

NO. C3-02-857

State of Minnesota
In Supreme Court

APPELLATE COURTS
AUG - 5 2005

Ronald Peterson, et al.,
Plaintiffs/ Respondents,

v.

BASF Corporation,
Defendant/ Appellant.

**RESPONDENT FARMERS' BRIEF ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES; BATES –
A COMPLETE VICTORY FOR FARMERS – EMBRACES
PETERSON CONFIRMING BASF'S FRAUDULENT "MARKETING
AND PRICING" SCHEME**

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THE ONLY ISSUE ON REMAND

Does *Bates v. Dow AgroSciences, LLC*, 544 U.S. ___, 125 S.Ct. 1788 (2005), holding that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), embrace *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*), confirming BASF's fraudulent marketing of its herbicide?¹

ANSWER: YES. *Bates* embraces *Peterson*. *Bates* is a “**label**” case: state claims by farmers challenging the effectiveness of the product even though the Environmental Protection Agency (EPA) under FIFRA approved the product container label. *Bates* confirms that claims addressing **marketing responsibilities** of pesticide sellers to consumers are not preempted by FIFRA. *Bates*, 125 S.Ct. at 1799. *Bates* recognizes the obvious; the EPA does not govern the effectiveness of the product as marketed by the company. Well beyond the label-based claims of *Bates*, *Peterson* is an “**off-label**” case: **fraudulent marketing** with lies, deceit and smoking-gun memoranda. The EPA informed state regulatory officials that BASF's market-segmentation scheme is “*a company marketing decision in which the EPA had no input.*” Said this Court, 675 N.W.2d at 70: “[F]armers ... consumer fraud claim is *not based on BASF's labels* but rather on *fraudulent marketing techniques.*” BASF's complaint that its fraudulent marketing scheme is immunized by FIFRA – a federal health and safety law – is perverse.

¹. Five state and federal court opinions all approving Farmers' claims are *Peterson v. BASF Corp.*, A04-1553 (Minn. App. 2005) (*Peterson IV*), *rev. denied* (Minn. July 19, 2005) (Minn. R. Civ. P. 54 jury verdict judgment was a “final ... common fund” judgment ending BASF's interest.); *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*) (affirming jury verdict and judgment); *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*) (affirming jury verdict and judgment); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*) (reversing district court summary judgment and remanding for trial); *Peterson v. BASF Corp.*, 12 F. Supp.2d 964 (D. Minn. 1998) (*Peterson*) (granting Farmers' motion to remand to state court).

SUPREME COURT FREQUENTLY REMANDS AFTER RELATED DECISION THE SAME TERM

The Supreme Court of the United States (Supreme Court) “*frequently*” remands – “*deciding not to decide*” after a related decision the same Term – and lower courts “*substantial[ly]*” *affirm* the previous ruling.² The U.S. Eighth Circuit Court of Appeals, in *National Association For The Advancement Of Colored People (NAACP) v. Metropolitan Council*, No. 96-3092MNST (April 17, 1998), after a remand from the Supreme Court for “further consideration in light of *Rivet v. Regions Bank of Louisiana*, 522 U.S. [470] (1997)” decided the same term, ordered *limited briefing on remand without oral argument*. RFADD4.³ The Eighth Circuit promptly affirmed its original ruling:

Because this court’s holding in NAACP is not at odds with [*Rivet*], *we reinstate our opinion* reported at 125 F.3d 1171 and *again affirm the*

². See *Tyler v. Cain*, 121 S.Ct. 2478, 2484 n. 6 (2001) (rejecting attempt to find substantive support in order vacating judgment and remanding for further consideration in light of intervening authority); see generally A. Hellman, “*Granted, Vacated, and Remanded * * **”: *Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 394-95 (1984) (“in a substantial number of the remanded cases the [lower court] adhered to the original ruling”); Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 Okla. L. Rev. 746, at n. 82 (2001) (“The Court relatively frequently grants certiorari and then vacates the decision below ... in conjunction with an order remanding the case to a lower court (GVR) for disposition in light of another case which the Court did decide on the merits, usually during the same Term.”); Note, *Deciding Not To Decide: The Supreme Court’s Expanding Use Of The “GVR” Power Continued In Thomas v. American Home Products, Inc. And Department Of The Interior v. South Dakota*, 76 N.C.L. Rev. 1387, 1388-89 (1998).

³. RFADD is Respondent Farmers Addendum bound with this brief. RFA is Respondent Farmers’ Appendix. PX is Respondents (Farmers) trial exhibits.

district court.

RFADD5-11 (emphasis added). The Supreme Court readily denied NAACP's second petition for certiorari. RFADD12.

