in 2014, they provided Fees with aerial maps and a color-coded list of what crops were planted in what locations. Buechler at 20-21, SR at 192; SR at 240; SR at 226-228. These field lists and aerial maps were maintained by SDWG and could have been easily accessed by Fees when Dallas and Corson County Feeders called for spraying prescriptions. Fees at 35, SR at 171. But Fees admitted he did not double check the SDWG-maintained lists, maps, or soil tests before giving spraying prescriptions or directions to Appellants in 2014. Fees at 38, SR at 171.

Moreover, in 2014, Dallas and Corson County Feeders *did not know* what Clearfield sunflowers were, let alone the distinction between them and traditional sunflower seeds. Schott at 32-33, 35, SR at 181-182; Buechler at 10, SR at 190. At the time of preplanning in December 2013, Fees knew Dallas and Corson County Feeders were planning to have *at least some* non-Clearfield sunflowers, because TapOut, the herbicide used for non-Clearfield sunflowers, was included in the preplanning list. SR at 237. And while Fees contends that Dallas later changed his planting plan, stating his sunflowers were “all Clearfield,” this makes no sense in light of the other factors governing Appellants’ crop and Fees’s admission that those words may not have been used. SR at 235, 239; Fees at 27-30, SR at 169.

Dallas farms over 12,000 acres of land, which made it impractical (if not impossible) for him to memorize each and every chemical he had used in previous years, let alone the crops with which they were paired, particularly when these change over the years. Schott at 31-32, SR at 181. Instead, Dallas stated, “I only used what Wheat Growers prescribed . . . I didn’t keep track of that. Whatever they told me to do, I did.” Schott at 12, 32, 37, SR at 178, 181-182. Dallas also denies that he ever told Fees he was planting “all Clearfield” sunflowers because: (a) his contract with Dahlgren (fixing the amount of seed and variations) had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving from Dahlgren remained *exactly the same* as what Fees had set up the previous two years (1200 acres each); and (c) Schott had no idea what “a Clearfield” sunflower was. Schott at 24-26, 35, 64, 66-68, SR at 179, 182, 185-186.

It is clear, from the undisputed facts, that Dallas and Corson County Feeders were unaware of the distinction between Clearfield and non-Clearfield sunflowers. In fact, it appears that Jason Fees was the only one who *did* know of the distinction and the implications thereof. Dallas knew only that he and Corson County Feeders “had gotten con-oils, regular oils and confections . . . in the past[.]” Schott at 24, SR at 179; Buechler at 10, SR at 190. But knowledge of the market designation for each type of seed does not impart any knowledge of the spraying requirements, as each of these varieties of sunflower seeds comes in traditional seed, as well as GMO variations, including Express and Clearfield.

Fees at 21-22, SR at 167. This is precisely why Dallas and Corson County Feeders needed to rely upon Fees and SDWG for direction.

B. Appellants cannot be imputed with knowledge of the risk.

SDWG asserts that, regardless of what he actually knew, Dallas should be imputed with knowledge of the risk because he was spraying his own crops. This Court has held that “[c]onstructive knowledge will be imputed if the risk is so plainly observable that ‘anyone of competent faculties [could be] charged with knowledge of it.’” *Goepfort v. Filler*, 1997 S.D. 56, ¶ 8, 563 N.W.2d 140, 143 (quoting *Westover v. East River Elec. Co-op, Inc.*, 488 N.W.2d 892, 901 (S.D. 1992)). “Since knowledge and appreciation of a particular risk are essential to the defense of assumption of risk, a plaintiff must only be held to assume the risk he appreciates, not the risk which he does not.” *Thomas v. St. Mary’s Roman Catholic Church*, 283 N.W.2d 254, 260 (S.D. 1979). The risk here cannot be reasonably deemed “plainly observable”, when everyone involved agrees that only the agronomist, Jason Fees, had the information necessary to have averted the injury.

There was no evidence before the trial court that supported imputing Dallas and Corson County Feeders with knowledge regarding the difference in herbicide applications for each GMO variation, whether Clearfield, non-Clearfield or something else. SDWG employees admitted that Dallas relied completely on SDWG for what to spray, when to spray, and where to spray. SR at 155-159, 166, 241; Maher at 14-15, 17, 21, 29; Fees at 17-18. Dallas testified, “I only used what

Wheat Growers prescribed . . . I didn't keep track of that.² Whatever they told me to do, I did." Schott at 12, 32, 37, SR at 178, 181-182. Dallas further stated, "[w]hen I went in for spraying, I went a hundred percent on what I was told to spray with from Wheat Growers." Schott at 28, SR at 180.

Even Brent Haas, the SDWG site manager in McLaughlin, and Craig Maher, the McLaughlin agronomy manager, were unaware of the distinctions between Clearfield and non-Clearfield sunflowers. Haas stated he did not know what a Clearfield sunflower was, but SDWG's agronomists "would know on that." Haas at 22, SR at 152. While Maher knew that Beyond was for use only on Clearfield sunflowers, he was not aware of whether oils, con-oils, or confection seeds were all available in the Clearfield GMO, stating that was something the SDWG agronomists would know. Maher at 22, SR at 157. Therefore, it was wrong for the trial court to impute this knowledge to Dallas and Corson County Feeders when even SDWG's employees, those whose very job it is to know this information, agree that the agronomists are the only ones with full knowledge of the same.

C. SDCL 38-21-44 does not impute an applicator with an agronomist's knowledge.

² Q: You did not know that Beyond should not be used on non-Clearfield seeds?
A: I didn't keep track of that. Whatever [SDWG] told me to do, I did.
Schott at 32:8-11, SR at 181.

The trial court appeared to base its holding entirely upon Dallas's status as a licensed applicator. At the hearing on SDWG's Motion for Summary Judgment, the trial court stated:

So this case is about one thing, which is the Plaintiff, in this case, sprayed the non-Clearfield sunflowers with Beyond, which was a mistake. He didn't read the label. As a licensed applicator, he's required to follow the label.

HT at 28:4-8. But this analysis by the trial court ignores the disputed facts regarding Dallas's and Corson County Feeders' *actual or constructive knowledge* of the risk.

It is clear from the facts set forth above that Dallas was unaware of the difference between Clearfield and non-Clearfield sunflowers. In fact, no one has disputed that fact. Also undisputed is the fact that Jason Fees was the only one with full information in that regard, as attested to by SDWG's own managers and supervisors. Also undisputed is the fact that Dallas *relied* on Fees' recommendations, a reliance which SDWG was fully aware of and actually invited. Because Dallas was unaware of the distinction between Clearfield and non-Clearfield sunflowers, the act of "reading the label" would not have informed him that the chemical could not be applied to his sunflowers; for all he knew, those sunflowers were Clearfield. So the label could not have warned him off.

Relying on Fees, and without knowledge of the Clearfield/non-Clearfield distinction, there was nothing about the situation to raise an alarm in Dallas's mind prior to the application. Maher agreed that it was Fees's job to know and advise

customers that they cannot spray Beyond on non-Clearfield sunflowers, particularly when he *knows* that non-Clearfield sunflowers were *also* planted in this particular grower's fields. Maher at 38, SR at 160. And there was no evidence before the trial court indicating that Dallas knew or should have known the significance of those terms, given his consistent reliance upon SDWG.

Even SDWG's expert, Gerald Smith, testified, if a grower did not know what a Clearfield sunflower was, "the label wouldn't be of much advantage if he didn't know what kind of seed he was working with." Smith at 42, SR at 195. Without knowledge of the Clearfield/non-Clearfield distinction, Dallas could not have known that the chemical was incompatible with his crop, regardless of whether he read the label or not. Therefore, he did *not* have knowledge of the risk or the ability to appreciate its character.

The trial court's holding essentially makes licensed applicators *strictly liable* for any misapplication of chemicals. By his status as a licensed applicator, the trial court seemingly imputed to Dallas all of the relevant knowledge of an agronomist, including seed/plant varieties and appropriate chemicals. But applicators are not required, by practice or state law, to have this extensive of knowledge. In fact, the trial court's ruling imputed licensed applicators with knowledge that *everyone involved in this case agreed only an agronomist would have*. There was no evidence before the trial court that Dallas had such knowledge, simply by nature of being a licensed applicator.

While the trial court did not explicitly state so, it appeared to be relying on an alleged violation by Dallas of SDCL 38-21-44, which states:

The secretary of agriculture, pending inquiry and after opportunity for a hearing, pursuant to chapter 1-26, may deny, suspend, revoke, or modify any provision of any license or certification issued under this chapter, if he finds that the applicant or the holder of a license or certification has committed any of the following acts, each of which is declared to be a violation of this chapter:

* * *

(2) Made a pesticide recommendation or application inconsistent with the labeling[.]³

However, SDCL 38-21-44 has no impact on the critical elements of assumption of the risk, as it has no bearing on Dallas's *actual or constructive knowledge* of the risk involved or appreciation of the risk.

Instead, any analysis of SDCL 38-21-44 would be more appropriate under a contributory negligence defense, which is not what the trial court relied upon in granting summary judgment. *See Baddou v. Hall*, 2008 S.D. 90, ¶ 19, 756 N.W.2d 554, 559 (“Violation of a safety statute is negligence as a matter of law unless it is legally excused.”) Such an analysis would first require the trial court to determine that SDCL 38-21-44 is, indeed, a safety statute, as this Court has never made that determination. *See Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, ¶ 16, 862 N.W.2d 549, 555. The trial court made no such finding, nor did it make any

³ It should be noted that, as a pesticide dealer, SDWG is also required to maintain a license pursuant to SDCL 38-21-33.4. As SDCL 38-21-44 applies to “any license or certification issued under this chapter,” then Fees’s *recommendation* and prescription of Beyond to Dallas’s non-Clearfield crop would also be a violation of SDCL 38-21-44. It is undisputed that Fees did have actual knowledge of the Clearfield/non-Clearfield distinction and the appropriate chemicals for each.

specific finding that Dallas had violated the statute. In fact, it did not analyze whether any such alleged violation occurred OR was legally excused. Therefore, it does not appear that the trial court made the appropriate inquiry for any reliance on an alleged violation of SDCL 38-21-44 or contributory negligence defense, which was not the basis the trial court relied upon in granting summary judgment.

CONCLUSION

While the trial court relied upon assumption of the risk in granting summary judgment, it did not make any findings regarding the *essential* elements of that defense. The trial court imputed knowledge to Dallas, which was not “plainly observable to anyone of competent faculties.” The trial court relied on Dallas’s failure to read the Beyond label, but it is undisputed that, given his lack of knowledge regarding the meaning of the terms “Clearfield” and “non-Clearfield,” that the act of reading the label would not have alerted him to any risk. It is also undisputed that Jason Fees was the only individual who had all of the information necessary to determine whether application of Beyond was inappropriate for the sunflowers planted in that particular location.

Dallas had no actual or constructive knowledge of the risk involved in applying Beyond to the sunflowers planted there. Instead, Dallas and Corson County Feeders detrimentally relied on Fees’s recommendation and prescriptions, because Fees was the one who set up the planting plan, negotiated for the particular mix of seeds and variations, and prescribed all of Dallas’s seed, chemical and fertilizer applications. Dallas and Corson County Feeders had no

reason to appreciate any risk. This is not the “rare case” without factual dispute that this Court has identified as being ripe for summary judgment for assumption of the risk. For these reasons, Appellants Dallas Schott and Corson County Feeders, respectfully urge this Court to reverse and vacate the trial court's Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Dated this 23rd day of March, 2017.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.

305 Sixth Avenue S.E.

P.O. Box 970

Aberdeen, SD 57402-0970

605-225-2232

605-225-2497 (fax)

mneville@bantzlaw.com

jscott@bantzlaw.com

CERTIFICATE OF COMPLIANCE

Justin M. Scott, attorney for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Appellant's brief does not exceed 32 pages;
- b. The body of Appellant's brief was typed in Times New Roman 13 point typeface, with foot notes being in 13 point typeface; and
- c. Appellant's brief contains 5,497 words, 26,767 characters (no spaces), and 32,482 characters (with spaces), according to the word and character counting system in Microsoft Word for Windows 2013 used by the undersigned.

Dated this 23rd day of March, 2017.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
mneville@bantzlaw.com
jscott@bantzlaw.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellants, Dallas Schott and Corson County Feeders, Inc., hereby certifies that on the 23rd day of March, 2017, a copy of Appellants' Brief was sent by electronic mail to:

Mr. Michael L. Luce	South Dakota Supreme Court
Lynn, Jackson, Lebrun & Shutz, P.C.	<i>scclerkbriefs@uds.state.sd.us</i>
<i>mluce@lynnjackson.com</i>	

and the original and 2 copies of the same were mailed by first class mail, postage prepaid, to the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
mneville@bantzlaw.com
jscott@bantzlaw.com

APPENDIX

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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CORSON)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON COUNTY
FEEDERS, INC.,

Plaintiffs,

vs.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV15-000012

SUMMARY JUDGMENT

Defendant, South Dakota Wheat Growers Association ("Defendant"), having moved for summary judgment, pursuant to SDCL 15-6-56, and the Court having held the hearing on the Motion for Summary Judgment on Tuesday, November 29, 2016, and the Court having considered all of the records and files herein, and the Court having considered the arguments of counsel and the Briefs that have been submitted, and the Court having determined that the sole legal cause of the loss sustained by Plaintiffs, Dallas Schott and Corson County Feeders, Inc. ("Plaintiffs") was the misapplication of a chemical by Plaintiffs for which Defendant was not responsible and which represents assumption of the risk by Plaintiffs; it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion of Defendant for Summary judgment be, and hereby is, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiffs be, and hereby is, dismissed, on the merits, with prejudice, and that Defendant is entitled a recovery of its taxable disbursements to be assessed by the Clerk pursuant to SDCL 15-17-37 and SDCL 15-6-54(d).

BY THE COURT: Signed: 12/13/2016 4:31:44 PM


Honorable Michael Day
Circuit Court Judge

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CORSON)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

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FEEDERS, INC.,

Plaintiffs,

vs.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV15-000012

**DEFENDANT'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Defendant, South Dakota Wheat Growers Association ("SDWGA"), by and through their attorneys of record, respectfully submits this Statement of Undisputed Material Facts.

1. This claim concerns crop damage as a result of a chemical application in July, 2014 to Plaintiffs' sunflower crop (see Complaint).
2. Corson County Feeders, Inc. is owned and operated by Dallas Schott. (Schott Deposition at 7).
3. For several years prior to 2014, Plaintiffs had planted both Clearfield and non-Clearfield sunflowers. (Schott Deposition at 28).
4. Clearfield sunflowers need to be matched with the herbicide Beyond.
5. Beyond should be applied to Clearfield sunflowers, but it will kill non-Clearfield sunflowers if applied to them. (Randall Deposition at 14).
6. For several years, Plaintiffs would have purchased both sunflower seeds and herbicide chemicals from SDWGA. (Schott Deposition at 65-66).
7. However, for the last couple of years prior to 2014, Plaintiffs had purchased their sunflower seeds, both Clearfield and non-Clearfield, from Dahlgren (now SunOpta). (Schott Deposition at 65).
8. For years prior to 2014, Plaintiffs would purchase the herbicide TapOut to be used with non-Clearfield sunflowers and the herbicide Beyond to be used with the Clearfield sunflowers. (Fees Deposition at 26).

9. Prior to the year 2014, Plaintiffs had apparently known which sunflower seeds had been planted in which fields so that he could apply the TapOut for the non-Clearfield sunflowers and Beyond for Clearfield sunflowers. Plaintiffs had not suffered a sunflower loss prior to 2014 as a result of applying the wrong chemicals to the wrong sunflower fields. (Schott Deposition at 52-53).

10. The agronomist at SDWGA would rely upon the producer/Plaintiffs to tell the agronomist what crops he was planting and where they were planted so that the chemicals could be matched. (Fees Deposition at 21).

11. A grower would be discussing seed purchases and chemical purchases prior to the growing season. These discussions related to purchasing the herbicide chemicals purchased for the sunflower field that suffered a loss occurred in December and early January. (Fees Deposition at 22-23).

12. SDWGA's agronomist, Jason Fees ("Fees"), recalls having discussions with Schott regarding his chemical needs for the 2014 growing season. Fees recalls Schott initially indicating he was going to have approximately 1200 acres planted with Clearfield sunflower seeds and about the same number of acres planted with non-Clearfield sunflower seeds. However, as Fees was attempting to get an order placed for chemicals in order to get the early payment discount, he again contacted Schott. This was in January, 2014, and at that time Schott indicated for the 2014 growing season he was only going to plant Clearfield sunflower seeds. (Fees Deposition at 27; Smith Deposition at 27). An order was placed for chemicals, and because of the information about only Clearfield sunflower seeds, Beyond was purchased but, unlike earlier years, no TapOut was purchased. This was reflected in the order that was provided to Schott. (Exhibit 23; Fees Deposition at 29-30; Smith Deposition at 29, 30, 31; Randall Deposition at 45-46).

13. Again, the chemical orders were based upon what Plaintiffs were planning to plant for the 2014 growing season. However, when the growing season commenced in the spring of 2014, Plaintiffs did order a small amount of sunflower seeds from S SDWGA. (Fees Deposition at 49). However, all of the initial orders for sunflower seeds were with Dahlgren and were not purchases from SDWGA. (Fees Deposition at 49).

14. When Plaintiffs ordered a small amount of additional sunflower seeds to use in a remaining quarter section in the spring of 2014, Fees recalls mentioning to Schott that these non-Clearfield seeds would have been different from the seeds he had previously indicated he would be planting for the 2014 growing season. (Fees Deposition at 50).

15. Plaintiffs would have been responsible for planting and to know where he planted Clearfield sunflowers and where he planted non-Clearfield sunflowers. (Randall Deposition at 47).

16. The agronomist would not typically go back and check with the producer as to

what was actually planted. (Fees Deposition at 38).

17. The Beyond chemical that was to be applied to the Clearfield sunflower seeds, which had been previously purchased, was picked up by Plaintiffs in July, 2014. (Exhibit 26; Fees Deposition at 41; Smith Deposition at 26).

18. Again, SDWGA did not plant, nor supply, the sunflower seeds from Dahlgren. SDWGA would not have the bags in front of it to verify which seeds were Clearfield sunflower seeds and which were non-Clearfield sunflower seeds and in what fields they were planted. (Fees Deposition at 51; Randall Deposition at 46-47).

19. Just like Plaintiffs did their own planting, Plaintiffs also did their own spraying. In fact, Schott himself was the only one that did the spraying of the Beyond chemical in July, 2014. (Schott Deposition at 32, 37).

20. Plaintiffs incorrectly applied the Beyond chemical to non-Clearfield sunflower seeds, causing the loss of that crop. (Smith Deposition at 44-45).

21. A reasonable grower is expected to know which fields he had planted Beyond matched seeds and which fields he did not. (Smith Deposition at 28-29).

22. Plaintiffs' expert is Hugh Randall. SDWGA's expert is Gerald Smith. Both experts agree that the grower would be responsible to know in which fields he would have Clearfield and non-Clearfield sunflower seeds. (Smith Deposition at 28, 29, 42-44, 46 and 52-53; Randall Deposition at 47).

23. As Plaintiffs' expert concedes, this is important so that a grower does not apply Beyond to non-Clearfield sunflower seeds. Beyond only matches with Clearfield sunflower seeds. (Randall Deposition at 47; Maher Deposition at 22).

24. As the grower in this case, Plaintiffs were responsible for the misapplication of the Beyond to the non-Clearfield sunflower seeds. (Smith Deposition at 42-45).

25. This misapplication is not the fault of the agronomist. The agronomist did not tell the grower that he could use Beyond on non-Clearfield sunflower seeds. (Maher Deposition at 37-38).

26. The fault for this loss not only rests with Schott as the grower but also Schott as a licensed applicator. (Beuchler Deposition at 18).

27. Schott was an applicator licensed in the state of South Dakota. (Schott Deposition at 32).

28. As a licensed applicator, Schott is responsible for knowing what chemicals he is applying and to make sure that the chemicals are appropriate for the crops involved. (Smith

Deposition at 52-53).

29. SDWGA was not involved in the chemical application. (Smith Deposition at 52).

30. As a licensed applicator, Schott was responsible to read the label. (Randall Deposition at 47-48, 53).

31. Schott has conceded that he neither read the label for the Beyond chemical (Schott Deposition at 34-35, 37-38) nor the insert (Schott Deposition at 35-36). (Randall Deposition at 53).

32. The proper application of chemicals is governed by South Dakota law. SDCL 38-21-44(2). It is a violation of law for an applicator to apply chemical inconsistent with the label. The applicator is responsible for following the label. (Schott Deposition at 33-34).

33. The Beyond label and insert clearly provides that this chemical is only to be used on Clearfield sunflowers. (Schott Deposition at 34-35).

34. Schott acknowledges that this loss was due to his spraying Beyond on non-Clearfield sunflowers. (Schott Deposition at 34).

35. Plaintiffs' expert has acknowledged that the last effort to stop a mistake is reading the label. (Randall Deposition at 59).

36. Plaintiffs' expert acknowledges that if Schott would have read the label and followed it, this loss would have been prevented. (Randall Deposition at 59).

37. Although Plaintiffs' expert wants to place certain responsibility on SDWGA, he conceded that responsibility for this loss has to be shared by Plaintiffs. (Randall Deposition at 59).

38. Although Plaintiffs attempt to excuse this misapplication by indicating they didn't know particulars of what sunflower seeds and sunflowers were Clearfield and what were non-Clearfield, and what chemical he used with each particular field, Plaintiffs conceded that in previous years they had planted both Clearfield and non-Clearfield sunflower seeds and had appropriately applied Beyond chemical to Clearfield sunflowers and TapOut chemical to non-Clearfield sunflowers. (Schott Deposition at 42; Smith Deposition at 52-53).

39. Schott further concedes that he should have read the label (Schott Deposition at 37-38), and that he is responsible for putting this Beyond chemical on these non-Clearfield sunflowers. (Schott Deposition at 40-41).

40. Schott later told the agronomist, when asked if chemical was applied to Clearfield sunflowers, they were supposed to be Clearfield sunflowers, which is consistent with the information provided to SDWGA when the chemicals were ordered under the prepayment

program in January, 2014. Schott indicated he would talk to the seed supplier to confirm that these were Clearfield sunflower seeds. (Fees Deposition at 43-44). As it turns out, the Beyond was not applied to just Clearfield sunflowers.

Dated October 3, 2016.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Michael L. Luce
110 N. Minnesota Ave., Ste. 400
P.O. Box 2700
Sioux Falls, SD 57101-2700
Telephone: (605) 332-5999
Fax: (605) 332-4249
E-mail: mluce@lynnjackson.com
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 3, 2016, I caused the following document:

- **DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

Melissa E. Neville
Bantz, Gosch & Cremer, L.L.C.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
Telephone: (605) 225-2232
E-mail: mneville@bantzl原因.com

/s/ Michael L. Luce
Michael L. Luce

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF CORSON

FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON
COUNTY FEEDERS, INC.,

Plaintiff,

v.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV. 15-000012

**OBJECTIONS TO DEFENDANT'S
STATEMENT OF UNDISPUTED
MATERIAL FACTS**

Pursuant to SDCL 15-6-56 (c), Plaintiffs, by and through their counsel of record, set forth the following Statement of Material Facts in opposition to Defendant's Motion for Summary Judgment:

Plaintiffs have no objections to Defendant's statements of fact set forth in paragraphs 2-6, 8, 10, 14, 19, 27, 29, 31 and 33. For the rest and remainder of Defendant's purported statements of undisputed material facts, Plaintiffs object and contend that the same are either false, misleading, incomplete or at the very least, disputed, all as is more fully set forth below. Moreover, Plaintiffs object to the format of Defendants' statement of facts, in that "[e]ach material fact in this required statement must be presented in separate numbered statement and with appropriate citation to the record." SDCL 15-6-56(c)(1).

¶1. Objection.

- a. Plaintiffs' loss resulted from the negligence of Fees in prescribing and directing the application of the wrong chemical to Plaintiffs' non-Clearfield sunflowers. Complaint at ¶15
- b. Fees prescribed the chemical and Schott applied it as Fees directed. Complaint at ¶9, 10, 15; Schott at 28, 32, 36-37.

¶7. Objection.

- a. Plaintiffs crop rotation, to include the mix of both Clearfield and non-Clearfield sunflowers, was set up by Jason Fees. (Schott at 28-29, 65; Fees at 20, 49, 65).

- b. Fees knew Plaintiffs had both Clearfield and non-Clearfield sunflowers in the 2014 growing season. While Fees claimed he believed Plaintiffs had changed their plan to growing only Clearfield sunflowers, Fees knew that he personally had sold at least 300 acres of non-Clearfield oil sunflower seeds to Plaintiffs in that same year. (Fees at 49-50).
- c. Schott did not know the various sunflower GMOs, or their chemical pairing restrictions, and relied on Fees to direct the purchase, prescription and application of chemicals to his fields and he followed that direction. (Schott at 32-33, 35; Buechler at 10; Maher at 29).
- d. Indeed, even the SDWG Agronomy Manager and former agronomist Craig Maher did not know whether confection, con-oil and oil sunflower seeds all came in different GMOs. (Maher at 22).
- e. Maher agreed that Fees, who sold seed for Dahlgren in previous years, and who sold all GMO variations of sunflower seeds for SDWG, would know the difference between the variants and their respective chemical pairing restrictions. (Maher at 22).

¶9. Objection.

- a. There is no evidence to support the fact that Plaintiffs had “apparently known” which sunflowers required Tap Out and which required Beyond. (Schott at 24-26, 35, 64, 66-68; Mike Buechler at 10).
- b. Buechler, who now works for SDWG, was a hired hand for Schott and farmed some of his own sunflowers in 2014. (Buechler at 8-10). He confirmed that neither he nor Schott knew the difference between Clearfield sunflowers and other sunflowers and he relied on the advice of Fees in knowing what to plant and what chemical to apply. *Id.*
- c. Plaintiffs contacted Fees for planning, ordering, planting, and prescribing the appropriate chemicals for the appropriate crops each year from the time Plaintiffs began working with him and continuing up until the time of this lawsuit. (Dep. Exhibits 19, 20; Fees at 49, 51; Schott at 66-67).
- d. The year 2014 was not different from previous years. (Dep. Exhibits 19, 20; Fees at 49, 51; Schott at 66-67).

¶10. Objection.

- a. Each year, Plaintiffs did preplanning with Fees. (Dep. Exhibits 19 and 20; Fees at 22-23).

- b. When Plaintiffs had completed planting, they provided Fees with aerial maps and a color-coded list of what crops were planted in what locations. (Buechler at 20-21; Dep. Exhibits 29; Plaintiffs' Responses to Requests for Production, Exhibit 2).
- c. Then SDWG has dispatching mapping software it uses to code each field. (Fees at 31). Sometimes, the grower-given nicknames for the fields are even added to the description. (Fees at 32).
- d. Fees had access to these maps whenever Plaintiffs would call for a prescription or for direction when spraying. (Fees at 35). Fees also had access to the soil testing results and recommendations for previous years. (Fees at 13).
- e. Fees acknowledged that he usually warned growers who had both Clearfield and non-Clearfield sunflowers to be extra careful about where Beyond is applied, but for whatever reason, did not do so with Schott in 2014. (Fees at 49).

¶11. Objection.

- a. Craig Maher, the SDWG Agronomy Manager, testified that their agronomists do various things for their clients, including but not limited to lining up their fertilizer, their chemical and their seed. (Maher at 14-15).
- b. While a grower and the agronomist discuss preplanning (Fees Exhibits 19-20), the chemical being preordered/prepaid in December or January is *only* that which may change in price later in the year and for which the grower wishes to lock in a lower price. (Fees at 30-31).
- c. Fees agreed that TapOut (herbicide for non-Clearfield sunflowers) could have been a chemical that did not need to be preordered or prepaid. (Fees at 30-31; Maher at 23-24).
- d. The absence of TapOut on Plaintiffs' prepaid order sheet (Dep. Exhibit 23) for the 2014 growing season does not mean Plaintiffs were *only* planting Clearfield sunflowers. (Fees at 30-31; Schott at 72,74-75).

¶12. Objection.

- a. In December 2013, for the 2014 growing season, Fees met with Schott and discussed the continuance of the *same* plan and ratio originally set up by Fees years prior, that being 1200 acres of confection sunflowers, 1200 acres of con-oil sunflowers, and about 300-500 acres of oil sunflowers. (Dep. Exhibit 19, 20; Fees at 49, 51; Schott at 66-67).

- b. In this preplanning for 2014, there was no mention by Fees that any of these seeds were Clearfield, Express or otherwise. (Dep. Exhibits 19).
- c. Even the contracts and seed bags do not indicate the GMO. (Dep. Exhibits 9-10; Smith Dep. Exhibits 6-7). One would need to look up the seed hybrid number to make the determination. (Smith at 41-42).
- d. The seed GMO was not discussed between Fees and Schott, though Fees knew of the distinction, as he had prescribed the correct chemical in the past and it was his job to know what seed he was selling and what chemical needed to be paired with it. (Dep. Exhibit 20; Haas at 22; Maher at 22-23, 29, 38).
- e. Schott never told Fees he was planting or growing *only* Clearfield sunflowers. In fact, Fees himself sold 300 acres of non-Clearfield oil sunflower seeds to Plaintiffs. (Schott at 24-26, 35, 64, 66-68; Fees at 49-50).

¶13. Objection.

See Objection to ¶12. This statement is also vague and self-contradictory.

¶15. Objection.

This is not an accurate statement. Randall testified that the grower is responsible for knowing what crop he had planted and then conveying that information to the agronomist, which Plaintiff did in this case. See Objection to ¶10. But it is reasonable to rely on the agronomist for the specifics of what to spray and when to spray that crop. (Randall at 48, 64).

¶16. Objection.

- a. When Plaintiffs completed planting in 2014, they provided Fees with aerial maps and a color-coded lists of what crops were planted in what locations. (Buechler at 20-21; Dep. Exhibits 29; Plaintiffs' Responses to Requests for Production, Exhibit 2).
- b. SDWG used dispatching mapping software to code its customers' fields. (Fees at 31). Sometimes, the grower-given nicknames for the fields are even added to the description. (Fees at 32).
- c. SDWG customers' field lists and aerial maps are maintained by SDWG and can be accessed by Fees whenever growers call for prescriptions or for directions when spraying. (Fees at 35).

- d. Fees admitted that despite having all of this information readily available, he did not double check the SDWG-maintained lists, maps or soil tests before giving spraying prescriptions or directions to Plaintiffs. (Fees at 38).

¶17. Objection.

The Beyond was actually picked up in June 2014 by Mike Buechler. (Smith Dep. Exhibit 4).

¶18. Objection.

Object to that portion of the statement that indicates Defendant would not know “in what fields they were planted.” *See* Objections to ¶¶12 and 16.

¶20. Objection.

Plaintiffs correctly applied the chemical, it was simply applied to a crop with which it was not compatible. Moreover, Plaintiffs did so at the direction of Defendant or its agent, Fees, which misdirection is the cause of the loss of Plaintiffs’ crop. *See* previous objections.

¶21 Objection.

- a. Sunflower seeds come in confection, con-oil and oil varieties, which are designated by their intended market use. (Fees at 28).
- b. Each of these varieties of sunflower seeds come in traditional seed, as well as GMO variations, including Express and Clearfield. (Fees at 21-22). All of these seeds are sold by SDWG. (Maher at 29).
- c. The sunflower plants are not distinguishable when they are growing. The difference is only observable in the harvested seed. (Buechler at 18; Maher at 39).
- d. SDWG agronomists, including Jason Fees, know the difference between confection, con-oil and oil sunflower seeds, as well as the different GMO variations available for each, and the proper chemical to be paired with each GMO. (Maher at 22-23, 29; Haas at 22).
- e. Crop technology changes from year to year, sometimes faster than growers can keep up. (Fees at 10). For this reason, growers rely on agronomists for advice in what to plant, what chemicals to apply, and when to apply them. (Gerald Smith at 33, 47; Hugh Randall at 64).

¶¶22 and 23. Objection.

This is a mischaracterization of the testimony. *See* previous objections and Plaintiffs' Statement of Disputed Facts.

¶24. Objection.

See Objections to ¶¶ 10 and 12.

¶¶25 and 26. Objection.

These statements are conclusions of law regarding the ultimate issue in the case and are most definitely disputed. *See* Plaintiffs' Statement of Disputed Facts.

¶¶28 and 30. Objection.

These statements are inaccurate conclusions of law. The applicator is charged with knowing what chemical he is applying and mixing it appropriately, but not necessarily knowing whether the crop to which the agronomist directs it to be sprayed is "compatible or not compatible" with that particular chemical. That is the job of the agronomist. (Maher at 22-23, 29; Haas at 22).

¶34. Objection.

Schott acknowledged he now knows that Beyond is what killed his crop, but his loss was caused by the faulty direction of SDWG agronomist Fees in directing Schott to spray this chemical on his confection sunflower crop. *See* previous Objections and Plaintiffs' Statement of Disputed Facts.

¶¶35-36. Objection.

This is a mischaracterized summary of Randall's testimony. Reading the label would not have change the outcome here, as Schott had no idea what a "Clearfield Sunflower" was. *See* Objections to ¶¶1-12, 16, 21. The only person who knew was Fees because it was "his job to know." (Maher at 23).

¶37. Objection.

Randall testified that Schott shares responsibility in the sense that he physically applied the chemical, not that it was his fault for the error in crop compatibility. *See* previous Objections and Plaintiffs' Statement of Disputed Facts.

¶38. Objection.

- a. When Fees did the preplanning for Plaintiffs' 2014 crop in December 2013, his notes reflect a plan to plant about 3200 acres of sunflowers. (Dep. Exhibit 19).

This was essentially the same, though a bit overestimated, as previous years. (Dep. Exhibit 20; Fees at 49, 51; Schott at 66-67).

- b. Only Plaintiffs' con-oil sunflowers were Clearfield sunflowers, though this is not identified on the seed contracts or the seed labels. (Dep. Exhibits 9-10; Smith Dep. Exhibits 6-7). One would need to look up the seed hybrid number to make the determination. (Smith at 41-42).
- c. At the time of preplanning in December 2013, Fees knew Plaintiffs would have at least some non-Clearfield sunflowers, because TapOut, the herbicide used for them, was included in the preplanning list. (Dep. Exhibit 19).
- d. Fees contends that on or about January 24, 2016, when he was completing Plaintiffs' preordering form, Schott told Fees he had changed his planting plan, stating his sunflowers were "all Clearfield." (Dep. Exhibits 16, 23; Fees at 27-30). However, Fees also admitted he does not remember exactly what terminology was used in this conversation, and he agreed terminology is important when Schott did not know what a Clearfield sunflower was." (Fees at 28-29).
- e. Fees agreed that Plaintiffs could have still been planning to order and use TapOut (the herbicide used on non-GMO sunflowers), but simply chose not to preorder or prepay for that chemical. (Fees at 30-31).
- f. Schott contends that he would not have prepaid for TapOut if Fees had been fairly confident that the price would remain stable, as he would have had to borrow money from the bank to do so. (Schott at 72, 74-75).
- g. Schott farms over 12,000 acres and did not memorize each and every chemical he had used in previous years, let alone which crops with which they were paired. (Schott at 31-32). "I only used what Wheat Growers prescribed . . . I didn't keep track of that. Whatever they told me to do, I did." (Schott at 12, 32, 37).
- h. Schott also denies that he ever told Fees he was planting "all Clearfield" sunflowers because: (a) his contract with Dahlgren had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving remained the same as 2012 and 2013 (1200 acres each); and (c) Schott had no idea what a Clearfield sunflower was. (Schott at 24-26, 35, 64, 66-68).

¶39. Objection.

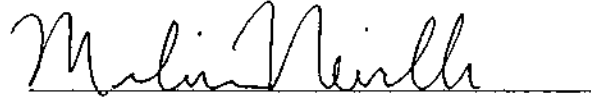
This mischaracterizes Schott's testimony. "As far as running my sprayer and operating my sprayer, I take a hundred percent of that. Putting the wrong chemicals on, I relied on them for that." (Schott at 40-41).

¶40. Objection.

This is Fees' hearsay statement and we dispute that Schott ever said this.

Dated this 21st day of November, 2016.

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in cursive script, appearing to read "Martin Neville", written over a horizontal line.

Attorneys for Plaintiffs

305 Sixth Avenue, S.E.

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzlaw.com

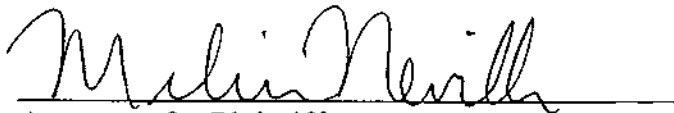
jscott@bantzlaw.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Plaintiffs hereby certifies that on the 21st day of November, 2016, a true and correct copy of the foregoing **Plaintiffs' Statement of Undisputed Material Facts** was electronically served through Odyssey File and Serve, with a courtesy copy sent via first class mail, postage prepaid, to:

Mr. Michael L. Luce
101 North Phillips Avenue
Wells Fargo Building, Suite 402
P.O. Box 1535
Sioux Falls, SD 57101-1535

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in cursive script, appearing to read "Melvin Neville", is written over a horizontal line.

Attorneys for Plaintiffs

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzlaw.com

jscott@bantzlaw.com

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF CORSON

FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON
COUNTY FEEDERS, INC.,

Plaintiff,

v.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV. 15-000012

**PLAINTIFFS' STATEMENT
OF DISPUTED
MATERIAL FACTS**

Pursuant to SDCL 15-6-56 (c)(2), Plaintiffs, by and through their counsel of record, set forth the following Statement of Disputed Material Facts in opposition to Defendant's Motion for Summary Judgment:

History.

1. South Dakota Wheat Growers (SDWG) offers agronomy services to farmers or growers in north central South Dakota. (Dep. Exhibit 18).
2. In 2014, SDWG's services included, but were not limited to "lin[ing] up their fertilizer, their chemical, their seed . . . look[ing] for what weeds are growing in the fields . . . deliver[ing] chemical, deliver[ing] seed" and lining up soil sampling. (Craig Maher at 14-15, 18).
3. SDWG prides itself on providing "superior service" to its customers. (Haas at 15). "We just want to make sure they grow a good crop on whatever they are looking to do." *Id.*
4. SDWG agronomists make recommendations to growers when they ask for them. (Maher at 21). These recommendations include what chemical to use on what crops, how to mix the chemicals with surfactants and other additives, and when to apply the chemicals. (Maher at 41-42).

5. While growers can preorder chemical, this is not required; it is merely one way to lock in a cheaper price. (Maher at 23-24; Haas at 18; Fees at 22-23).

6. Plaintiffs Dallas Schott and Corson County Feeders, Inc., farm about 12,000 acres of land in north central South Dakota and have been customers of SDWG for more than two decades, doing over \$1 million in business with SDWG annually. (Maher at 26, 42; Schott at 12, 23).

7. In March 2014, Fees conducted a "Listen and Learn" customer service survey with Plaintiffs, who were one of SDWG's "top tier" customers. (Dep. Exhibit 32; Haas at 12; Fees at 16-17). In the survey, Schott specifically mentioned how important it was to him and his company that SDWG was "willing[] to help on agronomy." (Dep. Exhibit 32; Fees at 17-18).

8. Agronomy services provided by SDWG to Plaintiffs included, but were not limited to the following: making chemical recommendations, seed variety recommendations, fertilizer recommendations, field scouting, seed and chemical sales, and soil testing. (Fees at 10-12, 17-18).

9. Schott asked SDWG agronomists for direction on "what to spray and what to fertilize" and he followed the recommendations provided by SDWG agronomists. (Maher at 29; Fees at 17-18). "Whenever I went in for spraying, I went a hundred percent on what I was told to spray with from Wheat Growers." (Schott at 28). "Whatever they told me to do, I did." (Schott at 32).

10. In the soil testing done by SDWG for Plaintiffs each year, SDWG determined what had been planted before and what would be planted the following growing season, so that it could make recommendations to the grower for each parcel of land, all of which was provided to Plaintiffs in a large binder. (Fees at 12-13; Haas at 23).

11. Soil tests for previous years are all maintained electronically by SDWG and can be accessed at any time by its agronomists. (Fees at 13).

12. When Plaintiffs completed planting in 2014, they provided Fees with aerial maps and a color-coded lists of what crops were planted in what locations. (Buechler at 20-21; Dep. Exhibits 29; Plaintiffs' Responses to Requests for Production, Exhibit 2).

13. SDWG used dispatching mapping software to code its customers' fields. (Fees at 31). Sometimes, the grower-given nicknames for the fields are even added to the description. (Fees at 32).

14. SDWG customers' field lists and aerial maps are maintained by SDWG and can be accessed by Fees whenever growers call for prescriptions or for directions when spraying. (Fees at 35).