BASF and the chemical industry were profoundly unsuccessful before the Supreme Court in *Bates* and *Peterson*. When BASF filed its petition for a writ of certiorari challenging *Peterson III*, BASF and its coordinated amici asked the Supreme Court to accept BASF's petition for oral argument. After the Supreme Court issued *Bates* – a complete victory for farmers – BASF was reduced to asking the Supreme Court to remand *Peterson* to this Court to consider *Bates*.⁴

SUMMARY ARGUMENT

BASF asks this Court to ignore *Peterson III* and extend a federal health and safety law – FIFRA – to shield BASF's fraudulent "marketing and pricing" scheme readily determined by a unanimous 12-member jury after a five-week trial. RFA001-02 (Dec. 6, 2001). *Bates* and *Peterson III, II* and *I* completely reject BASF's complaint that fraudulent "marketing and pricing" – enforced with lies, deceit and smoking gun

⁴. *BASF's remaining interest is delay* in the pursuit of unjustly earning \$5.5 million a year holding Farmers' money judgment for fraud. The post-judgment interest rate in Minnesota is 4%. BASF's return on capital in 2004 was 12.7%. See BASF Form 20-F Securities Exchange Commission (SEC) filing, p. 8 of 274 (March 9, 2005). BASF earns almost 9% rate-of-return each year on Farmers' money judgment (12.7% - 4%). With a present judgment of about \$62 million, from the April 2, 2002 entry of judgment through September, 2005, *BASF will have unjustly earned \$20 million* merely holding Farmers' money judgment.

memoranda – is preempted by FIFRA.

A. *Bates* Is A Complete Victory For Farmers

Bates plaintiffs are Texas peanut farmers who sprayed Dow’s herbicide “Strongarm” on peanuts, an EPA-approved label use. The herbicide did not kill the weeds and, in a cruel twist, injured the crop. After farmers served notice of intent to sue, Dow brought a declaratory action in federal court alleging that the farmers’ claims were preempted under FIFRA. The farmers counter-claimed under a variety of state claims: product liability, warranty, and claims that Dow’s statements on the label were fraudulent. The district court granted Dow’s declaratory action and the Fifth Circuit affirmed. The Supreme Court reversed in a 7-2 decision. *Bates* is a complete victory for farmers and all consumers. For independent analysis, *see*:

- Mauro, *Reversing 5th Circuit, High Court Rules Against Pesticide Makers*, Legal Times, April 28, 2005, RFADD13-14;
- *Wide Opening For Pesticide Damage Claims*, SCOTUSblog.com, April 27, 2005, RFADD15-16.

B. *Bates* And *Peterson* In A Nutshell

1. *Bates* Is A “Label” Case – Claims Addressing Product Effectiveness Even Though EPA Approved Product Label

Bates is a label-based case; claims by farmers addressing the effectiveness of the product on the crop even though the EPA approved the product label: (1) *crop safety claims* – the herbicide killed or injured the crop it was intended to protect; and (2) *efficacy claims* – the herbicide did not kill the weeds. Who is responsible? The EPA? The poor

farmer who paid good money for a product that did not work? Or the company that sold the product for profit?

Before *Bates*, the coordinated chemical industry persuaded some courts to dismiss injured farmers' claims for the simplistic reason that the "EPA approved the label." Yes, the EPA approved the product (container) label in reliance upon the common-sense notion that a company would not seek EPA registration to sell a product that did not work. No, the EPA did not step into the shoes of the company and guarantee the effectiveness of the product and accuracy of the company's marketing campaign.

Labeling claims, like *Bates*, address the pesticide seller's sale of a product that *did not work*. The EPA, under FIFRA, only evaluates the safety of a pesticide (herbicide) as it affects people and the environment. Decent society does not want companies selling a toxic pesticide – however well-intended – that leaves residue that kills trout in a stream and children on a school picnic. Congress wrote FIFRA as a vehicle for the EPA to evaluate the relative safety of the product for people and the environment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Congress has never granted the EPA authority to regulate or govern a pesticide seller's marketing and pricing schemes.

Bates recognizes the obvious; the EPA, under FIFRA, does not address the effectiveness of a product – whether it will work – as marketed by the company. The Supreme Court affirmed that state claims addressing *marketing responsibilities* of pesticide sellers to consumers are not preempted by FIFRA.

2. ***Peterson Is An “Off-Label” Case – A Consumer Fraud Claim Addressing Fraudulent Marketing And Pricing***

Peterson is a fraudulent marketing case. Well beyond the “label” claims in *Bates*, *Peterson* presents “off-label” claims of fraudulent “marketing and pricing.”

It was a market-segmentation scheme. Trial evidence established that BASF defrauded thousands of farmers by marketing the same herbicide as different products – Poast and Poast Plus – at different prices as a “system of deceit” to extract inflated prices for the same herbicide from minor crop farmers.

BASF concealed from farmers and state regulatory authorities that cheaper Poast Plus, sold to soybean growers, a “major” national crop, was approved by the EPA for use on the same crops as more expensive Poast sold to growers of “minor” crops such as sunflowers, sugarbeets, potatoes, vegetables and fruits. The EPA directly informed state regulatory officials, upon inquiry, that BASF’s market-segmentation scheme was “*a company marketing decision in which the EPA had no input.*”

BASF’s misconduct was unconscionable. BASF lied to state regulatory authorities, food processors, farmers and dealers to conceal a federal regulatory action, namely, the EPA registration of Poast Plus for the same crops as Poast, using the same safety data. BASF threatened and encouraged the criminal prosecutions of farmers for ‘off-label’ use of cheaper Poast Plus as a marketing “strategy.” BASF considered the “*risk*” of farmers discovering the truth, and whether United States farmers could be “*controlled in future*” if BASF’s fraudulent marketing and pricing schemes for Poast and

Poast Plus were discovered.

3. “Label” Claims Addressing Pesticide Sellers’ Duties To Consumers Are Not Preempted

Said the Supreme Court in *Bates*:

Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as *requirements* for “labeling and packaging.”

125 S.Ct. at 1798 (emphasis added).

Consumer fraud statutes, applied to fraudulent marketing schemes, likewise do not impose label “requirements” that impede the EPA’s mandate under FIFRA to evaluate the safety of products for people and the environment. Consumer fraud statutes, like the New Jersey Consumer Fraud Act (NJCFCA), only impose a duty upon global chemical companies to honestly market their product. The unanimous *Peterson* jury, on December 6, 2001, found that BASF violated honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than honestly market its product.

4. “Off-Label” Claims Addressing Pesticide Sellers’ Duty Of Honesty Are Off The Radar Of Preemption

Bates recognized the obvious, that fraudulent marketing representations – off-label claims – are off the radar of preemption. 125 S.Ct. at 1799, n. 17 (“To the extent that ... fraud claims are based on oral representations made by Dow’s agents, they [*are not*

preempted].” The EPA through the Solicitor General acknowledged during the January 10th oral argument in *Bates* that fraudulent marketing representations are not preempted: “[*We agree that ... off-labeled, false misrepresentation[s] [are] ... not preempted.*]” Tr. 43:4-7 (question by *Justice O’Connor* and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).⁵

BASF and its coordinated chemical industry have generated eight years of litigation over Farmers’ straightforward consumer fraud claim, and BASF’s preemption complaint summarily rejected by the Supreme Court. BASF never acknowledges its off-label lies to state regulatory officials. “*Shame on [BASF]*” said Fargo Forum (ND) editors, after BASF’s deceit was uncovered. Clerk Doc. 562.

C. BASF’s Misinformation Campaign

1. Pretends Jury Verdict Never Occurred

BASF grasps at isolated and out-of-context citations to a complaint drafted in 1997 – as if discovery and a five-week trial and *Peterson III, II* and *I* never occurred – and mis-cites the record from a 5000-page trial transcript. This case was tried to a 12-member jury in November and December, 2001 with a unanimous finding that BASF engaged in fraudulent “*marketing and pricing.*”

⁵ See supremecourt.us/oral_arguments/argument_transcripts/03-388.pdf.

2. Pretends EPA Never Pronounced BASF's Market Segmentation Scheme Is Not Preempted

This Court acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide -- "*a company marketing decision in which the EPA had no input.*" *Peterson III*, 675 N.W.2d at 70 (emphasis added). No authority supports BASF's disregard of the EPA's statement in this case.⁶ *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984) (court defers to agency's reasonable interpretation of statute it administers).

3. Recalcitrant Attempt To Challenge Established Facts

BASF re-argues factual complaints it lost before the jury. BASF cannot challenge established facts:

- **Same product:** *Peterson III*, 675 N.W.2d at 69 ("*[E]vidence was presented that Poast and Poast Plus are essentially the same product ... this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud.*");
- **Crop injury:** *Peterson II*, 657 N.W.2d at 867 ("There was *clearly evidence* ... that BASF believed that Poast Plus had been sufficiently tested for use on minor crops.") (emphasis added); and
- **State registration:** 657 N.W.2d at 867 (farmers presented evidence, including expert testimony, from which "*jury could [conclude]*" that BASF's state registration decisions were part of BASF's national system of deceit) (emphasis added).

⁶ *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989), *cert. denied*, 495 U.S. 957 (1990) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is *unprofessional*") (emphasis added).