15. Fees admitted he did not double check the SDWG-maintained lists, maps or soil tests before giving spraying prescriptions or directions to Plaintiffs. (Fees at 38).

GMO Sunflower Seed

16. Sunflower seeds come in confection, con-oil and oil varieties, which are designated by their intended market use. (Fees at 28).

17. Each of these varieties of sunflower seeds come in traditional seed, as well as GMO variations, including Express and Clearfield. (Fees at 21-22). All of these seeds are sold by SDWG. (Maher at 29).

18. The sunflower plants are not distinguishable when they are growing. The difference is only observable in the harvested seed. (Buechler at 18; Maher at 39).

19. SDWG agronomists, including Jason Fees, know the difference between confection, con-oil and oil sunflower seeds, as well as the different GMO variations available for each, and the proper chemical to be paired with each GMO. (Maher at 22-23, 29; Haas at 22).

20. Crop technology changes from year to year, sometimes faster than growers can keep up. (Fees at 10). For this reason, growers rely on agronomists for advice in what to plant, what chemicals to apply, and when to apply them. (Gerald Smith at 33, 47; Hugh Randall at 64).

Planting Sunflowers

21. Plaintiffs initially only grew crops that could be fed to their cattle, which did not include sunflower seeds, but at Fees's and Maher's direction, Plaintiffs started growing sunflowers in 2008 or 2009. (Schott at 9-10, 27). These sunflowers were limited to traditional oil sunflower seeds. (Schott at 26-27).

22. In 2012, Fees introduced Plaintiffs to Tim Petry and Dahlgren seed and set up the mix or inclusion of both con-oils and confections in Plaintiffs sunflower crop. (Schott at 28-29, 65; Fees at 20, 49, 65).

23. In 2013, Dahlgren Seed/SunOpta pulled its business, along with several of SDWG's bigger seed-purchasing customers, away from SDWG, which eliminated a significant portion of Fees' income. (Maher at 35-36; Fees at 19-21). Fees was forced to make up that income in other areas.

24. When Dahlgren pulled its contract from SDWG, Maher advised Plaintiffs to stay with the contracts offered by Dahlgren/SunOpta because they were more lucrative than anything offered by SDWG. (Schott at 65-66; Maher at 28).

25. In 2014, Fees was busier than usual, because SDWG's McLaughlin site was short one agronomist. (Maher at 20). Fees was also the only agronomist farming on the side at that time. (Maher at 22).

26. In 2014, Fees was attempting to service 30-40 full-time clients, up to 100 total clients, and still farm his own land in Meade and Perkins County, up near Bison, South Dakota. (Fees at 6-7, 10).

27. In 2014, Plaintiffs did not know what Clearfield sunflowers were, nor the distinction between them and traditional sunflower seeds. (Schott at 32-33, 35; Buechler at 10).

2014 Preplanning

28. When Fees did the preplanning for Plaintiffs' 2014 crop in December 2013, his notes reflect a plan to plant about 3200 acres of sunflowers. (Dep. Exhibit 19). This was essentially the same, though a bit overestimated, as previous years. (Dep. Exhibit 20; Fees at 49, 51; Schott at 66-67).

29. Only Plaintiffs' con-oil sunflowers were Clearfield sunflowers, though this is not identified on the seed contracts or the seed labels. (Dep. Exhibits 9-10; Smith Dep. Exhibits 6-7). One would need to look up the seed hybrid number to make the determination. (Smith at 41-42).

30. At the time of preplanning in December 2013, Fees knew Plaintiffs would have at least some non-Clearfield sunflowers, because TapOut, the herbicide used for them, was included in the preplanning list. (Dep. Exhibit 19).

31. Fees contends that on or about January 24, 2016, when he was completing Plaintiffs' preordering form, Schott told Fees he had changed his planting plan, stating his sunflowers were "all Clearfield." (Dep. Exhibits 16, 23; Fees at 27-30). However, Fees also admitted he does not remember exactly what terminology was used in this conversation, and he agreed terminology is important when Schott did not know what a Clearfield sunflower was." (Fees at 28-29).

32. Fees agreed that Plaintiffs could have still been planning to order and use TapOut (the herbicide used on non-GMO sunflowers), but simply chose not to preorder or prepay for that chemical. (Fees at 30-31).

33. Schott contends that he would not have prepaid for TapOut if Fees had been fairly confident that the price would remain stable, as he would have had to borrow money from the bank to do so. (Schott at 72, 74-75).

34. Schott farms over 12,000 acres and did not memorize each and every chemical he had used in previous years, let alone which crops with which they were paired. (Schott at 31-32). "I only used what Wheat Growers prescribed . . . I didn't keep track of that. Whatever they told me to do, I did." (Schott at 12, 32, 37).

35. Schott also denies that he ever told Fees he was planting "all Clearfield" sunflowers because: (a) his contract with Dahlgren had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving remained the same as 2012 and 2013 (1200 acres each); and (c) Schott had no idea what a Clearfield sunflower was. (Schott at 24-26, 35, 64, 66-68).

The Incident

36. In June 2014, Schott contacted Fees requesting an herbicide prescription for spraying his sunflowers. (Schott at 36-37; Smith Dep. Exhibit 4). Mike Buechler went into McLaughlin and picked up the prescription and the chemical. (Smith Dep. Exhibit 4).

37. Even if Schott had told Fees in January 2014 that he was planning to plant all Clearfield sunflowers, Fees knew by this time that Plaintiffs had at least some non-Clearfield sunflowers because Fees, himself, sold approximately 300 acres of traditional, non-GMO, oil sunflower seeds to Plaintiffs. (Fees at 49-50; Schott at 77-78).

38. At Fees' direction, Schott sprayed all of his sunflowers with the same herbicide in July 2014. (Schott at 36-37).

39. Within hours, Schott noticed a change in the color of the sunflowers and contacted Fees via telephone. (Schott at 40). Fees told him, "maybe they need a little time, because sometimes spraying Beyond on Clearfield tolerant sunflowers causes them to yellow flash for a while." (Fees at 44).

40. Schott also called Tim Petry at Dahlgren/SunOpta, who told Schott he had two different sunflowers and if they were all sprayed with the same thing, half of them would be dead. (Schott at 41).

41. Plaintiffs lost 1200 acres of non-Clearfield confection sunflowers, which turned black and died within days. (Fees at 45; Schott at 14).

42. No replacement crop was planted because it was too late in the growing season and there was some concern about the compatibility of the pre-emergent chemical used. (Fees at 46; Schott 52-53).

43. Fees admitted he told Schott he was concerned about losing his job. (Fees at 48; Schott at 53-54). "[I]f a producer comes in and says you owe me a half a million dollars and I just tell him, 'Yep, I just screwed up, go pay him,' I'll probably lose my job." (Fees at 48).

Damages

44. Plaintiffs contracted with Dahlgren to plant and grow 1200 acres of confection sunflowers and deliver 1,800,000 pounds of sunflower seeds in accordance with the following schedule:

- a. 600,000 pounds at \$31.00/cwt for delivery at harvest (\$186,000);
- b. 600,000 pounds at \$31.60/cwt for delivery during the month of March 2015 (\$189,600); and
- c. 600,000 pounds at \$31.80/cwt for delivery during the month of April 2015 (\$190,800).

Thus, the contract was expected to yield at least \$566,400 in income to Plaintiffs, which income Plaintiffs lost. (Complaint at ¶27; Dep. Exhibits 1 and 10).

45. Had Plaintiffs' crop been successful, they could reasonably have expected to incur the following expenses:

- a. Trucking costs at \$2.58/cwt, for a total of \$46,440;
- b. Fertilizer costs at \$44 per acre x 1200 acres, for a total of \$52,800;
- c. Seed costs at \$51,770.40;

- d. Fuel for planting and spraying of \$3.29 per acre x 1200 acres, for a total of \$3,948;
- e. Chemical costs of \$38.66 per acre, for a total of \$46,392; and
- f. Combining costs of \$8 per acre x 1200 acres, for a total of \$9,600.

Therefore, Plaintiffs' reasonable costs, had the crop survived, would have been \$210,950.40. (Complaint at ¶29; De. Exhibit 1).

46. 2014 was also an exceptionally good year for sunflowers in Corson County, with Plaintiffs' other fields yielding over 1800 pounds of sunflower seeds per acre, as opposed to the 1500 pounds provided in the contract. This means that with the 1200 acres Plaintiffs planted, they could reasonably have expected to yield an additional 360,000 pounds of sunflower seeds above what was provided in the contract, resulting in an additional \$114,480 in income, less the additional trucking expense of \$9,288, for a total additional income of \$105,192. (Complaint at ¶30; De. Exhibit 1).

47. In addition, Plaintiffs receive a premium for the quality and lack of insect damage at an estimated \$.80/cwt for the crop, which was consistently received in previous years. This totals \$17,280. (Complaint at ¶31; Dep. Exhibit 1).

48. Defendant's error caused Plaintiffs damages, including but not limited to the following:

- a. Total destruction of Plaintiffs' growing confection sunflower crop resulting in a yield loss, to maturity, of 1800 pounds per acre upon 1200 acres for a loss of \$477,921.60;
- b. For reimbursement of the costs of the Beyond used on the non-Clearfield confection sunflowers, from which Plaintiffs derived no benefit, in the amount of \$16,162.25;
- c. For consequential damages and expenses incurred by Plaintiffs in retaining the services of an agronomist to sample (\$207.70) and test (\$1,302) Plaintiffs' crop in the total amount of \$1,509.70;
- d. For prejudgment interest from the date of injury through the date of judgment, at the statutory rate of 10% per year, calculated at \$135.78 per day from and after July 21, 2014; and

- e. Additional and consequential damages of the impact of a no-yield crop upon future crop insurance benefits and future eligibility for government crop payments in an amount to be determined at trial.

(Complaint at ¶32; Dep. Exhibits 1-2, 6-8, 16).

Dated this 21st day of November, 2016.

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in cursive script, appearing to read "Matthew Neville", is written over a horizontal line.

Attorneys for Plaintiffs

305 Sixth Avenue, S.E.

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzlaw.com

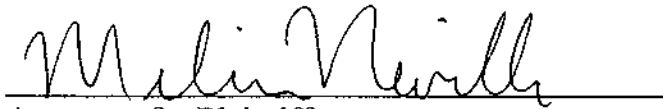
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CERTIFICATE OF SERVICE

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Mr. Michael L. Luce
101 North Phillips Avenue
Wells Fargo Building, Suite 402
P.O. Box 1535
Sioux Falls, SD 57101-1535

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in cursive script, appearing to read "Melinda Neville", is written over a horizontal line.

Attorneys for Plaintiffs

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzlaw.com

jscott@bantzlaw.com

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT
 3 * * * * *
 4 DALLAS SCHOTT and CORSON COUNTY *
 FEEDERS, INC., * 15CIV15-000012
 *
 5 Plaintiffs, *
 *
 6 vs. *
 *
 7 SOUTH DAKOTA WHEAT GROWERS *
 ASSOCIATION, *
 8 *
 Defendant. *
 9 * * * * *

10

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13

D E P O S I T I O N

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O F

15

BRENT HAAS

16

April 26, 2016

17

12:45 o'clock, p.m.

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19

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Taken at:

21

Dacotah Bank

22

320 N. Main Street

Mobridge, South Dakota

23

Reporter: Tammy Stolle, RPR

24

25



11

1 performance of the agronomists at South Dakota Wheat Growers?

2 A. I don't know. Not that I'm aware of.

3 Q. Okay. It's not -- at least it's not something

4 that you do on a regular basis then?

5 A. I would say yes, that's true.

6 Q. Okay. And -- well, here, I'm just going to show

7 you. I'm going to show you what we've marked as Exhibit 32.

8 A. Oh, yes, listen and learn.

9 MR. LUCE: Wait a second.

10 A. Okay.

11 Q. (BY MS. NEVILLE) So you recognize the document

12 that's marked as Exhibit 32?

13 A. I do.

14 Q. What are these?

15 A. This would be not a survey like I thought you

16 were entailing.

17 Q. Okay.

18 A. But this is something that we started, I believe

19 two years ago, and it is where we go out and talk with a few

20 customers to have them evaluate how they feel we are doing as

21 a customer for them.

22 Q. With all the services that you're providing?

23 A. Yeah, and it sort of, you know -- each location

24 is required to probably do ten or so.

25 Q. So it's sort of a spot check then?

12

1 A. Yeah, and they say to probably go out -- or to

2 ask some of your bigger customers, but this is for all

3 encompassing.

4 Q. Okay. And this one looks like it was done with

5 Corson County Feeders?

6 A. Um-huh.

7 Q. In March of 2014?

8 A. Yes.

9 Q. And it says lead staff on call, Jason. Would

10 that have been Jason Fees?

11 A. That would be my assumption, yes.

12 Q. So when you said that they usually ask you to go

13 out and talk to your bigger customers, would you agree that

14 Corson County Feeders or Dallas Schott's one of your bigger

15 customers?

16 A. He would be in the top tier.

17 Q. What's the top tier?

18 A. He would be in that top list, yeah.

19 Q. Okay.

20 A. Yep. That does a lot of grain and agronomy.

21 Q. Okay. Probably does over a million dollars of

22 business with you a year roughly?

23 A. I believe so.

24 Q. Okay.

25 MR. LUCE: What was the number of that one?

13

1 MS. NEVILLE: 32. Sorry.

2 MR. LUCE: That's okay. No, I think you said it.

3 I just didn't write it down.

4 Q. (BY MS. NEVILLE) On Exhibit 32, one of the notes

5 there -- and I don't know whose handwriting this is. Do you

6 know whose handwriting this is?

7 A. I don't, but since it says lead staff member on

8 call is Jason.

9 Q. Okay. And one of the pieces of information that

10 it says willingness to help on agronomy, what do you take

11 that to mean? If you know.

12 A. It is okay to say what my assumption is, I guess?

13 Q. Well, yeah, I mean, if you -- In your experience,

14 is this -- do you think he's referring to the work that the

15 agronomists do in making recommendations to the farmers? I

16 mean, that's how I take it. Is that wrong?

17 A. It could mean a few things, I guess. That could

18 be one of the possibilities.

19 MR. LUCE: Objection. Speculation, foundation.

20 It's not his notes, so...

21 Q. (BY MS. NEVILLE) Okay. And do you know what

22 kind of work the agronomists at your location are expected to

23 do for their clients, their farming clients?

24 A. What kind of -- restate that, please.

25 Q. Yeah. What is an agronomist's responsibilities

14

1 at your location, what are they expected to do?

2 A. They are supposed to provide service to our

3 customers and go out and get sales.

4 Q. Okay.

5 A. Yeah.

6 Q. Okay. And sales of?

7 A. Agronomy products being seed, chemical,

8 fertilizer,

9 Q. Okay. And as part of that --

10 A. And keep them up-to-date on newest trends too.

11 Q. Okay. That was my --

12 A. Sorry.

13 Q. That was my next question. I was just going

14 there. So technology changes from year to year, fair

15 statement, even in crops?

16 A. Yeah, in the world, yeah.

17 Q. Okay. So part of what they do is stay up-to-date

18 with their classes on the new products that are out there and

19 what works well together, that kind of thing?

20 A. Generally.

21 Q. And then --

22 A. I'd say so.

23 Q. And then they go out and make a pitch to the

24 client, "Here's what I think might work for you, this might

25 work together well, I know your operation, here's what's

1 going to work, buy from us," is that a fair statement?

2 A. I don't know if it would be so much a pitch, but

3 we always try to make sure we are helping our customers grow

4 the best crop they can.

5 Q. Okay. Because then they're going to buy more

6 products from you, right?

7 A. Well --

8 Q. If they get good results, they'll purchase more

9 from you?

10 A. That's a potential, but part of what we do is

11 we're supposed to always -- one of our biggest things is to

12 provide superior service to our customer, and it wouldn't be

13 going out there and -- how would I say it? We weren't trying

14 to gouge them. We just want to make sure they grow a good

15 crop on whatever they are looking to do.

16 Q. Okay. You don't want to cheat them essentially?

17 A. Yeah.

18 Q. And if they're set up to be growing wheat, you're

19 not trying to sell them something that's for sunflowers and

20 vice versa?

21 A. It's whatever the producer wants.

22 Q. Okay. Do you have any incentive programs at your

23 McLaughlin branch for agronomists or production?

24 A. Agronomists have sales incentives to my

25 knowledge.

1 Q. Okay. But you aren't -- you're sounding like

2 you're not real familiar with those?

3 A. Not very familiar, no.

4 Q. Okay.

5 A. I don't have direct, I don't know, supervisory

6 over that part there. That's more of Ross Concurrence.

7 Q. Okay. In a nutshell though, from what I've

8 heard, is essentially they're paid a certain rate but then

9 they also receive bonuses and incentives based on overall

10 production of the business and their own personal production,

11 is that a fair statement?

12 A. I don't know what their sales incentive all

13 includes. Their incentive bonus, I don't know what that

14 would all include.

15 Q. Do you know what kind of bonuses they are, are

16 they cash, are they trips, do you know?

17 A. I know they get a cash bonus if they meet certain

18 requirements. I don't know that -- I believe there's trip

19 incentives in there too, but I do not believe that's -- I

20 don't know who gets those.

21 Q. Okay. That wouldn't have been related to seed

22 sales?

23 A. I don't know.

24 Q. Okay. Do you know Dallas Schott?

25 A. Oh, do I -- oh, do I know -- oh, I thought you

1 were asking Dallas if he knew -- sorry.

2 MR. LUCE: Do you know Dallas?

3 DALLAS SCHOTT: I was going to say, well, gees,

4 that hurt my feelings.

5 A. I thought you were asking him on the sales

6 incentive question.

7 Q. (BY MS. NEVILLE) No, that's all right.

8 A. Sorry about that.

9 Q. That's okay.

10 A. Yes.

11 Q. Okay. And what kind of business have you

12 conducted with Dallas or Corson County Feeders?

13 A. I generally handle the grain side of things when

14 he comes in hauling grain. He occasionally -- yeah, that

15 would be grain side.

16 Q. So do you mean grain side in that you purchase

17 the grain that he sells?

18 A. I believe he's at times past called me and made

19 contracts with me directly on grain, yes.

20 Q. Oh, okay, so pre-contracting?

21 A. Um-huh.

22 Q. Okay. And are you familiar with his overall

23 accounts with your location?

24 A. What do you all mean?

25 Q. Like the accounts receivable that has all of the

1 grain sold, chemical purchased, fertilizer purchased, seed

2 purchased, that kind of thing, are you familiar with those

3 reports, or is that something you don't deal with?

4 A. I deal with very little of that. I can -- the

5 grain stuff is what I know most. Account receivable I will

6 call on when customers exceed their credit limits or --

7 Q. What do you mean by that?

8 A. When they exceed credit limits or are past due,

9 then I'll call to see what the issue is.

10 Q. Okay.

11 A. See if we can get money to get them back

12 underneath their credit limit.

13 Q. So you have certain credit accounts for

14 particular clients, is that what you're referring to, like

15 they can carry a certain amount of credit on their --

16 A. Yeah, if they get pre-approved.

17 Q. Okay. And it would also be a fair statement then

18 that sometimes they can save money by prepaying a bunch of

19 that stuff in advance?

20 A. Um-huh.

21 Q. Yes?

22 A. Yes.

23 Q. And are you involved with all of that as well,

24 like the pre-contracting fertilizer, chemicals --

25 A. I've never written a contract on fertilizer or

1 chemicals.

2 Q. Okay. That would be strictly with the
3 agronomists that he would be dealing with?

4 A. Yes, I believe so.

5 Q. Okay. What kind of records are kept at your
6 McLaughlin location regarding what the particular farmers are
7 planting in what locations on what time, that kind of thing,
8 how do you keep track of that?

9 A. What kind of records are kept?

10 Q. Yes.

11 A. When plant -- guys are planting?

12 Q. Well, for example, if Dallas were to come in and
13 speak to his agronomist and say, "I'm planting wheat on this
14 location, corn on this location, soybeans on this location,"
15 how does the agronomist keep track of all that? Is it kept
16 in a three-ring binder that you guys have at the office?

17 A. Agronomists, I my -- I guess I can speak on my
18 behalf on this. I keep track of conversations, like when I
19 do a contract for grain with a customer, I keep track of that
20 on a notepad or in a ticket sheet booklet, a couple inches
21 thick, and I write down everything that pertained to that
22 conversation in there; time, date, etc.

23 Q. Okay. Are those then transferred to a particular
24 file for that client?

25 A. No, I keep it all in one big old book. It's just

1 a running date range. All right, so today's -- yesterday is
2 the 25th, anyone that contracted with me yesterday would be
3 in the 25th, then it rolls over to the 26th if I did any
4 grain contracts on the 26th.

5 Q. Oh, okay.

6 A. So on and so forth. It's all kept in the one. I
7 keep it to myself and I file it away when it's full in my
8 room.

9 Q. And what about -- do you know if the agronomists
10 are doing something similar, or do they each have their own
11 method, it just depends on them?

12 A. I'd say it just depends on them. They each have
13 their own method.

14 Q. Okay. So Dallas has been with Wheat Growers
15 essentially longer than you have, right?

16 A. Yes.

17 Q. Do you have any regular meetings with him each
18 year, or do you consult with him at all on how South Dakota
19 Wheat Growers is doing for him, or if you guys can do
20 anything to improve? Do you do any of that?

21 A. I might have done a listen and learn on him at
22 one time. I'm not sure.

23 Q. Okay.

24 A. Other than that, I wouldn't say there's anything
25 on a regular basis. If Dallas has had issues in the past

1 with grain grading or his -- when he comes and gets a check
2 for discounts, discounts on grain and stuff. Most things
3 pertaining to grain --

4 Q. Like dockage or something like that?

5 A. Yeah.

6 Q. Okay.

7 A. Most things pertaining to grain he would come to
8 me generally on that.

9 Q. Are you aware of the incident that occurred in
10 July of 2014 regarding his sunflower crop?

11 A. I'm aware of the incident, yes.

12 Q. Did you read the Complaint?

13 A. This one here, Exhibit 1?

14 Q. Yes.

15 A. I read it I'm sure a long time ago when this was
16 submitted, yes.

17 Q. Okay. And is there anything that you remember as
18 you sit here today that stood out at you that you know to be
19 false?

20 A. I would have to reread it again.

21 Q. Okay. It's not -- I'm not going to make you do a
22 memory test, but you said you're aware of the incident. What
23 do you understand in your own words to have happened in July
24 of 2014 with Dallas Schott's sunflower crop?

25 A. To the best of my understanding, because I have

1 very little agronomy experience and knowledge, two different
2 kinds of flowers, sunflowers were planted and one chemical
3 was sprayed on them all and it killed off a variety that
4 wasn't supposed to have that chemical sprayed on it.

5 Q. So do you know what a Clearfield sunflower is?

6 A. No.

7 Q. Do you know what an Express sunflower is?

8 A. No, not -- I don't have enough knowledge to
9 understand what the difference would be on the two.

10 Q. And so you wouldn't know what you could spray on
11 one and not the other and vice versa?

12 A. No.

13 Q. Okay. Me either.

14 A. Not without doing the research.

15 Q. Okay. Is it fair to say that's the agronomist's
16 area of expertise?

17 A. Yeah, they would know on that.

18 Q. Okay. So aside from your knowledge and the fact
19 that you've read Exhibit 1, any other personal interactions
20 or personal knowledge that you have regarding the facts that
21 surrounded the incident in July of 2014? I just don't want
22 anything to come back later to bite me that we didn't talk
23 about, so...

24 A. So can you just restate that one last time?

25 MS. NEVILLE: Do you want to read that one back

1 for me?

2 (The requested portion of the record was read
3 back by the court reporter.)

4 A. **Not that I can recall.**

5 Q. (BY MS. NEVILLE) Do you have any personal
6 knowledge of what crops Dallas planted in 2014?

7 A. **No.**

8 Q. Okay. And do you know if South Dakota Wheat
9 Growers keeps track of what crops he plants each year?

10 A. **Not to my knowledge.**

11 Q. Does South Dakota Wheat Growers do soil testing
12 for Dallas?

13 A. **I know he's done soil testing this year. I can't
14 say anything about past years.**

15 Q. Okay. Well, and if he had done soil testing with
16 South Dakota Wheat Growers, there would be an indication of
17 what was planted in each location, isn't that fair?

18 A. **That could be. I don't know what soil testing
19 all encompasses, other than testing the minerals that are
20 left in the soil.**

21 Q. Okay. They don't present -- I mean, what I'm
22 talking about is something, it's about this thick, has all
23 the maps, the soil sample testing and the crops that were
24 planted presented to him in a three-ring binder that he gets
25 from South Dakota Wheat Growers. You don't know what I'm

1 **serious, we need to -- and it couldn't be handled at just the
2 location level, it generally has to escalate up to my
3 manager.**

4 Q. Is there some kind of a report that you have to
5 do?

6 A. **No.**

7 Q. So how would he be made aware of what's going on,
8 do you just pick up the phone?

9 A. **Generally by picking up the phone, yep.**

10 Q. Okay. Have you had any meetings with David
11 regarding this lawsuit?

12 A. **Meetings to this lawsuit? No. We might have had
13 a discussion way back when, I guess.**

14 Q. When you initially told him about this?

15 A. **Yeah, that would probably be about one of the few
16 times I can ever think of.**

17 Q. Okay. And then the other person identified was
18 this Ross Concurrence, is that right?

19 A. **Um-huh.**

20 MS. NEVILLE: I don't think I have anything else,
21 Mike.

22 MR. LUCE: You have the right to read this
23 deposition after it has been transcribed to make sure
24 everything has been taken down accurately, things spelled
25 right. I typically will encourage a witness where there's

1 talking about in that?

2 A. **I don't have enough knowledge in that area to --
3 I've never really dealt with or touched that area of the
4 business yet.**

5 Q. It's not something that you deal with?

6 A. **No.**

7 Q. Okay. Who would be the person that I'd talk to
8 on that?

9 A. **I'd give Jason a call.**

10 Q. Okay. One of the answers to interrogatories that
11 we received from South Dakota Wheat Growers in this case says
12 that David Siefkes, the regional manager, may have had some
13 involvement. Who is David Siefkes and what does he do?

14 A. **He would be the regional manager and he would be
15 my boss.**

16 Q. Okay. The same thing you do, except on a
17 regional basis?

18 A. **I do not know what all his job pertains to, but I
19 know that he would manage multiple locations underneath him,
20 and beyond that, I don't know the further scope of what his
21 position all entails.**

22 Q. Okay. And how would he know about what's all
23 going on with regard to a complaint that occurred at your
24 location?

25 A. **I would say if there was a complaint and it was**

1 technical information, because the reporter may not know all
2 that technical information, to proofread it. Yours was
3 pretty basic. As far as I'm concerned, you don't have to
4 proofread it, but it's up to you whether you want to read it
5 and sign it, or just waive the reading and signing. We'll
6 still get a copy, but you don't have to proofread it. It's
7 up to you. Do you want to read it?

8 THE WITNESS: Is the proofreading right now?

9 MR. LUCE: No, it will be a couple weeks or
10 something. If you want to look it over, you can, before it's
11 finalized.

12 THE WITNESS: Do I have to decide right now?

13 MR. LUCE: Yeah, you have to either -- well, if
14 you are undecided, don't waive it today. We can always waive
15 it later.

16 THE WITNESS: Undecided right now.

17 MR. LUCE: Okay.

18 (This deposition was concluded at 1:20 o'clock,
19 p.m.)

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT
 3 * * * * *
 4 DALLAS SCHOTT and CORSON COUNTY *
 FEEDERS, INC., * 15CIV15-000012
 5 Plaintiffs, *
 6 vs. *
 7 SOUTH DAKOTA WHEAT GROWERS *
 ASSOCIATION, *
 8 Defendant. *
 9 * * * * *

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DEPOSITION
 OF
 CRAIG MAHER
 April 26, 2016
 11:10 o'clock, a.m.

Taken at:
 Dacotah Bank
 320 N. Main Street
 Mobridge, South Dakota

Reporter: Tammy Stolle, RPR



- 1 direct supervisor?
- 2 A. No.
- 3 Q. His direct supervisor would be?
- 4 A. **Ross Concurrence.**
- 5 Q. Okay. And then your responsibilities deal more
- 6 with the chemical and the facility itself?
- 7 A. **Yep, and probably all the other agronomy**
- 8 **employees except the agronomists.**
- 9 Q. Okay. What type of experience do you have with
- 10 the sales agronomy or the agronomist's position itself, or
- 11 did you serve in that position?
- 12 A. Yes.
- 13 Q. How many years did you do that?
- 14 A. **Right around 15.**
- 15 Q. Okay.
- 16 A. **Give or take a couple.**
- 17 Q. Do you have to have any particular school or
- 18 training to become an agronomist for South Dakota Wheat
- 19 Growers?
- 20 A. **Yeah, you got to know what you're doing.**
- 21 Q. Do you have to have a certain degree or certain
- 22 certificate?
- 23 A. No.
- 24 Q. No?
- 25 A. No.

- 1 Q. Okay. So somebody could just get on-the-job
- 2 experience and become --
- 3 A. Yes.
- 4 Q. -- an agronomist?
- 5 A. **That's how I became one.**
- 6 Q. Okay. And please don't take this the wrong way,
- 7 but I'm going to tell you you're already doing the talking
- 8 over the top of me thing.
- 9 A. Okay.
- 10 Q. So even if you know what my question is going to
- 11 be, and you probably do, just wait until I'm all the way done
- 12 before you answer because it's hard for her to take us both
- 13 at the same time.
- 14 A. Okay.
- 15 Q. Everybody does it.
- 16 So you wouldn't necessarily have to go to college
- 17 for an agronomy degree to be an agronomist?
- 18 A. No.
- 19 Q. Okay. And then if you don't have that degree,
- 20 what sort of training do you have to have in order to be in
- 21 that position?
- 22 A. **Like I said, there's numerous classes we go to**
- 23 **every year. I know those guys are always gone to classes.**
- 24 Q. Okay.
- 25 A. **There's a week-long training in Minneapolis**

- 1 **they've all been to, and a lot of on-the-job training.**
- 2 Q. Is it true that technology changes throughout,
- 3 you know, even from year to year and so you may update what
- 4 chemical you use or what seed you use or that kind of thing?
- 5 A. Yes.
- 6 Q. And it's up to the agronomist to stay up-to-date
- 7 with that?
- 8 A. Yes.
- 9 Q. Okay. Do they take classes on what chemicals
- 10 work best for what crops, what seeds?
- 11 A. **I wouldn't say they go to classes specifically**
- 12 **for that. They talk to the -- we got reps from all the**
- 13 **different chemical companies and they're in constant contact**
- 14 **with them.**
- 15 Q. Do the reps actually come to the facilities and
- 16 give training of any kind?
- 17 A. **Sometimes. They come to the place a lot, bring**
- 18 **their literature and --**
- 19 Q. Basically they want you to buy their product?
- 20 A. Exactly.
- 21 Q. Okay. And so they try to convince you of how it
- 22 might work into your system?
- 23 A. Yes.
- 24 Q. In those classes, or in the trainings that are
- 25 offered by the dealers, do they ever train the agronomists on

- 1 risks of applying the wrong chemical to crops that aren't
- 2 intended to be used with that chemical?
- 3 A. **I don't know if they specifically get into that,**
- 4 **but it's all in the literature.**
- 5 Q. Okay.
- 6 A. **You know, what crops it's labeled for and what it**
- 7 **ain't.**
- 8 Q. And the agronomists know that?
- 9 A. Yes.
- 10 Q. Okay. What other sorts of things does an
- 11 agronomist do for its clients? So, for example, if one of
- 12 your agronomists has a list of clients, maybe they have ten,
- 13 what sorts of things do they do for them?
- 14 A. **Oh, they line up their fertilizer, their**
- 15 **chemical, their seed.**
- 16 Q. What do you mean by "line up"?
- 17 A. **Help them purchase it, you know.**
- 18 Q. Tell them what to purchase?
- 19 A. **No, not necessarily. You know, give them the**
- 20 **options. It's all up to the customer what he wants, but they**
- 21 **can give their recommendations.**
- 22 Q. Okay.
- 23 A. **What they think will work the best.**
- 24 Q. Okay.
- 25 A. **They go out and scout fields.**

- 1 Q. What's that mean?
- 2 A. **Look for what weeds are growing in the fields and**
- 3 **that helps them determine what chemical to spray on them.**
- 4 Q. So if they see a particular weed growing or
- 5 overtaking a field, they'll know which chemical would apply
- 6 best?
- 7 A. **Yes.**
- 8 Q. Okay. What else?
- 9 A. **Them are the main things. They'll do all kinds**
- 10 **-- just sorts of things. They'll deliver chemical, deliver**
- 11 **seed.**
- 12 Q. Okay.
- 13 A. **But that's the majority of it is helping them**
- 14 **determine what --**
- 15 Q. And they visit with them, with their clients
- 16 regularly?
- 17 A. **Yes. Some they visit with a lot and some not so**
- 18 **much.**
- 19 Q. I suppose some farmers are more hands on than
- 20 others?
- 21 A. **Yes.**
- 22 Q. How many clients does each agronomist have
- 23 typically speaking?
- 24 A. **It varies.**
- 25 Q. By how much?

- 1 A. **Without looking at the paper, I wouldn't be able**
- 2 **to tell you.**
- 3 Q. Okay. More than ten?
- 4 A. **Yes.**
- 5 Q. More than twenty?
- 6 A. **I'd say around there maybe.**
- 7 Q. Okay. How many agronomists do you have at the
- 8 McLaughlin location?
- 9 A. **Three.**
- 10 Q. And who are they?
- 11 A. **John Roggow, Jason Fees, and Mike Huber.**
- 12 Q. And I'm going to show you what we've marked as
- 13 Exhibit 17. Do you recognize Exhibit 17?
- 14 A. **I would say it's our -- I'm guessing it's our web**
- 15 **page.**
- 16 Q. Okay. And it comes in a little bit different
- 17 format when you print it, but is it fair to say your web page
- 18 lists the products and services that you guys offer?
- 19 A. **Yeah, I'd say it's fair.**
- 20 Q. Okay. So when we were talking about the things
- 21 that the agronomists will do for his or her clients, it looks
- 22 like the field scouting's mentioned there and the equipment
- 23 rental. What's the custom application or aerial application,
- 24 what are those about?
- 25 A. **Aerial application is an airplane comes in and**

- 1 **applies the chemical.**
- 2 Q. So they could actually hire you to put the
- 3 chemical on, the client could?
- 4 A. **No, we don't have a plane.**
- 5 Q. Oh.
- 6 A. **What we do is line it up through Jake Kraft in**
- 7 **Timber Lake.**
- 8 Q. Okay. So again, it's more like facilitating what
- 9 goes on and when it goes on, but they're just buying the
- 10 product from you?
- 11 A. **Correct.**
- 12 Q. And what is precision ag products or services?
- 13 A. **It's putting a -- breaking it down into zones,**
- 14 **more so on the fertilizer end of it.**
- 15 Q. Okay.
- 16 A. **Where they'll put a specific fertilizer in a**
- 17 **specific piece of ground in the field.**
- 18 Q. And --
- 19 A. **The rates can vary over that whole field.**
- 20 Q. Okay. What's site specific variable application?
- 21 A. **The same.**
- 22 Q. Is it a computer system?
- 23 A. **We use a computer system.**
- 24 Q. Okay. And so as part of that whole system, you
- 25 go out and you do soil sampling, that kind of thing?

- 1 A. **Yes.**
- 2 Q. And again, your agronomist does that for his
- 3 clients?
- 4 A. **No.**
- 5 Q. No?
- 6 A. **We have somebody else do the soil sampling.**
- 7 Q. Who does --
- 8 A. **The agronomist will help line it up.**
- 9 Q. Okay.
- 10 A. **And we have a different guy go out and do the**
- 11 **soil testing.**
- 12 Q. Okay. What's NutriSphere?
- 13 A. **That is a something you put on urea fertilizer to**
- 14 **keep it from volatilizing and leaching into the ground.**
- 15 Q. Okay. I'm going to show you what we've marked as
- 16 Exhibit 18. Are these -- again this is from your website.
- 17 Do you recognize this document?
- 18 A. **Yeah, I've never looked at it, but I believe it**
- 19 **probably is.**
- 20 Q. And does this break down the things that you've
- 21 just been talking to me about what the agronomists will do
- 22 and what you guys have available to line up for your farmers?
- 23 A. **Yeah, the agronomists won't do this. They will**
- 24 **help line this up.**
- 25 Q. Okay. Why wouldn't the agronomist do this stuff?

- 1 A. They're too busy with everything else. This just
2 takes too much time, too much of their time. We got guys
3 that specifically this is what they do in Aberdeen.
4 Q. So then when the numbers come back from the
5 precision ag services when the soil testing comes back, is it
6 a fair statement that they report that stuff to the
7 agronomist and the agronomist goes back to the farmer and
8 says, "Based on what your results are, here's what I think
9 would work best in your field?"
10 A. Yes.
11 Q. Okay. What does -- if there's an abbreviation
12 that says FERT and then RX, what does that mean?
13 A. Fertilizer recommendation.
14 Q. Okay. Are clients assigned to the agronomists,
15 or are they responsible for obtaining their own clients, or
16 how does that work?
17 A. Both.
18 Q. Okay. So if you have some that are long-standing
19 members of South Dakota Wheat Growers, they might get
20 assigned?
21 A. Yes.
22 Q. Okay.
23 A. Usually you try to assign them to whoever you
24 think they'll get along with the best.
25 Q. Oh, okay.

- 1 A. And what their workload is.
2 Q. Okay. And in a typical year, is it -- you said
3 roughly around 20, you try to keep it at 20 clients per --
4 A. Roughly. Real rough.
5 Q. Okay. Would that have been the same in 2014?
6 A. I would guess it might have been a little more in
7 2014 because I think we only had two agronomists in 2014.
8 Q. So you guys would have been busier?
9 A. Oh, we were busy. I don't know if we were busier
10 or we just -- you know, we pick up more customers every year.
11 Q. Okay. And with respect to the other two
12 agronomists -- you say you have three, right?
13 A. Right.
14 Q. Is Jason's workload about the same as --
15 A. I would assume it is.
16 Q. Do you keep any records of that, of how many
17 clients he serves as opposed to the others?
18 A. Yes.
19 Q. Are they full-time, or are they part-time?
20 A. Full-time.
21 Q. Do any of them have other jobs besides what they
22 do for Wheat Growers?
23 A. The only other one would be Jason and he just
24 started farming, doing a little farming.
25 Q. When did he start farming?

- 1 A. I don't know. The last year or two.
2 Q. But the other two don't do anything else?
3 A. Mike doesn't. And John might do a little farming
4 too.
5 Q. Okay.
6 A. He's got cattle, John does, some cattle.
7 Q. But as an agronomist, and even you as the
8 agronomy manager, do you make recommendations to clients on
9 what chemicals to apply and when?
10 A. When they ask for them, yes.
11 Q. Okay. When in the growing season is that
12 typically done, or is it an ongoing thing?
13 A. It depends on the crop.
14 Q. Okay. So, for example, sunflowers, when would
15 that recommendation be made?
16 A. Depends on what kind of flowers they are and when
17 they want to buy their chemical.
18 Q. Okay. Let's start with the first part. You said
19 it depends on what kind of flowers they are. What kind are
20 there?
21 A. There's Express, there's regular oil and there's
22 Clearfield.
23 Q. What's Express?
24 A. Meaning you can spray a chemical called Express
25 on them.

- 1 Q. Oh, they're only for --
2 A. You can only put -- they're the only ones you can
3 put Express on.
4 Q. Okay. And the next one you said is?
5 A. Clearfield.
6 Q. Okay. And they are?
7 A. You can only spray -- you can only spray Beyond
8 on them, not the other two. And then you got regular flowers
9 where you can only spray a certain -- you can't spray Express
10 or Beyond on them.
11 Q. Okay.
12 A. Just a grass chemical.
13 Q. Okay. Is it like a brand name, or is it --
14 A. No, it's just a chemistry, I guess.
15 Q. It's just how they're engineered?
16 A. Right. It's a GMO I guess you'd --
17 Q. Okay. And then we've heard a lot about oils,
18 con-oils and confection sunflowers. Do each of these three,
19 the Express, the Clearfield, and the regular, come in all
20 three of those kinds of sunflowers?
21 A. I don't know.
22 Q. Okay. Would an agronomist know that?
23 A. If they are the ones selling the seed, they
24 should.
25 Q. Why do you say that?