See, e.g., *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999) (evidentiary findings will not be set aside unless clearly erroneous); see generally Eric J. Magnuson & David F. Herr, 3 *Minnesota Practice*, § 103.20, at 82 (4th ed. 2002) (“[A]ppellate courts have little patience for litigants who insist on bringing appeals in an effort to merely re-argue the facts.”).

4. **Recalcitrant Attempt To Challenge Indefensible And Waived Legal Complaints**

BASF also re-argues indefensible and waived legal complaints resolved in *Peterson III, II* and *I*:

- **Federal Preemption:** *Peterson III*, 675 N.W.2d at 70 (“[F]armers ... consumer fraud claim is not based on BASF’s labels but rather on fraudulent marketing techniques ... Farmers’ claims were based on BASF’s misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging.”), citing *Peterson II*, 657 N.W.2d at 865; and
- **Jury Instruction:** 657 N.W.2d at 871 (“BASF’s proposed instructions do not relate directly to the charge before the jury, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses’ descriptions of the effect of the regulations. These topics were more properly the subject of counsel’s final argument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.”).

STATEMENT OF THE CASE

This is a straightforward consumer fraud case brought under the NJCFA, §§ 56:8-1-56:8-116 on behalf of farmers in all 50 states who purchased Poast herbicide from New

Jersey-based BASF⁷ in 1992-96, except for some North Dakota farmers who settled a separate class action lawsuit with BASF in 1997 for \$3.5 million and national injunctive relief. *See, e.g.*, RFA003 (Class Action Notice); RFA1732-54 (*national reduction in price of Poast*).

This case has been litigated for eight years with five published and unpublished state and federal court opinions and a unanimous 12-member jury verdict adopted by the Norman County District Court, the Honorable Michael J. Kraker, approving Farmers' claim that BASF engaged in a national "system of deceit"—intentional misrepresentations, unconscionable commercial practices, and omissions — by marketing the same herbicide as different products — Poast and Poast Plus — to extract inflated prices from minor crop farmers.

- *Peterson III*, 675 N.W.2d at 63-64 (BASF made material misrepresentations in advertisements ... [and engaged in many other] ... efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast.”);
- *Peterson II*, 657 N.W.2d at 866 (“jury could conclude that BASF’s marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA”);
- *Peterson I*, 618 N.W.2d at 821 (remanding for a jury to determine whether

⁷. BASF is a subsidiary of a global German parent corporation, BASF Aktiengesellschaft (BASF AG), with yearly revenues exceeding \$8 billion dollars. The trial court conservatively excluded evidence that BASF and BASF AG were at the epicenter of recent major violations of antitrust and consumer laws. Clerk Doc. No. 493; Minn.R.Evid. 404(b).

BASF's herbicide marketing and pricing schemes deceived farmers and wrongfully exploited the federal EPA and state regulatory process as a "system of deceit" to exact inflated prices from minor crop farmers).

This Court confronted the evidence:

[F]armers argue that their consumer fraud claim *is not based on BASF's labels but rather on fraudulent marketing techniques*. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that *BASF's registration and container labels were false or misleading*, * * * [r]ather, the farmers' point was that *even if BASF's labels were technically accurate*, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops ...

For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, *which a BASF executive candidly admitted was a material omission*. Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "*problem appears to stem from a company marketing decision in which the EPA had no input.*"

Peterson III, 675 N.W.2d at 70 (emphasis added).

A. BASF Engaged In A National “System Of Deceit” To Extract Inflated Prices From Minor Crop Farmers

BASF’s misconduct and deceit arose when BASF’s original product, Poast, faced competition in the national soybean (major crop) market. In the minor crop market, Poast had a dominant position. To meet competition in major crops, while retaining a premium price in minor crops, BASF deceptively devised Poast Plus and marketed expensive Poast to minor crop growers and cheaper Poast Plus to major crop growers. It was a market-segmentation scheme.

The EPA and BASF regarded Poast and Poast Plus as the same herbicide and both products were EPA-registered for the same crops based on the same residue safety data submitted to the EPA under oath by BASF. Both products were applied at the same amount of active ingredient per acre. BASF admitted in federal court and at trial, that Poast was \$4/acre (\$32 per gallon of product) more expensive during the class period. *See, e.g., Peterson, 12 F.Supp.2d at 967.*

B. Unanimous *Peterson I* Reversed Summary Judgment For BASF And Remanded For Trial

Peterson I rejected BASF’s mutating federal preemption/regulatory compliance defense by distinguishing between regulatory compliance and consumer fraud:

BASF’s registering of one herbicide for use on different crops was specifically permitted by the EPA. 40 C.F.R. § 152.130(b) (1994). [Farmers] presented evidence, however, to suggest that BASF designed a plan to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus...Thus, [farmers] have shown that a genuine issue of

material fact exists as to whether BASF's system of deceit falls within the broad protection of the [NJCFRA].