- 1 A. **Because it's their job to know what seed they're**
 2 **selling.**
 3 Q. And I assume then it's their job to know what
 4 chemicals work with that particular seed?
 5 A. **Yes.**
 6 Q. Okay. Then the next thing you said was it
 7 depends on the flower and then it depends on the, did you say
 8 time?
 9 A. **(Witness nodded head.)**
 10 Q. And why does that make a difference?
 11 A. **Well, some people prepay their chemical, and some**
 12 **people don't.**
 13 Q. Why does that matter?
 14 A. **You get it cheaper when you prepay it.**
 15 Q. Okay.
 16 A. **If you prepay it in the winter, we can buy it**
 17 **cheaper, so we pass that savings onto the grower.**
 18 Q. So if they wanted to save money and prepay, they
 19 could order the whole year's worth of chemical upfront?
 20 A. **Yes.**
 21 Q. When would they do that?
 22 A. **Generally depends on when they got to spend their**
 23 **money for tax purposes. December or January.**
 24 Q. Oh, okay. And then if they didn't, it would be
 25 possible then to buy it, I assume, right up until the day you

- 1 Q. As it grows throughout the season?
 2 A. **Right.**
 3 Q. Okay.
 4 A. **And Roundup will kill everything that's there**
 5 **growing at that moment.**
 6 Q. It doesn't kill though the seed because it's
 7 just --
 8 A. **No.**
 9 Q. -- on the leaf?
 10 A. **Once it hits the dirt, it's done.**
 11 Q. Okay. And then when do you apply -- you
 12 mentioned Beyond and Express and grass chemicals, when do you
 13 apply those?
 14 A. **Beyond you want to do early. It works better**
 15 **when the weeds are small.**
 16 Q. Okay.
 17 A. **The grass chemical, it really doesn't matter.**
 18 **You just do it whenever it gets grassy.**
 19 Q. Okay.
 20 A. **And the Express is the same, you want the weeds**
 21 **small. The smaller they are, the better the chemicals work.**
 22 Q. Okay. So that would be when the plant itself is
 23 small?
 24 A. **Typically, it varies, but around a foot tall.**
 25 Q. Okay. When do you usually -- I'm not a farmer in

- 1 put it on?
 2 A. **Yes.**
 3 Q. You're just not going to get that --
 4 A. **As big of discount.**
 5 Q. Discount, okay.
 6 And then are there certain things that you put on
 7 depending on the time of the year, or maybe not even the time
 8 of the year, but the level of growth that the plant is in?
 9 A. **Yes.**
 10 Q. Okay.
 11 A. **Insecticides.**
 12 Q. Okay.
 13 A. **We're still talking sunflowers?**
 14 Q. Yes.
 15 A. **Yes.**
 16 Q. All right. So is there something you put down
 17 before the plant is even emerged?
 18 A. **Yes.**
 19 Q. And what would that be?
 20 A. **A lot of people put -- it varies, but a lot of**
 21 **people put Roundup and Spartan down.**
 22 Q. Okay.
 23 A. **When they're no-tilling them.**
 24 Q. What's the purpose of that?
 25 A. **It helps keep the broadleaf weeds down.**

- 1 case you haven't figured that out. But when do you usually
 2 plant sunflowers? What's the growing season in South Dakota?
 3 A. **Oh, it varies a lot. Generally June.**
 4 Q. Okay.
 5 A. **Beginning of June.**
 6 Q. And then when's harvest for sunflowers?
 7 A. **Oh, November-ish. October, November, depending**
 8 **on the year.**
 9 Q. Okay. Do you know Dallas Schott?
 10 A. **Yes.**
 11 Q. How do you know him?
 12 A. **Customer.**
 13 Q. How long has Dallas been a customer with South
 14 Dakota Wheat Growers?
 15 A. **I would guess as long as -- since I've been**
 16 **there.**
 17 Q. Okay.
 18 A. **Before he started farming, he bought feed.**
 19 Q. And your wife actually used to be a secretary
 20 or --
 21 A. **Yes.**
 22 Q. -- office manager or something like that?
 23 A. **Yes.**
 24 Q. Okay. Before you were promoted to agronomy
 25 manager, were you the agronomist that served Dallas's fields?

- 1 A. Yes.
- 2 Q. And was he growing sunflowers at that time?
- 3 A. Yes.
- 4 Q. Do you know when he started growing sunflowers?
- 5 A. No, not exactly.
- 6 Q. Okay. My understanding is that at some point
- 7 Dahlgren and SunOpta allowed South Dakota Wheat Growers to
- 8 sell their seed and they contracted through Wheat Growers, is
- 9 that correct?
- 10 A. The very first year.
- 11 Q. Okay. And then the very next year they pulled
- 12 them away?
- 13 A. Yes.
- 14 Q. So you only had it for one year?
- 15 A. Yes.
- 16 Q. Would that have been the year that Dallas started
- 17 growing sunflower seeds?
- 18 A. No.
- 19 Q. No?
- 20 A. No.
- 21 Q. When would that have --
- 22 A. He grewed them before then.
- 23 Q. He grew sunflowers?
- 24 A. I don't remember how many years before then,
- 25 but...

- 1 Q. Okay. Did he do any confection sunflowers before
- 2 then?
- 3 A. Not that I recall.
- 4 Q. Okay. And then when Dahlgren or SunOpta took the
- 5 contract away, did you recommend to him that he stick with
- 6 them?
- 7 A. I told him to do whatever was best for him.
- 8 Q. And did you say why that would be best for him?
- 9 A. Wherever the most -- you can make the most money.
- 10 Q. Were they offering a better contract than
- 11 anything that wheat --
- 12 A. They're generally worth more.
- 13 Q. Okay. They -- I mean, they're pretty specific to
- 14 that particular -- to sunflowers, right?
- 15 A. Yes.
- 16 Q. So was it because of that that they're able to
- 17 offer a better contract or --
- 18 A. It's just -- no, I don't know, I guess --
- 19 Q. Okay.
- 20 A. -- without talking to them.
- 21 Q. Does Wheat Growers sell any other kinds of
- 22 sunflowers?
- 23 A. As far as?
- 24 Q. Sunflower seed.
- 25 A. You mean as far as different, like Express or --

- 1 Q. Any of them.
- 2 A. Yeah.
- 3 Q. You do?
- 4 A. Yeah.
- 5 Q. What do you sell?
- 6 A. Express flowers, regular flowers, Clearfield
- 7 flowers.
- 8 Q. Okay. In all three, the oils, con-oils and --
- 9 A. That I don't know anymore. I kind of turned the
- 10 seed over to the agronomists.
- 11 Q. Okay. But they would know?
- 12 A. Yes.
- 13 Q. So when you were the agronomist for Dallas, did
- 14 you make recommendations to him regarding his crops?
- 15 A. Yes.
- 16 Q. What to plant, when to --
- 17 A. Not what to plant.
- 18 Q. Okay.
- 19 A. But probably what to spray and what to fertilize.
- 20 Q. Okay. And did he listen to your recommendations?
- 21 A. Yes.
- 22 Q. Have you actually gone back out in 2015 and done
- 23 some agronomy work for Dallas scouting his fields, that kind
- 24 of thing?
- 25 A. I don't remember.

- 1 Q. Okay. Do you remember --
- 2 A. Not that I recall, but I ain't saying I didn't.
- 3 Q. Okay.
- 4 A. I just don't recall it.
- 5 Q. And that's fair.
- 6 A. I sure could have.
- 7 Q. Do you remember any conversations where he called
- 8 you concerned about the work Jason was doing and he asked you
- 9 to do it instead?
- 10 A. No, I don't recall that.
- 11 Q. Did Dallas ever express to you any concerns about
- 12 the work that Jason was doing?
- 13 A. Not that I recall.
- 14 2015 I did go -- now that I think about it -- I
- 15 did go look at, I think, his cornfields.
- 16 Q. Okay.
- 17 A. I'm not sure. I remember I went and looked, it
- 18 was either corn or flower fields.
- 19 Q. Okay. Do you know in 2012 what mix of sunflowers
- 20 Dallas had on his land?
- 21 A. No.
- 22 Q. Were you even -- were you doing the agronomy work
- 23 then, or were you already promoted?
- 24 A. No, I don't believe I was.
- 25 Q. Okay. Do you know what the last year you would

1 A. Basically the more you sell, the more incentive
2 you get.
3 Q. Okay.
4 A. The more fertilizer you sell, the more tons, the
5 more --
6 Q. And the same with seed?
7 A. Yes.
8 Q. So --
9 A. It was part of your wage.
10 Q. Oh, it is?
11 A. Yes.
12 Q. And is that just the case for agronomists, or is
13 that the case for everybody?
14 A. It's just the agronomists.
15 Q. Okay.
16 A. The managers also get a bonus, but theirs is
17 different. It's more on how profitable the company is.
18 Q. Okay. So overall production?
19 A. Right.
20 Q. And I see how that would translate directly, but
21 would it be a fair statement then if an agronomist was
22 selling less seed to a farmer, he's going to make less
23 income?
24 A. Yes.
25 Q. Okay. And so was it harmful to the agronomists

1 A. I don't know what the -- I don't know.
2 Q. Have you read any of the pleadings in this
3 lawsuit?
4 A. This looks familiar. (Pointing.) I read
5 something like that.
6 Q. And by this, you were pointing to Exhibit 1
7 that's been marked and that's the Complaint?
8 A. Can I look at it?
9 Q. Absolutely.
10 A. It seems like we got this right away when it
11 happened.
12 Q. Okay.
13 A. Yeah, it looks familiar.
14 Q. What do you know personally in your own words
15 what happened in July of 2014?
16 A. I wasn't there, but I'm assuming the wrong
17 chemical got sprayed by Dallas on non-Clearfield flowers.
18 Q. On Clearfield flowers?
19 A. Non-Clearfield.
20 Q. Non-Clearfield?
21 A. Beyond got sprayed on non-Clearfield flowers.
22 Q. Okay. And do you know what the chemical was?
23 A. Beyond.
24 Q. Beyond, okay. And that's the one that you said
25 that can only be sprayed on Clearfield?

1 when Dahlgren pulled their seed?
2 A. As far as that, yeah. I mean, you still got to
3 do what's good for your farmer.
4 Q. Okay.
5 A. But yeah, it didn't help us. We lost some big
6 customers.
7 Q. Okay. Any other incentives that they had or that
8 they could earn in 2014?
9 A. Yeah, Wheat Growers has another bonus. It's a
10 yearly bonus, but that goes to everybody.
11 Q. And that's, again, overall production?
12 A. Yes.
13 Q. Not directly related to seed sales?
14 A. Not directly, no.
15 Q. Okay. Do you know if Jason Fees earned any of
16 those bonuses in 2013 or 2014?
17 A. Yes.
18 Q. Yes he did, or yes you know?
19 A. Yes, he did.
20 Q. Okay. Do you guys keep a record of that?
21 A. No, not at McLaughlin we wouldn't have it.
22 Q. Where would it be?
23 A. Aberdeen might have it in the main office.
24 Q. Do you know if it was less in 2014 than it was in
25 2013 or 2012?

1 A. Yes.
2 Q. And do you think that the South Dakota Wheat
3 Growers' agronomist that gave him the prescriptions is in any
4 way responsible for that?
5 A. No.
6 Q. Why not?
7 A. Because I don't believe he gave him a
8 prescription to spray Beyond on non-Clearfield flowers.
9 Q. Why don't you believe that?
10 A. I know he wouldn't do that.
11 Q. Okay.
12 A. Personally.
13 Q. Because he would know that you can't do that?
14 A. Yes. Yes.
15 Q. And it's his job to know that you can't spray
16 beyond on non-Clearfield flowers?
17 A. If he knows them are non-Clearfield flowers.
18 Q. Okay. And when he gives chemical prescriptions
19 to a client, it's his job to know what seed can take what
20 chemicals?
21 A. No, it is the client's job to tell him what seed
22 he has planted.
23 Q. Okay. And if -- let's assume for a second that
24 he knows what seed's been planted.
25 A. Um-huh.

- 1 Q. It's his job to know what chemical goes on what
2 seed?
- 3 A. **If he knows where them seeds are planted, yes.**
- 4 Q. Okay. So not only what seeds are planted, but
5 where they are planted?
- 6 A. **He would have to know both of them.**
- 7 Q. Okay. And it's then important to know and
8 remember where that's at before you give a prescription to a
9 client?
- 10 A. **For the grower also.**
- 11 Q. Okay. Do you ever have agronomists that make
12 prescriptions like that without actually going out and
13 looking at the land --
- 14 A. **Yes.**
- 15 Q. -- or the field? Okay.
- 16 A. **A lot of our stuff is done right over the phone.**
- 17 **And you cannot tell a non-Clearfield flower from a Clearfield**
18 **by looking at it in the field.**
- 19 Q. Okay. So if you walked up to a field and looked
20 at the plant when it's about a foot tall, you wouldn't be
21 able to tell the difference?
- 22 A. **No.**
- 23 Q. The farmer wouldn't be able to tell the
24 difference by just looking at it either?
- 25 A. **No.**

- 1 Q. When chemical is delivered or picked up by the
2 farmer or his hired hand or whoever's picking it up to go
3 spray the field -- where is your bucket?
- 4 MR. LUCE: Yeah, I put it in my box. (Handing.)
- 5 Q. (BY MS. NEVILLE) Is this what it looks like when
6 they pick it up?
- 7 A. **It either looks like that or it's in a box with**
8 **two of them in there.**
- 9 Q. Okay. It's not in a big tub?
- 10 A. **No.**
- 11 Q. Okay.
- 12 A. **Oh, I mean, it can come in totes, but not this**
13 **chemical.**
- 14 Q. Okay. So this one doesn't come in a tote?
- 15 A. **No, it comes in this.**
- 16 Q. And then if it comes like this, it would be in a
17 box too?
- 18 A. **Yes.**
- 19 Q. Okay.
- 20 A. **If they wanted more than one jug, it would come**
21 **in a box.**
- 22 Q. Okay. And does every jug come with these on it?
- 23 A. **Yes.**
- 24 Q. And by these, I'm referring to the label that's
25 attached to Exhibit 37

- 1 A. **Yes.**
- 2 Q. Okay. Has Wheat Growers ever provided chemical
3 to farmers with the wrong labels on the chemical?
- 4 A. **Not that I recall.**
- 5 Q. What kind of chemicals come in that five-gallon
6 tote? Is it five gallons? Is that --
- 7 A. **I don't know.**
- 8 Q. The big tote, you said it would either come like
9 this or jugs in a box or the totes.
- 10 A. **Well, the totes are 250 gallons, up to 250-gallon**
11 **totes.**
- 12 Q. Okay. And what kind of chemicals come in that?
- 13 A. **It depends on what they want. We got bulk**
14 **chemicals that we can fill them with, or they can**
15 **specifically be ordered with them chemicals in there, so**
16 **there's numerous.**
- 17 Q. So they could be -- there can be a mix?
- 18 A. **There could be.**
- 19 Q. Okay. And does that happen with sunflowers?
- 20 A. **No.**
- 21 Q. Or is Beyond sprayed only by itself?
- 22 A. **Only by itself. No, I see what you're saying.**
23 **No, there's a surfactant you put with it too.**
- 24 Q. Okay. And when you say you put with it, who puts
25 that -- is that mixed before it's given to the farmer, or is

- 1 that something they --
- 2 A. **Somebody does it when he sprays it.**
- 3 Q. Okay. So they would take it back to their place,
4 wherever they're applying it and they would put it in the
5 sprayer together?
- 6 A. **Yes.**
- 7 Q. And is that also something that Wheat Growers
8 tells them how to mix?
- 9 A. **Yes.**
- 10 Q. I assume that's also something you sell?
- 11 A. **Yes.**
- 12 Q. Is it fair to say that Dallas has done over a
13 million dollars of business with South Dakota Wheat Growers
14 in any given year?
- 15 A. **Yes.**
- 16 MS. NEVILLE: Can we take about five minutes?
- 17 MR. LUCE: Yes.
- 18 (A break was taken.)
- 19 Q. (BY MS. NEVILLE) I'm going to show you what
20 we've marked as Exhibit 26. As the agronomy manager, do you
21 handle accounts receivable for the business?
- 22 A. **I help with it, yes.**
- 23 Q. Okay. So you would be aware of this report
24 that's generated?
- 25 A. **No, I've not seen this.**

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT
 3 * * * * *
 4 DALLAS SCHOTT and CORSON COUNTY *
 5 FEEDERS, INC., * 15CIV15-000012
 6 Plaintiffs, *
 7 vs. *
 8 SOUTH DAKOTA WHEAT GROWERS *
 9 ASSOCIATION, *
 Defendant. *

10

11

12

13

D E P O S I T I O N

14

O F

15

JASON FEES

16

April 26, 2016

17

1:55 o'clock, p.m.

18

19

20

Taken at:

21

Dacotah Bank

22

320 N. Main Street

23

Mobridge, South Dakota

24

Reporter: Tammy Stolle, RPR

25



STIPULATIONS

1
2 IT WAS STIPULATED AND AGREED by and between counsel
3 for the respective parties that notice, time and all other
4 statutory prerequisites incident to the taking and return of
5 said deposition, including notice of filing, are hereby
6 waived; that same may be taken at the time and place set
7 forth, and when reduced to writing and returned into Court,
8 may be used by either party upon the trial of said cause.
9 Said deposition however is subject to all other legal
10 objections, which need not be reserved at the time of taking
11 the deposition, but may be urged at the time of trial the
12 same as if the witness were present, testifying in person.
13 IT IS FURTHER STIPULATED that the said witness shall
14 read and sign the deposition before filing.
15
16
17
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23
24
25

1 A. **Tried to review some things.**
2 Q. Okay. You reviewed a few documents?
3 A. **Um-huh.**
4 Q. What did you review?
5 A. **Just invoices, notes that I had.**
6 Q. Okay. Did you bring any notes or documents with
7 you today?
8 A. **No.**
9 Q. Did you do any independent research or
10 investigations on your own?
11 A. **No.**
12 Q. And did you talk to anyone in preparation for
13 your deposition today, other than your attorney?
14 A. **No.**
15 Q. Where did you go to school at?
16 A. **Which school?**
17 Q. College, or post high school.
18 A. **Western Dakota Tech in Rapid.**
19 Q. And what did you get a degree in there?
20 A. **Welding.**
21 Q. Was that in 2000?
22 A. **It would have been fall of '99, spring of 2000.**
23 Q. Okay. Did you go to any school for agronomy
24 after that?
25 A. **No.**

1 WHEREUPON,
2 the following proceedings were had, to wit:
3 JASON FEES, after being first duly sworn, testified
4 on his oath as follows:
5 EXAMINATION
6 BY MS. NEVILLE:
7 Q. Jason, can you state your full name, please?
8 A. **Jason Robert Fees.**
9 Q. Jason, how old are you?
10 A. **34.**
11 Q. And where do you live, your mailing address?
12 A. **519 5th Avenue East, Mobridge, South Dakota.**
13 Q. But you work in McLaughlin, right?
14 A. **Correct.**
15 Q. Have you ever had your deposition taken before?
16 A. **Yep.**
17 Q. Okay. So just remember that you have to answer
18 everything out loud, try to wait until I'm done asking before
19 you answer, and if you don't understand my questions, just
20 have me restate them.
21 A. **Okay.**
22 Q. What did you do to prepare for your deposition
23 today?
24 A. **Not really much of anything, I guess.**
25 Q. Okay.

1 Q. So how did you wind up at South Dakota Wheat
2 Growers?
3 A. **Just ended up there.**
4 Q. And how did you get into the field of agronomy?
5 A. **I grew up on a farm and ranch, so...**
6 Q. Did you grow up in this area?
7 A. **No, down by Faith.**
8 Q. Okay. Do you farm yourself?
9 A. **Yep.**
10 Q. Where do you farm at, what county?
11 A. **Meade and Perkins.**
12 Q. Meade, that's a ways away.
13 A. **Yep, it's a long drive.**
14 Q. How often do you get over there?
15 A. **This time of year, usually once a week.**
16 Q. Okay. And were you farming over there in 2014?
17 A. **In Meade I was.**
18 Q. Okay. Perkins County, where's that?
19 A. **Bison.**
20 Q. Okay. That's also a ways?
21 A. **North of Meade, west of Corson.**
22 Q. How long does it take to get over there?
23 A. **Oh, a little better than two hours.**
24 Q. And how often do you have to go up to Perkins
25 County?

- 1 A. Depends on time of the year, but...
- 2 Q. So in the summer?
- 3 A. If I don't have wheat up there, I don't get up
- 4 there very often. I go to Meade. It just kind of depends on
- 5 what crop I have there.
- 6 Q. Okay. What did you have up there in 2014 if you
- 7 remember?
- 8 A. I didn't -- let me think for a second here. I've
- 9 got to remember my years. I had corn in Perkins County.
- 10 Q. So if you had corn in Perkins County, what did
- 11 you have in Meade County?
- 12 A. Winter wheat.
- 13 Q. So how often were you getting up to Perkins then
- 14 in the summer of 2014?
- 15 A. Oh, not much during the summer.
- 16 MR. LUCE: Isn't that what you just asked a
- 17 minute ago?
- 18 MS. NEVILLE: Well, that's what he said he didn't
- 19 know, it depended on what he had for crop and then he got
- 20 into the crop.
- 21 A. By summer, there's not really much you can do
- 22 with it.
- 23 Q. (BY MS. NEVILLE) Okay.
- 24 A. Watch it grow.
- 25 Q. Do you have any relatives in Corson County?

- 1 A. Not that I'm aware of.
- 2 Q. Do you do all -- for your own personal farming,
- 3 do you do all your business through South Dakota Wheat
- 4 Growers?
- 5 A. I do most of it, probably 80 percent of it, I
- 6 guess.
- 7 Q. Do you have an agronomist that works for you or
- 8 do you do all of your own?
- 9 A. I do most of my own. I do some things I work
- 10 with our other two agronomists at the elevator.
- 11 Q. And who are they?
- 12 A. Mike Huber and John Roggow.
- 13 Q. How do you spell Mike's last name?
- 14 A. H-U-B-E-R.
- 15 Q. And the other one is Shawn?
- 16 A. John.
- 17 Q. John?
- 18 A. Yep, J-O-H-N. R-O-G-G-O-W. And then Craig Maher
- 19 too. I mean, we all kind of work together.
- 20 Q. Okay. But he's not a sales agronomist anymore,
- 21 right?
- 22 A. Not anymore, no, he's the agronomy manager.
- 23 Q. Who's your immediate supervisor?
- 24 A. Ross Concurrence would be my sales manager.
- 25 Location wise it would be Craig.

- 1 Q. How is there a difference?
- 2 A. Craig's the agronomy location manager.
- 3 Q. Okay.
- 4 A. And then Ross is an area sales manager. He
- 5 actually oversees the sales agronomists.
- 6 Q. Do you have to go to like continuing education
- 7 courses or some --
- 8 A. Oh, yeah, there's always training going on.
- 9 Q. Are you required by your job to go to certain
- 10 number of them a year or --
- 11 A. There's never a set number. Some events they do
- 12 make it mandatory to go.
- 13 Q. What events are those?
- 14 A. It depends whether it be certain chemical
- 15 manufacturers putting something together. It varies from
- 16 year to year, but...
- 17 Q. Okay.
- 18 A. Updates.
- 19 Q. Do you get training on chemicals and how they
- 20 apply to certain crops?
- 21 A. Anything new that comes out we do.
- 22 Q. Okay. Is it fair to say that technology changes
- 23 from year to year?
- 24 A. Oh, yeah, tremendously.
- 25 Q. Okay. And so you try to keep up with what's the

- 1 latest and greatest essentially?
- 2 A. You try to.
- 3 Q. Okay.
- 4 A. It seems like it grows faster than you can keep
- 5 up though.
- 6 Q. How many clients do you serve, you personally
- 7 serve, generally speaking?
- 8 A. There's about a hundred listed under me, but I
- 9 would say that I physically work with 30 to 40.
- 10 Q. And what's the difference?
- 11 A. Well, some of them are just -- they're so far out
- 12 they might just stop in and pick up some chemical and we
- 13 don't really do a lot with them hands on.
- 14 Q. Okay.
- 15 A. And then others, you know, closer that we work
- 16 with more continually, I mean.
- 17 Q. Okay. Was that the same in 2014 or --
- 18 A. Yeah.
- 19 Q. So what kinds of things do you have to do, what's
- 20 involved in your job description?
- 21 A. Oh, chemical recommendations, seed variety
- 22 recommendations, fertilizer recommendations, you know, given
- 23 -- depends on what guys want for yield goals, and help with
- 24 some crop rotations. You mentioned technology, I try to help
- 25 with variable rate fertilizer and seed. Pretty much a

1 shoulder to cry on if that's needed, or just a little bit of
2 everything really.

3 Q. Okay. So how do you know what to -- you said
4 fertilizer recommendations, chemical recommendations and seed
5 recommendations?

6 A. Most of that is based off of -- fertilizer is
7 based off of soil tests.

8 Q. Okay.

9 A. If there's no soil test, we do crop removal. We
10 know a bushel of corn takes 1 to 1.1 units, so we can -- so
11 if they want a hundred bushel corn, we know how to tell how
12 many pounds to put down.

13 Chemical depends on what the crop is, what type
14 it is, and then there's some variations there, depends on the
15 weeds you have in the spring too, so it kind of varies with
16 that.

17 Q. So do you have to do field scouting and that kind
18 of thing too?

19 A. Yep, we do field scouting.

20 Q. And is that something you personally do, or does
21 somebody else do that?

22 A. It depends. I personally do it, but we kind of
23 help each other out. If one guy's in an area and needs to
24 look at something, we'll have one of the other guys look.

25 Q. Okay. And then when you make those

1 Q. Does that give you an idea of what was planted
2 there before and what the rotation should be?

3 A. Right, right, and a lot of guys are on a rotation
4 every year, you know, it was wheat, it's probably going to
5 corn type of thing. So when we soil test a field, we know
6 wheat was in it, you can assume, things can change, but
7 typically we go to corn so...

8 Q. And in order to soil test, do you have to know
9 what was planted there before?

10 A. You don't have to, but it's -- the more
11 information the better.

12 Q. Okay. And all of that's reported on those
13 books --

14 A. Right.

15 Q. -- that you present to him?

16 A. Yeah.

17 Q. And has Dallas done that with South Dakota Wheat
18 Growers for the last five --

19 A. As long as I've been around.

20 Q. Okay. Does South Dakota Wheat Growers then keep
21 a record of previous years' testing?

22 A. We have access to previous years. They're on a
23 website. We usually don't keep the carbon copy paper one
24 past a year.

25 Q. Right. Everything is electronic, --

1 recommendations, in what format is it done, is it verbally,
2 is it in writing?

3 A. More often than not, it's verbally.

4 Q. Okay. Then you mentioned soil testing and that's
5 one of the things that's listed on the South Dakota Wheat
6 Growers' website as kind of a thing that you guys are proud
7 of --

8 A. Um-huh.

9 Q. -- essentially? How does -- when South Dakota
10 Wheat Growers does soil testing, for example, for a customer
11 like Dallas, how are those results presented to him?

12 A. On paper form.

13 Q. Okay.

14 A. You know, most of the time we soil test, we get
15 the legal description of the fields, we go soil test it. A
16 paper copy shows up in the mail that we attach it to the deal
17 and send it out.

18 Q. Okay.

19 A. Like for his, usually what we do is we'd fill in
20 all the recommendations on there and then put it together in
21 kind of a binder usually and just kind of field by field and
22 it helps to know what they're planting intentions are so you
23 know what to test for.

24 Q. Okay.

25 A. So it's --

1 A. Right.

2 Q. -- computerized nowadays. And so when you make
3 the recommendations to Dallas, or any customer, and you said
4 it's usually verbally, do you then write it down or keep
5 track of what you told somebody?

6 A. It depends. If it's something that somebody just
7 calls in and is wondering what I should spray and they're
8 going to spray the same product over everything, just give
9 them the recommendation and they go spray it. We may write
10 nothing done.

11 If it's something we're spraying, that usually
12 gets written down in our notes so we know to put it in our
13 system.

14 Q. Okay. And if you put it in your system, or if
15 you had notes, where would you put that?

16 A. The notes would be in a notebook and we have a
17 computerized dispatching software that we use to dispatch our
18 own equipment.

19 Q. Okay.

20 A. And a lot of the products are used year after
21 year, so many of the producers get familiar with them.

22 Q. Okay. And is it fair to say that you get
23 familiar with the producer too?

24 A. Yeah.

25 Q. Okay. I'm going to show you what we've marked as

1 Exhibit 28. Do you recognize Exhibit 28?
 2 A. I can't say as I recognize it, but I know what it
 3 is.
 4 Q. What is it?
 5 A. That would be Kelsch sprayed, so that's a total
 6 of all the products he used for whatever year that was.
 7 Q. Okay. Do you know whose writing that is?
 8 MR. LUCE: There's two different --
 9 A. Yeah.
 10 Q. (BY MS. NEVILLE) Yeah.
 11 A. This would be --
 12 Q. This bottom -- and you're pointing to the bottom
 13 part, the handwritten, or the --
 14 A. I don't know if that's Craig's writing here. I'm
 15 guessing this would be Travis Kelsch's writing. I'm
 16 guessing. I don't know.
 17 Q. Who's Travis Kelsch?
 18 A. He's a producer around that does some spraying
 19 for us from time to time, and I think Dallas has had him do
 20 some work for him.
 21 Q. Okay. And so if you have this record in your
 22 documents at South Dakota Wheat Growers, what can we glean
 23 from Exhibit 28?
 24 A. Well, the only thing I would get from this, and
 25 this is -- I'm making an assumption based off what this is,

1 A. Find out concerns, issues, things they're happy
 2 with or unhappy with.
 3 Q. Okay. Is that your handwriting?
 4 A. Yep.
 5 Q. Okay. And so you have to do these every year?
 6 A. It seems like it, yes.
 7 Q. How many are you supposed to do each year?
 8 A. I never have a total. The location, they usually
 9 expect 10 to 20 of them.
 10 Q. Okay.
 11 A. I'm not the only one that does them.
 12 Q. And it looks like you did this one in March of
 13 2014?
 14 A. Yep.
 15 Q. One of the notes there is "willingness to help on
 16 agronomy?"
 17 A. Um-huh.
 18 Q. What's that, what are you referring to there?
 19 A. That's -- this would be -- so concerns and
 20 positives. After visiting with him, he felt that we were
 21 willing -- our willingness to help him on agronomy decisions.
 22 Q. Okay.
 23 A. That was one of the positives he liked about --
 24 Q. And what do you mean by agronomy decisions?
 25 A. Anything related to seed, chem, fertilizer.

1 Travis Kelsch did some spraying for Dallas and these were the
 2 products that he used that needed billed to him.
 3 Q. Okay.
 4 A. That went on those fields.
 5 Q. And so when you make a prescription
 6 recommendation for what --
 7 A. This would be a total, I'm sorry.
 8 Q. Okay. When you make a prescription
 9 recommendation for what should be sprayed in various
 10 locations, is this what it looks like?
 11 A. No.
 12 Q. Okay.
 13 A. No. This is an after the fact deal. Travis did
 14 the spraying himself, wrote down the totals once he got done
 15 with all of it, and this is just totals after he got done.
 16 Q. Okay.
 17 A. Even ours don't look like this. Ours are on maps
 18 and --
 19 Q. Okay. I'm going to have you take a look at what
 20 we've marked as Exhibit 32. Do you recognize this?
 21 A. Yep.
 22 Q. And what is it?
 23 A. This is a report that our upper management likes
 24 us to find out with our producers.
 25 Q. And how --

1 Q. Okay. So --
 2 A. Kind of a general --
 3 Q. He appreciated that you gave advice on what to
 4 plant?
 5 A. Right.
 6 Q. And what to spray?
 7 A. (Witness nodded head.)
 8 Q. Yes?
 9 A. Yes.
 10 Q. Do you have any involvement with like the overall
 11 -- maybe you don't, so like the overall accounts receivable
 12 that --
 13 A. No.
 14 Q. Okay.
 15 A. All that is handled -- some of the direct
 16 invoicing is done at a location level, but the main billing
 17 comes from our main office in Aberdeen.
 18 Q. Who do you know would have a better idea of that
 19 billing?
 20 A. You're talking from Aberdeen or --
 21 Q. Would that be Dennine or --
 22 A. Dennine would on the location side.
 23 Q. And she's your local -- or the McLaughlin
 24 location --
 25 A. Bookkeeper, yeah.

- 1 Q. -- bookkeeper? What's her last name?
- 2 A. Krumm. K-R-U-M-M.
- 3 Q. Okay. So I apologize for jumping around.
- 4 Getting back to the responsibilities. What other things do
- 5 you to for the clients aside from making recommendations,
- 6 doing the soil testing, anything else?
- 7 A. That kind of covers a broad spectrum. I mean,
- 8 like I said, I've helped guys work on planters if they
- 9 needed.
- 10 Q. Okay.
- 11 A. I don't know, whatever needs done.
- 12 Q. Do you also have sales responsibilities?
- 13 A. Oh, yeah, yeah.
- 14 Q. Okay. Are there incentive programs regarding
- 15 that?
- 16 A. There is. It's kind of a broad spectrum
- 17 incentive. It's not one single product; it's more total
- 18 dollars towards, say, chemical, seed, fertilizer.
- 19 Q. Okay.
- 20 A. But yeah, that's -- we are -- we have a base
- 21 salary and we're paid on a bonus system.
- 22 Q. Okay. And so in 2014, was it the same?
- 23 A. Um-huh.
- 24 Q. Yes?
- 25 A. Yes.

- 1 Q. And was it then detrimental for you as an
- 2 agronomist or for your salary as an agronomist when Dahlgren
- 3 pulled the sunflower seed away from the South Dakota Wheat
- 4 Growers?
- 5 A. I wouldn't say it was detrimental. It was
- 6 disappointing. I've lost seed before and gained seed back.
- 7 I kind of saw the writing on the wall. What's not in that is
- 8 I'm the one that brought Dahlgren to that and then they
- 9 pulled us out, and yeah, it was frustrating, but if it was in
- 10 his best interest, all the power to him.
- 11 Q. Okay. And in fact, you were the one that
- 12 introduced Dallas to Dahlgren?
- 13 A. Right, yeah.
- 14 Q. So did you help him set up his program with
- 15 Dahlgren initially?
- 16 A. I wouldn't say I helped set up the program. I
- 17 kind of connected the people together, I guess.
- 18 Q. Okay.
- 19 A. They -- Dahlgren worked out a deal with one of
- 20 our seed suppliers to just funnel it through us and that's
- 21 how we got tied into it.
- 22 Q. So what happened, I mean why did they only do
- 23 it --
- 24 A. They wanted to eliminate the middleman and go
- 25 direct, and Dallas wasn't the only producer they did that

- 1 with. They --
- 2 Q. So basically they used you to get to your
- 3 clients, --
- 4 A. Exactly.
- 5 Q. -- and then left and took your clients with them?
- 6 A. Correct. Yeah, they're -- Dallas wasn't the only
- 7 one.
- 8 Q. When you make recommendations on chemicals, do
- 9 you go back to those seed testing books or back to your
- 10 computer records, or do you do anything to make sure that the
- 11 recommendation you're giving matches the crop that was
- 12 actually planted or reported to have been planted in that
- 13 particular year?
- 14 A. I basically have what the producer tells me.
- 15 Q. Okay.
- 16 A. You know, and if the seed came from my shed, I
- 17 know what it was. I mean, that's -- corn we know is Roundup
- 18 ready corn. Unless somebody tells differently, we spray
- 19 Roundup on it. We test certain selective herbicides that are
- 20 just labeled for all wheat, so that kind of thing doesn't
- 21 matter. Flowers, there's a couple different options on
- 22 there.
- 23 Q. Explain those to me.
- 24 A. Well, there's Beyond tolerant, Clearfield
- 25 flowers, that you can spray Beyond herbicide on. There's

- 1 Express tolerant sunflowers that you can only spray Express
- 2 herbicide on.
- 3 Q. But not Beyond?
- 4 A. And not Beyond. And then there's traditional
- 5 flowers where you can spray no broadleaf herbicides on, only
- 6 grass herbicides.
- 7 Q. And each of those come in all three kind; oils,
- 8 con-oils and confections?
- 9 A. I believe, but I don't know. We don't sell
- 10 con-oils or confections, so what other seed companies have, I
- 11 couldn't answer that truthfully.
- 12 Q. Okay. So that would be important information for
- 13 you to have in making the recommendations --
- 14 A. Correct.
- 15 Q. -- of what chemical to spray?
- 16 A. Correct.
- 17 Q. Okay. And how does that conversation occur with
- 18 the producer? I mean, is that something you do in December
- 19 and then you're just expected to remember it all year long,
- 20 or is it something you discuss at the time?
- 21 A. It's usually done in December if the customer's
- 22 looking to prepay and has the next year figured out more or
- 23 less, or at least a rough idea. Some of it's done in season,
- 24 you know, they just decide they want to plant this certain
- 25 crop and see what's available on it, but yeah, usually it's

1 **done in December if they're looking to prepay.**

2 Q. Okay.

3 A. **To save money.**

4 Q. And if they don't buy it -- if they don't prepay
5 or he doesn't buy it in December, the fact is he could buy it
6 the day he's putting it down, right?

7 A. **You're right, yes.**

8 Q. Okay. And if he calls you and says, "I need to
9 spray my sunflowers with some herbicide, what do I use," do
10 you say, "Well, tell me what kind of sunflowers you have?"

11 A. **Exactly, right.**

12 Q. And did that happen in this case, in 2014?

13 A. **Not in season, no.**

14 Q. Okay.

15 A. **That decision was made December, first of**
16 **January.**

17 Q. Okay. I'm going to show you what we've marked as
18 Exhibit 19 and Exhibit 20.

19 (Off-the-record discussion.)

20 Q. (BY MS. NEVILLE) Okay. Let's start with 19.

21 A. **Um-huh.**

22 Q. Is this your handwriting?

23 A. **Yes.**

24 Q. And it says 2013 in the upper right-hand corner.

25 Are these the notes that you would have made --

1 in 2012 for the 2013 growing year?

2 A. **It's possible. If so, somebody rewrote it.**

3 Q. Why is that?

4 A. **Because this is not my handwriting, but I don't**
5 **know where -- I don't know whose handwriting it is.**

6 Q. Okay. And so the one that's Exhibit 19, that was
7 done, you think, in December of 2013 --

8 A. **Correct.**

9 Q. -- for the 2014 growing season?

10 A. **Correct.**

11 Q. Okay. Now it looks like, and jump in and correct
12 me if I'm wrong, but it looks like this was broken down into
13 the different crops that he was planting?

14 A. **Yes.**

15 Q. So if you go about the bottom third of the first
16 page is where we start to see the sunflowers?

17 A. **Yes.**

18 Q. Then I see there's different chemicals for burn
19 down?

20 A. **Yes.**

21 Q. What's it mean when it says post?

22 A. **Post-emergence.**

23 Q. Okay.

24 A. **After the flowers are up.**

25 Q. And how -- and when you say flowers, you meant

1 A. **Yes.**

2 Q. -- with Dallas Schott in 2013?

3 A. **Yes.**

4 MR. LUCE: Okay, just so it's clear, 2013,
5 because December is 2013 too. 2013 growing season or 2014?

6 A. **2014 growing season. This would have been wrote**
7 **up in December of 2013 for the 2014 season.**

8 Q. (BY MS. NEVILLE) Okay. And what about
9 Exhibit 20 then?

10 A. **That one I don't know. That is not my writing.**

11 Q. Okay.

12 A. **I would guess it would be the year before,**
13 **possibly two years before.**

14 Q. And why do you guess that?

15 A. **Just based off of one of the glyphosate**
16 **components.**

17 Q. Where do you see that?

18 A. **This Traxion.**

19 Q. Okay.

20 A. **That was used a few years ago.**

21 Q. And go to the very last page as well.

22 A. **Of 20?**

23 Q. Yes. And none of that is your handwriting?

24 A. **No.**

25 Q. Okay. So is it possible that this one was done

1 the plant actually, --

2 A. **Yes.**

3 Q. -- right, the sunflowers?

4 A. **Right.**

5 Q. And how long do you wait before you put that on?

6 A. **It depends, but usually a V4 to V7, V8 stage,**
7 **when the flowers are between 6 and 12 inches tall. It really**
8 **does vary. It's kind of when the weeds start coming in.**

9 Q. Okay. And what's the Beyond for?

10 A. **The Clearfield sunflowers.**

11 Q. What's Class Act for?

12 A. **It's a water conditioning agent with AMS.**

13 Q. So like a surfactant type?

14 A. **Yes.**

15 Q. And then what's TapOut for?

16 A. **That would be a selective grass herbicide.**

17 Q. Is that what's used for the non-Clearfield
18 sunflowers?

19 A. **Yes.**

20 Q. And then the Lambda?

21 A. **It's an insecticide.**

22 Q. Okay.

23 A. **And at the time this was written, this was kind**
24 **of a rough idea of what was to be planted just to start**
25 **getting an idea of cost together.**

1 Q. So at least at this time he was planning to plant
2 some, as indicated by the TapOut, planning to plant some
3 non-Clearfield sunflowers?
4 A. Correct.
5 Q. But you think at some point later he told you
6 that he only had Clearfield sunflowers?
7 A. Correct.
8 Q. When did that occur?
9 A. January.
10 Q. Of two thousand --
11 A. 2014.
12 Q. Okay. And tell me how that occurred, how that
13 conversation occurred.
14 A. I know at this time he had a rough idea and I
15 know his acres were dictated on contracts. So when January
16 rolled around, I do not remember the date, but it would
17 correspond closely to his prepay. We selected a few items
18 that were most worth prepaying, the higher priced ones that
19 go up a lot, and I had stopped in to his office and said I
20 need to know --
21 Q. What you want to the prepay?
22 A. Exactly. And then asked, I need to know how many
23 acres of Beyond flowers, and that's when I was told they were
24 all the same, so I said, "They're all Clearfield?"
25 Q. Did you ask him like that, "How many acres of

1 with the GMO or the genetic."
2 Q. (BY MS. NEVILLE) With the GMO or the genetic
3 modifications to the plant?
4 A. Correct.
5 Q. So you would agree with me that it would matter
6 how you phrased it to Dallas if he didn't know what a
7 Clearfield sunflower was?
8 A. Oh, I agree.
9 Q. Okay. And so you don't know exactly what wording
10 was used?
11 A. I do not.
12 Q. I'm going to show you what we've marked as
13 Exhibit 16. Is that the prepaying list that you were talking
14 about early earlier?
15 A. Yes.
16 Q. And what's the date on that document?
17 A. January 23rd, 2014.
18 Q. So what you're saying essentially is it had to
19 have been before January 24th, 2014?
20 A. Yes.
21 Q. This conversation that you referred to?
22 A. Correct.
23 Q. I'm going to also show you what we've marked as
24 Exhibit 23.
25 A. Do you want this back?

1 Beyond flowers?"
2 A. I don't know if that was the exact wording. I
3 just needed to know how many -- I needed to know how many
4 acres so I know how many gallons of chemical.
5 Q. Because I've heard some -- you know, in the
6 depositions we've taken today, there's been some confusion
7 about referring to the Clearfield flowers as con-oils or vice
8 versa, but that doesn't necessarily --
9 A. That doesn't really mean anything.
10 Q. Exactly, because --
11 A. To me anyway.
12 Q. Because they can come in different kinds?
13 A. Exactly.
14 Q. Okay. So --
15 A. The con-oil and confection is the end use market
16 of it, whether it's this -- the hulls are split open and the
17 seeds are taken out, or if they're in the bags you buy at the
18 store.
19 Q. It really has nothing to do with the GMO or the
20 genetic --
21 A. No.
22 COURT REPORTER: Just wait until she's finished,
23 please.
24 A. Sorry.
25 COURT REPORTER: "It really has nothing to do

1 Q. No, just throw it on the pile.
2 A. (Witness complying.)
3 Q. Do you recognize Exhibit 23?
4 A. Yes.
5 Q. Would that have been completed at the time that
6 you had this conversation with Dallas?
7 A. Yes.
8 Q. It looks like it was dated the 20th up on the top
9 right-hand corner?
10 A. Um-huh.
11 Q. And then Dallas signed it on the 24th?
12 A. Right.
13 Q. And is that your signature --
14 A. Yes.
15 Q. -- to the right? Okay, also on the 24th?
16 A. Yes. This would be the contract that goes along
17 with this.
18 Q. Okay.
19 A. Because that -- if I may look at this real quick,
20 this would have been put in as a booking to have been prepaid
21 off of so we can lock -- once we put it in as a booking we
22 lock the price and then the contract was filled out and
23 signed and then it was paid for.
24 Q. Is it possible that Dallas was still planning to
25 have TapOut, but it wasn't one that was going to change price

- 1 and therefore didn't need to be prepaid early?
- 2 **A. It's possible.**
- 3 **Q.** Now I'm going to show you what we've marked as
- 4 Exhibit 29. These are a number of aerial maps that I
- 5 received from South Dakota Wheat Growers. Would you agree
- 6 with me that this probably doesn't come close to the number
- 7 of maps that Dallas would have for all the property that he
- 8 has?
- 9 **A. It would be hard to say definitively without**
- 10 **counting them all.**
- 11 **Q.** Okay. He has several, fair statement?
- 12 **A. He has several.**
- 13 **Q.** And what I wanted to ask you about these is on
- 14 several, there is handwritten, or are handwritten notes, and
- 15 I'm wondering if you know -- for example, go to the second
- 16 page. There's numbers written up there on the left-hand
- 17 corner of that aerial map. Do you know what those numbers
- 18 are?
- 19 **A. Are you referring to CE36NH01?**
- 20 **Q.** Yes.
- 21 **A. Those are an ID tag that our dispatching mapping**
- 22 **software uses to code a field.**
- 23 **Q.** Okay.
- 24 **A. He has his own field names he uses, so we link**
- 25 **the two together there. So CE36, the CE is a township range**

- 1 reference. The 36 would be the section number. The NH would
- 2 be north half, and the 01 would be field one of that.
- 3 **Q.** Okay. And so you have software that codes that
- 4 particular field with what was planted there?
- 5 **A. No.**
- 6 **Q.** What's the purpose of coding the field then?
- 7 **A. All it is is -- in everywhere else in South**
- 8 **Dakota, except Corson County, they have township names and**
- 9 **they use that as a descriptor to identify legals, field**
- 10 **boundaries and stuff.**
- 11 **Q.** Okay.
- 12 **A. And that's -- all that really is is an**
- 13 **identifier.**
- 14 **Q.** Okay. And then if you go onto some of these
- 15 others, for example the third page, same thing?
- 16 **A. Yep.**
- 17 **Q.** Now on the fourth page, there's a Maxon written
- 18 in there?
- 19 **A. Yes.**
- 20 **Q.** What's that?
- 21 **A. That's what he calls that field.**
- 22 **Q.** Okay. So again, just another way for you to
- 23 identify it?
- 24 **A. Correct.**
- 25 **Q.** And then the next page?

- 1 **A. Same thing.**
- 2 **Q.** Same thing, okay. And then the next page it says
- 3 -- and for reference it's page 1103 at the bottom. It says
- 4 Gugel East on that?
- 5 **A. Yep.**
- 6 **Q.** That's what he calls it, right?
- 7 **A. Yes.**
- 8 **Q.** And then that's your code number?
- 9 **A. Correct.**
- 10 **Q.** It looks like most of these are this way except
- 11 once you get to 1106. Down at the bottom there's some
- 12 handwriting?
- 13 **A. Yes.**
- 14 **Q.** Is that your handwriting?
- 15 **A. It looks like it.**
- 16 **Q.** What's that say?
- 17 **A. That would be a rate of chemical that would have**
- 18 **been sprayed on wheat.**
- 19 **Q.** Okay. And what were you doing here with that?
- 20 **A. I don't know.**
- 21 **Q.** Just keeping track of where you --
- 22 **A. More than likely.**
- 23 **Q.** Would you have kept track of those kinds of
- 24 things in 2014?
- 25 **A. Hit and miss like this, correct. I don't know**

- 1 why it was wrote on there other than he may have had us spray
- 2 that field that year and that's why it was wrote on there.
- 3 **Q.** Okay. But if you guys sprayed it, there would be
- 4 a document that looks like -- a document that looks like this
- 5 with --
- 6 **A. Similar to this, yes. The only thing is I would**
- 7 **have to find what year that was even done.**
- 8 **Q.** Okay.
- 9 **A. It may have been for spring oats too.**
- 10 **Q.** But you think it was wheat, huh?
- 11 **A. It probably was oats. I don't think he's had**
- 12 **wheat there other than a year or two years ago. I don't**
- 13 **remember.**
- 14 **Q.** How do you --
- 15 **A. Usually that was oats.**
- 16 **Q.** How do you remember what farmers had what crops
- 17 where when there's so many of them to keep track of?
- 18 **A. You do the best you can. It's -- some of them**
- 19 **you're more familiar with. Some you got to write them down**
- 20 **on the maps. If it's something that we're applying on,**
- 21 **usually it's written on the maps and they're carried to the**
- 22 **next year and then we'll make new ones, but...**
- 23 **Q.** Okay.
- 24 **MR. LUCE:** Do you want to -- just so the record,
- 25 I don't care if you don't want to -- he said it depends on

1 the date. There is a date on these.
 2 A. **So I don't know what date that corresponds to.**
 3 MR. LUCE: Okay.
 4 A. **It could be the date the map was printed,**
 5 MS. NEVILLE: Yeah, because it --
 6 MR. LUCE: Oh, it's the printing date, okay.
 7 MS. NEVILLE: Yeah.
 8 A. **Or it could be the date the aerial photo was**
 9 **taken.**
 10 MS. LUCE: All right. Good for clarification.
 11 A. **I'm not sure.**
 12 Q. (BY MS. NEVILLE) And these are -- when these
 13 come, when these aerial maps come, they're computerized,
 14 right?
 15 A. **Yes.**
 16 Q. You have access to them?
 17 A. **Yes.**
 18 Q. And there's no handwriting on them, right, just
 19 the typewritten stuff?
 20 A. **Correct.**
 21 Q. So if you didn't date this when you printed it,
 22 it would be pretty hard to tell when this was done?
 23 A. **Correct.**
 24 Q. The next one, can you tell me what this --
 25 A. **That would be --**

1 MR. LUCE: What page number, I'm sorry?
 2 MS. NEVILLE: 1107.
 3 MR. LUCE: Okay.
 4 A. **That would be a total pounds of fertilizer**
 5 **analysis that would have been treated with a stabilizer.**
 6 Q. (BY MS. NEVILLE) Okay. And why would you have
 7 written that down?
 8 A. **I don't know.**
 9 Q. That is your handwriting?
 10 A. **Yeah, I believe it is.**
 11 Q. Now go to 1108. What are the notes here?
 12 A. **Same thing, total pounds of a fertilizer product.**
 13 **We must have applied this. Those might have been the first**
 14 **year he did variable rates so we applied -- I don't believe**
 15 **he had application equipment capable of applying variable**
 16 **rate at that time and we did. So those would have been just**
 17 **total pounds of the product that were getting spread on that**
 18 **field.**
 19 Q. And if the map is dated 2013, it had to have been
 20 after 2013, right?
 21 A. **Correct.**
 22 Q. Because this one looks like it's dated
 23 April 2013?
 24 A. **Correct.**
 25 Q. So do you know, ball park, when this could have

1 taken place?
 2 A. **May of 2013.**
 3 Q. Okay. And then 1109?
 4 A. **Same thing on that one.**
 5 Q. Okay.
 6 A. **Would have been total pounds.**
 7 Q. Fertilizer?
 8 A. **Yes. 43-0-0-3 would be an analysis. It would**
 9 **stand for percentage of nitrogen and sulfur.**
 10 Q. And then the next one, 1110. Look at the bottom
 11 right-hand corner. What was going on there?
 12 A. **That would be a burn down in front of sunflowers.**
 13 Q. Okay.
 14 A. **And just general use rate.**
 15 Q. And it looks like this map was printed in May of
 16 2014. Do you know when those notes would have been written?
 17 A. **I do not. Sometime after that.**
 18 Q. Okay.
 19 A. **I would guess they would have been written in**
 20 **May. That would have coincided about to a planting time**
 21 **frame.**
 22 Q. And that's not something that South Dakota Wheat
 23 Growers would have sprayed?
 24 A. **If it wasn't us, it might have been Travis Kelsch**
 25 **and that could be why it's written on there.**

1 Q. Okay. You would never write on here what you
 2 recommended to Dallas that he spray?
 3 A. **No. Because he usually had his maps, these maps**
 4 **way ahead of any of this.**
 5 Q. Okay.
 6 A. **I can print numerous copies at any given time, so**
 7 **we'd usually print new ones.**
 8 Q. Do you ever go back and check, you know, if he
 9 called you up and said, "Hey, Jason, I'm getting ready, I
 10 need to spray my sunflowers," and you say, "Well, what kind
 11 of sunflowers?" "Well, I don't know, I planted these
 12 con-oils." Do you ever go back and check to see what was
 13 actually --
 14 A. **I usually don't go back and check typically**
 15 **because we figure it all out ahead of time, so I don't check,**
 16 **no.**
 17 Q. So you just tell him, "Spray this on these and
 18 spray this on these?"
 19 A. **Yes.**
 20 Q. And so as far as you can tell, all of the maps
 21 here that have handwriting on, you think that was for
 22 spraying that either South Dakota Wheat Growers did or
 23 contracted for?
 24 A. **I believe so. I'm not a hundred percent sure,**
 25 **but...**

- 1 Q. Okay.
- 2 A. **Without going back through the records.**
- 3 Q. Okay. I'm going to show you what we've marked as
- 4 Exhibit 31. This was also a document that was produced by
- 5 Wheat Growers. Can you tell me what this is?
- 6 A. **Not with some sort of basis as to --**
- 7 Q. What it goes to?
- 8 A. **But that don't --**
- 9 Q. Okay. Is that your handwriting?
- 10 A. **Yeah.**
- 11 MR. LUCE: The Monsanto/Seed program?
- 12 A. **That's not my handwriting. The numbers are my**
- 13 **handwriting.**
- 14 Q. (BY MS. NEVILLE) Okay. And so unless you had
- 15 something to go with, you --
- 16 A. **Right.**
- 17 Q. -- don't know what this would have been for?
- 18 A. **Right.**
- 19 MR. LUCE: And just so the record is clear, the
- 20 part that's not your handwriting is the --
- 21 A. **Monsanto/seed program writing.**
- 22 Q. (BY MS. NEVILLE) What's Class Act used for? Is
- 23 that the surfactant one?
- 24 A. **Yes.**
- 25 Q. What's WideMatch used for?

- 1 A. **It's a broadleaf herbicide in small grains.**
- 2 Q. Not sunflowers?
- 3 A. **No.**
- 4 Q. What's Barrage used for?
- 5 A. **That's a broadleaf herbicide and it can be used**
- 6 **in small grains or a burn down, 2,4-D.**
- 7 Q. Is that used for sunflowers?
- 8 A. **No.**
- 9 Q. How about Banvel, what's that one used for?
- 10 A. **That's another broadleaf herbicide typically used**
- 11 **in and on top of corn.**
- 12 Q. And Hel-Fire?
- 13 A. **A water conditioner, a surfactant.**
- 14 Q. Different than the other one?
- 15 A. **Yes.**
- 16 Q. The Class Act?
- 17 The pile is getting smaller. Okay. Now I'm
- 18 going to give you -- maybe this will give you some
- 19 perspective on Exhibit 31 too, but I'm going to give you what
- 20 we've marked as Exhibit 30. These are the chemical orders
- 21 for June and July of 2014 for Dallas.
- 22 A. **(Witness reviewing exhibit.)**
- 23 Q. If you need more time, let me know.
- 24 A. **No.**
- 25 Q. Okay. So if he had prepaid for the Beyond In

- 1 January, how come it's showing up here again on the June 13,
- 2 2014?
- 3 A. **That would have been the day he picked it up.**
- 4 Q. Okay. But he's not billed again, right?
- 5 A. **No.**
- 6 Q. It says prepaid?
- 7 A. **It says right here in the prepaid column that**
- 8 **that amount was prepaid.**
- 9 Q. Okay. So if he picked it up in June, he would
- 10 have been -- does it keep, I mean can you keep it until July
- 11 or --
- 12 A. **Yeah.**
- 13 Q. Okay. So we don't know whether he sprayed it
- 14 that day or sometime thereafter?
- 15 A. **I don't know that information.**
- 16 Q. Okay. What's Paradigm?
- 17 A. **Insecticide. Same as Lambda. Different company,**
- 18 **same product.**
- 19 Q. Okay. And what's Rapport?
- 20 A. **That would be a generic Affinity. It's a**
- 21 **broadleaf herbicide that's sprayed in small grains.**
- 22 Q. And Raxil?
- 23 A. **Seed treatment for small grain.**
- 24 Q. And how about Pre-Pare?
- 25 A. **That would be pre-emerge or post-emerge grass and**

- 1 **mustard herbicide for small grains.**
- 2 Q. Are any of those used for sunflowers?
- 3 A. **Which page is that?**
- 4 Q. The last one.
- 5 A. **None of the chemicals are.**
- 6 Q. Okay.
- 7 A. **Some of the fertilizer could be used for flowers.**
- 8 Q. And is that pretty much a general fertilizer?
- 9 A. **Yes.**
- 10 Q. It could be used for any of the crops?
- 11 A. **Yes.**
- 12 Q. So of the chemicals that are listed in
- 13 Exhibit 30, are any of these, besides Beyond, used for
- 14 sunflowers?
- 15 A. **Paradigm.**
- 16 Q. What's Paradigm used for?
- 17 A. **That's an insecticide.**
- 18 Q. Okay.
- 19 A. **Class Act, a surfactant.**
- 20 Q. That would have been mixed in with the Beyond?
- 21 A. **Correct.**
- 22 Q. Okay. So is it fair to say that Dallas has been
- 23 with South Dakota Wheat Growers longer than you have?
- 24 A. **Yeah.**
- 25 Q. Okay. So you've known him quite a while?

- 1 A. Yes.
- 2 Q. Okay. What kind of farmer would you say, in your
3 experience, is Dallas?
- 4 A. **Very progressive. Probably one of the hardest**
5 **working ones I ever knew.**
- 6 Q. Why do you say that?
- 7 A. **Just the way he works.**
- 8 Q. Okay. And how often are you talking to Dallas or
9 out at his place on a general basis, generally speaking?
- 10 A. **Not as much recently. Years past it would depend**
11 **on the time of year it would be.**
- 12 Q. So, for example, in 2014, how much time were you
13 spending with Dallas or out at his place?
- 14 A. **Oh, sometimes a couple times a week, sometimes**
15 **once every couple weeks, sometimes on the phone.**
- 16 Q. Okay. I want to take you to July of 2014. Was
17 there a point where you got a phone call from Dallas
18 regarding the spraying of his sunflowers?
- 19 A. Yes.
- 20 Q. And do you know what date that was?
- 21 A. I don't.
- 22 Q. Do you know what time of day it was?
- 23 A. Evening.
- 24 Q. Okay. Tell me about that conversation.
- 25 A. **I know it was evening because I was at home and I**

- 1 Q. Because if it was dark out, he probably wasn't
2 seeing much, right?
- 3 A. Right.
- 4 Q. Okay. And so he was basically relating to you
5 what he had seen earlier that day?
- 6 A. Right.
- 7 Q. And did you say then give it some time because
8 the --
- 9 A. **That was my first thought because, like I say, I**
10 **have seen them turn bright yellow after spraying Beyond on**
11 **them and they would grow through.**
- 12 Q. Okay. And did you then go out to look at the
13 field?
- 14 A. **I did at -- I don't remember the day we went out,**
15 **but it was a few days later and it was clear they weren't**
16 **coming out of it.**
- 17 Q. They were black?
- 18 A. (Witness nodded head.)
- 19 Q. Yes?
- 20 A. Yes.
- 21 Q. When you went out to look at the field a few days
22 later, did you also meet with Dallas, or did you just go out
23 on your own?
- 24 A. **I went out on my own, I believe. I don't**
25 **remember if somebody rode out with me, but I didn't meet with**

- 1 think it was dark, but he called and said he was flying over
2 his flowers and they were turning yellow and he said it
3 looked like the ones that had been -- a partial field that
4 had been sprayed a week or two prior that were dying and he
5 said that it looked like the same thing.
- 6 Q. And what did you say?
- 7 A. I said, "Well, aren't they Clearfield flowers?"
- 8 Q. Did he know what Clearfield flowers were?
- 9 A. To my knowledge he understood.
- 10 Q. What did he say when you said, "Aren't they
11 Clearfield flowers?"
- 12 A. I believe he said that they're supposed to be.
13 And I think he said he was going to talk to his seed supplier
14 after that.
- 15 **One of the things we had talked about at the time**
16 **was maybe they need a little time because sometimes spraying**
17 **Beyond on Clearfield tolerant flowers causes them to yellow**
18 **flash for a while.**
- 19 Q. Okay. So if you were at home and it was dark,
20 you said he was in the plane flying over his field at the
21 time?
- 22 A. I believe he had been flying over earlier.
- 23 Q. Oh.
- 24 A. I can't remember if he was in the plane at that
25 time.

- 1 Dallas.
- 2 Q. Did you have any discussions with Dallas about
3 whether a replacement crop could be planted?
- 4 A. Yes. At the time we knew it was plenty late to
5 put anything in right away. We had visited somewhat about
6 putting winter wheat in in September to try to recuperate
7 some of the fertilizer that had been placed out there and --
8 but it never went any farther than the conversation.
- 9 Q. Why not?
- 10 A. It just didn't. He didn't plant winter wheat and
11 I think some of that land he got rid of that fall, so...
- 12 Q. He sold that lands?
- 13 A. Correct, some of it. I don't --
- 14 Q. Okay. So would there have been anything to
15 prevent planting winter wheat if he had sprayed, you know, in
16 preparation for sunflowers, was there anything that would
17 have been remaining in the ground that would have harmed the
18 winter wheat?
- 19 A. As long as we used Clearfield winter wheat.
- 20 Q. Okay.
- 21 A. There could have been a soil test done in front
22 of it to determine the levels of Beyond left to see if it was
23 suitable for standard wheat, but until planting, we wouldn't
24 have any idea on that, but for sure Clearfield wheat wouldn't
25 have been a problem.

1 Q. Okay. And did you tell Dallas that?

2 A. **I believe we had discussed a little bit about it.**

3 Q. Okay. So when was the next conversation that you

4 had with Dallas?

5 A. **I don't recall.**

6 Q. Did you at some point in the fall of 2014 have a

7 conversation with Dallas and Brent Haas?

8 A. **Yes.**

9 Q. And what was that conversation?

10 A. **I don't remember.**

11 Q. Do you know where you met?

12 A. **I know it was at the office at Wheat Growers in**

13 **Brent's office.**

14 Q. Okay. Do you know how long your meeting was?

15 A. **I don't. I apologize, I really don't remember**

16 **what we discussed that day.**

17 Q. Okay. Was there anyone else present besides the

18 three of you?

19 A. **I don't believe so.**

20 Q. Did anyone take any notes?

21 A. **I did not. I think Brent may have. I believe, I**

22 **know we discussed something to do with these flowers, but I**

23 **don't remember any details of what was actually said.**

24 Q. Okay. When was the next conversation that you

25 had with Dallas?

1 A. **I'm sorry, I don't understand.**

2 Q. Did you tell him that you did not know what he

3 had planted there, like what version of sunflowers he had

4 planted?

5 A. **More than likely. I didn't know what varieties**

6 **he planted where.**

7 Q. Okay. So did you ever say to him, "Hey, Dallas,

8 you know, be careful about spraying this Beyond, make sure

9 you don't get it on non-Clearfield flowers?"

10 A. **I have in the past. This wasn't the first time**

11 **we've used Beyond. I didn't say this year because we were**

12 **under the assumption they were all Clearfield tolerant**

13 **flowers, so...**

14 Q. Okay. Aside from this -- because in the previous

15 year he had had a mix, right, of Clearfield and

16 non-Clearfield?

17 A. **Correct.**

18 Q. And aside from that change, were there any other

19 changes regarding the sunflowers that you were aware of or

20 believed to have been the case for 2014?

21 A. **No.**

22 Q. And he did not purchase his sunflowers from you?

23 A. **No.**

24 Q. Did he purchase some straight oil sunflowers from

25 you?

1 A. **I don't know.**

2 Q. Did you have a conversation with him later where

3 you told him that you felt like you hadn't been paying as

4 much attention to his fields as you probably should have?

5 A. **I don't recall saying that, I guess.**

6 Q. Okay. Do you recall telling Dallas that you were

7 concerned about losing your job?

8 A. **Well, in the right context. I mean, if we just**

9 **go and pay out and --**

10 Q. What do you mean by that?

11 A. **Well, if somebody, if a producer comes in and**

12 **says you owe me a half a million dollars and I just tell him,**

13 **"Yep, I just screwed up, go pay him," I'll probably lose my**

14 **job.**

15 Q. Okay. Any other meetings or conversations with

16 Dallas or anyone else about the sunflower loss in 2014?

17 A. **Nothing specific that I can think of.**

18 Q. Okay. Did you tell Dallas that you had not

19 looked at his fields before prescribing chemical?

20 A. **Which fields?**

21 Q. His sunflower fields.

22 A. **I didn't look at them.**

23 Q. Okay. And did you tell him that you didn't know

24 what had been planting there before prescribing the

25 chemicals?

1 A. **I believe there was a few acres at the end of**

2 **planting, I think he had one quarter or something, he came in**

3 **in season and grabbed some.**

4 Q. Okay. Were those Clearfield sunflowers?

5 A. **No.**

6 Q. Those were not Clearfield sunflowers?

7 A. **Correct.**

8 Q. So at a minimum, you must have told him to watch

9 out for those, huh?

10 A. **I believe I did when him and Mike Buechler bought**

11 **his sunflowers earlier that season, I said, "These are**

12 **different."**

13 Q. Okay.

14 A. **After that, no, I didn't tell him again.**

15 Q. Because Mike Buechler also bought his from you?

16 A. **Correct.**

17 Q. And they were non-Clearfield?

18 A. **Not.**

19 Q. Okay. So if I understand you correctly, what

20 you're saying is Dallas contacted you and asked you for the

21 prescription for his sunflowers, and you gave him a

22 prescription believing them to all be Clearfield sunflowers?

23 A. **Correct.**

24 Q. And you believe that because you think Dallas

25 told you he had planted all Clearfield sunflowers?

1 A. **Correct.**
 2 Q. Okay.
 3 A. **Which made sense to me.**
 4 Q. Why did that make sense to you?
 5 A. **Because then you only have to spray one product.**
 6 **You don't have to spend time rinsing your machine out and...**
 7 Q. So why then would you have set him up the
 8 previous years with Dahlgren with the mix?
 9 A. **Because that's what they had at the time.**
 10 Q. That's what they sold?
 11 A. **I was just getting started with some Clearfield,**
 12 **it's kind of a new thing we were trying out, so -- it was**
 13 **new, so we just spread it around a little bit.**
 14 Q. Okay. Do you feel you have any responsibility
 15 for the damage to Dallas's sunflower crop in July of 2014?
 16 A. **No.**
 17 Q. Why not?
 18 A. **I gave him a recommendation based off the**
 19 **information I was given. I didn't plant the flowers. I**
 20 **didn't have the bags in front of me to verify. To the best**
 21 **of my knowledge, we recommended based off the information I**
 22 **had.**
 23 Q. Okay. Is there any other information, Jason,
 24 that we haven't talked about today that you think is
 25 important for resolution of this case?

1 CERTIFICATE OF COURT REPORTER
 2 STATE OF SOUTH DAKOTA
 3 COUNTY OF BROWN
 4 CERTIFICATE OF REPORTER
 5 I, Tammy Stolle, Registered Professional Reporter
 6 and Notary Public, hereby certify that the deponent
 7 aforementioned was duly sworn prior to the taking of this
 8 deposition; that as of the time I affix my signature to this
 9 transcript, it contains a true and correct record of the
 10 proceedings so had; and that the witness did not waive the
 11 reading and signing of the deposition.
 12 I further certify that in compliance with SDCL
 13 15-6-28(c), I am not a relative or employee or attorney or
 14 counsel of any of the parties, or a relative or employee of
 15 such attorney or counsel, that I am not financially
 16 interested in this action, and have no contractual
 17 relationship with any person or entity.
 18 To all of which I have affixed my signature this
 19 12th day of May, 2016.
 20
 21 /s/ Tammy Stolle
 22 Tammy Stolle, RPR
 23 511 N. Washington Street
 24 Groton, South Dakota
 25 (605) 470-0209
 My Commission Expires: January 16, 2022

1 A. **Not that I can think of.**
 2 MS. NEVILLE: Good. I have nothing further.
 3 MR. LUCE: Jason, why don't you review your
 4 deposition and read and sign it, and it will be provided to
 5 you.
 6 THE WITNESS: When will it be provided?
 7 MR. LUCE: A couple weeks probably.
 8 THE WITNESS: Okay.
 9 MR. LUCE: When your schedule might lighten up a
 10 little bit.
 11 THE WITNESS: Couple months maybe.
 12 MR. LUCE: All right.
 13 MS. NEVILLE: Thanks, Jason. It was nice meeting
 14 you.
 15 THE WITNESS: Thanks.
 16 (This deposition was concluded at 3 o'clock,
 17 p.m.)
 18
 19
 20
 21
 22
 23
 24
 25

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT
3
4 * * * * *
5 DALLAS SCHOTT and CORSON COUNTY *
6 FEEDERS, INC., * 15CIV15-000012
7 *
8 Plaintiffs, *
9 *
vs. *
*
SOUTH DAKOTA WHEAT GROWERS *
ASSOCIATION, *
*
Defendant. *
* * * * *

D E P O S I T I O N
O F

DALLAS SCHOTT

April 26, 2016

9 o'clock, a.m.

20 Taken at:
Dacotah Bank
21 320 N. Main Street
Mobridge, South Dakota

23 Reporter: Tammy Stolle, RPR



- 1 again assume if you answer a question, you understood it, and
 2 I'm also going to assume your answer is truthful.
 3 A. Yes.
 4 Q. That, like the oath says, the truth, the whole
 5 truth and nothing but the truth?
 6 A. Yes, sir.
 7 Q. Tell me a little bit about Corson County Feeders,
 8 Inc. Again, I'm assuming that is a corporation that was
 9 organized under the laws of the State of South Dakota?
 10 A. Yes, it was.
 11 Q. And about what year would you have set up that
 12 corporation?
 13 A. I believe it was around 1999.
 14 Q. Okay. And is that organization still in good
 15 standing and have active status in the State of South Dakota?
 16 A. Yes, it is.
 17 Q. You follow the procedures in terms of annual
 18 meetings and things of that sort?
 19 A. Yes, sir.
 20 Q. Who are the officers in Corson County Feeders,
 21 Inc.?
 22 A. I am the president.
 23 Q. Okay.
 24 A. Dallas Schott. Vice president is Maxwell Schott.
 25 Q. Is that your son?

- 1 A. Yes, sir.
 2 Q. Okay.
 3 A. And secretary/treasurer is Hope Maher.
 4 Q. And who is Hope Maher?
 5 A. She was actually my secretary for the company and
 6 doing all my stuff.
 7 Q. Okay. Is that Craig's wife?
 8 A. Yes, it is.
 9 Q. Okay. And is she still secretary/treasurer?
 10 A. No. She still is secretary/treasurer, yes.
 11 Q. Okay. But does she still work for you?
 12 A. No, sir.
 13 Q. And when did she leave your employment?
 14 A. December 31st.
 15 Q. Of 2015?
 16 A. Yes, sir.
 17 Q. I don't need to know the reason she left unless
 18 they had anything to do with this lawsuit?
 19 A. It has nothing to do with the lawsuit.
 20 Q. Okay. Has she been replaced in that position?
 21 A. Yes, sir.
 22 Q. And who has replaced her?
 23 A. As secretary in the office, her name is Christine
 24 Lopez.
 25 Q. Okay.

- 1 MS. NEVILLE: How do you spell her first name?
 2 A. C-H-R-I-S-T-I-N-E, I think. It's not a K. It's
 3 a C anyway.
 4 Q. (BY MR. LUCE) The ownership of Corson County
 5 Feeders, Inc. is what, how much ownership do you have, a
 6 hundred percent?
 7 A. I have a hundred percent, yes, sir.
 8 Q. Okay. I assume you were farming and ranching
 9 prior to the establishment of Corson County Feeders, Inc.,
 10 correct?
 11 A. Yes, I started farming in -- well, in high
 12 school.
 13 Q. Okay.
 14 A. Okay, and then through, I'm going to guess it was
 15 1986, and then I owned the trucking company and so on and I
 16 trucked, and in 1991, I bought McLaughlin Livestock Auction.
 17 Q. Okay.
 18 A. And through the years of McLaughlin Livestock
 19 Auction, I started putting out yearlings, or raising
 20 yearlings and trying to feed them. At that time we would
 21 have milled grain and so on, delivered from, it was actually
 22 the elevator in McLaughlin at that time, and then we just
 23 started to just -- decided to start raising our own feed, you
 24 know, to try and cheapen things up, so then I started back
 25 again.

- 1 Q. And when did you -- about what year did you start
 2 farming back again?
 3 A. We always kind of raised hay, but I mean, as far
 4 as actual tillage, I'm going to guess it was around '97, '98.
 5 Q. Okay.
 6 A. Yeah.
 7 Q. Do you still own and operate McLaughlin Livestock
 8 Auction?
 9 A. We actually still have the corporation just
 10 because there wasn't much in there and the tax guy said we're
 11 just going to whatever, let it run out, but the physical
 12 building and everything, I had sold that in 19 -- or 2007 and
 13 since then the new owners have just destroyed or taken it
 14 down.
 15 Q. Okay.
 16 A. And used the land for other purposes.
 17 Q. Okay. Besides Corson County Feeders, Inc., do
 18 you have ownership in any other businesses or corporations?
 19 A. I do.
 20 Q. Okay.
 21 A. I have one venture we started last year, Broken
 22 Arrow S Apparels & Accessories.
 23 Q. And are you wearing one of the accessories right
 24 now?
 25 A. No, not really.

1 Q. Okay.

2 A. Well, pants, yeah. I mean, it was -- I was --

3 yeah, I --

4 Q. What is the business?

5 A. It was a retail clothing, like Wranglers. There

6 was another person that came to me, wanted me to invest into

7 it, and yeah, since then it's -- yeah.

8 Q. Is it still in operation?

9 A. Well, it's still -- everything is still in a

10 trailer. I'm trying to sell it, if you know of somebody

11 looking to start a clothing business.

12 Q. Okay. So it's still in the developmental stage,

13 is that a nice way to put it?

14 A. Yeah.

15 Q. All right. Any other businesses or corporations

16 that you own?

17 A. There was a corporation we set up, Double D

18 Choppers, just for the ownership of an aircraft that we had.

19 Me and another gentleman owned it together.

20 Q. Okay.

21 A. And due to liability reasons and everything, we

22 had just set this up. There's no business through it, per

23 se.

24 Q. Okay.

25 A. But it is a corporation.

1 Q. Do you still have that aircraft?

2 A. Yes, I do.

3 Q. Some of the questions will deal with the spraying

4 you did in 2014. Would you have used that aircraft for that

5 spraying?

6 A. No, sir.

7 Q. Okay. Any other businesses or corporations that

8 you own, have an ownership interest in?

9 A. No, sir.

10 Q. So tell me, educate me on how much land you farm

11 and I'm talking about in 2014. You being either you

12 individually, through others or through the corporation.

13 A. I'm going to say it was -- do you want custom

14 farming included?

15 Q. Please, and we can break that down then.

16 A. Okay. I'm going to say that for my own personal,

17 there was about 2,000 -- or excuse me, 11,000 acres. You

18 know, it varied between, you know, 11 and 12 thousand.

19 Q. Okay.

20 A. Somewhere in there.

21 Q. Now is any of that custom?

22 A. No.

23 Q. Okay.

24 A. And then we --

25 Q. This is land you own or rent?

1 A. Both.

2 Q. Okay. And on that 11 to 12 thousand, what crops

3 in 2014 did you raise on that land?

4 A. Either oats, wheat, sunflowers, or corn.

5 Q. Okay. And the sunflowers that are at issue here

6 that were -- that died, would that have been on this 11 to 12

7 thousand acres?

8 A. Yes. Yes. I mean, yeah, between -- yeah, I was

9 trying to differentiate between what I own and rent, but no,

10 it was all on either I owned or rented, yes.

11 Q. Okay. And just so you understand, my concern

12 right now is both you personally and your corporation are

13 named as plaintiffs. You have both sued. And the one thing

14 I want to know is who actually farmed the land where these

15 seeds -- where the sunflowers were lost, and who owned that

16 land. Was it Dallas Schott individually, was it Corson

17 County Feeders, Inc., or was it a combination of both?

18 A. Okay, I guess it's a -- I didn't maybe personally

19 drive the tractor doing each, but me or us did it. Me or my

20 company. I guess, me or my hands or my equipment put it all

21 in, whether it was the -- my own land or the leased land.

22 Q. All right. So maybe let's go back and try this a

23 different way. There were how many acres of confection

24 sunflower seeds that were lost in 2014 because of the

25 chemical spraying?

1 A. Approximately 1200.

2 Q. Okay. And those 1200 acres, where was -- can you

3 give me a general description of where those 1200 acres were

4 located?

5 A. We --

6 Q. Two miles west of whatever.

7 A. The furthest ones away would have been -- there

8 was some ten miles to the southwest.

9 Q. Of what?

10 A. McLaughlin.

11 Q. Okay.

12 A. Okay. There were --

13 Q. How many of the 1200 acres were at that location?

14 A. That is a section. It's across -- right at

15 600 acres. I call it Bullhead section.

16 Q. Okay.

17 MS. NEVILLE: You keep looking over here. Would

18 it help to have maps? Is that what you're looking for?

19 A. Yeah, I mean if I'm going to get real specific, I

20 got to grab my maps. I mean, I got a general idea.

21 Q. (BY MR. LUCE) If you need anything to help you

22 in your testimony, feel free to access it.

23 A. Yeah, I mean, I need --

24 MS. NEVILLE: Keep going. I'll see if I can find

25 them.

- 1 A. From the year I started farming again.
 2 Q. So from 1999 or thereabouts?
 3 A. I believe that's when it was, yes.
 4 Q. Okay.
 5 MS. NEVILLE: Try to wait until he's done asking
 6 before you answer. It's hard for her to take two down at the
 7 same time.
 8 THE WITNESS: Okay. I'm sorry.
 9 Q. (BY MR. LUCE) Other than purchasing of
 10 chemicals, what other type of business transactions have you
 11 undertaken with South Dakota Wheat Growers over the 17 years?
 12 A. Almost everything pertaining to the farming. I
 13 got fertilizer from them.
 14 Q. Okay.
 15 A. I got seed from them. They did my soil testing.
 16 They did my MZB. They --
 17 Q. Your what?
 18 A. It's just a -- it's an enhancement of soil
 19 testing.
 20 Q. Okay.
 21 A. They convinced me to try that. They did my
 22 agronomy work.
 23 Q. What do you mean by that?
 24 A. They looked at my fields, they told me when they
 25 should be sprayed, what they should be sprayed with.

- 1 Q. Anything else included in agronomy work other
 2 than what you've described?
 3 A. Well, they -- from supplying me to -- they gave
 4 me the rates of what to use, what -- in what order to put the
 5 chemicals in my sprayer. I asked them, if I bought seed from
 6 them, what populations they suggested. I got everything from
 7 sunflower seeds from them. They used to -- I used to get all
 8 my sunflower seeds from them, corn seed from them, wheat seed
 9 from them. So other than oats, which they didn't handle -- I
 10 take that back. In the first years they even handled -- so
 11 there was times I got every product from South Dakota Wheat
 12 Growers for my farming.
 13 Q. With respect to sunflower seeds, did you purchase
 14 from South Dakota Wheat Growers both Clearfield and
 15 non-Clearfield sunflower seeds?
 16 A. I would have to look in the past to see exactly
 17 what was done. I know that I had gotten con-oils, regular
 18 oils and confections from them in the past.
 19 Q. Tell me, since I'm not a farmer, what the
 20 difference is between Clearfield and non-Clearfield sunflower
 21 seeds.
 22 A. I don't know that I can tell you exactly the
 23 difference, other than what now I learned they can be treated
 24 with. In all my -- in all my farming, even down to when I
 25 was offered different contracts, I asked the opinion of Wheat

- 1 Growers if it was a good price, if it was not. I put in what
 2 they suggested would be a good product to make money.
 3 Q. Okay. That's not my question. So let me ask it
 4 one more time.
 5 A. Okay.
 6 Q. And maybe you don't -- I have no idea what a --
 7 if you're sitting in a restaurant right now and somebody
 8 says, "I've heard of Clearfield sunflower seeds and
 9 non-Clearfield sunflower seeds. What's the difference
 10 between those two?" How would you answer that question?
 11 A. I don't know the difference.
 12 Q. You just don't know? Okay.
 13 A. I don't know the difference.
 14 Q. Okay. And you mentioned that you had confection
 15 sunflower seeds over the years, con-oil ones, and you
 16 mentioned one other, I'm sorry?
 17 A. They call them just regular oil seeds.
 18 Q. All right. What's the difference between
 19 con-oil, regular oil and confection sunflower seeds?
 20 A. The confection, as far as I've been told, is more
 21 or less the edible type. They just eat them.
 22 Q. Like if I buy some sunflower seeds at the
 23 convenience store, --
 24 A. Yes, sir.
 25 Q. -- those are confection?