618 N.W.2d at 824 (emphasis added).⁸

C. MN Supreme Court Denies BASF Petition for Review

BASF petitioned this Court to review *Peterson I*. BASF *only argued causation* rejected by *Peterson I*, and *did not petition for further review* of class certification or its *federal preemption defense*.⁹ RFA203 (BASF's "Legal Issues" In *Peterson I* petition for further review). This Court denied BASF's petition.

D. Unanimous 12-Member Jury Verdict And Common Fund Judgment

On December 6, 2001, 12 jurors unanimously found:

We, the jury in this case, find as a Special Verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's *marketing and pricing strategies* for Poast and Poast Plus herbicides?
Answer: YES X NO _____
2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's *marketing and pricing strategies* for Poast and Poast Plus herbicides?

⁸. BASF's Addendum provides *Peterson III* and *II* opinions for ready review by this Court. BASF's Addendum also includes the district court's March 2, 2000 order erroneously dismissing the case. BASF childishly fails to provide *Peterson I*, the unanimous Court of Appeals opinion reversing the district court and remanding for trial.

⁹. BASF waived any right to continue its federal preemption defense after it failed to seek further review on federal preemption before this Court after *Peterson I*. See ARGUMENT, Part IV(D)(1).

Answer: YES X NO _____

If you answered "Yes" to any one of Questions 1 and/or 2 above, then answer Question No. 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

Answer: YES X NO _____

If you answered Question No. 3 above "Yes", then go to Question No. 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992 \$ 2,000,000

1993 \$ 5,000,000

1994 \$ 3,000,000

1995 \$ 4,000,000

1996 \$ 1,000,000

RFA001-02 (emphasis added); Clerk Doc.575. On April 2, 2002, the trial court entered a Minn. R. Civ. P. 54 "final ... common fund" money judgment for Farmers. *Peterson IV* (A04-1553).

E. Unanimous *Peterson II* Affirms Jury Verdict And Judgment

Peterson II, 657 N.W.2d at 853, rejected BASF's 34 appeal issues and affirmed the 12-member jury verdict and judgment.

F. Unanimous *Peterson III* Affirms Jury Verdict And Judgment

This Court on Feb. 19, 2004 affirmed the jury award and judgment against BASF. *Peterson III*, 675 N.W.2d at 64.

G. *Bates Embraces Peterson III*

Bates affirms that state "label" claims addressing marketing responsibilities of

pesticide sellers to consumers are not preempted by FIFRA. 125 S.Ct. at 1799. *Bates* acknowledges that “off-label” claims are off the radar of preemption. *Id.*, at 1799, n. 17. *Bates* embraces *Peterson* confirming BASF’s fraudulent “marketing and pricing” scheme.¹⁰

STATEMENT OF FACTS

A. Poast And Poast Plus Are The Same Herbicide

Poast and Poast Plus are a post-emergence grass herbicide with the same active ingredient (sethoxydim), EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. RFA611-90;Tr.2424:19-2425:10;2776:12-2777:13. BASF’s EPA registration submission certified that Poast Plus was “tolerant” for the same minor crops as Poast. RFA611;623(field);636(forage);648(vegetables);656(fruits). BASF’s

¹⁰. BASF’s effort to create a judicial train wreck of post-judgment litigation before the district court and appellate courts – to delay payment of the money judgment while unjustly earning \$5.5 million holding Farmers’ money judgment – is drawing to a close:

Peterson IV: On July 19, 2005, this Court denied BASF’s petition for further review of *Peterson IV* (A04-1553) (Minn. R. Civ. P. 54 jury verdict judgment entered for Farmers on April 26, 2002 was a “final ... common fund” judgment ending BASF’s interest.).

Peterson V: Pending before the Court of Appeals is *Peterson V* (A04-2464), argued June 30, 2005, BASF’s challenge to Judge Kraker’s Oct. 12, 2004 order finding that BASF’s attempted “settlement” fund transferring “ownership” and “distribution” disputes over Farmers’ money judgment to the jurisdiction of Manhattan (NY) courts – without any settlement dismissing BASF from the case – was an “*abuse of process* and *interference with Farmers’ property.*”

Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies.

Tr.1340:14-18;1343:1-8;2673:6-12. Under trade names *Vantage* and *Torpedo*, Poast Plus was legally used on hundreds of varieties of minor crops across the country, i.e., delicate roses and violets and fruit-bearing trees, without crop injury.