- 1 A. Yes.
 2 Q. Okay. And what are con-oil or regular oil?
 3 A. The processing from what I believe is different,
 4 I don't know that they're all edibles, and they're striped.
 5 I've learned in the past that the con-oils have the stripes
 6 down them, and the regular oils are the small, solid black
 7 seeds that are just crushed for oil.
 8 Q. What about the oil ones, what are those?
 9 A. The small black ones are just crushed just for
 10 oil.
 11 Q. Okay. Are Clearfield seeds limited to con-oil,
 12 or can you get Clearfield regular oil and confection?
 13 A. I have no idea.
 14 Q. Okay. Same question with respect to confection.
 15 Can you get Clearfield and non-Clearfield for confection?
 16 A. I don't know.
 17 Q. In all the years you have been farming from 1999
 18 on, have you farmed -- have you raised sunflower seeds each
 19 of those years?
 20 A. No.
 21 Q. Okay. Which years since 1999 have you not had
 22 sunflower seeds?
 23 A. Working with Craig and Jason, we put them into
 24 the rotation. I'm not sure which year.
 25 Q. Okay.

1 A. I'm going to say close to seven, eight years ago.
 2 My main production has always been feed.
 3 Q. Okay.
 4 A. If it was up to me, I probably wouldn't have put
 5 sunflowers in at all because I can never feed them to cattle.
 6 Q. Okay.
 7 A. But we needed them for a rotation.
 8 Q. On average, again since I'm not familiar with
 9 your farming operation, can you break down, and I realize you
 10 rotate, but on average, how much of your land is in wheat,
 11 how much of your land is in oats, how much is in sunflower
 12 seeds?
 13 A. Approximately?
 14 Q. Yeah.
 15 A. Wheat is around 3,000 to 3300 acres a year. Corn
 16 is usually closer to 4,000. Sunflowers has bounced from 2500
 17 to 2700, and oats has been approximately 11 to 12
 18 hundred acres.
 19 Q. Okay. So oats is your largest crop, acre wise?
 20 A. No.
 21 Q. Oh, no, 1100, 1200, I'm sorry. Wheat would --
 22 A. Corn.
 23 Q. Corn would be your largest?
 24 A. Yes, sir.
 25 Q. Okay. I put one other zero on oats.

1 In the years you have had sunflower seeds, have
 2 there been years when you've had Clearfield and
 3 non-Clearfield sunflower seeds?
 4 A. I -- looking back, I cannot honestly tell you
 5 which were Clearfield and which were not because I had always
 6 -- when I started with the confections and the con-oils, that
 7 was as a suggestion from Wheat Growers and their agronomy
 8 when I was doing just plain oils and they were the ones that
 9 sold me the first seeds.
 10 Q. So you don't know like in 2013 whether you had
 11 some confection and some con-oil?
 12 A. I believe, yes, I had some of each.
 13 Q. And do you know --
 14 A. But I don't know if they were Clearfield or -- I
 15 don't remember what chemicals.
 16 Q. Okay. Well, you've been farming enough, would
 17 you agree that certain chemicals can be used with Clearfield
 18 sunflower seeds that should not be used with non-Clearfield?
 19 A. I know that now, yes, sir.
 20 Q. You did not know that at all in 2012 or 2013?
 21 A. Whenever I went in for spraying, I went a hundred
 22 percent on what I was told to spray with from Wheat Growers.
 23 Q. Okay.
 24 A. I didn't background. What, you know, was -- I
 25 went off of what they had told me or suggested that I do;

1 rates, planting dates, everything. I -- well, I don't know
 2 how much I'm supposed to say.
 3 Q. No, go ahead.
 4 MS. NEVILLE: Yeah.
 5 A. I've always claimed that I -- I learn my farming
 6 from listening to other farmers. They're like the biggest
 7 bunch of braggers there is, so I tried to take stuff from
 8 everybody, but I never wanted to reinvent the wheel or
 9 anything, so I was glad when somebody would say, "Dallas, you
 10 take these sunflowers, you plant them at this rate and you do
 11 this, you should get this." I wasn't -- I'm not one to go
 12 out and try to change or alter to do anything other than I'd
 13 do the best part of trying to get it in, keep them clean and
 14 get them off in a timely manner.
 15 Q. (BY MR. LUCÉ) Okay, let's work at it this way.
 16 For 2013 you would have purchased chemicals that included
 17 Beyond and another chemical called TapOut. Do you remember
 18 having those purchases?
 19 A. Yes.
 20 Q. And you purchased those chemicals before the
 21 growing season starts?
 22 A. We had agreed they -- in the fall, Jason or Craig
 23 would sit down, and yes, we did a prelist of what they
 24 suggested that I may use for the year.
 25 Q. Okay.

1 A. And they made up a list in their own writing of
 2 what they suggested that I should use.
 3 Q. Well, and I -- since I'm not a farmer, my analogy
 4 or my understanding would be it's sort of like me that may
 5 have a list of prescriptions I take depending upon the
 6 particular condition, and I may have four prescriptions
 7 filled at one time, but what I use depends upon the
 8 condition. Can you understand that?
 9 A. Yes.
 10 Q. Okay. So what I'm understanding is before
 11 planting season, you communicate with Wheat Growers as to
 12 what you are planning on planting, you have discussions with
 13 them about that, correct?
 14 A. Yes.
 15 Q. And based upon what you indicate in terms of your
 16 decisions as to rotating crops and what you want to plant for
 17 that growing season, they put together an order of what
 18 chemicals you will need to -- with your intended plantings
 19 for that year, correct?
 20 A. Yes.
 21 Q. And so you had then purchased those chemicals.
 22 They are delivered when you actually need to do the spraying,
 23 or are they delivered like in the spring and you keep them in
 24 a barn until you have to spray?
 25 A. I'm going to say almost 95 to 98 percent is we go

1 pick them up as we need them.

2 Q. Okay. And so for 2013, for example, you would
3 have had some TapOut and some Beyond. Do you recall that?

4 A. I believe so, yes.

5 Q. Okay. So now when it comes time to spray and you
6 have some fields with confection seeds, sunflower seeds, and
7 some fields with con-oil seeds, which chemical, between
8 TapOut and Beyond, did you need to spray on the con-oil
9 seeds, on con-oil? Beyond or TapOut?

10 A. I don't remember which one they prescribed.

11 Q. Okay. And would it be a different one for the
12 confection?

13 A. Yes.

14 Q. Did you ever in years prior to 2014 use either
15 TapOut or Beyond on both confection and con-oil seeds?

16 A. Prior to 2014?

17 Q. Correct.

18 A. I don't believe so, no, sir.

19 Q. Because you would have known one relates to
20 Clearfield or con-oil seeds, and another chemical was
21 appropriate for confection or non-Clearfield, correct?

22 MS. NEVILLE: I'm going to --

23 A. I don't know that --

24 MS. NEVILLE: I'm going to object there because
25 they're not necessarily the same, so I'm not sure of the

1 gave them your license, you had a previous one, they just
2 renewed it to be honest with you.

3 Q. When did you first obtain that license?

4 A. I don't know when it was.

5 Q. Okay.

6 A. They're good for so many years.

7 Q. Okay.

8 A. I couldn't tell you.

9 Q. One of the things that they would emphasize in
10 getting that license is that a sprayer must follow the label
11 for chemicals that are being sprayed, is that correct?

12 A. That may be correct.

13 Q. Would you disagree with that?

14 A. No.

15 Q. You better make sure you're putting the right
16 chemical on the right field, correct, in the right
17 quantities?

18 A. Well, they don't teach you that. What they teach
19 you is more or less to -- the big thing they had taught was
20 overuse of chemicals and using spraying at the wrong times
21 and so on, but to sit there and tell you that what to use on
22 what fields, no, it had nothing to do with that.

23 Q. So you're telling me -- because I can confirm
24 this one way or another with the Department of Agriculture --
25 that you are not told as an applicator, licensed applicator

1 question. Object to the form of the question.

2 MR. LUCE: Okay. Compound, I'm sorry.

3 Q. (BY MR. LUCE) You knew that Beyond should not be
4 used on non-Clearfield seeds?

5 A. No, I didn't know that. I --

6 Q. Okay.

7 A. I only used what Wheat Growers prescribed.

8 Q. You did not know that Beyond should not be used
9 on non-Clearfield seeds?

10 A. I didn't keep track of that. Whatever they told
11 me to do, I did.

12 Q. You did the spraying in 2014 yourself?

13 A. I did, yes.

14 Q. You had a license with the State of South Dakota
15 to do that spraying?

16 A. Yes, I did.

17 Q. What's that license called?

18 A. Pesticide license.

19 Q. Okay. And how did you obtain that pesticide
20 license?

21 A. You sit in about a two-hour little clinic in a
22 room and you listen to videos for an hour and a half, two
23 hours and they give you a license.

24 Q. Okay. So you take a test, or not?

25 A. I don't remember if we took a test, or if you

1 that you need to follow the label instructions?

2 A. No, I'm not going to say they didn't say that,
3 no.

4 Q. Okay. Were you aware that it's a violation of --
5 it's a criminal violation if you apply a pesticide
6 inconsistent with the label? Were you aware that that's a
7 violation of law?

8 A. I guess I may have been told that. Remembering
9 it, no, I guess I didn't know it was a criminal action, no,
10 sir.

11 Q. And this loss was sustained because it turned out
12 that you applied Beyond to non-Clearfield sunflower seeds?

13 A. I applied Beyond to the wrong sunflowers, yes.

14 Q. They were non-Clearfield?

15 A. Yes.

16 Q. Okay.

17 A. I guess, I -- I don't -- yeah, I --
(Exhibit No. 3 was marked.)

19 Q. (BY MR. LUCE) I'm handing you a jug, a gallon
20 jug of Beyond, the chemical that you were applying in 2014.
21 Is that correct?

22 A. Yes.

23 Q. Would you read for me the first paragraph of that
24 label?

25 A. "For use only on Clearfield canola, Clearfield

1 **lentil, Clearfield rice, Clearfield and Clearfield Plus**
 2 **sunflower, and Clearfield and Clearfield Plus wheat."**
 3 **Q.** It says very clearly for use only on Clearfield
 4 sunflower seeds, does it not?
 5 **A.** **Yes, it does.**
 6 **Q.** And you did not follow that label, did you?
 7 **A.** **I didn't know what the sunflowers were as far as**
 8 **Clearfield, non-Clearfield. I don't know, I didn't know what**
 9 **they were. I applied what I was told to apply.**
 10 **Q.** So you, when you applied them in July of 2014,
 11 you thought you were applying Beyond to Clearfield sunflower
 12 seeds?
 13 **A.** **I thought what they prescribed was right.**
 14 **Q.** Okay. Well, it is right for Clearfield and you
 15 did have some Clearfield seeds, but it's not right for
 16 non-Clearfield and you did have some non-Clearfield seeds,
 17 correct?
 18 **A.** **Correct.**
 19 **(Exhibit No. 4 was marked.)**
 20 **Q.** (BY MR. LUCE) Besides the label, would Beyond
 21 also have a product insert as part of that product?
 22 **A.** **It may have, yes. I don't know.**
 23 **Q.** I'm showing you what is marked as Exhibit 4.
 24 Have you ever reviewed a product insert with respect to the
 25 Beyond chemical that you were applying in 2014?

1 **A.** **No, sir.**
 2 **Q.** Why didn't you look at that?
 3 **A.** **I guess because when I go to somebody for advice**
 4 **and ask them what to use on a product and I've trusted them**
 5 **over the years, I used what they told me to use.**
 6 **Q.** So who told you to use Beyond contrary to the
 7 label on non-Clearfield seeds? Who told you that?
 8 **MS. NEVILLE:** Well, I'm going to object to the
 9 form of the question. You can answer, if you can.
 10 **A.** **I was working with Jason Fees in the years -- in**
 11 **the year 2014.**
 12 **Q.** (BY MR. LUCE) So you're telling me under oath
 13 that Jason Fees told you to apply Beyond to non-Clearfield
 14 seeds?
 15 **A.** **What I'm saying is that's the chemical he gave me**
 16 **and the prescription for spraying my sunflowers.**
 17 **Q.** Okay. And did you use the Beyond on the
 18 Clearfield seeds in 2014?
 19 **A.** **Yes.**
 20 **Q.** The con-oil seeds. Spray both the con-oil and
 21 the confection seeds at the same time on July 20 and 21?
 22 **A.** **I don't know exactly what dates that I did the**
 23 **con-oils and which I did the confections. Roughly the same**
 24 **time, yes.**
 25 **Q.** Yeah, any reason you would have done one before

1 the other or anything?
 2 **A.** **Depends on the stage of the weeds and where it**
 3 **was at.**
 4 **Q.** Okay. And when you use the Beyond that had been
 5 supplied by Wheat Growers as part of the order filled by Mr.
 6 Fees, the Beyond on your con-oil seeds did not cause any
 7 damage to those seeds, is that correct?
 8 **A.** **Correct.**
 9 **Q.** But when you applied the Beyond to the
 10 non-Clearfield, the confection seeds, you suffered damage?
 11 **A.** **Yes.**
 12 **Q.** You were the one -- you individually, and only
 13 you, were the one that applied the chemicals?
 14 **A.** **I applied the chemicals, yes.**
 15 **Q.** You were the one that had a license that said you
 16 should not, as an applicator, place chemicals on your crops
 17 without reading and following the label?
 18 **A.** **I was given a prescription, even the rates to use**
 19 **from them and that's what I put on my crop.**
 20 **Q.** But you -- that's not my question. You knew as
 21 an applicator from your training and with your license that
 22 you should not apply chemicals to your crops without reading
 23 and following the label?
 24 **A.** **I did not read the label on Beyond, no.**
 25 **Q.** But you knew you should have?

1 **A.** **I might have been told that before, yes.**
 2 **Q.** Okay. About a week or so after you applied the
 3 Beyond to the non-Clearfield, the confection seeds, you
 4 noticed that there was damage to those crops, correct?
 5 **A.** **I believe it was within at least that, yes.**
 6 **Q.** Yeah. What did you first notice, sir?
 7 **A.** **They were turning black.**
 8 **Q.** Okay. The con-oil ones looked fine, but the
 9 confection ones were showing severe distress?
 10 **A.** **Yes.**
 11 **Q.** And what did you do when you first observed that?
 12 **A.** **The first thing I did, I believe, is I had called**
 13 **Tim Petry at SunOpta.**
 14 **Q.** Okay. Did you notice from the ground, or did you
 15 go up in the plane to notice the problem?
 16 **A.** **From the ground.**
 17 **Q.** Okay. Did you follow up and go in the plane just
 18 to see the extent of the problem, or could you observe it
 19 fine from the ground?
 20 **A.** **You could see it for -- it was black.**
 21 **Q.** Okay.
 22 **A.** **I mean, you could see it for miles.**
 23 **Q.** Okay. The reason I'm asking is I think Jason
 24 recalls you calling him from the plane, but maybe I'm wrong
 25 on that.

1 A. I -- I don't -- I'm just saying you can. I used
 2 the plane or helicopter to check my fields all the time.
 3 Q. Okay. So it may have been?
 4 A. It absolutely may have been. I --
 5 Q. Okay.
 6 A. But I don't remember.
 7 Q. But the first call you made to anyone after you
 8 saw the distress with your con-oil seeds, or with the
 9 confection seeds, was to Tim?
 10 A. It was either Tim or Jason, yes.
 11 Q. Okay.
 12 A. Yeah.
 13 Q. And Tim is with whom?
 14 A. Dahlgren/SunOpta.
 15 Q. Okay. And what was the reason you first called
 16 Tim?
 17 A. That's who I had the contract with for the
 18 sunflower seeds.
 19 Q. And tell me about that conversation you had with
 20 Tim.
 21 A. I told him what the sunflowers looked like and he
 22 immediately said, "What did you spray them with?"
 23 Q. Okay.
 24 A. I said, "I'm not sure." I called to find out.
 25 Q. What do you mean you're not sure? Didn't you

1 know that you were spraying with Beyond?
 2 A. Well, he had asked whether it was Clearfield or
 3 non-Clearfield, and I said I -- you know, I believe -- then I
 4 called to ask exactly what I had used.
 5 Q. Okay. But you said you weren't clear what you
 6 had sprayed them with. Did you not know that a week before
 7 -- sometime within the last week you had sprayed those fields
 8 with Beyond?
 9 A. Whatever chemical they had given me.
 10 Q. Okay. But when you talked to him you said you
 11 weren't sure what you used?
 12 A. I wasn't exactly -- yeah, yeah. I totally
 13 relied, even to spray dead in the spring which is almost the
 14 same every year, I ask them what to use.
 15 Q. Do you take any responsibility for spraying your
 16 fields with the wrong chemical?
 17 A. I had grown a trust with Wheat Growers to where
 18 everything had worked. I had some of the cleanest fields
 19 around. I didn't cheat on cutting ounces back. Even when
 20 the neighbor says, "You don't need 24 ounces, you can get by
 21 with 22 ounces of Roundup and do the same thing." I never
 22 did that. Whatever they prescribed, that's what I put on.
 23 Q. Okay. Do you take any responsibility for
 24 spraying your fields with the wrong chemical?
 25 A. As far as running my sprayer and operating my

1 sprayer, I take a hundred percent of that.
 2 Q. Okay.
 3 A. Putting the wrong chemicals on, I relied on them
 4 for that.
 5 Q. Okay. Do you take any responsibility for being
 6 told that you have to follow the label and you not doing so?
 7 A. I guess at the class, which -- you know, they
 8 probably mentioned that.
 9 Q. Okay.
 10 A. I guess, yeah, I am responsible for putting on
 11 what I did on the field.
 12 Q. Okay.
 13 A. I guess, you know.
 14 Q. So tell me then, continue with your conversation
 15 with Tim. Did you -- anything else said with him? You said
 16 -- I think what you had said, you told him you weren't sure
 17 what you applied to it, and then what happened about -- did
 18 you ask him whether they were Clearfield or not?
 19 A. He had told me that they were two different, you
 20 know, sunflowers, and if they were sprayed with the same, he
 21 said they're dead.
 22 Q. Okay.
 23 A. And I said, "Well, what can I do?" And he said,
 24 "There's nothing you're going to do."
 25 Q. So he told you if you have Clearfield and

1 non-Clearfield, you can't use the same chemical on both?
 2 A. He had told me, yes, that it -- he says, "You
 3 can't use the same chemical."
 4 Q. Okay. And in fact, in prior years when you had
 5 both, you had not used the same chemical on both?
 6 A. That is correct.
 7 Q. Okay. Anything else discussed with Tim?
 8 A. He had just said, "You better get with Jason and
 9 see what happened."
 10 Q. Okay. And so you talked to Jason, correct?
 11 A. Um-huh.
 12 Q. You have to -- um-huh won't -- yes or no.
 13 A. Yes. Sorry.
 14 Q. And you don't recall if you talked to Jason
 15 before you talked to Tim or after you talked to Tim?
 16 A. I'm not exactly sure, no.
 17 Q. That's fair. Tell me what you can recall in your
 18 first conversation you had with Jason after you observed your
 19 seeds being in distress.
 20 A. I guess first conversation -- oh, there was so
 21 many conversations. I guess I --
 22 Q. Yeah, let's break them down. The first one you
 23 had after you observed the blackened field of confection
 24 seeds, tell me what you said to Tim -- or excuse me, to Jason
 25 and what he said to you.

1 A. Because I had applied over 200 pounds -- whatever
2 they had prescribed for nitrogen, I'd applied that to it, and
3 weeds were starting to grow again.

4 Q. Okay.

5 A. And I didn't want them weeds burning it up for
6 the next year's crop.

7 Q. Did you consider after you knew in late July that
8 your confection sunflower seeds were dead or dying, did you
9 consider planting any type of replacement crop on those
10 1200 acres for 2014?

11 A. I thought -- I had discussed that with somebody,
12 but with the chemical that I had put down for the
13 sunflowers --

14 Q. The Beyond?

15 A. No. I believe it's -- there's a chemical we put
16 down in the spring, one with corn and it's different for
17 sunflowers.

18 Q. Pre-emergent or --

19 A. Yes.

20 Q. Would that be the Roundup?

21 A. No. I think it's called Spartan.

22 Q. And what's that for?

23 A. That's to keep weeds from coming through. I'm
24 not exactly sure. Okay, we use atrazine on corn, and they've
25 had me use Spartan, I think, on sunflowers and it helps keep

1 grasping at straws.

2 Q. But somebody then told you, or you on your own
3 determined that whatever you would attempt to do may be
4 restricted by the spring's chemicals you had applied?

5 A. Yes.

6 Q. Okay. The chemicals, the pre-emergent would have
7 been -- how would you have applied those chemicals?

8 A. However Wheat Growers told me to put them on.

9 Q. Okay. But what's the mechanism for --

10 A. I would have put them on with the 4940 ground
11 sprayer.

12 Q. Okay.

13 A. John Deere sprayer.

14 Q. And the spraying you did in July with the Beyond,
15 what was the mechanism for that spraying?

16 A. Same thing.

17 Q. Okay. Any other conversations you had with
18 anybody at Wheat Growers about the crop damage you suffered
19 that you have not already testified to me about? I don't
20 want to leave not knowing about a certain conversation.

21 A. Well, there were several conversations. I still
22 continued to do all my business in there.

23 Q. Okay. Anything else --

24 A. I was in there and you know, Jason would come to
25 my office. He'd come out to my office. I had been into his

1 them clean during the year.

2 Q. Okay. But that's not -- is that a glyphosate
3 like Roundup is a glyphosate?

4 A. I don't know if it is or not. I don't --

5 Q. Okay, so going back. So you considered a
6 replacement crop, but understood that this chemical you
7 applied in the spring would prevent you from applying a -- or
8 planting a replacement crop? I'm just trying to make sure I
9 under --

10 A. It may have done that. It depended on what you
11 tried to use is what I recall.

12 Q. So who did you talk to about whether you could
13 plant a replacement crop?

14 A. I believe it would have been Jason or Craig.

15 Q. Okay. What were your options? Again, I'm not a
16 farmer. By the end of July, what kind of options would you
17 have in terms of something you could plant in that
18 1200 acres?

19 A. Almost nothing. It's too late in the growing
20 season.

21 Q. Okay. So that's what's confusing. You were
22 thinking about doing it. What were you thinking about doing?
23 Hay, or what can you plant in the end of July?

24 A. I don't know. There wasn't many options, but I
25 also couldn't take a year for no income, so I was -- I was

1 office. He was scared for losing his job. He had told me
2 that. He said, "Dallas," he said, "I don't know what's going
3 to happen." He says I don't know -- he said, "But I can't
4 afford to lose my job."

5 Q. Okay. When was that said?

6 A. In one of the conversations. I don't know which
7 one.

8 Q. Okay.

9 A. In the late summer, fall.

10 Q. Okay. Any other conversations -- because you
11 still talked to him about everything, I imagine, this year
12 and everything else. Any other conversations you had with
13 South Dakota Wheat Growers concerning this loss, the subject
14 of this lawsuit that I've not heard about yet? I don't want
15 to hear at trial, oh, so and so said this about my crop loss
16 that I never heard about before. I don't want any surprises.

17 A. Well, I know I -- there was times last summer
18 then that I had visited with Craig because I didn't know if
19 Jason was quite doing -- you know, I know he was nervous, I
20 know he was scared. He had come to me wanting to buy a
21 parcel of land to build a house on and he wanted to buy that
22 awful bad, and I personally had -- you know, I had actually
23 talked to Melissa and I said, "Well, what do I need to do
24 about this?" She says, well, right now, she says, I would --

25 MS. NEVILLE: I'm going to object.

1 Q. Yeah. When will you plant?
 2 A. After the corn. Mid-May.
 3 Q. Okay.
 4 A. To end of May. I guess we'll --
 5 Q. Are you planting both con-oil and confection
 6 seeds this year?
 7 A. No.
 8 Q. What are you planting this year?
 9 A. Just straight con-oils.
 10 Q. Okay. Why did you stop the confection?
 11 A. This mistake right there was --
 12 Q. You don't want it to happen again?
 13 A. Yeah, I can't -- I found maybe I don't know that
 14 I want to take the risk of things happening. That was
 15 detrimental, and to this day, that has haunted me through my
 16 banking trying to get financing this spring, that loss.
 17 Q. So it's not the risk of applying the wrong
 18 chemical alone, but it would also be it's easy too because
 19 you only have to use one chemical for all the seeds then,
 20 right?
 21 A. Right.
 22 Q. Okay.
 23 A. And one other reason. Confections are bigger.
 24 They take up more room.
 25 Q. Okay.

1 A. I don't have enough bin space, so that's another
 2 reason.
 3 Q. Is the market any different between confection
 4 and sun oil?
 5 A. Confections are way higher.
 6 Q. So you can make more profit on them?
 7 A. Not with these like this.
 8 Q. No, well, if you have a good crop though?
 9 A. I don't know.
 10 Q. Okay.
 11 A. I couldn't. I didn't seem to.
 12 Q. Okay. So con-oil makes more sense for you
 13 because it's smaller?
 14 A. It just seems to make more sense.
 15 Q. All right. Exhibit 9, what's that?
 16 A. This is the contract, it looks like the contract
 17 I had with Dahlgren on the con-oils.
 18 Q. Okay. Exhibit 10, what's that?
 19 A. This is with the confections.
 20 Q. Okay. It's dated at the top of the 27th day of
 21 December of 2013. Is that about when you would have entered
 22 into both of these contracts with Dahlgren?
 23 A. Yeah, obviously it is, yes.
 24 Q. Who would you have negotiated with Dahlgren on
 25 these contracts, who is your contact person?

1 A. Tim Petry has always been the contact.
 2 Q. And for how many years prior to the 2014 growing
 3 season had you purchased seeds from Dahlgren?
 4 A. It was a year or two prior to that. Actually
 5 Wheat Growers was selling these seeds. They brought Tim
 6 Petry. Tim Petry went to them, they came out to my place,
 7 they had convinced me to try these and with -- I hadn't had
 8 them before. I had had strictly oils before. On the
 9 recommendations of Wheat Growers and hearing what the
 10 contracts may be with SunOpta, I went to go with them, and I
 11 made a deal with SunOpta -- or with Wheat Growers, the
 12 delivery was to be to SunOpta or Dahlgren, and the next year
 13 Dahlgren/SunOpta pulled the seeds from Wheat Growers. At
 14 that time, I had went to Tim and I says, "Well, wait a
 15 minute, you went to who's selling me stuff, you got my
 16 business, now you pulled the seeds away. I'll do business
 17 with you, but I want to get the seeds through Wheat Growers."
 18 I said, "They're the ones that, you know, I'm loyal to."
 19 Q. Okay.
 20 A. Tim Petry said, "No, Dallas, I can't do that."
 21 Q. Okay.
 22 A. You either have to go and buy direct from us,
 23 we're not dealing with Wheat Growers. At that time -- I want
 24 to say that the contract that year, confections was \$36. At
 25 that time I asked Craig Maher, "What do you think?" He goes,

1 "Dallas," he says, "you're looking at a contract that we
 2 can't even come close to." He says, "I would stay there."
 3 Q. Okay.
 4 A. But it did mean that South Dakota Wheat Growers
 5 lost selling me the seeds after one year, which I thought was
 6 a bad deal, but...
 7 Q. Okay. It's dated on top the 27th day of December
 8 and it says printed that day. When would you have signed
 9 that, do you know? There's no date for your signature.
 10 A. I -- he usually mailed them. What he did is he
 11 set aside -- he'd call ahead and say, "Do you want the same
 12 thing," and when you agreed to do the contract, then he
 13 agreed to give you X amount of seeds for them acres. So
 14 exact dating, I'll be real honest, I guess I don't know why
 15 it isn't dated in here other --
 16 Q. It's dated at the top but -- because I assume
 17 it's done through the mail, I assume the two of you didn't
 18 sign it the same day?
 19 A. No, he signed --
 20 Q. Who signed first? If you -- when they were sent
 21 to you, were they already signed, or did you sign it and send
 22 it back to Petry?
 23 A. I think they came signed.
 24 Q. Okay.
 25 A. I don't exactly remember which way they came

1 first.

2 Q. Now prior to December --

3 A. It doesn't ask for me to sign a date though.

4 Q. No, it doesn't.

5 A. No.

6 Q. Prior to December 27, had you had some
7 discussions with Tim or Dahlgren about I don't know if I want
8 both con-oil and confection or what quantities, was there
9 some discussions back and forth what you ultimately wanted to
10 do?

11 A. Well, the way he had divvied it out, it was
12 almost -- I didn't have a lot of options because --

13 Q. You had to buy contracts of 1200 acres for each
14 seed?

15 A. Right, he had already -- he has certain growers
16 that want about the same thing, so I wasn't -- I couldn't
17 have put -- even to this year, the 2400 acres again, I've
18 done the same 2400 acres every year with these guys. He
19 wouldn't give me more acres.

20 Q. But you didn't have to have any con-oil this
21 year, or confection, which one did you -- I forgot.

22 A. I quit the confection.

23 Q. Yeah. So you did 2400, but you didn't have to do
24 1200 confection and 1200 con?

25 A. No, I didn't.

1 A. I don't know where he lives. I -- If it's in

2 Brecken -- I don't know where he lives honestly.

3 Q. Maybe it's in the interrogatories.

4 MS. NEVILLE: It is.

5 MR. LUCE: It's in Minnesota?

6 MS. NEVILLE: Yes.

7 MR. LUCE: Okay. I'll look at the interrogatory
8 answers.

9 MS. NEVILLE: (Handing.)

10 A. He lives at 1220 Sunflower Street, Crookston,
11 Minnesota. Well, it's an address he has. Crookston,
12 Minnesota.

13 Q. (BY MR. LUCE) Is that sun oil sunflower street
14 or confection sun -- never mind.

15 A. I couldn't tell you.

16 Q. Okay.

17 MS. NEVILLE: We're learning way more about
18 sunflowers than we thought possible.

19 MR. LUCE: What a coincidence.

20 A. I'm guessing he's really loyal if his house
21 actually lives there.

22 MS. NEVILLE: I think that's the business
23 address.

24 A. I'm sure it's the business, I'm guessing.

25 Q. (BY MR. LUCE) And the time you entered these

1 Q. So did you have to do 1200 of each back in two
2 thousand -- for the 2014 growing season, or could you have
3 divided --

4 A. I didn't ask if I could have back then or not.

5 Q. All right.

6 A. I didn't ask. It was -- that's what we had done
7 the year before so we just did it again.

8 Q. Didn't you tell Jason Fees that you were going to
9 use all con-oil for that growing season?

10 A. No.

11 Q. Exhibit 11, what is that?

12 A. Okay. I had a contract for close to half a
13 million dollars with SunOpta and I was scared I was going to
14 have to produce them seeds.

15 Q. Okay. What is Exhibit 11?

16 A. It's a cancelled contract. He let me out of it
17 with no damages.

18 Q. When did you cancel -- it doesn't have any date
19 on it. When was that canceled?

20 A. I don't remember when it was.

21 Q. Okay. And you dealt with Mr. Petry about that?

22 A. Tim Petry.

23 Q. Where is he located at because I'll probably want
24 to take his deposition and get his -- the Dahlgren documents.
25 Where is Mr. Petry at?

1 contracts, you also got a booking order confirmation from
2 SunOpta or Dahlgren, correct?

3 A. Yes.

4 Q. And that's Exhibit 12?

5 A. Yes.

6 Q. So tell me, SunOpta and Dahlgren, the contracts
7 have both. This booking order just mentions SunOpta.
8 They're one and the same as far as you know?

9 A. As far as I'm concerned, I deal with Tim Petry
10 and he can put whatever name he wants on it.

11 Q. And then you would have -- Exhibit 13, after
12 getting that booking order, three days later you would have
13 paid for the seeds and this amount includes the discounts you
14 got for early payments?

15 A. I assume so, yes.

16 Q. And Exhibit 14 would reflect that a bill of
17 lading, which I assume means that the confection seeds were
18 shipped to you on April 11 of 2013, is that -- is my
19 assumption correct on Exhibit 14?

20 A. That looks right, yes, sir.

21 Q. Okay. And then the con-oil seeds it looks like
22 from the bill of lading, Exhibit 15, was shipped to you on
23 April 25 of 2013?

24 A. Yep.

25 MS. NEVILLE: 2013?

1 MR. LUCE: 2014, excuse me.
 2 A. **Actually --**
 3 Q. (BY MR. LUCE) No, it says 2013.
 4 A. **Actually it does say '13.**
 5 Q. So both of these say 2013.
 6 MS. NEVILLE: Okay.
 7 Q. (BY MR. LUCE) So these bills of lading are
 8 actually not the bills of lading for these sunflower seeds,
 9 is that correct?
 10 MS. NEVILLE: Those would have been the previous
 11 year.
 12 A. **Or the date's wrong, yes, I --**
 13 Q. Okay.
 14 MR. LUCE: All right, thanks for catching that.
 15 Q. (BY MR. LUCE) For 2014 the contracts are
 16 1200 acres, so you would have -- would it have been the same
 17 quantity of each for 2014?
 18 A. **Yes.**
 19 Q. These at least reflect that in 2013 you --
 20 A. **I had the same thing.**
 21 Q. Well, you ordered confection, 180 bags, but on
 22 the con-oil, 125 bags?
 23 A. **Well, I think that might have been all that was**
 24 **delivered at that time, but I mean -- and the bags, you got**
 25 **to understand, confections are way bigger, so seed count**

1 **versus bags is different.**
 2 Q. Do you know on Exhibit 12, because there's a
 3 mention of 222 bags for 9521, do you know whether that's the
 4 con-oil or the confection?
 5 A. **I don't know.**
 6 Q. Okay. Once you placed an order for the
 7 chemicals, you would have received a booking confirmation on
 8 them from Wheat Growers just like you got from SunOpta for
 9 the seeds, correct?
 10 A. **The only time I got a pre-booking is when it was**
 11 **prepaid. You know, I don't know that year if we prepaid**
 12 **fertilizer. X amount of dollars, I only have X amount of**
 13 **dollars to spend in the fall, so I don't know that I have the**
 14 **same thing for the chemical.**
 15 Q. Okay. Exhibit 16 is a booking dated January 23,
 16 2014 from Wheat Growers to you?
 17 A. **Okay.**
 18 Q. Is that correct?
 19 A. **Yes, it looks correct, yes.**
 20 Q. Okay. And that reflected what you were ordering
 21 for the 2014 season, correct?
 22 A. **Looks correct, yes.**
 23 Q. And Status is the first item listed. What is
 24 Status?
 25 A. **I don't know which exact compound or what they**

1 **recommended I use.**
 2 Q. Is it a herbicide, pesticide, what is it?
 3 A. **I'm assuming it's a herbicide, I don't know.**
 4 Q. Was it for all of your crops?
 5 A. **No.**
 6 Q. Or was it to be used with just certain crops?
 7 A. **I'm sure it's just certain crops.**
 8 Q. Okay. And you would have followed the label in
 9 using that product?
 10 A. **I would have followed what Wheat Growers told me**
 11 **to put on.**
 12 Q. What is the second reference which is 11-25-00?
 13 It's just a number. Do you know what that is?
 14 A. **It's a starter fertilizer.**
 15 Q. Okay. And what about the third item, another
 16 67 tons of some number, is that a fertilizer?
 17 A. **Fertilizer, I'm guessing, yes.**
 18 Q. And then the third one which is another --
 19 A. **46-0, that's nitrogen.**
 20 MS. NEVILLE: Wait until -- even if you know what
 21 he's going to ask, wait until he's done asking before you
 22 answer.
 23 THE WITNESS: I'm sorry.
 24 Q. (BY MR. LUCE) The number for the fourth item,
 25 46-00 would be nitrogen?

1 A. **Yes, sir.**
 2 Q. Okay. And then there is a fifth item, Spartan
 3 Charge 1. What is that product?
 4 A. **That is put on pre-emergence for the sunflowers.**
 5 Q. Okay. Is that the pre-emergent we were talking
 6 about earlier?
 7 A. **Yes.**
 8 Q. Okay. And then the last item on there is the
 9 Beyond 1, correct?
 10 A. **Yes.**
 11 Q. In previous years for the con -- for the
 12 confection, you had received TapOut, correct? Do you
 13 remember that?
 14 A. **I remember hearing of that chemical, yes.**
 15 Q. Yeah. This booking order for 2014 reflected no
 16 TapOut or other chemical for the confection seeds, correct?
 17 A. **Well, that is a blanket deal. I don't know if**
 18 **this -- this was not all for sunflowers anyway.**
 19 Q. What else was -- well, but --
 20 A. **I don't know, because it's a blanket of what we**
 21 **paid for that they were comfortable that the price wouldn't**
 22 **go up, or that they thought this price may change, so that's**
 23 **what we did in the fall. He would say this is what we feel**
 24 **comfortable paying for, what they recommended, and I split it**
 25 **up however they used to want it.**

1 Q. Okay. Did you ever --
 2 A. **I had X amount of dollars.**
 3 Q. Did you ever get a booking order reflecting that
 4 TapOut was being sold to you for the 2014 growing season?
 5 A. **In the spring of the year, I don't know that I**
 6 **did. That might have been a product that they thought would**
 7 **be fine. I didn't -- if they didn't think the price would go**
 8 **up, I didn't prepay it because I have to borrow for that.**
 9 MS. NEVILLE: So I'm just going to -- for clarity
 10 sake then, are you saying that this is not all the chemicals
 11 you would have ordered in that particular year?
 12 A. **Absolutely not.**
 13 MS. NEVILLE: Okay.
 14 Q. (BY MR. LUCE) All right.
 15 A. **Because, yeah, the chemical alone is over 300,000**
 16 **that I got from Wheat Growers, and a hundred and twenty of**
 17 **this is nitrogen alone. I mean, this is a small portion of**
 18 **what I do with Wheat Growers.**
 19 Q. Okay. Let me just ask you about some people
 20 you've identified. We have to determine who else we need to
 21 talk to. Renita Mairs, M-A-I-R-S, what information would she
 22 have concerning this matter?
 23 A. **She's my crop insurance agent.**
 24 Q. Okay. And did you discuss with her this
 25 sunflower seed loss?

1 A. **Yes, sir.**
 2 Q. Did you have any insurance for that?
 3 A. **Not for -- no, there was no coverage for being**
 4 **sprayed dead, no, sir.**
 5 Q. Okay. So how would that have come up in your
 6 discussions with Renita?
 7 A. **Well, this has an impact of me trying to prove my**
 8 **yields and my stuff over the years, so as far as what**
 9 **production I had for that year, I had zero when it comes to**
 10 **this. That tremendously affects what happens in my -- for my**
 11 **insurance needs that the bank requires and everything else.**
 12 Q. You had production beyond the confection seeds
 13 though; you had sunflower seed production in 2014?
 14 A. **Yes, I did.**
 15 Q. So it wasn't zero?
 16 A. **No, but if you take --**
 17 MS. NEVILLE: I can probably clarify that. It's
 18 per field, correct?
 19 A. **Yeah.**
 20 Q. (BY MR. LUCE) Okay.
 21 A. **Yeah, I mean it's -- if you take -- when you're**
 22 **trying to prove a yield, it takes everything, okay?**
 23 Q. I understand that.
 24 A. **Okay, if you take 35 percent as a zero and --**
 25 Q. It lowers the percentage, I understand that, but

1 you said you had a yield of zero for two thousand --
 2 A. **On confection -- oh, I'm sorry, on confections,**
 3 **yeah.**
 4 Q. Okay. That's what I was wondering.
 5 A. **I did have some regular oils and I did have some**
 6 **con-oils, I'm sorry.**
 7 Q. And in fact, your contracts were for a total of
 8 2400 acres for sunflower seeds; 1200 for confection and 1200
 9 for con-oil?
 10 A. **Yes, sir.**
 11 Q. But I believe your production records reflected
 12 that you had maybe 27 acres in sunflower seeds?
 13 A. **27?**
 14 Q. You had more than 2400?
 15 A. **Oh, yes, I believe there was 300 acres that would**
 16 **have been just regular oils.**
 17 Q. Okay.
 18 A. **The little black ones.**
 19 Q. Who did you buy that seed from?
 20 A. **Wheat Growers.**
 21 Q. Okay. So the confection and the con-oil you
 22 bought from Dahlgren and they wouldn't let you buy those from
 23 Wheat Growers, but you could buy oil sunflower from Wheat
 24 Growers?
 25 A. **Yes.**

1 Q. Okay.
 2 A. **But them weren't contracted -- them 300 acres**
 3 **SunOpta/Dahlgren wouldn't take. You know, them were sold to**
 4 **Wheat Growers, like all my previous years, all the regular**
 5 **oils, they got a hundred percent of my crop and they -- same**
 6 **with my wheat.**
 7 Q. 2015, did you -- you've told me what you are
 8 planting this year. Did you plant both confection and son
 9 oil in -- or con-oil, excuse me, in 2015?
 10 A. **No, sir, just con-oils.**
 11 Q. Just con-oil. Any regular oil in 2015?
 12 A. **I think there was a few acres, yes, sir. Not**
 13 **very many.**
 14 Q. Did you have a contract with --
 15 A. **SunOpta?**
 16 Q. -- SunOpta for 2015?
 17 A. **That's the only reason I buy from them is because**
 18 **they have a good contract, yes.**
 19 MR. LUCE: Let's take a break for a minute or so.
 20 I think I might be done.
 21 MS. NEVILLE: Okay.
 22 (A break was taken.)
 23 MR. LUCE: I don't have anything further.
 24
 25

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT
3 * * * * *
4 DALLAS SCHOTT and CORSON COUNTY *
FEEDERS, INC., * 15CIV15-000012
*
5 Plaintiffs, *
*
6 vs. *
*
7 SOUTH DAKOTA WHEAT GROWERS *
ASSOCIATION, *
8 *
Defendant. *
9 * * * * *

DEPOSITION
OF

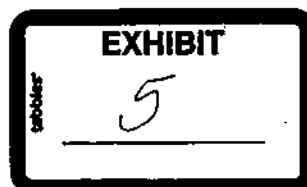
MIKE BUECHLER

April 26, 2016

1:25 o'clock, p.m.

20 Taken at:
Dacotah Bank
21 320 N. Main Street
Mobridge, South Dakota

23 Reporter: Tammy Stolle, RPR



1 A. **Yeah, I would guess.**
 2 Q. Okay. And why do you say you were probably in a
 3 hay field?
 4 A. **Because the day he sprayed my field, we was on a**
 5 **-- putting up hay on a Sunday.**
 6 Q. So he also sprayed a field for you?
 7 A. **(Witness nodded head.)**
 8 Q. Okay.
 9 MR. LUCE: You have to make sure you answer out
 10 loud. Head nods --
 11 A. **Okay.**
 12 MR. LUCE: Unless your head rattles she doesn't
 13 have anything to put down.
 14 MS. NEVILLE: Unless your head rattles. That's a
 15 good one, I haven't heard that one.
 16 Q. **(BY MS. NEVILLE)** So in your conversations with
 17 Jason Fees and Craig Maher, then the gist was they don't
 18 think there's anything South Dakota Wheat Growers did
 19 improperly in causing the damage that occurred to Dallas
 20 Schott's sunflowers?
 21 A. **No.**
 22 Q. Okay. Did they say why they believed that?
 23 A. **He bought the chemical from them. He sprayed it.**
 24 Q. Okay.
 25 A. **Misunderstanding on the seed types or something.**

1 agronomy advice from South Dakota Wheat Growers?
 2 A. **Yes.**
 3 Q. Who did you get advice from?
 4 A. **Jason.**
 5 Q. And what kind of advice does he give you, or did
 6 he give you in 2014?
 7 A. **He gave me a different brand of sunflowers to**
 8 **plant than what Dallas was.**
 9 Q. Okay.
 10 A. **And I was going to him to get my fertilizer and**
 11 **my chemical.**
 12 Q. Okay. What kind of -- what brands did he give
 13 you?
 14 A. **Well, I don't remember any names, but that was**
 15 **his department --**
 16 Q. Okay.
 17 A. **-- at the time.**
 18 Q. So is it fair to say that you relied on his
 19 advice for the seed that you plant and the chemical you put
 20 on them?
 21 A. **Yes.**
 22 Q. So do you know what a Clearfield sunflower is?
 23 A. **Oh, I believe what we called them, the con-oils.**
 24 Q. Okay. Do you know what an Express sunflower is?
 25 A. **No.**

1 Q. Okay. Were you ever involved with any of the
 2 communications between Dallas and Jason in the context of
 3 Jason's agronomy advice to Dallas?
 4 A. **No.**
 5 Q. Do you farm yourself?
 6 A. **No.**
 7 Q. Okay. Then why did you say "my field" then when
 8 he sprayed your field?
 9 A. **Dallas gave us some land to farm, his boy and I.**
 10 Q. Okay.
 11 A. **And I had sunflowers in that year, and Max had**
 12 **wheat I think.**
 13 DALLAS SCHOTT: Wheat or something, yeah. It was
 14 an incentive --
 15 MS. NEVILLE: Okay. He's got to testify, not
 16 you.
 17 A. **But, you know, that year I had a couple hundred**
 18 **acres worth of sunflowers and Max had about that in wheat.**
 19 **It was our little bonus deal.**
 20 Q. **(BY MS. NEVILLE)** Okay. So you farmed that year,
 21 but you're not farming now --
 22 A. **No.**
 23 Q. -- is what you're telling me? Okay.
 24 A. **We used his machinery and whatever.**
 25 Q. Okay. In 2014 when you were farming, did you get

1 Q. Or a regular sunflower?
 2 A. **Regular sunflowers, that's what I had.**
 3 Q. Okay. And you said I believe we called them the
 4 con-oils. Who's we?
 5 A. **(Pointing.)**
 6 Q. You and --
 7 A. **Dallas and I.**
 8 Q. You and Dallas, okay. And so what makes you say
 9 I believe we called them the con-oils?
 10 A. **I think that is their name, ain't it?**
 11 Q. Okay. So that's what I'm getting at. You did
 12 not know that Clearfield sunflowers come in con-oils,
 13 confectionary and regular oils?
 14 A. **Nope.**
 15 Q. Okay. And Dallas didn't know that either, did
 16 he?
 17 MR. LUCE: Objection as to form of the question.
 18 You're asking him to know what Dallas knew.
 19 Q. **(BY MS. NEVILLE)** Well, I mean, answer if you
 20 can.
 21 A. **Probably not clear.**
 22 Q. Have you done any independent research regarding
 23 chemicals or the application of certain chemicals to
 24 different sunflower types, anything like that?
 25 A. **No.**

1 you pick that up from, I'm not sure if you're asking him
2 about Exhibit 28 because I don't know what year that is.

3 MS. NEVILLE: Okay.

4 MR. LUCE: If you're asking generally a recipe
5 card, who did you pick it up from.

6 MS. NEVILLE: I apologize, that's my mistake.

7 Q. (BY MS. NEVILLE) When you went to pick up a
8 prescription, generally speaking, you picked up the recipe
9 card or the recipe like the note reflected in 28, and I'm not
10 talking in particular this particular one, you picked up this
11 note and then what did you do with it?

12 A. **These guys, their buildings are probably a block
13 apart.**

14 Q. Okay.

15 A. **So Jason sits in the office. The Butler building
16 is where the chemical is at. They might meet you over there
17 one time or you stop by the office and pick this up and
18 they've already called over to the Butler building, let them
19 know what you're coming to get.**

20 Q. Okay.

21 A. **They got it all loaded.**

22 Q. So sometimes is it like when you go to the doctor
23 and they can call the prescription in so you don't even have
24 to take a paper over there?

25 A. **Well, like something like this they're going to**

1 Q. Okay.

2 A. **Well, the year before I had a little wheat in.**

3 Q. Okay. What is your position with Wheat Growers?

4 A. **Oh, shop foreman, truck driver, kind of
5 jack-of-all.**

6 Q. Okay. When did you leave CC Feeders and go to
7 South Dakota Wheat Growers?

8 A. **January.**

9 Q. Of?

10 A. **2015.**

11 Q. Of 2015, or 2016?

12 A. **'15.**

13 Q. '15. And what was the reason for that change?

14 A. **Oh, just a little change.**

15 Q. Okay. Did it have anything to do with this
16 lawsuit?

17 A. **No. Dallas runs his operation, everything about
18 9-O.**

19 Q. What does that mean?

20 A. **Go go go, you know.**

21 Q. So you wanted to slow down a little bit?

22 A. **Yep.**

23 Q. What kind of farmer is Dallas? I mean, would you
24 say he is -- you worked with him for ten years. Would you
25 say he's conscientious?

1 **give, or you know, they did.**

2 Q. Okay.

3 A. **Like I say, I don't know, after he's got all this
4 entered into his monitor on his sprayer, whether they're
5 still giving it, I'm not sure.**

6 Q. Okay. And then how does the -- how do the people
7 in the bucket building know what to give you, you just hand
8 them that slip?

9 A. **Jason called over and told them what to load
10 probably.**

11 Q. Okay. When you were farming in 2014, did you
12 ever think, "Yeah, that Jason, I don't really think he knows
13 what he's talking about, I'm just going to do it my way?"

14 A. **Nope, I didn't have nothing to doubt him for.**

15 Q. Okay. So when Jason told you to put certain
16 chemicals on certain crops, you followed his recommendations?

17 A. **Yes.**

18 Q. Okay. No reason not to, right?

19 A. **No.**

20 Q. It's his job?

21 A. **Yes.**

22 Q. When did you quit farming?

23 A. **2014.**

24 Q. Oh, okay. So you just did it that one year?

25 A. **Yeah.**

1 A. **Well, I'd say he's a pretty good farmer. We
2 raised some good crops.**

3 Q. Okay. Would you describe him as sloppy or
4 somebody who doesn't pay attention to what he's doing?

5 A. **No, I wouldn't call him sloppy, but maybe on this
6 deal, I don't know.**

7 Q. Why do you say that?

8 A. **Well, there was -- he sprayed the wrong
9 sunflowers with the wrong chemical, you know.**

10 Q. So just because he sprayed the wrong chemical on
11 the wrong sunflowers, you think that that was his mistake?

12 A. **Yeah.**

13 Q. Okay. How do you think he should have known -- I
14 mean, can you look at the sunflowers and tell the difference
15 between them?

16 A. **When you harvest them, the confection seeds are
17 bigger.**

18 Q. Okay.

19 A. **The con-oils got a stripe them on, but they're
20 bigger than the little black oils like I had.**

21 Q. Okay. We're talking about harvesting.

22 A. **Well, the seed, there's a hair difference.**

23 Q. When the plant is about yea tall, can you look at
24 the plant and tell the difference between them?

25 A. **No.**

1 Q. So you just have to go by what was planted to
 2 know what you planted there, right?
 3 A. Yeah.
 4 Q. But you didn't know that there were different
 5 kinds of Clearfield sunflowers?
 6 A. No.
 7 Q. So if Dallas didn't know that, how was that his
 8 fault?
 9 A. He bought them.
 10 Q. Okay. And if he told Jason Fees what he had
 11 planted and Jason mistakenly gave him the wrong prescription,
 12 would that still be Dallas's fault?
 13 MR. LUCE: Objection, argumentative, improper in
 14 form, assumes facts not in evidence. You're asking an
 15 opinion question of a witness who is a fact witness as well.
 16 A. So what do you want me to say?
 17 Q. (BY MS. NEVILLE) I said if the error had been
 18 because Jason Fees had prescribed the wrong chemical to those
 19 and Dallas just followed the instructions, do you still think
 20 it's Dallas's fault?
 21 MR. LUCE: Same objections. Also vague and --
 22 A. Okay, and this is something that we visited
 23 about. Dallas told Jason that he bought all Clearfields,
 24 okay.
 25 Q. (BY MS. NEVILLE) When did Dallas tell Jason

1 kind of the way we done things.
 2 Q. Okay. It was actually a listing of each legal
 3 description?
 4 A. Yes.
 5 Q. And she color coded them to what crop was planted
 6 on those in that particular year?
 7 A. Yes.
 8 Q. And she kept one for each year that was planted?
 9 A. Yeah, as far as I know.
 10 Q. Okay. Do you know anything about books that he
 11 kept, three-ring binders kind of like -- or spiral notebooks
 12 like this?
 13 A. She -- we'd kind of tell her every day what we
 14 done, like the -- yesterday. We'd come in the next morning,
 15 okay, we got Joe Lee quarter done or whatever, you know.
 16 Q. I planted this quarter today --
 17 A. Yeah.
 18 Q. -- or I sprayed this quarter today?
 19 A. And Dallas done the same. Dallas done all the
 20 spraying.
 21 Q. Okay.
 22 A. So when he'd come in, it was the same thing. "I
 23 sprayed this quarter today, I sprayed this quarter."
 24 Q. And she'd make notes in the book?
 25 A. Yeah.

1 that?
 2 A. Somewheres when he pre-bought his chemical like
 3 at the end of the year.
 4 Q. And how do you know that Dallas told Jason that?
 5 A. Well, this is what -- visiting with Jason and --
 6 Q. This is what Jason says?
 7 A. You know, okay, that's simple enough, we only
 8 need the one chemical.
 9 Q. Okay. So Jason told you or made the statement in
 10 your presence that Dallas told him he had all one kind of
 11 sunflower?
 12 A. Yes.
 13 Q. And did he say when Dallas told him that?
 14 A. No.
 15 Q. He didn't?
 16 A. No.
 17 Q. Were you present for any conversation where
 18 Dallas told Jason that?
 19 A. Nope.
 20 Q. Did Dallas ever tell you that?
 21 A. No.
 22 Q. What do you know about Dallas's farm books?
 23 A. Oh, I think that Terry would take a color code or
 24 whatever, yellow is going to be sunflowers, the green might
 25 be wheat, and we had all these fields by names, and that's

1 Q. Okay. Did you ever see those books?
 2 A. Yeah, she filled them out.
 3 Q. Okay.
 4 A. Then there was days we had to run back and look
 5 for something, you know, when did we do this, you know, to
 6 have some dates.
 7 Q. Okay.
 8 A. You know, it would be in there.
 9 Q. Okay. Do you know if -- there's some pages that
 10 are missing from the 2014 book. Do you have any idea what
 11 would have happened to those?
 12 A. No.
 13 Q. Okay. So aside from that color coded crop report
 14 thing that you're talking about that Hope kept for Dallas, do
 15 you have any independent recollection of what crops were
 16 planted where in 2014 on Dallas's property?
 17 A. No.
 18 Q. I mean, that was a lot, right, it's fair to say?
 19 A. Yeah.
 20 Q. It would be difficult to have that memorized?
 21 A. Yeah. I can guess a few of the fields that
 22 got --
 23 Q. For 2014 you can? Really?
 24 A. Skinner Road. Gugel land.
 25 Q. Okay. That was where the sunflowers were?

STATE OF SOUTH DAKOTA IN CIRCUIT COURT
COUNTY OF CORSON FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON COUNTY
FEEDERS, INC.,

Plaintiffs,

vs.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15 CIV.
15-000012

DEPOSITION
OF
GERALD SMITH

DATE: Wednesday, August 24, 2016
PLACE: Norman E. Mark - Court Reporter Service
Fargo, North Dakota
BY: Charla A. Pawlik, R.P.R.

1 APPEARANCES

2 FOR THE PLAINTIFFS:

3 Bantz, Gosch & Cremer, L.L.C.
4 Attorneys at Law
5 305 Sixth Avenue Southeast
6 P.O. Box 970
Aberdeen, South Dakota 57402
By: Melissa E. Neville

7 FOR THE DEFENDANT:

8 Lynn, Jackson, Shultz & Lebrun, P.C.
9 Attorneys at Law
10 P.O. Box 2700
11 Sioux Falls, South Dakota 57101
By: Michael L. Luce

1 CONTENTS
2 WITNESSES

3 PAGE

4 GERALD SMITH

5 Examination by Ms. Neville 4
6 Examination by Mr. Luce 52

7 EXHIBITS

8 DEPOSITION
9 EXHIBIT NO.

10 MARKED

11 1 Resume 4
12 2 Report dated 7-20-16 4
13 3 Service Documents dated 11-17-15 23
14 4 Handwritten Receipt dated 6-13-14 25
15 5 invoice dated 6-13-14 25
16 6A SunOpta Seeds 4421CL Label 40
17 6B Photograph 40
18 7A SunOpta Seeds 9521 Label 40
19 7B Photograph 40

EXHIBIT

tabbies

1 PROCEEDINGS

2 (whereupon, the deposition of GERALD
3 SMITH commenced at 2:05 p.m. as follows:)

4 (whereupon, Deposition Exhibit Nos.
5 1 & 2 were marked for identi-
6 fication by the court reporter.)

7 GERALD SMITH,

8 HAVING BEEN FIRST DULY SWORN TO TESTIFY THE TRUTH,
9 THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, RELATIVE
10 TO THE CAUSE SPECIFIED, TESTIFIED AS FOLLOWS:

11 EXAMINATION

12 BY MS. NEVILLE:

13 Q. Mr. Smith, could you state your full
14 name for the record, please?

15 A. Gerald Henry Smith.

16 Q. And I'm Melissa Neville. I'm an
17 attorney for the plaintiff in this case. I
18 introduced myself earlier.

19 A. Uh-huh.

20 Q. I assume you've had your deposition
21 taken before?

22 A. Yes.

23 Q. Okay. So if I ask you any questions
24 that you don't understand, just let me know that. If
25 you answer I'm going to assume you understood them.
And then of course just wait until I'm done asking
even if you know what I'm going to ask before you

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1 technology is always changing?
2 A. Pardon?
3 Q. Technology is always changing?
4 A. Yes.
5 Q. Even in the farming business?
6 A. Yes.
7 Q. And someone -- a farmer or a grower --
8 I'll say a grower in this case -- might employ an
9 agronomist to keep up on that technology particularly
10 as it relates to GMOs?
11 MR. LUCE: Objection. Overly broad.
12 Vague. And form.
13 Q. (Ms. Neville continuing) Is that
14 something that an agronomist would advise a grower
15 about?
16 A. There are those that hire their own
17 agronomists to do -- to keep abreast of the changing
18 technology, yes.
19 Q. Okay. Okay. Do you have an opinion as
20 to whether it's ever acceptable for a grower then to
21 rely on the advice or direction of his or her
22 agronomist in -- in his behavior or am I to
23 understand what you said earlier, it doesn't matter,
24 the final decision's always theirs, they're the ones
25 responsible?

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1 Q. (Ms. Neville continuing) You can
2 answer.
3 A. He can take it into his decision-making
4 process.
5 Q. Okay. So if I understand you
6 correctly, you're saying he can consider it but he
7 shouldn't rely on it?
8 MR. LUCE: Objection.
9 Q. (Ms. Neville continuing) Is that a
10 fair statement?
11 A. He can consider it.
12 Q. Okay.
13 A. It's his decision.
14 Q. Okay. Do you know how much business in
15 dollars Dallas Schott did or Corson County Feeders,
16 Inc., did with South Dakota Wheat Growers in 2014?
17 A. It was in some of the documents.
18 Q. Okay. Did you consider that important?
19 A. No.
20 Q. Okay. In the same area a little bit
21 farther down of your report, section 2 again, page 2,
22 you said that a reasonable grower would be expected
23 to know which fields have GMO sunflowers and which
24 fields have non-GMO sunflowers. But is it enough for
25 the grower to just know whether it's GMO or non-GMO?

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1 A. They're the owner. They're the ones
2 who --
3 Q. Okay.
4 A. -- make that decision.
5 Q. So if an agronomist gives bad advice,
6 the agronomist is not responsible for that?
7 MR. LUCE: Objection. Form. Same
8 objections.
9 A. I don't know how to answer that one.
10 Q. (Ms. Neville continuing) Okay. Well,
11 you told me before that the owner or the grower has
12 the ultimate authority; right?
13 A. Yes.
14 Q. He decides what's actually done?
15 A. Yes.
16 Q. So do you have an opinion as to whether
17 it's ever acceptable for the grower to -- to simply
18 rely on what the agronomist has told him to do?
19 MR. LUCE: Objection. Overly broad.
20 Q. (Ms. Neville continuing) Well, I'm
21 asking you, do you have an opinion?
22 A. Yes.
23 Q. Okay. What is that opinion?
24 A. He --
25 MR. LUCE: Same objection.

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1 Is that enough?
2 MR. LUCE: Objection. Vague. Enough
3 for what?
4 Q. (Ms. Neville continuing) I mean, he
5 really needs to know what kind of GMO; doesn't he?
6 MR. LUCE: Objection. Vague.
7 Q. (Ms. Neville continuing) Because
8 there's different kinds of GMO sunflowers; right?
9 A. But the technology that we're talking
10 about is the same no matter which GMO sunflower you
11 would purchase.
12 Q. Okay. So -- so if he was applying
13 herbicide or herbicide -- however you say it;
14 right -- to sunflowers, all he really needs to know
15 then in differentiating is whether they're GMO or
16 non-GMO; is that what you're saying?
17 A. Yes.
18 Q. So do you know what kind of different
19 sunflower seeds can be grown in South Dakota?
20 A. No.
21 Q. There's like oils, con oils, that kind
22 of thing. Do you know anything about those?
23 A. Well, there -- yes, there's quite a
24 different number of varieties sold by different
25 companies --

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1 would have been provided?
2 MS. NEVILLE: Yes.
3 MR. LUCE: Okay.
4 A. So your question?
5 Q. (Ms. Neville continuing) How -- how
6 would -- you said the grower would know by looking at
7 the seed bag or the labels. So my question to you
8 is, where -- where does -- where does the grower look
9 to find the GMO on the seed bag or the labels?
10 A. I don't see anything in these
11 documents --
12 Q. Okay.
13 A. -- Indicating which -- what they are.
14 Q. So basically they'd have to take the
15 number and go back and match the number up to see
16 what kind of hybrid that number matches to?
17 A. No, I take that back. I think this CL
18 stands for Clearfield.
19 Q. Okay. So if you didn't know that it
20 was a Clearfield sunflower and you didn't know what
21 CL stood for, is there any other way to tell that
22 it's a Clearfield sunflower?
23 A. Not that I'm aware of.
24 Q. If you take the hybrid number or the
25 variety number, is there a place that that can be

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1 whether he has Clearfield seeds -- he may know that
2 he's got GMO or non-GMO. But if he doesn't know that
3 he has Clearfield seeds, would it be reasonable for
4 him to rely on an agronomist that said put this
5 Beyond on your crops?
6 MR. LUCE: Objection. It assumes facts
7 not in evidence. Overly broad.
8 Q. (Ms. Neville continuing)
9 Hypothetically speaking.
10 A. The question again?
11 MS. NEVILLE: I'm going to make you do
12 it again.
13 (The last question was read by the
14 court reporter.)
15 A. No, it wouldn't be reasonable.
16 Q. (Ms. Neville continuing) Okay. Why
17 not?
18 A. Because he's asking him to make a
19 recommendation on something the agronomist doesn't
20 know and the grower doesn't know.
21 Q. Okay. In section 2 you also said as a
22 certified applicator Dallas Schott is responsible to
23 know what chemical he is applying to what fields.
24 A. Yes.
25 Q. Okay. Is there any evidence that you

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1 looked up to match it to find out what kind of seed
2 it is?
3 A. I would think there's information
4 provided by the companies that sell the seed. They
5 usually have brochures that say whether they're a GMO
6 or non-GMO or more descriptive other than what
7 information you have there.
8 Q. And -- and it would have to be even
9 more descriptive than just non-GMO or GMO, right,
10 because different GMOs call for different chemicals?
11 A. Yes.
12 Q. You mentioned in your report that the
13 Beyond label clearly says has to be only applied to
14 Clearfield seeds. If the grower doesn't know what a
15 Clearfield seed is, would the Beyond label do much to
16 inform him of what it should be applied to?
17 A. Could you repeat that?
18 (The last question was read by the
19 court reporter.)
20 A. Well, the label wouldn't be of much
21 advantage if he didn't know what kind of seed he was
22 working with.
23 Q. (Ms. Neville continuing) Would it be
24 reasonable in that instance assuming the grower
25 doesn't know what a Clearfield seed is or that he --

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1 have that he didn't know what chemical he was
2 applying, that Mr. Schott didn't know what chemical
3 he was applying?
4 A. Well, he knew what chemical he was
5 applying.
6 Q. Okay. So if he knew what chemical he
7 was applying to his crop and he knew that he had
8 sunflower seeds planted, in your opinion where did he
9 go wrong? What -- what did he do wrong in this case?
10 A. He put the Beyond on the non-GMO
11 sunflowers.
12 Q. Okay. And -- and if I can take it one
13 step further. I understand you to be saying he put
14 Beyond on a crop that he didn't know for sure was
15 safe to be used with Beyond?
16 MR. LUCE: Objection. Misstatement.
17 Q. (Ms. Neville continuing) Well, I mean
18 you tell me. You're saying he needs to know what
19 crop he's planted and what chemical he's applying;
20 yes?
21 A. Correct.
22 Q. Okay. And we know he knew what
23 chemical he was applying?
24 A. Yes.
25 Q. And he applied it to the crops in this

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1 case believing them to be a GMO crop but they
2 weren't --
3 MR. LUCE: Objection.
4 Q. -- right?
5 MR. LUCE: Assumes facts not in
6 evidence as to what he believed.
7 Q. (Ms. Neville continuing) I mean, do
8 you have any evidence that he intentionally applied
9 Beyond to a crop he knew couldn't withstand it?
10 A. No.
11 Q. Okay. It was an accident?
12 A. It was a misapplication --
13 Q. Okay.
14 A. -- accident, whatever --
15 Q. Okay.
16 A. -- you want to call it.
17 Q. So then taking this step by step. I
18 understand you to be saying that his mistake was in
19 not knowing exactly what GMO brand he had to make
20 sure it was safe to use with --
21 MR. LUCE: Objection.
22 Q. -- Beyond?
23 MR. LUCE: Objection as to form. Not
24 knowing exactly. He was responsible for knowing his
25 crops.

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1 he's going to do all that himself, why does he need
2 an agronomist?
3 A. He doesn't.
4 Q. Because that's usually what an
5 agronomist does; right?
6 MR. LUCE: Objection. Overly broad and
7 vague.
8 A. The agronomist information -- the
9 agronomist does the sort of thing that you described
10 and staying abreast of what's happening in the
11 industry, but if he's not asked he can't be held
12 responsible for what some individual does beyond the
13 scope of their expertise.
14 Q. (Ms. Neville continuing) Okay. So in
15 this case your understanding is that -- that Dallas
16 Schott never asked Jason Fees?
17 A. Correct.
18 Q. So in summary -- and I don't want to
19 put words in your mouth so you tell me if I'm wrong.
20 But it's your contention that South Dakota Wheat
21 Growers and Jason Fees as their employee more
22 specifically had no responsibility for any direction
23 they may or may not have given to Dallas Schott to
24 spray that 75 gallons of Beyond to his sunflower
25 seeds --

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1 A. He should have known what crop was in
2 what field.
3 Q. (Ms. Neville continuing) Okay. And
4 not just what crop but what GMO brand?
5 A. Yes.
6 Q. And so in not knowing what GMO brand he
7 had he breached his standard of care in your opinion?
8 A. Yes.
9 Q. So if a grower -- if the grower is
10 responsible and as you said he -- he ultimately makes
11 all the decisions, what does he need an agronomist
12 for?
13 MR. LUCE: Objection. Overly broad.
14 Vague.
15 Q. (Ms. Neville continuing) I mean,
16 isn't -- isn't that what you pay an agronomist for,
17 to give you that instruction?
18 A. Well, he can do that. He can read the
19 literature. He can go on the Internet. All of this
20 stuff -- all of the information we're talking about
21 is readily available through South Dakota State
22 University or on the Internet.
23 Q. Okay. So again I ask if -- if he's
24 going to do his own research and he's going to go on
25 the Internet or he's going to go to the classes and

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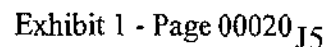
1 MR. LUCE: Objection.
2 Q. -- or sunflower plants?
3 MR. LUCE: Objection. The report
4 speaks for itself and a misstatement and overly
5 broad.
6 Q. (Ms. Neville continuing) Do you
7 believe that South Dakota Wheat Growers or Jason Fees
8 has any responsibility for the direction that Jason
9 Fees gave to Dallas Schott in spraying 75 gallons of
10 Beyond to Dallas Schott's sunflower crop?
11 MR. LUCE: Again objection. There's no
12 evidence that Jason Fees gave advice on the
13 application of chemicals.
14 A. It's my understanding he just sold him
15 the chemical that he ordered.
16 Q. (Ms. Neville continuing) And gave no
17 advice at all?
18 A. Correct.
19 Q. And you have read Jason Fees's
20 deposition?
21 A. Yes.
22 Q. And -- and part of the reason you say
23 that is Fees claims he was told that Schott had all
24 Clearfield sunflowers?
25 A. That was the understanding.

Date: 6/13/14

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0000994975 R15761/22414 SD-065 DRK 01

QUANTITY	ITEM #	DESCRIPTION/EPA#	REF#	PRICE	PREPAID	TOTAL
75.000	GALLONS 160 332205	BEYOND 1		431.0000	D \$32,325.00	\$32,325.00

CORSON COUNTY FEEDERS INC
% DALLAS SCHOTT
PO BOX 560
MCLAUGHLIN SD 57642

CHECK NUMBER
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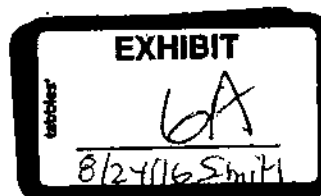
BRAND: 4421CL

Hybrid Sunflower Seed

Lot Number : US18U14190-4C4D
Size: 4
Seeds/Lbs: 8,655
Seeds/Bag: 225,000
Variety : E80352CL
Origin : CA, USA
Date Tested : 01/2016
Net Weight : 26.0 LBS
Germination : 85.00%
Purity : 99.50%
Inert Matter : 0.50%
Other Crop : None
Weed Seed : 0.00%
Nox Weeds: None
Hybridity: 90-95%

Warning: Seed Treated With Cruiser
5FS Insecticide, and Apron XL,
Maxim 4FS and Dynasty Fungicides

SunOpta, 1220 Sunflower St.
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SunOpta Seeds

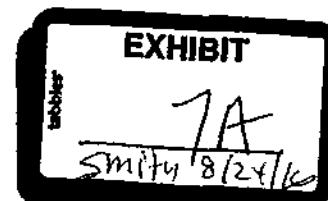
BRAND: 9521

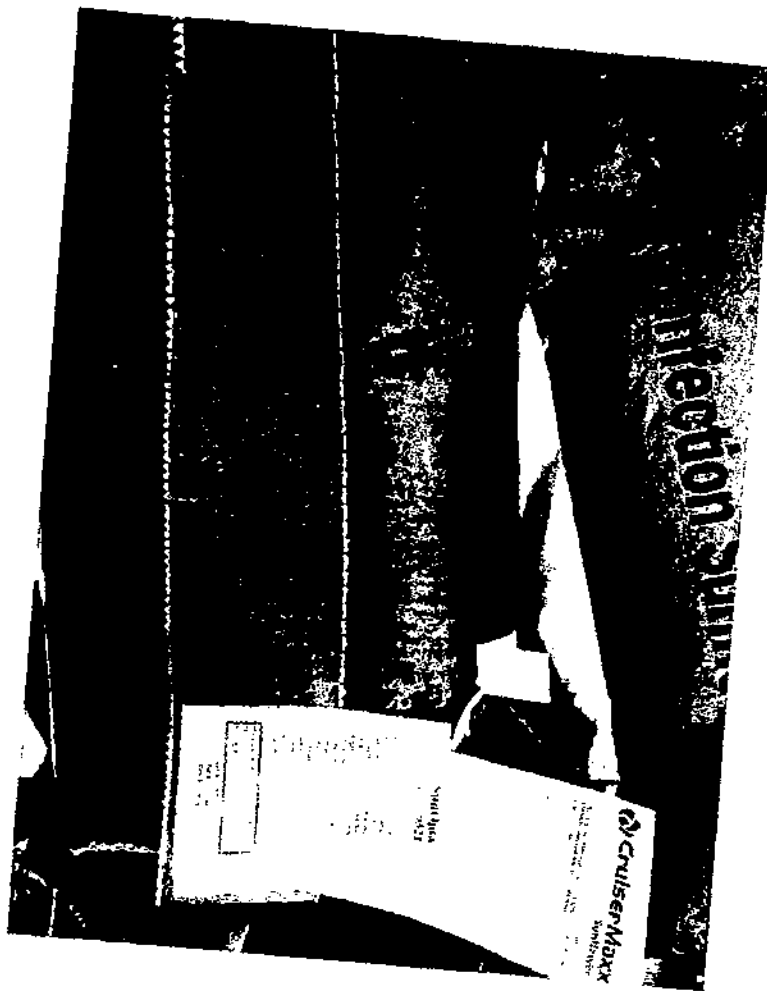
Hybrid Sunflower Seed

Lot Number :	USL8U14401-MC4D
Size:	Medium
Seeds/Lbs:	3,360
Seeds/Bag:	100,000
Variety :	06EXP01
Origin :	CA. USA
Date Tested :	01/2016
Net Weight :	29.8 LBS
Germination :	85.00%
Purity :	99.50%
Inert Matter :	0.50%
Other Crop :	None
Weed Seed :	0.00%
Nox Weeds:	None
Hybridity:	90 - 95%

Warning: Seed Treated With Cruiser
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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF CORSON) :SS
3 FOURTH JUDICIAL CIRCUIT

4 Dallas Schott and Corson 15CIV15-000012
5 County Feeders, Inc.,

6 Plaintiffs,

7 -vs-

8 South Dakota Wheat Growers
9 Association,

10 Defendant.

11 * * * * *

12 D E P O S I T I O N O F

13 Hugh Randall, Ph.D

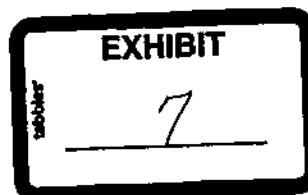
14 * * * * *

15
16 APPEARANCES: Ms. Melissa E. Neville
17 Bantz, Gosch & Cremer
18 Aberdeen, South Dakota
19 Attorney for the Plaintiffs.

20 Mr. Michael L. Luce
21 Lynn, Jackson, Shultz & Lebrun
22 Sioux Falls, South Dakota

23 Attorney for the Defendant.

24 ALSO PRESENT: Mr. Dallas Schott
25



K1
10-203

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1 our discussions.
 2 MS. NEVILLE: Yeah.
 3 Q First of all, how many times have you talked to
 4 Ms. Neville about this matter?
 5 A Well, let's see. Once I guess. There's some e-mails.
 6 Q The one time when she called you initially is the only
 7 time you have talked to her?
 8 A I believe so.
 9 Q Okay. Talked to her today?
 10 A Well, of course.
 11 Q And you indicated a draft report was sent to you that you
 12 reviewed. Did you have any discussion with her about the
 13 draft report and any of the information she had typed up
 14 for your signature?
 15 A I -- I'm trying to remember. Basically she made
 16 corrections to what I made initially.
 17 Q And I don't need -- I just -- did you have discussions
 18 with her?
 19 A No.
 20 Q Okay. Are you aware of any other incidents where
 21 Mr. Schott has had crop loss from chemical application?
 22 A No.
 23 Q Okay. And, again, your knowledge of Mr. Schott and his
 24 operation is very limited to what you know concerning
 25 this particular case?

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1 Q Okay. Now, Mr. Luce asked you repeatedly about shared
 2 responsibility. Is -- and then you explained, well, no,
 3 it's reasonable if he relied on the advice that was given
 4 by Mr. Fees. In your experience of, you know, the past
 5 25 years plus, is it customary for a grower to rely on
 6 the direction of his crop consultant or his agronomist?
 7 MR. LUCE: Objection. Leading and suggestive. This
 8 is your witness. And also being overly broad and vague
 9 in form.
 10 Q You can answer if you can.
 11 A The answer is yes, and that -- would you restate that,
 12 please.
 13 MR. LUCE: He has answered the question, so...
 14 MS. NEVILLE: I mean -- yeah.
 15 Q Now, Mr. Luce also asked you several questions about
 16 reading the label. I believe you have printed out the
 17 Clearfield system and the Beyond labels. It seems to me
 18 they're all in terms of Clearfield and non-Clearfield.
 19 Is that a correct statement? Is there anything in those
 20 labels that talks about conoils or confections or oils or
 21 anything like that?
 22 A It talks about sunflowers and -- the only distinction you
 23 can make here is the pair. We're talking about one
 24 chemical and one genetically modified sunflower. That's
 25 all that talks about.

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1 A I wouldn't say it's very limited. I would say it's quite
 2 a bit of depth. Just -- now, this is just 2014. But if
 3 he is doing what he's doing and the farming he's doing, I
 4 mean he's no neophyte.
 5 Q Let me re --
 6 A He is very good.
 7 Q Let me rephrase it and not use "very limited." Your
 8 knowledge of Mr. Schott's farming operation is based upon
 9 the information you have been provided regarding this
 10 particular incident?
 11 A That's correct.
 12 MR. LUCE: I have no further questions.
 13 EXAMINATION BY MS. NEVILLE:
 14 Q I am just going to follow-up with a couple of questions
 15 for you, Doctor Randall. If -- and I know you used the
 16 word "set up." Were you meaning prescription or
 17 direction, or were you meaning as in intentional misdeeds
 18 that was -- was being done by the other side?
 19 A I think I indicated when I contradicted what I said, that
 20 I don't think it was on purpose. No one is doing -- no
 21 one would possibly do this on purpose.
 22 Q Okay.
 23 A But through actions, you end up with these things
 24 happening. And there are places that you could have --
 25 someone could have stopped this.

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1 Q So would the label mean anything to the grower if the
 2 grower didn't know what Clearfield was?
 3 A I -- I can't determine -- I haven't talked to the grower
 4 in this case. If he doesn't know -- if you don't know,
 5 things happen. That's about all I can say.
 6 MS. NEVILLE: I don't have any other questions.
 7 We'll reserve.
 8 THE WITNESS: Just one moment. I would like to say
 9 that I am presenting this to a jury. I will -- there
 10 will be some minor modifications of the information that
 11 I have furnished, but there will be a lot of exhibits
 12 relating primarily to the numbers that we have got shown
 13 here today.
 14 BY MS. NEVILLE:
 15 Q Are you referring to Exhibit 4?
 16 A Yes.
 17 THE WITNESS: Do you have this, Mike?
 18 MR. LUCE: Yes. It's been marked as an exhibit,
 19 so -- and I will object to any additional opinions beyond
 20 what has been disclosed, but --
 21 (Witness excused at 11:49 a.m.)
 22
 23
 24
 25

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28095

DALLAS SCHOTT AND CORSON COUNTY FEEDERS, INC.,
Plaintiffs/Appellants,

v.

SOUTH DAKOTA WHEAT GROWERS ASSOCIATION,
Defendant/Appellee.

Appeal from the Circuit Court,
Fourth Judicial Circuit,
Corson County, South Dakota
The Honorable Michael Day, Presiding

APPELLEE'S BRIEF

Melisa E. Neville
Justin M. Scott
Bantz, Gosch & Cremer, L.L.C.
305 6th Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
Attorneys for Appellants

Michael L. Luce
Lynn, Jackson, Shultz & Lebrun, PC
110 N. Minnesota Avenue, Suite 400
P.O. Box 2700
Sioux Falls, SD 57101
Attorney for Appellee

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JURISDICTIONAL STATEMENT

This appeal is from the entry of Summary Judgment, entered on December 13, 2016, by the Honorable Michael Day, Fourth Judicial Circuit Court. Certified Record (“CR”) at 244. Appellants served the Notice of Entry on December 19, 2016. CR at 245-247. Appellants’ Notice of Appeal was served on January 12, 2017, and filed on January 18, 2017. CR at 248-249. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether it was err for the trial court to enter summary judgment in favor of Appellee.

Relevant Authority: *Goepfert v. Filler*, 1997 S.D. 56, 563 N.W.2d 140; *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, 758 N.W.2d 754; *Stone v. Von Eye Farms*, 2007 S.D. 115, 741 N.W.2d 767; *Westover v. East River Elec. Power Co-op., Inc.*, 488 N.W.2d 892 (S.D. 1992).

STATEMENT OF THE CASE

This claim concerns crop damage as a result of herbicide application in July 2014. Appellant Dallas Schott was growing sunflowers. Appellant Corson County Feeders, Inc. is owned and operated by Schott. For several years prior to 2014, Appellants had been planting both Clearfield and non-Clearfield sunflowers. Clearfield sunflowers are an herbicide-tolerant plant that is matched with the

herbicide Beyond. Beyond may be applied to Clearfield sunflowers, but it will kill non-Clearfield sunflowers if applied to them. In the past, Appellants had purchased both sunflower seeds and herbicide chemicals from Appellee. Several years prior to 2014, however, Appellants began purchasing the sunflower seeds, both Clearfield and non-Clearfield, from Dahlgren (a/k/a SunOpta).

In this case, Schott applied the chemicals to his own fields. Through no direction or instruction from Appellee, Appellants applied the Beyond chemical to non-Clearfield sunflowers. TapOut, however, was the appropriate chemical for use on non-Clearfield sunflowers. As a result, the non-Clearfield sunflowers were destroyed. As a licensed applicator, Schott had the responsibility to apply the correct chemical. He did not. Schott also had the responsibility to read the directions included with the Beyond chemical. He did not. Accordingly, in this case, Appellants assumed the risk of danger inherent in applying incompatible chemicals to sunflowers. In addition, Appellants' misapplication of the chemical was the sole the legal cause of the damaged sunflowers.