RFA394;426;606;1198;1235;1248;Tr.2012:14-2013:18;3110:9-3117:1.

B. BASF's Scheme: "Opportunistically Exploit" Minor Crop Farmers

BASF's exploitation of minor crop farmers originated at BASF's New Jersey headquarters in 1988. RFA450;602. BASF decided to price Poast at a premium for minor crop farmers and introduce the same herbicide, cheaper Poast Plus, to meet competition in major crops. BASF was concerned that its scheme would be uncovered, RFA450 (emphasis added):

Does it make sense to position Poast on a high price level in high value [minor] crops and introduce a 2nd grasskiller for soybeans, cotton, sugarbeet for example on a lower price level? *Will the farmer be controlled in future?*

In 1989, at the direction of parent BASF AG, with instructions emanating from New Jersey headquarters, BASF implemented its exploitive United States' "marketing scheme." RFA602. BASF's "Confidential" marketing plan for Poast included these predatory elements: "ACTIVE MARKET SEGMENTATION. OPPORTUNISTIC EXPLOITATION OF NON-SOYBEAN MARKET POTENTIAL." RFA469 (emphasis in original).

By 1992, BASF had registered Poast Plus with the EPA as safe for use on the same minor crops as Poast. RFA611-90;Tr.2149:8-2150:1;2424:19-2425:10. BASF attested to the EPA that no new residue studies were needed:¹¹

No new residue data is included and is not needed because the proposed label directions for use in the above listed crops for Poast Plus are *identical* to those for the registered product Poast Herbicide (EPA Reg. No. 7969-58) in terms of number of applications, pounds of active ingredient per acre, and PHI [preharvest interval].

RFA689-90 (emphasis added);Tr.2684:22-2685:22. *Poast and Poast Plus are*

indistinguishable when used by farmers except that Poast was \$4.00/acre

(\$32.00/gallon) more expensive than Poast Plus. RFA1013;Tr.1291:11-1294:13;2174:7-25;2236:1-2238:20.

C. BASF's Exploitation Scheme: Concealment Of Material Facts And Overt Lies

The EPA *and* BASF regarded Poast and Poast Plus as the same herbicide:

Any crops currently registered for use on the POAST label can be placed into the POAST PLUS label. All that is needed is a proposed POAST PLUS label, containing that particular use, to submit to the EPA for approval.

RFA1289.

BASF concealed from farmers and agriculture officials – and lied when directly confronted – the truth that Poast and Poast Plus were EPA-registered for the same crops.

¹¹. A company must demonstrate the relative safety of a herbicide as it relates to people and the environment. 40 C.F.R. § 158.20 (1993).

Tr.1876:1-1879:5. BASF's "secret"¹² registration for Poast Plus was a marketing decision. RFA1289. The motive for the deception is explained in an October 23, 1992 memo from BASF's public relations firm to BASF's marketing division: "*[W]e run the risk of some people knowing* POAST PLUS is also registered, but not labeled, for [minor crops]." RFA365 (emphasis added).

To conceal the EPA registration of Poast Plus and advance its "Opportunistic Exploitation" scheme, BASF's marketing was blatant lies and half-truths. BASF claimed through advertising materials that Poast was the "only" product with registered residue tolerances for minor crops. Tr.447:20-449:1. BASF's product line catalog deceptively stated: "Poast Plus for postemergence grass control in multiple crops. *Registered* for use on cottons, soybeans, peanuts, alfalfa." RFA967(emphasis added);Tr.445:6-20. BASF executives testified that it was not appropriate to use the term "registered." Tr.2223:6-12;445:8-20;461:7-21. BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops was perpetuated through publications, radio spots, ad slicks,

¹². North Dakota Agriculture Commissioner Sarah Vogel detailed, to the EPA, North Dakota's discovery that BASF had lied about the Poast Plus registration, RFA1428;1430 (emphasis added):

On May 18, 1994, I received a letter from Mr. Sanders [of the EPA] stating, '... the crops, which appear on the Poast label, were accepted [registered] for use on the Poast Plus label in 1992. Your problem appears to stem from *a company marketing decision in which the EPA had no input.*' . . . This was the first time that the Department of Agriculture learned about BASF's *secret* label.

bill stuffers, and postcards directed at minor crop farmers:

Sugarbeets

Poast “[c]ontrols more grasses than any other sugar beet herbicide.”
RFA884;908;925;951.

Dry Beans

“Poast is the only over-the-top grass herbicide developed for dry beans.”
RFA963;965;868;897;925;950.

Vegetables

“For grass control in vegetables, Poast herbicide stands alone. No other herbicide, pre or postemergence, controls so many grasses in all these varieties.” RFA869;876;909;926;893;939.