STATEMENT OF THE FACTS

Prior to 2014, Appellants would purchase the herbicide TapOut to be used with non-Clearfield sunflowers and the herbicide Beyond to be used with the Clearfield sunflowers. CR at 58-59; Deposition of Jason Fees at 26:6-25, 27:1-4. Also prior to 2014, Appellants had apparently known which sunflower seeds had been planted in which fields in order to apply the TapOut on the non-Clearfield

sunflowers and Beyond for the Clearfield sunflowers. CR at 53; Deposition of Dallas Schott at 42:4-6. For the 2014 growing season, Appellants were placing the sunflower seed orders with Dahlgren, but still purchasing the chemicals from SDWGA. CR at 55; Schott Depo at 65:2-4.

Jason Fees (“Fees”), the agronomist at SDWGA would rely upon the producer, i.e., Appellants, to tell the agronomist what crops he was planting and where they were planted so that the chemicals could be matched. CR at 57-58; Deposition of Jason Fees at 21:8-14, 23:8-11. A grower would be discussing seed purchases and chemical purchases prior to the growing season. CR at 57; Fees Depo at 22:17-25. These discussions related to purchasing the herbicide chemicals purchased for the sunflower field that suffered a loss occurred in December 2013 and early January 2014. CR at 57-58; Fees Deposition at 22:17-25, 23:1-16). Fees had discussions with Schott regarding Appellants’ chemical needs for the 2014 growing season. CR at 58; Fees Deposition at 23:24-25, 24:1-7, 26:23-25. Fees recalls that Schott first intended to have a mixture of Clearfield and non-Clearfield sunflowers for the 2014 growing season. CR at 59; Fees Deposition at 27:1-4.

As Fees was attempting to get an order placed for chemicals, Schott again contacted Fees in January 2014. CR at 59; Fees Deposition at 27:5-11. At that time Schott indicated that he instead was opting for only Clearfield sunflowers for the 2014 growing season. CR at 59, 63, 66; Fees Deposition at 27:5-11, 50:19-23; Deposition of Gerald Smith at 26:21-25, 27:1-14. An order was placed consistent with Schott’s stated intent, and, because of Schott only intending to plant

Clearfield sunflowers, only the Beyond chemical was purchased. CR at 63; Fees Deposition at 49:7-13. This was reflected in the order that was provided to Schott. CR at 239, 59, 67, 74-75; Exhibit 23; Fees Deposition at 29:12-22, 30:3-23; Smith Deposition at 29:11-20, 30:7-16, 31:2-8; Deposition of Hugh Randall at 45-46. When the growing season commenced in Spring 2014, Appellants did order a small number of non-Clearfield sunflower seeds from SDWGA. CR at 63; Fees Deposition at 49:18-25, 50:1-7. Appellants' other orders were placed exclusively with Dahlgren. CR at 63; Fees Deposition at 49:22-23. When Appellants ordered a small amount of non-Clearfield sunflower seeds to use in a remaining section of fields, Fees recalls stating that the seeds were inconsistent with the seeds that Appellants had previously indicated would be planted for the 2014 growing season. CR at 63; Fees Deposition at 50:1-12.

Appellants would have been solely responsible for planting; the agronomist would not check with the producer as to what was actually planted. CR at 60; Fees Deposition at 38:1-19. The Beyond chemical that was to be applied to the Clearfield sunflower seeds, which had been previously purchased, was picked up by Appellants in June 2014. CR at 197, 61, 66; Exhibit 4; Fees Deposition at 41:1-12; Smith Deposition at 26:10-14. SDWGA neither planted nor supplied the initial order of sunflower seeds. CR at 64; Fees Deposition at 51:14-22. SDWGA would not have the bags in front of it to verify which seeds were Clearfield sunflower seeds and which were non-Clearfield sunflower seeds and in what fields they were

planted. CR at 64, 75; Fees Deposition at 51:14-22; Randall Deposition at 46:24-24, 47:1-9.

Just like Appellants planted the sunflowers, Appellants also applied the chemicals. CR at 51; Schott Deposition at 32:12-13. In fact, Schott himself was the only one that did the spraying of the Beyond chemical in July 2014. CR at 51, 52; Schott Deposition at 32:12-16, 37:12-19. Schott incorrectly applied the Beyond chemical to non-Clearfield sunflower seeds, causing the loss of the crop. CR at 68-69; Smith Deposition at 44:6-11, 45:11-16. A reasonable grower is expected to know which fields he had planted herbicide tolerant seeds and which fields he had not. CR at 66-67; Smith Deposition at 28:9-25, 29:1-2. Both Appellants' expert, Hugh Randall ("Randall"), and SDWGA's expert, Gerald Smith ("Smith"), agree that the grower would be responsible to know in which fields he would have Clearfield and non-Clearfield sunflower seeds. CR at 66-71, 75; Smith Deposition at 28:9-28, 29:1-2, 42:23-25, 43:1-20, 44:4-11, 46:1-8, 52:1-25, 53:-3; Randall Deposition at 47:5-22. As Appellants' expert concedes, this is important so that a grower does not apply Beyond to non-Clearfield sunflower seeds. CR at 75; Randall Deposition at 47:10-22. *See* CR at 79; Deposition of Craig Maher at 22:7-10).

The grower in this case, Schott, was responsible for the misapplication of the Beyond to the non-Clearfield sunflower seeds. CR at 68-69; Smith Deposition at 42:23-25, 43:1-20, 44:4-24, 45:7-16. Fees did not state to Appellants that Beyond could be used on non-Clearfield sunflower seeds. CR at 80; Maher

Deposition at 37:2-25, 38:1-23. The fault for this loss not only rests with Schott as the grower, but also Schott as a licensed applicator. CR at 82; Deposition of Mike Beuchler at 18:8-12. Schott is an applicator licensed in the state of South Dakota. CR at 51; Schott Deposition at 32:12-16. As a licensed applicator, Schott is responsible for knowing what chemicals he is applying and to make sure that the chemicals are appropriate for the crops involved. CR at 70-71; Smith Deposition at 52:8-25, 53:1-3. SDWGA was not involved in the chemical application. CR at 70; Smith Deposition 52:13-17. Mike Beuchler (“Beuchler”), who was working for Appellants at the time of this chemical application, has confirmed that this loss was due to the mistake by Schott. CR at 82; Beuchler Deposition at 18:3-12. As a licensed applicator, Schott was responsible for reading the label. CR at 75-76; Randall Deposition at 47:23-25, 48:1-25, 53:12-15. Schott has conceded that he neither read the label nor the insert for the Beyond chemical CR at 51-52; Schott Deposition at 34:19-25, 35:1-18, 35:20-25; 36:1; 37:20-25, 38:1. As Appellants’ expert acknowledged during his deposition, Schott was responsible for reading the label. CR at 75-76; Randall Deposition at 48:9-25, 53:12-15.

The proper application of chemicals is governed by South Dakota law. *See* SDCL § 38-21-44(2). It is a violation of law for an applicator to apply chemicals inconsistent with the label. *See id.* In addition, the applicator is responsible for following the label. CR at 51; Schott Deposition at 33:9-25, 34:1-10. The Beyond label and insert clearly provides that this chemical is only to be used on Clearfield sunflowers. CR at 51-52; Schott Deposition at 34:19-25, 35:1-5. Schott has

acknowledged that this loss was due to his spraying Beyond on non-Clearfield sunflowers. CR at 51; Schott Deposition at 34:11-15. Appellants' expert has acknowledged that the last barrier between a grower and a mistake is reading the label. CR at 77; Randall Deposition at 59:1-25. Appellants' expert acknowledged that if Schott would have read the label and followed it, this loss would have been prevented. CR at 77; Randall Deposition at 59:1-25.

Schott attempts to excuse his misapplication by stating that he was not aware of the particulars surrounding the difference between Clearfield and non-Clearfield sunflowers and what chemical to be used with each, yet he conceded that in previous years he has planted both Clearfield and non-Clearfield sunflowers and applied the appropriate chemicals. CR at 53; Schott Deposition at 42:4-6. *See* CR at 70-71; Smith Deposition at 52:4-25, 53:1-3. Schott further concedes that he should have read the label, and that he is responsible for applying Beyond on the non-Clearfield sunflowers, which destroyed them. CR at 52-53; Schott Deposition at 37:20-25, 38:1, 40:23-25, 41:1-13. Schott later told Fees that, when asked about what chemical was applied to the Clearfield sunflowers, the sunflowers were supposed to be Clearfield sunflowers, which is consistent with the information provided to SDWGA when the chemicals were ordered under the prepayment program in January 2014. CR at 62; Fees Deposition at 43:16-25, 44:1-14. Schott indicated that he was going to speak with the seed supplier to confirm that the purchased seeds were Clearfield sunflower seeds. CR at 62; (Fees Deposition at 43:16-25, 44:1-14).

STANDARD OF REVIEW

Summary judgment is appropriate under SDCL § 15-6-56(c) when the moving party demonstrates the absence of any genuine issue of material fact and establishes entitlement to judgment as a matter of law. The non-moving party must then set forth specific facts showing that there is a genuine issue of material fact for trial. SDCL § 15-6-56(e). “[A] disputed fact is not ‘material’ unless it would affect the outcome of the suit under the governing substantive law in that a ‘reasonable jury could return a verdict for the nonmoving party.’” *Parsons v. Dacy*, 502 N.W.2d 108, 110 (S.D. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Summary judgment is not disfavored. This Court has indicated that “entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and one which that party will bear the burden of proof at trial.” *Rodriguez v. Miles*, 2011 S.D. 29, ¶ 6, 799 N.W.2d 722, 724-25. *See also Nationwide Mutual Ins. Co. v. Barton Solvents*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145,149. Relative to assumption of risk, it is true that those “are ordinarily jury questions,” but those same questions are ripe for summary judgment “when the facts are of such a nature that there can be no disagreement that the question should not be submitted to the jury.” *Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833, 835 (S.D. 1984) (citations omitted).

ARGUMENT

I. The trial court correctly applied the assumption of risk standard and correctly found that Appellants assumed the risk of damaging the sunflowers.

South Dakota courts apply the "traditional formulation" of assumption of risk. To be found to have assumed the risk of an activity or condition, a plaintiff must be shown to have ““(1) had actual or constructive knowledge of the risk; (2) appreciated its character; and (3) voluntarily accepted the risk, with the time, knowledge, and experience to make an intelligent choice.”” *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758 (quoting *Ray v. Downes*, 1998 SD 40, ¶ 11, 576 N.W.2d 896, 898 (citation omitted)). *See Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 259 (S.D. 1979)) (“In order to support its assumption of risk defense, [a defendant] must show that [the plaintiff] not only had knowledge of the existence of the danger involved, whether actual or constructive, and an appreciation of its character, but also that [the plaintiff] voluntarily accepted such risk by having a sufficient amount of time, knowledge, and experience to make an intelligent choice.”). Upon a showing that the essential elements have been satisfied, a plaintiff may be found to have assumed the risk as a matter of law. *See Goepfert v. Filler*, 1997 S.D. 56, ¶ 7, 563 N.W.2d 140, 142.

The analytical standard of assumption of risk is a subjective one. *Duda*, 2008 S.D. 115, ¶ 12, 758 N.W.2d at 758. The analysis employs an assessment “of what the particular plaintiff in fact sees, knows, understands and appreciates.” *Id.* Based upon Schott's experience and knowledge as a farmer and licensed

applicator, the trial court was correct in finding that Schott assumed the risk by applying an incompatible chemical to his sunflowers. This Court should affirm.

A. Appellants had actual knowledge of the risk of damaging the crop.

To prove that Appellants had actual knowledge of the risk, it must be shown “that exercising ordinary common sense, reasonable minds [could not] differ on the jeopardy involved in” applying incompatible chemicals to crops. *See Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 20, 741 N.W.2d 767, 772 (citing *Goepfert*, 1997 S.D. 56, ¶ 8, 563 N.W.2d at 143). “Generally, both knowledge and appreciation of danger are jury questions. However, ‘[W]here it is clear that *any person in [Appellants’] position* must have understood the danger, the issue may be decided by the court.’” *Ray*, 1998 S.D. 40, ¶ 13, 576 N.W.2d at 899 (quoting *W. Page Keeton Et Al.*, *Prosser and Keeton on the Law of Torts* § 68, at 481 (5th ed. 1984)) (emphasis added) (alteration in original).

At the outset, it should be noted that Appellants’ perennial argument that only Fees understood that sunflowers come in confection, con-oil, and oil sunflower seeds is a red herring. *See* Appellants’ Brief at 11-12, 16, 18. In his deposition, Fees stated that those labels do not carry any importance. CR at 59; Fees Depo at 28:5-25; 29:1-4. The labels have no effect on the GMO or non-GMO status of the sunflowers. Furthermore, Appellants’ argument is internally inconsistent. Appellants admit in their Brief that “[Schott] knew only that he and Corson County Feeders ‘had gotten con-oils, regular oils and confections . . . in the past[.]’” Appellants’ Brief at 14. Apparently, then, Schott did know the

difference. Appellants then contend that those labels *have no effect on the spraying requirements*. *Id.* at 14-15. Accordingly, even if, *arguendo*, Fees was the only person who truly knew the difference between confection, con-oil, and oil sunflowers, a lack of that knowledge has *no impact* on knowledge surrounding spraying requirements.

In this case, the record shows that Schott had, in the past, separated his fields into "Clearfield" and "non-Clearfield" sections and applied chemicals accordingly. This approach is consistent with the collective experiences and recommendations of Fees and the parties' experts, Randall and Smith, each of whom has stated, to varying degrees, that *it is the role of the grower* to ensure that the correct chemical is being applied to the crop. Were there no jeopardy inherent to the act of applying the incorrect chemical to crops, Schott would not have, in the past, so separated his sunflowers. Based upon Schott's experience with the two types of seeds in the previous years, he certainly had actual knowledge of the risk of danger if incompatible chemicals were applied to sunflowers.

Not only had Schott separated his fields in the past, he had planted a mix of Clearfield and non-Clearfield seeds in the past. Schott had also applied the appropriate chemical to the two types of seeds. Having previously undertaken to apply a specific chemical to a specific seed, Schott cannot now say he was ignorant of a risk of danger of doing otherwise. In addition, as stated above, when Schott purchased non-Clearfield seeds from SDWGA in 2014, Fees indicated to Schott that those seeds were inconsistent with his previous intentions for that

season. Moreover, Schott stated during deposition that he did not read the label and insert that accompanied the Beyond purchase. The label and insert specifically instruct that the chemical is only appropriate for use on Clearfield sunflowers. In fact, after Beyond was applied to the non-Clearfield sunflowers, Schott stated to Fees that the sunflowers in his fields should all have been Clearfield. CR at 62; Fees Deposition at 44:12-14. Thus, Schott cannot viably assert that he did not appreciate the dangers inherent to applying the incorrect chemical to his sunflowers. Schott assumed the risk of damaging his sunflowers by not reading the Beyond label. He should thus be precluded from any recovery.

Appellants contend that Schott never told Fees that he was only going plant Clearfield sunflowers, that Schott did not understand that there was a difference between Clearfield and non-Clearfield, and that Schott did not use the word “Clearfield” when describing his plants. Appellants’ Brief at 13-14. This argument misses the mark. According to Fees, in order to place an order for the appropriate chemical, Fees needed Schott to tell him “how many acres of Beyond flowers, and that’s when [Fees] was told they were all the same, so [Fees] said, ‘They’re all Clearfield?’” CR at 59; Fees Deposition at 27:22-24. While Fees stated in his deposition that he did not know if “that was the exact wording[,]” he still needed the basic question answered as to what flowers were being planted. CR at 59; Fees Deposition at 28:2-4. Being able to answer that question, as, based upon an order ultimately being placed, Schott was able to do, implies that Schott understood that there is a difference between Clearfield and non-Clearfield sunflowers. Fees’s

testimony is in accord. *See* CR at 59; Fees Deposition at 29:5-8 (Q: “So you would agree with me that it would matter how you phrased it to [Schott] if he didn’t know what a Clearfield sunflower was?” A: “Oh, I agree”).

Appellants also try to shift the blame for the crop damage to Appellee by asserting that aerial maps of Schott’s fields were available for Fees’s consultation. *See* Appellants’ Brief at 13. A clear review of the record, however, reflects that the argument is baseless. Aerial maps have gained common usage in the agricultural arena. Suppliers, such as Appellee, can access them for information, as well as growers and applicators, such as Appellants. Also, of significant importance, entities undertaking aerial spraying can utilize such maps to know where to spray.

As Exhibit 29 reflects, certain aerial maps that were in possession of Appellee dealt with fields in years other than 2014. CR at 240. In fact, none of Exhibit 29 has any reference to 2014. Despite Appellants’ assertion, the aerial maps reflect no information as to what was planted in those fields. Appellants did the planting and they, alone, would have the information as to what the fields contained and where. It also must be borne in mind that the date on maps may either mean the date that the photographs were printed or perhaps when the photographs were taken. CR at 60; Fees Deposition at 35:2-9. Again, they would only show information as to the location of the fields. These maps have no relevance as to whether Clearfield or non-Clearfield sunflowers were in a particular field. The only one with that information would have been Appellants.

These maps have no relevance to the applicator's responsibility to read the chemical label and properly apply the chemical to appropriate crops.

To suggest that these aerial maps reflect some involvement of Appellee in the spraying is misguided at best. As a clear review of the record illustrates, Appellee was not involved in the chemical application in June 2014. Appellants were solely responsible for the application. Appellee does *not* do any of the aerial spraying. CR at 60, 156; Fees Deposition at 37:22-25; Maher Deposition at 17:2-5. Appellee does *not* even own a plane. CR at 156; Maher Deposition at 17:2-5. If aerial spraying is needed, that is arranged through outside sources. CR at 145-146, 60; Maher Deposition at 17:6-11; 43:8-12; Fees Deposition at 37:22-25. Where aerial spraying is involved, an agronomist will often send those maps to the sprayer for use. CR at 146; Maher Deposition at 43:13-19. They clearly do not represent any identification of what was planted in each field that would be applicable to the 2014 growing season. Accordingly, Appellants should be found to have assumed the risk as a matter of law and summary judgment should be entered in favor of Appellee.

B. Alternatively, Appellants had constructive knowledge of the risk of damaging the crop.

“One has constructive knowledge of a risk if that risk is so plainly observable anyone of ‘competent faculties will be charged with knowledge of it.’” *Westover v. East River Elec. Power Co-op., Inc.*, 488 N.W.2d 892, 901 (S.D. 1992). This Court has stated that a person “‘may not close his eyes to obvious

dangers, and cannot recover where he was in possession of facts from which he would be legally charged with appreciation of the danger.” *Goepfert*, 1997 S.D. 56, ¶ 9, 563 N.W.2d at 143. While the question of whether a plaintiff appreciated the risk of danger is embodied in the second prong of the assumption of the risk test, as opposed to the first, “the same requirement of a showing of the specificity of the appreciation of the nature of the risk that applies to the first element also applies to the risks character.” *Stone*, 2007 S.D. 115, ¶ 21, 741 N.W.2d at 772 (citation omitted). Thus, the same set of facts may support both the first and second prongs. *See id.*

During the several years prior to the events giving rise to this action, Appellants had not been purchasing seeds from Appellee. Nevertheless, upon Appellants placing an order for non-Clearfield seeds from Appellee in Spring 2014, Fees went so far as to tell Schott that the non-Clearfield seed purchase was inconsistent with what Schott had said he was intending to purchase earlier in the season. Thus, this case differs from *Westover* insofar as the record here shows that, even based solely on Fees’s comments, at the least, Schott had constructive knowledge of the risk of damage to his property. *See Westover*, 488 N.W.2d at 901 (S.D. 1992) (noting that “[t]here [was] no evidence that plaintiff came into contact with the [electrically charged bushing] knowing it was energized.”). *Cf.*, *McClanahan v. California Spray-Chemical Corp.*, 75 S.E.2d 712, 725 (Va. 1953) (in a chemical application case, the court held, “Here *there was no warning*. Where there is a duty to warn and the defendant fails to give the required warning,

there is no assumption of risk.”) (emphasis added) (citation omitted); *Gompert v. Great Western Sugar Co.*, 164 N.W.2d 459, 461 (Neb. 1969) (the plaintiff assumed the risk of damage to his sugar beets by applying improper chemicals).

In addition, Schott had undeniable constructive knowledge in July 2014 in the form of the label and insert that accompanied the Beyond chemical. The label and insert specifically instructed that the chemical is only appropriate for use on Clearfield sunflowers. In fact, after Beyond was applied to the non-Clearfield sunflowers, Schott stated to Fees that the sunflowers in his fields should all have been Clearfield. *See* CR at 62; Fees Deposition at 44:12-14. Thus, Schott cannot viably assert that he did not appreciate the dangers inherent to applying the incorrect chemical to his sunflowers.

When asked during his deposition whether the label on the Beyond clearly stated that it was only meant for use on Clearfield sunflower seeds, Schott responded, “Yes, it does.” CR at 52; Schott Deposition at 35:3-5. Furthermore, Schott also stated that he did not read the Beyond label at the time of its application. CR at 52; Schott Deposition at 37:24. Schott did *not* say that he did not understand the difference between “Clearfield” and “non-Clearfield.” Instead, he said simply that the label specified that Beyond was only appropriate for use on Clearfield sunflowers. In fact, Schott even stated during his deposition that he was “responsible for putting on what [he] did on the field.” CR at 53; Schott Deposition at 41:10-11. Therefore, Appellants should be found to have had constructive knowledge of the risk of danger in applying Beyond to his non-

Clearfield sunflowers. Based on the label and Schott's testimony, the risk should be found to have been "so plainly observable [that] anyone of 'competent faculties [should] be charged with knowledge of it.'" *Westover, supra*.

Appellants seize on deposition testimony that Schott did not know the distinction between Clearfield and non-Clearfield sunflowers. *See* Appellants' Brief at 16. Appellants seem to suggest that Schott, as a mere grower, cannot possibly have understood such a distinction. Because of this argued unawareness, Appellants assert that Schott could not have assumed the risk of applying Beyond to non-Clearfield sunflowers because he cannot be imputed with knowledge of the risk of harm to Appellants' sunflowers. Appellants' assertion that Schott could not have had constructive knowledge of the risk because he did not know the difference between Clearfield and non-Clearfield sunflowers conflates constructive knowledge with actual knowledge. Again, "[o]ne has constructive knowledge of a risk if that risk is so plainly observable anyone of 'competent faculties will be charged with knowledge of it.'" *Westover, supra*. Plainly, constructive knowledge is not what the person actually knows; *it is what he should know*. When it is clear that a person in Schott's position must have understood the danger, the issue of knowledge may be resolved by a court as a matter of law. *See Ray*, 1998 S.D. 40, ¶ 12, 576 N.W.2d at 899 (S.D. 1998).

As Fees and the parties' experts, Randall and Smith, have stated, *it is the role of the grower* to ensure that the correct chemical is applied. CR at 60, 66-70, 75; Fees Deposition at 38:1-19; Smith Deposition at 28:9-28, 29:1-2, 42:23-25,

43:1-20, 44:4-11, 46:1-8, 52:1-25, 53:1-3; Randall Deposition at 47:5-22. Were there no danger inherent to the act of applying the incorrect chemical to crops, Appellants would not have separated the sunflowers in the past because of unawareness of the distinction between Clearfield and non-Clearfield sunflowers. Even if, as Appellants wish this Court to accept, Appellants only separated the fields in accord with instruction from Appellee, that only supports that Appellants *should have known* that it is dangerous to treat the two types of sunflowers analogously. Once again, a person ““may not close his eyes to obvious dangers, and cannot recover where he was in possession of facts from which he would be legally charged with appreciation of the danger.”” *Goepfert, supra*.

In addition, as the licensed applicator, Schott alone applied Beyond to both the Clearfield and non-Clearfield sunflowers. An applicator is responsible for knowing what chemicals he is applying and ensuring that that chemical is appropriate for the crops involved. Consequently, Appellants were responsible to read and interpret the Beyond label. CR at 75-76; Randall Deposition at 47:23-25, 48:1-25, 53:12-15. *See* SDCL 38-21-44(2). Appellants failed to do so. CR at 51-52; Schott Deposition at 34:19-25, 35:1-18, 37:20-25, 38:1. As discussed above, when asked during his deposition whether the label on the Beyond clearly stated that it was only meant for use on Clearfield sunflower seeds, Schott responded, “Yes, it does.” CR at 52; Schott Deposition at 35:3-5.

Appellants argue that Schott reading the label would have had no effect on the outcome in this case because Schott was not aware of the distinction between

Clearfield and non-Clearfield sunflowers. Appellants' Brief at 17. Appellants specifically point to deposition testimony of Smith wherein it was suggested that "if a *grower* did not know what a Clearfield sunflower was, 'the label wouldn't be of much advantage[.]'" *Id.* at 18 (quoting Smith Deposition) (emphasis added). Again, this ignores the salient fact that, as the licensed applicator, Schott was required to know the difference between the two types of sunflowers. Schott's deposition testimony clearly indicates that he understood the label's instruction, as any licensed applicator in South Dakota should.

Appellants also claim that reading the label would have been ineffective because "for all [Schott] knew, those sunflowers were Clearfield. So the label could not have warned him off." *Id.* at 17. Appellants ignore the record evidence. When the growing season commenced in Spring 2014, Appellants ordered a small number of non-Clearfield sunflower seeds from Appellee. CR at 63; Fees Deposition at 49:18-25, 50:1-7. Prompted by the order, Fees recalls stating to Schott that the seeds being ordered were inconsistent with the seeds that Schott had previously indicated would be planted for the 2014 growing season. CR at 63; Fees Deposition at 50:1-12. Based on Fees's admonishment, therefore, "for all [Schott] knew," his fields contained at least a small number of non-Clearfield sunflowers that could not withstand the application of Beyond. Thus, Appellants had constructive knowledge, in the form of the Beyond label, of the harm to come to his sunflowers if Beyond was incorrectly applied.

Incredibly, Appellants also claim that no one has disputed that Schott “was unaware of the difference between Clearfield and non-Clearfield sunflowers.” Appellants’ Brief at 17. This claim is patently fallacious. Every argument put forth in the summary judgment proceedings below and herein was and is a disputation as to the assertion that Schott did not know the difference between the two sunflowers. Appellee has disputed the claim, at the least, by arguing that Schott was constructively aware of a difference between the two sunflowers. Whether Schott was aware of the difference is the crux of this appeal. In fact, Schott’s being aware of the difference is largely why summary judgment was granted below.

C. SDCL § 38-21-44(2) supports that Appellants had knowledge of the difference between Clearfield and non-Clearfield sunflowers.

The proper application of chemicals is governed by South Dakota law. *See* SDCL 38-21-44(2). It is a violation of the statute for an applicator to apply chemicals inconsistent with the label. An applicator of herbicide is responsible for following the label accompanying the herbicide. CR at 51; Schott Deposition at 33:9-25, 34:1-10. The Beyond label and insert clearly provided that the chemical is only to be used on Clearfield sunflowers. CR at 51-52; Schott Deposition at 34:19-25, 35:1-5. In fact, Schott acknowledged that this loss was due to his spraying Beyond on non-Clearfield sunflowers. CR at 51; Schott Deposition at 34:11-15. Appellants’ expert has acknowledged that the last barrier between a grower and a mistake is reading the label. CR at 77; Randall Deposition at 59:1-

25. Appellants' expert acknowledged that if Schott would have read the label and followed it, this loss would have been prevented. CR at 77; Randall Deposition at 59:1-25. The trial court agreed with this assessment. CR at 293; Summary Judgment Hearing Transcript at 28:4-8.

Appellants argue that the trial court's ruling "ignores the disputed facts regarding [Appellants'] *actual or constructive knowledge* of the risk." Appellant's Brief at 17 (emphasis in original). Appellants then make several assertions as to what they believe are undisputed facts. *See id.* A majority of Appellants' asserted "undisputed facts" Appellee has addressed herein, *supra*. In addition to what Appellee has addressed, Appellants also assert "that [Schott] relied on Fees' recommendations, a reliance which [Appellee] was fully aware and actually invited[.]" No evidence is cited for the proposition that Appellee "invited" Appellants' reliance. Invitation notwithstanding, it is an undisputed fact that Appellee *never* instructed Appellants that it was appropriate to apply Beyond to non-Clearfield sunflowers. CR at 80; Maher Deposition at 37:2-25, 38:1-23. Schott alone was responsible for the misapplication, not Appellee. *See* CR at 68-69; Smith Deposition at 42:23-25, 43:1-20, 44:4-24, 45:7-16).

In addition, what Appellants relied upon has no bearing on what they should have known about the chemical application in this case. Appellants argue that "there was no evidence before the trial court indicating that [Schott] knew or should have known the significance of [Clearfield and non-Clearfield designations], given his consistent reliance upon [Appellee]." Appellants' Brief at

18. Again, and as Appellants continue to conveniently ignore, Appellee had no involvement in the chemical application process. The Beyond was applied solely by Schott, a licensed applicator with years of experience in both growing sunflowers and applying the appropriate chemicals. To say that “there was no evidence before the trial court indicating that [Schott] knew or should have known” the difference between the two types of sunflowers is a misstatement of the record. Moreover, and as Appellee stressed both below in the summary judgment proceedings and herein, *supra*, Schott did not read the label that accompanied the Beyond; the label warned users of the danger of misapplication. During his deposition, however, Schott had no trouble reading and interpreting the same, going so far as agreeing that the label clearly warned of misapplication.

Finally, Appellants argue that “SDCL § 38-21-44 has no impact on the critical elements of assumption of the risk, as it has no bearing on [Schott’s] *actual or constructive knowledge* of the risk involved or appreciation of the risk.”

Appellants’ Brief at 19 (emphasis in original). Appellants are mistaken. Under § 38-21-44(2), it is an explicit violation to apply chemicals inconsistent with the relevant labeling. It is undisputed that a label-inconsistent application is precisely what happened here. In addition, and as Appellants concede, the trial court did not state that it was applying § 38-21-44. *See* Appellants’ Brief at 19. In fact, the trial court paid no mention to the statute. Instead, Appellee has maintained that the statute may be used to demonstrate the type of knowledge a licensed applicator should be imputed with having. Insofar as the statute requires an applicator to

follow the relevant label's instructions, an applicator must read, understand, and comport with the label's instructions. Additionally, while Appellants may wish to impugn Appellee as violating SDCL § 38-21-44, nothing in the record supports that Fees or Appellee instructed or recommended to Appellants that it was appropriate to apply Beyond to non-Clearfield sunflowers. *See* Appellants' Brief at 19 n. 3. To the contrary, as discussed above, when Schott bought a small amount of non-Clearfield sunflowers from Appellee in Spring 2014, Fees informed Schott that the order was inconsistent with Schott's previous stated intent. Accordingly, Appellants should be found to have had constructive knowledge of the risk of danger of misapplying Beyond to the non-Clearfield sunflowers.

II. The sole legal cause of Appellants' loss is Appellants' misapplication of chemicals to the sunflowers.

While Appellants fail entirely to address the issue in their brief, it is an undisputed fact recognized by the circuit court in this case that Appellants' application of the improper chemical to the sunflowers was the sole legal cause of Appellants' claimed damages. Appellants argue in their brief that the circuit court granted summary judgment exclusively on the basis of assumption of the risk. The circuit court noted, however, that the summary judgment hearing was based upon "the issues of contributory negligence and assumption of the risk." CR at 290. In any event, it is required of Appellants to prove causation in this case. Causation is

essential to a negligence claim.¹ “Proximate cause, or legal cause, is ‘a cause that produces a result in a natural and probable sequence and without which the result would not have occurred.’” *Quick v. Samp*, 2005 S.D. 60, ¶ 18, 697 N.W.2d 741, 747 (quoting *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 SD 126, ¶ 6, 670 N.W.2d 918, 921). Proximate cause exists when “[t]he harm suffered [is] . . . found to be a foreseeable consequence of the act complained of.... [T]he negligent act must be a substantial factor in bringing about the harm.” *Musch v. H-D Co-op., Inc.*, 487 N.W.2d 623, 626 (S.D. 1992) (quoting *Martino v. Park Jefferson Racing Ass’n*, 315 N.W.2d 309, 314 (S.D. 1982) (citations and internal quotations omitted)) (emphasis omitted) (second alteration and first ellipsis added). The burden rests with Appellants “to prove an unbroken sequence of events that tied [their] injuries to the [Appellee’s conduct]....” *Kumah v. Brown*, 23 A.3d 758, 761 (Conn. App. Ct. 2011) (quoting *Winn v. Posades*, 913 A.2d 407 (Conn. 2007)) (ellipsis in original).

The circuit court explicitly noted that there was “no testimony that Fees or anyone from Wheat Growers told [Schott] that he should spray the non-Clearfield sunflowers with the Beyond, which he clearly did.” CR at 292-93. “[T]his case is about *one thing*,” the circuit court continued, “which is [Appellants] . . . *sprayed*

¹ Not only is causation essential to negligence claims, but also breach of contract and breach of warranty claims. See *Bunkers v. Jacobson*, 2002 S.D. 135, ¶ 39, 653 N.W.2d 732, 743 (citing *Bad Wound v. Lakota Community Homes, Inc.*, 1999 SD 165, ¶ 9, 603 N.W.2d 723, 725) (“In order to award contract damages there must be evidence that the damages were in fact caused by the breach.”); *Crandell v. Larkin and Jones Appliance Co., Inc.*, 334 N.W.2d 31, 36 (S.D. 1983) (finding that the defendant’s breach of warranty caused the plaintiff’s injury).

the non-Clearfield sunflowers with Beyond, which was a mistake. [Schott] didn't read the label." CR at 293 (emphasis added). The circuit court's order entering summary judgment in favor of Appellee also makes clear that the circuit court "determined that the sole legal cause of the loss sustained by [Appellants], Dallas Schott and Corson County Feeders, Inc. [] was the misapplication of a chemical by [Appellants] for which [Appellee] was not responsible" CR at 247. It has never been disputed that it was Appellants that applied Beyond to the non-Clearfield sunflowers and that Appellants failed to read the label and insert that accompanied the Beyond. *See* CR at 53; Schott Deposition at 41:10-11 (Schott stating that he was "responsible for putting on what [he] did on the field."); CR at 52; Schott Deposition at 37:24 (Schott stating that he did not read the label before applying Beyond to his sunflowers). Thus, it has never been disputed that Appellants were the cause of their loss. Nothing in the record supports the notion that Appellee instructed Appellants that it was property to apply Beyond the non-Clearfield sunflowers. As Appellee has continued to emphasize, it is the role of the grower to ensure that he applies the correct chemical to his sunflowers. CR at 60, 66-70, 75; Fees Deposition at 38:1-19; Smith Deposition at 28:9-28, 29:1-2, 42:23-25, 43:1-20, 44:4-11, 46:1-8, 52:1-25, 53:1-3; Randall Deposition at 47:5-22.

CONCLUSION

At the time of this incident, Appellants had years of experience planting sunflowers and applying the appropriate chemicals. More specifically, Appellants, in the past, separated their fields into Clearfield and non-Clearfield sunflowers and applied the appropriate chemicals. The separation of the fields was for a critical reason and Appellants cannot now claim that they were unaware of the risk of danger if an incorrect chemical were applied to a particular sunflower. Moreover, as a licensed applicator, Appellant Dallas Schott had a duty to read and follow the instructions that accompanied the herbicide that was used in this case. Schott failed to do so. As a result, he suffered a loss. As a licensed applicator, as well as an experienced grower, Schott should have known that the Beyond herbicide would destroy non-Clearfield sunflowers. That is to say, Schott had constructive knowledge. As a result, this Court should find that Appellants assumed the risk of harm by applying an incompatible chemical to their sunflowers and affirm the circuit court's grant of summary judgment to Appellee.

Dated this ____ day of May, 2017.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: _____

Michael L. Luce
Attorneys for Appellant
PO Box 2700
Sioux Falls, SD 57101-2700
605-332-5999
mluce@lynnjackson.com
Attorney for Appellee

ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, Michael L. Luce, counsel for the Appellee does hereby submit the following:

The foregoing brief is 26 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates that there are a total of 6,768 words and 35,492 characters (no spaces) in the body of the brief.

Michael L. Luce

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of May, 2017, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

Melissa E. Neville
Bantz, Gosch & Cremer, LLC
305 Sixth Avenue SE
PO Box 970
Aberdeen, SD 57402-0970
mneville@bantzlzlaw.com

The undersigned further certifies that the original and two (2) copies of the Appellee's Brief in the above-entitled action were mailed by United States mail, postage prepaid, to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, on the date above written.

APPENDIX

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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CORSON)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON COUNTY
FEEDERS, INC.,

Plaintiffs,

vs.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV15-000012

SUMMARY JUDGMENT

Defendant, South Dakota Wheat Growers Association ("Defendant"), having moved for summary judgment, pursuant to SDCL 15-6-56, and the Court having held the hearing on the Motion for Summary Judgment on Tuesday, November 29, 2016, and the Court having considered all of the records and files herein, and the Court having considered the arguments of counsel and the Briefs that have been submitted, and the Court having determined that the sole legal cause of the loss sustained by Plaintiffs, Dallas Schott and Corson County Feeders, Inc. ("Plaintiffs") was the misapplication of a chemical by Plaintiffs for which Defendant was not responsible and which represents assumption of the risk by Plaintiffs; it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion of Defendant for Summary judgment be, and hereby is, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiffs be, and hereby is, dismissed, on the merits, with prejudice, and that Defendant is entitled a recovery of its taxable disbursements to be assessed by the Clerk pursuant to SDCL 15-17-37 and SDCL 15-6-54(d).

BY THE COURT: Signed: 12/13/2016 4:31:44 PM


Honorable Michael Day
Circuit Court Judge

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CORSON)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON COUNTY
FEEDERS, INC.,

Plaintiffs,

vs.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV15-000012

**DEFENDANT'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Defendant, South Dakota Wheat Growers Association ("SDWGA"), by and through their attorneys of record, respectfully submits this Statement of Undisputed Material Facts.

1. This claim concerns crop damage as a result of a chemical application in July, 2014 to Plaintiffs' sunflower crop (see Complaint).
2. Corson County Feeders, Inc. is owned and operated by Dallas Schott. (Schott Deposition at 7).
3. For several years prior to 2014, Plaintiffs had planted both Clearfield and non-Clearfield sunflowers. (Schott Deposition at 28).
4. Clearfield sunflowers need to be matched with the herbicide Beyond.
5. Beyond should be applied to Clearfield sunflowers, but it will kill non-Clearfield sunflowers if applied to them. (Randall Deposition at 14).
6. For several years, Plaintiffs would have purchased both sunflower seeds and herbicide chemicals from SDWGA. (Schott Deposition at 65-66).
7. However, for the last couple of years prior to 2014, Plaintiffs had purchased their sunflower seeds, both Clearfield and non-Clearfield, from Dahlgren (now SunOpta). (Schott Deposition at 65).
8. For years prior to 2014, Plaintiffs would purchase the herbicide TapOut to be used with non-Clearfield sunflowers and the herbicide Beyond to be used with the Clearfield sunflowers. (Fees Deposition at 26).

9. Prior to the year 2014, Plaintiffs had apparently known which sunflower seeds had been planted in which fields so that he could apply the TapOut for the non-Clearfield sunflowers and Beyond for Clearfield sunflowers. Plaintiffs had not suffered a sunflower loss prior to 2014 as a result of applying the wrong chemicals to the wrong sunflower fields. (Schott Deposition at 52-53).

10. The agronomist at SDWGA would rely upon the producer/Plaintiffs to tell the agronomist what crops he was planting and where they were planted so that the chemicals could be matched. (Fees Deposition at 21).

11. A grower would be discussing seed purchases and chemical purchases prior to the growing season. These discussions related to purchasing the herbicide chemicals purchased for the sunflower field that suffered a loss occurred in December and early January. (Fees Deposition at 22-23).

12. SDWGA's agronomist, Jason Fees ("Fees"), recalls having discussions with Schott regarding his chemical needs for the 2014 growing season. Fees recalls Schott initially indicating he was going to have approximately 1200 acres planted with Clearfield sunflower seeds and about the same number of acres planted with non-Clearfield sunflower seeds. However, as Fees was attempting to get an order placed for chemicals in order to get the early payment discount, he again contacted Schott. This was in January, 2014, and at that time Schott indicated for the 2014 growing season he was only going to plant Clearfield sunflower seeds. (Fees Deposition at 27; Smith Deposition at 27). An order was placed for chemicals, and because of the information about only Clearfield sunflower seeds, Beyond was purchased but, unlike earlier years, no TapOut was purchased. This was reflected in the order that was provided to Schott. (Exhibit 23; Fees Deposition at 29-30; Smith Deposition at 29, 30, 31; Randall Deposition at 45-46).

13. Again, the chemical orders were based upon what Plaintiffs were planning to plant for the 2014 growing season. However, when the growing season commenced in the spring of 2014, Plaintiffs did order a small amount of sunflower seeds from S SDWGA. (Fees Deposition at 49). However, all of the initial orders for sunflower seeds were with Dahlgren and were not purchases from SDWGA. (Fees Deposition at 49).

14. When Plaintiffs ordered a small amount of additional sunflower seeds to use in a remaining quarter section in the spring of 2014, Fees recalls mentioning to Schott that these non-Clearfield seeds would have been different from the seeds he had previously indicated he would be planting for the 2014 growing season. (Fees Deposition at 50).

15. Plaintiffs would have been responsible for planting and to know where he planted Clearfield sunflowers and where he planted non-Clearfield sunflowers. (Randall Deposition at 47).

16. The agronomist would not typically go back and check with the producer as to

what was actually planted. (Fees Deposition at 38).

17. The Beyond chemical that was to be applied to the Clearfield sunflower seeds, which had been previously purchased, was picked up by Plaintiffs in July, 2014. (Exhibit 26; Fees Deposition at 41; Smith Deposition at 26).

18. Again, SDWGA did not plant, nor supply, the sunflower seeds from Dahlgren. SDWGA would not have the bags in front of it to verify which seeds were Clearfield sunflower seeds and which were non-Clearfield sunflower seeds and in what fields they were planted. (Fees Deposition at 51; Randall Deposition at 46-47).

19. Just like Plaintiffs did their own planting, Plaintiffs also did their own spraying. In fact, Schott himself was the only one that did the spraying of the Beyond chemical in July, 2014. (Schott Deposition at 32, 37).

20. Plaintiffs incorrectly applied the Beyond chemical to non-Clearfield sunflower seeds, causing the loss of that crop. (Smith Deposition at 44-45).

21. A reasonable grower is expected to know which fields he had planted Beyond matched seeds and which fields he did not. (Smith Deposition at 28-29).

22. Plaintiffs' expert is Hugh Randall. SDWGA's expert is Gerald Smith. Both experts agree that the grower would be responsible to know in which fields he would have Clearfield and non-Clearfield sunflower seeds. (Smith Deposition at 28, 29, 42-44, 46 and 52-53; Randall Deposition at 47).

23. As Plaintiffs' expert concedes, this is important so that a grower does not apply Beyond to non-Clearfield sunflower seeds. Beyond only matches with Clearfield sunflower seeds. (Randall Deposition at 47; Maher Deposition at 22).

24. As the grower in this case, Plaintiffs were responsible for the misapplication of the Beyond to the non-Clearfield sunflower seeds. (Smith Deposition at 42-45).

25. This misapplication is not the fault of the agronomist. The agronomist did not tell the grower that he could use Beyond on non-Clearfield sunflower seeds. (Maher Deposition at 37-38).

26. The fault for this loss not only rests with Schott as the grower but also Schott as a licensed applicator. (Beuchler Deposition at 18).

27. Schott was an applicator licensed in the state of South Dakota. (Schott Deposition at 32).

28. As a licensed applicator, Schott is responsible for knowing what chemicals he is applying and to make sure that the chemicals are appropriate for the crops involved. (Smith

Deposition at 52-53).

29. SDWGA was not involved in the chemical application. (Smith Deposition at 52).
30. As a licensed applicator, Schott was responsible to read the label. (Randall Deposition at 47-48, 53).
31. Schott has conceded that he neither read the label for the Beyond chemical (Schott Deposition at 34-35, 37-38) nor the insert (Schott Deposition at 35-36). (Randall Deposition at 53).
32. The proper application of chemicals is governed by South Dakota law. SDCL 38-21-44(2). It is a violation of law for an applicator to apply chemical inconsistent with the label. The applicator is responsible for following the label. (Schott Deposition at 33-34).
33. The Beyond label and insert clearly provides that this chemical is only to be used on Clearfield sunflowers. (Schott Deposition at 34-35).
34. Schott acknowledges that this loss was due to his spraying Beyond on non-Clearfield sunflowers. (Schott Deposition at 34).
35. Plaintiffs' expert has acknowledged that the last effort to stop a mistake is reading the label. (Randall Deposition at 59).
36. Plaintiffs' expert acknowledges that if Schott would have read the label and followed it, this loss would have been prevented. (Randall Deposition at 59).
37. Although Plaintiffs' expert wants to place certain responsibility on SDWGA, he conceded that responsibility for this loss has to be shared by Plaintiffs. (Randall Deposition at 59).
38. Although Plaintiffs attempt to excuse this misapplication by indicating they didn't know particulars of what sunflower seeds and sunflowers were Clearfield and what were non-Clearfield, and what chemical he used with each particular field, Plaintiffs conceded that in previous years they had planted both Clearfield and non-Clearfield sunflower seeds and had appropriately applied Beyond chemical to Clearfield sunflowers and TapOut chemical to non-Clearfield sunflowers. (Schott Deposition at 42; Smith Deposition at 52-53).
39. Schott further concedes that he should have read the label (Schott Deposition at 37-38), and that he is responsible for putting this Beyond chemical on these non-Clearfield sunflowers. (Schott Deposition at 40-41).
40. Schott later told the agronomist, when asked if chemical was applied to Clearfield sunflowers, they were supposed to be Clearfield sunflowers, which is consistent with the information provided to SDWGA when the chemicals were ordered under the prepayment

program in January, 2014. Schott indicated he would talk to the seed supplier to confirm that these were Clearfield sunflower seeds. (Fees Deposition at 43-44). As it turns out, the Beyond was not applied to just Clearfield sunflowers.

Dated October 3, 2016.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Michael L. Luce
110 N. Minnesota Ave., Ste. 400
P.O. Box 2700
Sioux Falls, SD 57101-2700
Telephone: (605) 332-5999
Fax: (605) 332-4249
E-mail: mluce@lynnjackson.com
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 3, 2016, I caused the following document:

- **DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

Melissa E. Neville
Bantz, Gosch & Cremer, L.L.C.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
Telephone: (605) 225-2232
E-mail: mneville@bantzlaw.com

/s/ Michael L. Luce
Michael L. Luce

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF CORSON

FOURTH JUDICIAL CIRCUIT

DALLAS SCHOTT and CORSON
COUNTY FEEDERS, INC.,

Plaintiff,

v.

SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION,

Defendant.

15CIV. 15-000012

**PLAINTIFFS' STATEMENT
OF DISPUTED
MATERIAL FACTS**

Pursuant to SDCL 15-6-56 (c)(2), Plaintiffs, by and through their counsel of record, set forth the following Statement of Disputed Material Facts in opposition to Defendant's Motion for Summary Judgment:

History.

1. South Dakota Wheat Growers (SDWG) offers agronomy services to farmers or growers in north central South Dakota. (Dep. Exhibit 18).
2. In 2014, SDWG's services included, but were not limited to "lin[ing] up their fertilizer, their chemical, their seed . . . look[ing] for what weeds are growing in the fields . . . deliver[ing] chemical, deliver[ing] seed" and lining up soil sampling. (Craig Maher at 14-15, 18).
3. SDWG prides itself on providing "superior service" to its customers. (Haas at 15). "We just want to make sure they grow a good crop on whatever they are looking to do." *Id.*
4. SDWG agronomists make recommendations to growers when they ask for them. (Maher at 21). These recommendations include what chemical to use on what crops, how to mix the chemicals with surfactants and other additives, and when to apply the chemicals. (Maher at 41-42).

5. While growers can preorder chemical, this is not required; it is merely one way to lock in a cheaper price. (Maher at 23-24; Haas at 18; Fees at 22-23).

6. Plaintiffs Dallas Schott and Corson County Feeders, Inc., farm about 12,000 acres of land in north central South Dakota and have been customers of SDWG for more than two decades, doing over \$1 million in business with SDWG annually. (Maher at 26, 42; Schott at 12, 23).

7. In March 2014, Fees conducted a "Listen and Learn" customer service survey with Plaintiffs, who were one of SDWG's "top tier" customers. (Dep. Exhibit 32; Haas at 12; Fees at 16-17). In the survey, Schott specifically mentioned how important it was to him and his company that SDWG was "willing[] to help on agronomy." (Dep. Exhibit 32; Fees at 17-18).

8. Agronomy services provided by SDWG to Plaintiffs included, but were not limited to the following: making chemical recommendations, seed variety recommendations, fertilizer recommendations, field scouting, seed and chemical sales, and soil testing. (Fees at 10-12, 17-18).

9. Schott asked SDWG agronomists for direction on "what to spray and what to fertilize" and he followed the recommendations provided by SDWG agronomists. (Maher at 29; Fees at 17-18). "Whenever I went in for spraying, I went a hundred percent on what I was told to spray with from Wheat Growers." (Schott at 28). "Whatever they told me to do, I did." (Schott at 32).

10. In the soil testing done by SDWG for Plaintiffs each year, SDWG determined what had been planted before and what would be planted the following growing season, so that it could make recommendations to the grower for each parcel of land, all of which was provided to Plaintiffs in a large binder. (Fees at 12-13; Haas at 23).

11. Soil tests for previous years are all maintained electronically by SDWG and can be accessed at any time by its agronomists. (Fees at 13).

12. When Plaintiffs completed planting in 2014, they provided Fees with aerial maps and a color-coded lists of what crops were planted in what locations. (Buechler at 20-21; Dep. Exhibits 29; Plaintiffs' Responses to Requests for Production, Exhibit 2).

13. SDWG used dispatching mapping software to code its customers' fields. (Fees at 31). Sometimes, the grower-given nicknames for the fields are even added to the description. (Fees at 32).

14. SDWG customers' field lists and aerial maps are maintained by SDWG and can be accessed by Fees whenever growers call for prescriptions or for directions when spraying. (Fees at 35).

15. Fees admitted he did not double check the SDWG-maintained lists, maps or soil tests before giving spraying prescriptions or directions to Plaintiffs. (Fees at 38).

GMO Sunflower Seed

16. Sunflower seeds come in confection, con-oil and oil varieties, which are designated by their intended market use. (Fees at 28).

17. Each of these varieties of sunflower seeds come in traditional seed, as well as GMO variations, including Express and Clearfield. (Fees at 21-22). All of these seeds are sold by SDWG. (Maher at 29).

18. The sunflower plants are not distinguishable when they are growing. The difference is only observable in the harvested seed. (Buechler at 18; Maher at 39).

19. SDWG agronomists, including Jason Fees, know the difference between confection, con-oil and oil sunflower seeds, as well as the different GMO variations available for each, and the proper chemical to be paired with each GMO. (Maher at 22-23, 29; Haas at 22).

20. Crop technology changes from year to year, sometimes faster than growers can keep up. (Fees at 10). For this reason, growers rely on agronomists for advice in what to plant, what chemicals to apply, and when to apply them. (Gerald Smith at 33, 47; Hugh Randall at 64).

Planting Sunflowers

21. Plaintiffs initially only grew crops that could be fed to their cattle, which did not include sunflower seeds, but at Fees's and Maher's direction, Plaintiffs started growing sunflowers in 2008 or 2009. (Schott at 9-10, 27). These sunflowers were limited to traditional oil sunflower seeds. (Schott at 26-27).

22. In 2012, Fees introduced Plaintiffs to Tim Petry and Dahlgren seed and set up the mix or inclusion of both con-oils and confections in Plaintiffs sunflower crop. (Schott at 28-29, 65; Fees at 20, 49, 65).

23. In 2013, Dahlgren Seed/SunOpta pulled its business, along with several of SDWG's bigger seed-purchasing customers, away from SDWG, which eliminated a significant portion of Fees' income. (Maher at 35-36; Fees at 19-21). Fees was forced to make up that income in other areas.

24. When Dahlgren pulled its contract from SDWG, Maher advised Plaintiffs to stay with the contracts offered by Dahlgren/SunOpta because they were more lucrative than anything offered by SDWG. (Schott at 65-66; Maher at 28).

25. In 2014, Fees was busier than usual, because SDWG's McLaughlin site was short one agronomist. (Maher at 20). Fees was also the only agronomist farming on the side at that time. (Maher at 22).

26. In 2014, Fees was attempting to service 30-40 full-time clients, up to 100 total clients, and still farm his own land in Meade and Perkins County, up near Bison, South Dakota. (Fees at 6-7, 10).

27. In 2014, Plaintiffs did not know what Clearfield sunflowers were, nor the distinction between them and traditional sunflower seeds. (Schott at 32-33, 35; Buechler at 10).

2014 Preplanning

28. When Fees did the preplanning for Plaintiffs' 2014 crop in December 2013, his notes reflect a plan to plant about 3200 acres of sunflowers. (Dep. Exhibit 19). This was essentially the same, though a bit overestimated, as previous years. (Dep. Exhibit 20; Fees at 49, 51; Schott at 66-67).

29. Only Plaintiffs' con-oil sunflowers were Clearfield sunflowers, though this is not identified on the seed contracts or the seed labels. (Dep. Exhibits 9-10; Smith Dep. Exhibits 6-7). One would need to look up the seed hybrid number to make the determination. (Smith at 41-42).

30. At the time of preplanning in December 2013, Fees knew Plaintiffs would have at least some non-Clearfield sunflowers, because TapOut, the herbicide used for them, was included in the preplanning list. (Dep. Exhibit 19).

31. Fees contends that on or about January 24, 2016, when he was completing Plaintiffs' preordering form, Schott told Fees he had changed his planting plan, stating his sunflowers were "all Clearfield." (Dep. Exhibits 16, 23; Fees at 27-30). However, Fees also admitted he does not remember exactly what terminology was used in this conversation, and he agreed terminology is important when Schott did not know what a Clearfield sunflower was." (Fees at 28-29).

32. Fees agreed that Plaintiffs could have still been planning to order and use TapOut (the herbicide used on non-GMO sunflowers), but simply chose not to preorder or prepay for that chemical. (Fees at 30-31).

33. Schott contends that he would not have prepaid for TapOut if Fees had been fairly confident that the price would remain stable, as he would have had to borrow money from the bank to do so. (Schott at 72, 74-75).

34. Schott farms over 12,000 acres and did not memorize each and every chemical he had used in previous years, let alone which crops with which they were paired. (Schott at 31-32). "I only used what Wheat Growers prescribed . . . I didn't keep track of that. Whatever they told me to do, I did." (Schott at 12, 32, 37).

35. Schott also denies that he ever told Fees he was planting "all Clearfield" sunflowers because: (a) his contract with Dahlgren had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving remained the same as 2012 and 2013 (1200 acres each); and (c) Schott had no idea what a Clearfield sunflower was. (Schott at 24-26, 35, 64, 66-68).

The Incident

36. In June 2014, Schott contacted Fees requesting an herbicide prescription for spraying his sunflowers. (Schott at 36-37; Smith Dep. Exhibit 4). Mike Buechler went into McLaughlin and picked up the prescription and the chemical. (Smith Dep. Exhibit 4).

37. Even if Schott had told Fees in January 2014 that he was planning to plant all Clearfield sunflowers, Fees knew by this time that Plaintiffs had at least some non-Clearfield sunflowers because Fees, himself, sold approximately 300 acres of traditional, non-GMO, oil sunflower seeds to Plaintiffs. (Fees at 49-50; Schott at 77-78).

38. At Fees' direction, Schott sprayed all of his sunflowers with the same herbicide in July 2014. (Schott at 36-37).

39. Within hours, Schott noticed a change in the color of the sunflowers and contacted Fees via telephone. (Schott at 40). Fees told him, "maybe they need a little time, because sometimes spraying Beyond on Clearfield tolerant sunflowers causes them to yellow flash for a while." (Fees at 44).

40. Schott also called Tim Petry at Dahlgren/SunOpta, who told Schott he had two different sunflowers and if they were all sprayed with the same thing, half of them would be dead. (Schott at 41).

41. Plaintiffs lost 1200 acres of non-Clearfield confection sunflowers, which turned black and died within days. (Fees at 45; Schott at 14).

42. No replacement crop was planted because it was too late in the growing season and there was some concern about the compatibility of the pre-emergent chemical used. (Fees at 46; Schott 52-53).

43. Fees admitted he told Schott he was concerned about losing his job. (Fees at 48; Schott at 53-54). "[I]f a producer comes in and says you owe me a half a million dollars and I just tell him, 'Yep, I just screwed up, go pay him,' I'll probably lose my job." (Fees at 48).

Damages

44. Plaintiffs contracted with Dahlgren to plant and grow 1200 acres of confection sunflowers and deliver 1,800,000 pounds of sunflower seeds in accordance with the following schedule:

- a. 600,000 pounds at \$31.00/cwt for delivery at harvest (\$186,000);
- b. 600,000 pounds at \$31.60/cwt for delivery during the month of March 2015 (\$189,600); and
- c. 600,000 pounds at \$31.80/cwt for delivery during the month of April 2015 (\$190,800).

Thus, the contract was expected to yield at least \$566,400 in income to Plaintiffs, which income Plaintiffs lost. (Complaint at ¶27; Dep. Exhibits 1 and 10).

45. Had Plaintiffs' crop been successful, they could reasonably have expected to incur the following expenses:

- a. Trucking costs at \$2.58/cwt, for a total of \$46,440;
- b. Fertilizer costs at \$44 per acre x 1200 acres, for a total of \$52,800;
- c. Seed costs at \$51,770.40;

- d. Fuel for planting and spraying of \$3.29 per acre x 1200 acres, for a total of \$3,948;
- e. Chemical costs of \$38.66 per acre, for a total of \$46,392; and
- f. Combining costs of \$8 per acre x 1200 acres, for a total of \$9,600.

Therefore, Plaintiffs' reasonable costs, had the crop survived, would have been \$210,950.40. (Complaint at ¶29; De. Exhibit 1).

46. 2014 was also an exceptionally good year for sunflowers in Corson County, with Plaintiffs' other fields yielding over 1800 pounds of sunflower seeds per acre, as opposed to the 1500 pounds provided in the contract. This means that with the 1200 acres Plaintiffs planted, they could reasonably have expected to yield an additional 360,000 pounds of sunflower seeds above what was provided in the contract, resulting in an additional \$114,480 in income, less the additional trucking expense of \$9,288, for a total additional income of \$105,192. (Complaint at ¶30; De. Exhibit 1).

47. In addition, Plaintiffs receive a premium for the quality and lack of insect damage at an estimated \$.80/cwt for the crop, which was consistently received in previous years. This totals \$17,280. (Complaint at ¶31; Dep. Exhibit 1).

48. Defendant's error caused Plaintiffs damages, including but not limited to the following:

- a. Total destruction of Plaintiffs' growing confection sunflower crop resulting in a yield loss, to maturity, of 1800 pounds per acre upon 1200 acres for a loss of \$477,921.60;
- b. For reimbursement of the costs of the Beyond used on the non-Clearfield confection sunflowers, from which Plaintiffs derived no benefit, in the amount of \$16,162.25;
- c. For consequential damages and expenses incurred by Plaintiffs in retaining the services of an agronomist to sample (\$207.70) and test (\$1,302) Plaintiffs' crop in the total amount of \$1,509.70;
- d. For prejudgment interest from the date of injury through the date of judgment, at the statutory rate of 10% per year, calculated at \$135.78 per day from and after July 21, 2014; and

- e. Additional and consequential damages of the impact of a no-yield crop upon future crop insurance benefits and future eligibility for government crop payments in an amount to be determined at trial.

(Complaint at ¶32; Dep. Exhibits 1-2, 6-8, 16).

Dated this 21st day of November, 2016.

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in cursive script, appearing to read "Melvin Neville", is written over a horizontal line.

Attorneys for Plaintiffs

305 Sixth Avenue, S.E.

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzl原因.com

jscott@bantzl原因.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Plaintiffs hereby certifies that on the 21st day of November, 2016, a true and correct copy of the foregoing **Plaintiffs' Statement of Disputed Material Facts** was electronically served through Odyssey File and Serve, with a courtesy copy sent via first class mail, postage prepaid, to:

Mr. Michael L. Luce
101 North Phillips Avenue
Wells Fargo Building, Suite 402
P.O. Box 1535
Sioux Falls, SD 57101-1535

BANTZ, GOSCH & CREMER, L.L.C.



Attorneys for Plaintiffs

P.O. Box 970

Aberdeen, SD 57402-0970

(605) 225-2232

(605) 225-2497 (fax)

mneville@bantzl原因.com

jscott@bantzl原因.com

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

DALLAS SCHOTT and CORSON
COUNTY FEEDERS, INC.,

Plaintiffs/Appellants,

Appeal No. 28095

vs.

SOUTH DAKOTA WHEAT
GROWERS ASSOCIATION,

Defendant/Appellee

Appeal from the Circuit Court, Fourth Judicial Circuit
Corson County, South Dakota
The Honorable Michael Day, Presiding

APPELLANTS' REPLY BRIEF

Notice of Appeal was filed on January 18, 2017.

Melissa E. Neville
Justin M. Scott
Bantz, Gosch & Cremer, L.L.C.
305 6th Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
(605) 225-2232
(605) 225-2497 fax
jscott@bantzlzlaw.com

*Attorneys for Appellants
Dallas Schott and Corson County
Feeders, Inc.*

Michael L. Luce
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Ave., Ste. 400
P.O. Box 2700
Sioux Falls, SD 57101-2700
(605) 332-5999
(605) 332-4249 fax
mluce@lynnjackson.com

*Attorney for Appellee
South Dakota Wheat Growers
Association*

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STATEMENT OF FACTS

Appellants Dallas Schott and Corson County Feeders, Inc., rely on the Facts in their Appellants' Brief.

ARGUMENT AND AUTHORITIES

I. The trial court erred in finding that Appellants had assumed the risk of damage to their sunflower crop.

As previously stated, a plaintiff may only be charged with assumption of the risk where the following are conclusively established: “1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time, knowledge, and experience to make an intelligent choice.” *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772 (citing *Goepfert v. Filler*, 1997 S.D. 56, ¶ 6, 563 N.W.2d 140, 142); *Smith v. Community Co-op. Ass'n of Murdo*, 87 S.D. 440, 443, 209 N.W.2d 891, 892 (1973). It is only in rare cases where there is *both* an absence of factual dispute *and* those undisputed facts are sufficient to establish all three elements on summary judgment. *Ray v. Downes*, 1998 S.D. 40, ¶ 10, 576 N.W.2d 896, 898; *Westover v. East River Elec. Co-op, Inc.*, 488 N.W.2d 892, 896 (S.D. 1992).

The trial court awarded summary judgment on SDWG's assumption of the risk theory without making any findings regarding the necessary elements. It is clear from the record that SDWG could not establish that Schott had actual or constructive knowledge of the risk and, therefore, could certainly not establish that

Schott voluntarily accepted the risk given his time, knowledge, and experience to make an intelligent choice.

A. Appellants did not have actual knowledge of the risk.

Both Dallas Schott and Mike Buechler testified that Dallas and Corson County Feeders did not know what Clearfield sunflowers were. Schott at 32-33, 35, SR at 181-182; Buechler at 10, SR at 190. Dallas knew that he and Corson County Feeders “had gotten con-oils, regular oils and confections . . . in the past[.]” Schott at 24, SR at 179; Buechler at 10, SR at 190. But this market designation is irrelevant with regard to spraying. Rather it is the GMO variation, such as Express or Clearfield, that has relevance. When asked, at his deposition, the difference between Clearfield and non-Clearfield sunflowers, Dallas stated “I don’t know that I can tell you exactly the difference, *other than what now I learned they can be treated with.*” Schott at 24, SR at 179. Prior to the incident that led to this action, Dallas and Corson County Feeders had no knowledge of the GMO distinction of their sunflowers, which is the knowledge that would have been relevant to the spraying issues.

SDWG attempts to argue that Dallas and Corson County Feeders had actual knowledge of the risk because they had, in previous years, planted both Clearfield and non-Clearfield sunflowers in separate fields and sprayed them accordingly. However, this ignores the fact that Dallas relied on SDWG for agronomy services including, but not limited to: making chemical recommendations, seed variety recommendations, fertilizer recommendations, field scouting, seed and chemical

sales, and soil testing. Dallas relied on SDWG agronomists for direction on “what to spray and what to fertilize” and it is undisputed that he followed the recommendations provided by SDWG agronomists. Maher at 29, SR at 159; Fees at 17-18, SR at 166. SDWG was aware of this reliance and prided themselves on their “superior service.” SR at 151, 157, 166, 241; Fees at 17-18; Haas at 15; Maher at 21. Dallas stated, “[w]hen I went in for spraying, I went a hundred percent on what I was told to spray with from Wheat Growers.” Schott at 28, SR at 180. Dallas further stated, “[w]hatever they told me to do, I did.” Schott at 32, SR at 181. Therefore, the fact that Dallas and Corson County Feeders had planted separate fields of Clearfield and non-Clearfield sunflowers previously does not show any actual knowledge of the risk on their part; it merely shows they successfully relied on SDWG’s prescriptions when spraying.

SDWG further claims that Dallas and Corson County Feeders had actual knowledge of the risk because Dallas supposedly told Jason Fees that he had planted all Clearfield sunflowers. However, Dallas denies that he ever told Fees he was planting “all Clearfield” sunflowers and there is no evidence to support Fees’s claim. In fact, the evidence supports the contrary: (a) Dallas’s contract with Dahlgren (fixing the amount of seed and variations) had already been signed on December 27, 2013; (b) the amount of seed/number of acres of seed for each variety he would be receiving from Dahlgren remained *exactly the same* as what Fees had set up the previous two years (1200 acres each); and (c) Schott had no idea what “a Clearfield” sunflower was. Schott at 24-26, 35, 64, 66-68, SR at 179,

182, 185-186. It is clear that Fees was aware this was the case, as at the time of preplanning in December 2013, TapOut, the herbicide used for non-Clearfield sunflowers, was included in the preplanning list. SR at 237.

Moreover, despite the fact that Fees claims this conversation occurred, he could not remember the exact wording of the conversation, and he agreed that the terminology used would have been important if Dallas did not know what a Clearfield sunflower was. Fees at 28-29, SR at 169. Even if Dallas had told Fees in January 2014, at the time of preordering, that he was planning to plant all Clearfield sunflowers, Fees knew definitively by June 2014, *when the chemical prescription was actually requested*, that Dallas and Corson County Feeders had *actually* planted some non-Clearfield sunflowers, because Fees, himself, had sold approximately 300 acres of traditional, non-GMO, oil sunflowers to Dallas and Corson County Feeders. Fees at 49-50, SR at 174; Schott at 77-78, SR at 188. Therefore, Fees protestations that his prescription was based on information given to him by Dallas does not hold water, as the prescription was made in the face of his actual knowledge to the contrary.

Because of these factual disputes and inconsistencies with regard to Fees's unsupported and self-serving version of events, the trial court would have necessarily needed to make a credibility determination regarding his testimony in relation to Dallas's testimony. But "credibility determinations . . . are generally not appropriate for summary judgment." *Batiz v. Fire Ins. Exchange*, 2011 SD 35, ¶ 17, 800 N.W.2d 726, 729. Nevertheless, that is exactly what SDWG is asking

when it demands that Fees's testimony be taken at face value despite evidence and testimony to the contrary. Such a credibility determination by the trial court was inappropriate.

B. Appellants did not have constructive knowledge of the risk.

This Court has held that "[c]onstructive knowledge will be imputed if the risk is so plainly observable that 'anyone of competent faculties [could be] charged with knowledge of it.'" *Goepfort v. Filler*, 1997 S.D. 56, ¶ 8, 563 N.W.2d 140, 143 (quoting *Westover v. East River Elec. Co-op, Inc.*, 488 N.W.2d 892, 901 (S.D. 1992)). "Since knowledge and appreciation of a particular risk are essential to the defense of assumption of risk, a plaintiff must only be held to assume the risk he appreciates, not the risk which he does not." *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 260 (S.D. 1979).

SDWG claims that Dallas had constructive knowledge in July 2014 in the form of the label and insert that accompanied the Beyond chemical. SDWG incorrectly states that Dallas "did *not* say that he did not understand the difference between 'Clearfield' and 'non-Clearfield.'" Appellee's Brief at 16. It is true that Dallas did not make this exact statement in response to SDWG's counsel's questions about the label and insert, but Dallas made it very clear on several occasions that, prior to the incident which forms the basis of this action, he had no knowledge regarding the GMO distinction. For instance:

Q: Tell me, since I'm not a farmer, what the difference is between Clearfield and non-Clearfield sunflower seeds.

A: I don't know that I can tell you exactly the difference, other than what now I learned they can be treated with.

Schott at 24, SR at 179.

Q: And maybe you don't – I have no idea what a – if you're sitting in a restaurant right now and somebody says, "I've heard of Clearfield sunflower seeds and non-Clearfield sunflower seeds. What difference between those two?" How would you answer that question?

A: I don't know the difference.

Schott at 25, SR at 179.

Q: Okay. Are Clearfield seeds limited to con-oil, or can you get Clearfield regular oil and confection?

A: I have no idea.

Q: Okay. Same question with respect to confection. Can you get Clearfield and non-Clearfield for confection?

A: I don't know.

Schott at 26, SR at 179.

Q: Okay. Well, you've been farming enough, would you agree that certain chemicals can be used with Clearfield sunflower seeds that should not be used with non-Clearfield?

A: I know that now, yes, sir.

Schott at 28, SR at 180.

Q: You knew that Beyond should not be used on non-Clearfield seeds?

A: No, I didn't know that.

Schott at 32, SR at 181.

Q: And you did not follow that label, did you?

A: I didn't know what the sunflowers were as far as Clearfield, non-Clearfield. I don't know, I didn't know what they were. I applied what I was told to apply.

Schott at 35, SR at 182. Therefore, it is clear that Dallas did not understand the distinction, despite SDWG's attempts to paint a contrary picture.

SDWG has not proven that Dallas and Corson County Feeders should be imputed with knowledge of the risk. They seize upon testimony from the parties' experts to argue that it is the role of the grower to ensure that the correct chemical is applied, however, that theory ignores admissions by SDWG's *own employees*. They admitted that Dallas relied completely on SDWG for what to spray, when to spray, and where to spray. SR at 155-159, 166, 241; Maher at 14-15, 17, 21, 29; Fees at 17-18. They admitted that Fees, as the agronomist, would have been the only person with the requisite knowledge to have avoided the damage to the sunflowers. Haas at 22, SR at 152; Maher at 22, SR at 157. So contrary to SDWG's assertions, the record does not support a theory of imputed knowledge to Dallas, let alone an imputed understanding of the actual danger.

SDWG further relies on Dallas' status as a licensed applicator to attempt to impute knowledge to him. However, SDWG attempts to impute far more knowledge and responsibility to licensed applicators than the record indicates is appropriate. Dallas testified that in order to obtain the license "[y]ou sit in about a two-hour little clinic in a room and you listen to videos for an hour and a half, two

hours and they give you a license.” Schott at 32, SR at 181. When asked, with regard to the topics taught at the clinic:

Q: You better make sure you’re putting the right chemical on the right field, correct, in the right quantities?

A: Well, they don’t teach you that. What they teach you is more or less to – the big thing they had taught was overuse of chemicals and using spraying at the wrong times and so on, but to sit there and tell you that what to use on what fields, no, it had nothing to do with that.

Schott at 32-33, SR at 181. So while any licensed applicator is subject to discipline under the licensure statutes, the fact is the evidence regarding the process for licensure falls far short of making it appropriate to bestow an expert status upon all licensed persons. Nor is it reasonable to believe that one becomes an expert in agronomy, pesticides, and all crops, as well as their many GMO variations in a single two-hour clinic. Yet that is the knowledge that SDWG asks to be imputed to Dallas. The evidence does not support such a leap and if it did, this would have a chilling effect on the responsibilities of sprayers across the state. Instead, the evidence shows that Jason Fees, SDWG’s agronomist, was the only individual with all of the information that would have been necessary to avoid the damage to Dallas’s and Corson County Feeder’s crops.

Because Dallas and Corson County Feeders did not have actual or constructive knowledge of the danger in this case, they could not have voluntarily accepted that danger. The trial court failed to make any findings regarding the elements of the assumption of the risk and, as shown, the evidence did not support

the findings which would have been necessary to properly hold that Dallas and Corson County Feeders assumed the risk of their injury. This was not the “rare case” without any factual dispute whatsoever that this Court has identified as appropriate for summary judgment on the basis of assumption of the risk. Therefore, the trial court’s ruling should be reversed.

II. The trial court did not grant summary judgment on the issue of contributory negligence and causation was not before the trial court.

SDWG attempts to argue, apparently, that the trial court also based its award of summary judgment on the second issue that was before it, which was contributory negligence. It is true that contributory negligence was one defense SDWG cited in its Motion for Summary Judgment, and the trial court acknowledged as much. But the trial court’s decision *was in no way based on the theory of contributory negligence.*

In making its ruling, the trial court stated:

So this case is about one thing, which is the Plaintiff, in this case, sprayed non-Clearfield sunflowers with Beyond, which was a mistake. He didn’t read the label. As a licensed applicator, he’s required to follow the label.

The Court doesn’t find any genuine issues of material fact. The Court finds that Defendant is entitled to summary judgment as a matter of law on the issue of assumption of the risk, which would bar any claims that Plaintiff or Plaintiffs in this case have against the Defendants.

Hearing Transcript at 28. It is clear from the hearing transcript that the trial court considered two issues, assumption of the risk and contributory negligence, but

assumption of the risk is the only theory upon which the trial court ruled in granting summary judgment.

After the trial court's ruling, SDWG's counsel, pursuant to the trial court's request, submitted its proposed Summary Judgment, which included the language they now cite regarding the "sole legal cause of the loss." Dallas and Corson County Feeders objected to the proposed Summary Judgment on the basis that, among other reasons, the trial court had made no finding regarding the "sole legal cause of the loss." SR at 242. Despite this objection, the trial court signed SDWG's proposed Summary Judgment.

If indeed the trial court did grant summary judgment with regard to causation, which is disputed, it was error for the trial court to do so as that was not an issue before the trial court on SDWG's Motion for Summary Judgment. This Court has stated that "[t]here is a greater possibility of error when the opposing the summary judgment motion may be able to show that a genuine issue exists but has not done so because the facts relating to the particular legal principles were not in issue." *Leonhardt v. Leonhardt*, 2012 SD 71, ¶ 12, 822 N.W.2d 714, 717 (citing *Jaste v. Gailfus*, 679 N.W.2d 257, 261 (N.D. 2004)). "In light of this risk, it is generally recognized that '[a] court should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed or argued by the litigants.'" *Id.* (citing *Heisler v. Metro. Council*, 339 F.3d 622, 631 (8th Cir. 2003) ("It is fundamentally unfair to the nonmoving party to require her to address issues not addressed by the moving party in anticipation that the district court might rely

on some unidentified issue to grant the motion.”). “Providing the parties with adequate notice of the issues ensures that the parties have a meaningful opportunity to develop the record and present all relevant evidence to the court.”

Id.

As stated, causation was not an issue before the trial court on SDWG’s Motion for Summary Judgment. Neither did the trial court give any type of notice to Dallas and Corson County Feeders that causation regarding their claims would be considered by it in reaching a decision. Causation of the underlying claims was neither briefed nor argued. The only issues that were briefed and argued were assumption of the risk and contributory negligence. Therefore, if the trial court did grant summary judgment on the basis of causation, which is disputed and not supported by the record, then the trial court’s decision was again, in error.

To the extent that SDWG is now arguing that the “sole legal cause” language it unilaterally inserted in the Summary Judgment is somehow a *ruling* on its theory of contributory negligence, that also is not supported by the record nor by the bare language of the Summary Judgment itself. Summary judgment on the basis of contributory negligence is *even more* rare than the “rare case” which this Court describes as appropriate for summary judgment on assumption of the risk:

Summary judgment is generally not feasible in negligence cases because the standard of the reasonable man must be applied to conflicting testimony. Issues of negligence and such related issues as wanton or contributory negligence are ordinarily not susceptible of summary adjudication either for or against a claimant and should be resolved by trial in the ordinary manner. Summary judgment should not be granted on the ground of contributory negligence

except in an extra-ordinary, unusual, or rare case where the facts are conceded or demonstrated beyond reasonable question and show a right to summary judgment with such clarity as to leave no room for controversy. Contributory negligence to bar recovery must be the proximate cause of the injury and since both are fact questions generally are not subject to summary adjudication.

This court has repeatedly said that issues of negligence, contributory negligence, and the comparative extent thereof, and proximate cause are ordinarily questions of fact and it must be a clear case before a trial judge is justified in taking these issues from the jury. It is only when the evidence is such that reasonable men can draw but one conclusion from facts and inferences that they become a matter of law and this occurs rarely.

Wilson v. Great N. Ry., 157 N.W.2d 19, 22 (S.D. 1968) (internal citations omitted). The comparative negligence statute, SDCL 20-9-2, provides:

In all actions brought to recover damages for injuries to a person or to that person's property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant, but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.

The statute requires a comparison between the parties' negligence. Thus, the first step in the analysis is "a determination of whether the plaintiff and the defendant were negligent. If both parties are found negligent, the second step of the process requires that the negligence of the plaintiff be compared to the negligence of the defendant." *Treib v. Kern*, 513 N.W.2d 908, 911-912 (S.D. 1994).

Based on the required analysis, it makes sense that summary judgment on the issue of contributory negligence would be exceedingly rare, as it first requires a finding of negligence on the part of the defendant, which has usually not

occurred at the summary judgment stage of the proceedings. As SDWG has not admitted any negligence, there was nothing against which to compare any alleged negligence on the part of Dallas and Corson County Feeders. Therefore, the required analysis could not take place.

In addition, as set forth at length above, this is not the “extra-ordinary, unusual, or rare case where the facts are conceded or demonstrated beyond reasonable question . . . with such clarity as to leave no room for controversy.” *Wilson v. Great N. Ry.*, 157 N.W.2d at 22. Despite SDWG’s arguments to the contrary, the facts are most certainly in dispute, to wit, who said what to whom, when and how it was said, and what was the reasonable reaction or reliance thereon. Upon SDWG’s Motion for Summary Judgment, Dallas and Corson County Feeders were to be given the benefit of all reasonable inferences to be drawn from those facts. At a minimum, the questions remain: (a) whether Schott was or should have been aware that only his con-oil sunflowers were Clearfield sunflowers; or (b) whether he was reasonable in relying upon the advice and direction of his agronomist without doing his own investigation. Thus, the trial court, appropriately, did not rule on defense of contributory negligence.

CONCLUSION

While the trial court relied upon assumption of the risk in granting summary judgment, it did not make any findings regarding the *essential* elements of that defense. The trial court imputed knowledge to Dallas, which was not “plainly observable to anyone of competent faculties.” The trial court relied on

Dallas's failure to read the Beyond label, but it is undisputed that, given his lack of knowledge regarding the meaning of the terms "Clearfield" and "non-Clearfield," that the act of reading the label would not have alerted him to any risk. SDWG has not established that this was information Dallas knew or should have known.

SDWG reaches too far in attempting to impute knowledge to Dallas.

Following their argument to its logical conclusion, every farmer and licensed applicator would need to be an agronomy expert in all crops and chemicals, as well as their GMO variations and chemical pairs, with which they cross paths – a harsh result in a state built upon the agricultural community. This then begs the question: if that is the standard, both in theory and practice, why do agronomists exist, and why are they so widely relied upon?

The trial court erred in granting summary judgment without making any findings regarding the essential elements of assumption of the risk, and in spite of the presence of genuine issues of material fact. Appellants respectfully urge this Court to reverse that ruling.

Dated this 25th day of May, 2017.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.
305 Sixth Avenue S.E. / P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232 / 605-225-2497 (fax)
mneville@bantzlaw.com
jscott@bantzlaw.com

CERTIFICATE OF COMPLIANCE

Justin M. Scott, attorney for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Appellant's Reply Brief does not exceed 20 pages;
- b. The body of Appellant's Reply Brief was typed in Times New Roman 13 point typeface, with foot notes being in 13 point typeface; and
- c. Appellant's Reply Brief contains 3,780 words, 18,797 characters (no spaces), and 22,709 characters (with spaces), according to the word and character counting system in Microsoft Word for Windows 2013 used by the undersigned.

Dated this 25th day of May, 2017.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
mneville@bantzlaw.com
jscott@bantzlaw.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellants, Dallas Schott and Corson County Feeders, Inc., hereby certifies that on the 25th day of May, 2017, a copy of Appellants' Reply Brief was sent by electronic mail to:

Mr. Michael L. Luce	South Dakota Supreme Court
Lynn, Jackson, Lebrun & Shutz, P.C.	<i>scclerkbriefs@uds.state.sd.us</i>
<i>mluce@lynnjackson.com</i>	

and the original and 2 copies of the same were mailed by first class mail, postage prepaid, to the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ Justin M. Scott

Attorneys for Appellants, Dallas Schott
and Corson County Feeders, Inc.
305 Sixth Avenue S.E.
P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
mneville@bantzlzaw.com
jscott@bantzlzaw.com