Potatoes

Poast “[c]ontrols more grasses than any other potato herbicide.”
RFA883;908;925;951.

Flax and Sunflowers

“*Poast from BASF is the only postemergence herbicide registered for use in flax and sunflowers.*” RFA826 (emphasis added). “*Poast from BASF is the only postemergence herbicide registered for use in flax.*”
RFA883;909;924;950 (emphasis added).

These promotional pieces misrepresented and concealed that Poast Plus was registered with the EPA for the same crops to control the same grasses, based on the same residue safety data submitted for Poast. RFA689-90. “*As far as what the plant sees, they’d see the same amount of active ingredient.*” Tr.2777:1;1567:19-1569:9.

“Opportunistic Exploitation” of minor crop farmers remained the driving force behind BASF’s marketing of Poast. RFA703.

BASF’s scheme was effective. Class representatives testified they were misled by Poast and Poast Plus advertisements (Tr.1183:25-1187:7;1287:9-1288:16;1445:25-

1446:3;1670:11-22) and representations by BASF field representatives at growers' meetings (Tr.1395:25-1396:17;1443:10-1445:15;1644:18-1645:5;1669:13-1670:10). Farmers did not understand they had been deceived by BASF until North Dakota and South Dakota uncovered BASF's marketing fraud and allowed farmers to use Poast Plus on minor crops, and commencement of the North Dakota class action. Tr.1292:7-1294:23;1448:24-1449:7;1643:15-1644:20.

D. BASF's Enforcement Scheme: Criminal Prosecution Of Farmers As A "Marketing" Strategy – While Deceiving Farmers, Distributors, Processors And Regulatory Authorities

To exploit minor crop farmers, BASF recognized that it must actively enforce the use of Poast Plus only on major crops. RFA705-06;774. BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast. RFA780-81;793. If BASF could not prevent the use of cheaper Poast Plus on minor crops, it would experience millions of dollars in lost profits on the same sales volume. RFA691. BASF recognized that the greatest risk for losing control – "*will the farmer be controlled?*" – were areas, like the Red River Valley of Minnesota/North Dakota, where the same farmers grow major and minor crops side-by-side and purchased Poast and Poast Plus. RFA700-05;793;799.

BASF urged that farmers be criminally prosecuted for "off-label" use of cheaper Poast Plus on minor crops (RFA840-49) – not pursuant to the EPA's underlying taxpayer

mandate to regulate the safety of herbicides for man and the environment – but criminal prosecution for “off-label” use only pursuant to BASF’s “market[ing] ... strategy” to “enforce” the use of expensive Poast herbicide on minor crops.¹³ RFA385;1065.

As BASF’s registration specialist acknowledged in a May 11, 1995 internal memorandum: “We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label.” PX336. Enforcement of BASF’s marketing ploy to restrict the Poast Plus label became the means for BASF’s enforcement of its “Opportunistic Exploitation” of minor crop farmers. PX333;300.

BASF sent mailings to 5000 food processors and over 3000 dealers under the guise of maintaining the “safety of the food supply” and stewardship. In the mailing, BASF listed the four major crops on the Poast Plus label as its EPA registration (approved “residue tolerances”), while omitting that Poast Plus was EPA-registered with the same “residue tolerances” for the same minor crops as Poast. RFA360-64;769-73. The fraudulent purpose of these mailings was to enlist food processors and dealers to restrict the use of Poast Plus to only the major crops in order to “*protect the food supply*” and “*avoid residue problems.*” *Id.* Yet, BASF had already certified to the EPA that there were no residue or crop safety (tolerance) problems in using Poast Plus on minor crops.

¹³. FIFRA provides the EPA and state agriculture departments with enforcement mechanisms for violations of product labels (“off-label” use), including civil administrative penalties and criminal sanctions and fines. 7 U.S.C. § 136j-m.

RFA689-90;Tr.2684:22-2685:22. BASF fraudulently and unconscionably used food processors and dealers to enforce its “Opportunistic Exploitation” of minor crop farmers and conceal the EPA registration of Poast Plus. RFA770;773.

To further reinforce the risk of off-label use of Poast Plus, BASF used its public relations firm to draft a Position Paper that was mailed to a wide variety of agencies and processors involved with minor crops that could influence farmers regarding off-label use of Poast Plus. RFA817-18;1530-32. The Position Paper stressed “hefty fines” for off-label use and the dangers to consumers and the environment (RFA818;1758), even though BASF knew that Poast Plus was EPA approved as safe for use on the same crops as Poast. RFA689-90. To perpetuate its lies regarding the EPA registration of Poast Plus for use on minor crops, the Position Paper falsely stated that Poast was, “[T]he *only* postemergence *product registered* to control grasses in [minor crops]...” RFA817(emphasis added);Tr.3588:15-24.

E. BASF’s Deceit Unravels: Farmers And State Officials React When Truth Of EPA Registration Of Poast Plus is Uncovered.

BASF’s own sales force predicted that BASF’S fraudulent “Opportunistic Exploitation” scheme would fail. Tr.2231-33. The Jolly Green Giant was not so jolly upon surmising it was a victim of BASF’s scheme:

One more group can be added to the growing list of people who are not happy with the *sethoxydim market segmentation scheme* from BASF. A research agronomist from *Pillsbury Green Giant* called to discuss quote “the similarity between the two sethoxydim formulations.” To him, it was very clear that their company and the food processors in general were being

singled out and asked to pay a much higher price for post emergence grass control.

RFA1566 (emphasis added).

The grim concern of BASF and parent BASF AG at the dawn of the scheme – “*Will the farmer be controlled*” – proved prescient. RFA450 (emphasis added). Minor crop farmers began disregarding BASF’s container (marketing) label restricting Poast Plus to major crops. RFA1466;780;793;969 (BASF memo describing scheme as “becoming transparent”).

BASF egregiously enacted a strategy to use state agriculture departments to perpetuate BASF’s “Opportunistic Exploitation” scheme using state agriculture inspectors to “monitor and enforce the use of Poast over Poast Plus” on minor crops. RFA1285. BASF turned in its own dealers to Agriculture Inspectors for selling Poast Plus to minor crop farmers. RFA840-49. This resulted in “hefty fines” to dealers and farmers despite the fact that EPA approved Poast Plus safe on minor crops. RFA849;Tr.1727:2-17. As prosecutions increased, BASF took the extreme step of lying to state Agriculture Departments regarding EPA registration of Poast Plus. *See e.g.*, RFA1288;381-83;Tr.1730:13-1731:12. For example, BASF executives lied to the North Dakota Pesticide Control Board (“Control Board”) to conceal the EPA registration of Poast Plus for the same crops as Poast. Tr.1876:1-24;1877:20-24;1929:2-18. A BASF memorandum noted the need to “develop a strategy” *if North Dakota officials had already learned the truth*:

North Dakota State has indicated that they have requested information from EPA *and may know* by the time of the March 28 meeting that *Poast Plus is also labeled in all these crops and that BASF has chosen not to extend this label to the marketplace. . . .* This will involve some *nebulous argumentation* . . . that EPA could request side-by-side residue work for Poast Plus and Poast.

RFA375 (emphasis added).

Minutes of the March 1994 Control Board demonstrate BASF's overt lies:

BASF was asked if they could expand the Poast Plus label [to all minor crops on the Poast label]. They said they could not because of economics. When questioned on whether the EPA may allow them to expand the Poast Plus label based on the current residue package submitted on sethoxydim, BASF did not know. However, they feared if they put this issue to question with the EPA, the EPA may require BASF to do residue testing for the Poast Plus as well.

RFA377-78(emphasis added);Tr.1888:25-1889:12. The Control Board wrote the EPA to determine if Poast Plus *could be registered* for use on minor crops. The EPA responded:

A review of our records indicate that the crops, which appear on the Poast label, were accepted (registered) for use on the Poast Plus label in 1992. Your problem appears to stem from *a company marketing decision in which EPA has no input.*

RFA385 (emphasis added); Tr.1888:25-1890:7. A confidential internal BASF memorandum to BASF management states that the EPA was upset that BASF had deceived the Control Board:

Mr. Taylor (EPA) told me he did not appreciate getting put in the middle of this issue since *it is related to a marketing strategy and is not a regulatory matter.* Furthermore, EPA has already granted registration of POAST PLUS in most of the crops for which POAST is labeled, without requiring additional residue data from BASF. Mr. Taylor knows that the statement made to Ms. Vogel and attributed to BASF is *incorrect*, and *he is not pleased that BASF misdirected her*

as to where the issue really lies.

RFA334 (emphasis added). At trial, a BASF executive, *admitted that the statements he and another BASF executive made to the Control Board were false*, but that he *was told* to make them by senior executive William Wisdom. Tr.458:1-23.

As BASF turned in dealers and farmers for off-label use of Poast Plus, minor crop farmers petitioned regulators for the right to use cheaper Poast Plus. RFA1533;1540-52. After BASF's lies were uncovered by North and South Dakota authorities, RFA857-58, North and South Dakota issued 7 U.S.C. § 136v(c) (1) (Rule 24(c)) registrations to use cheaper Poast Plus on minor crops.¹⁴ RFA1015-21. Although BASF opposed the Rule 24(c) labels, BASF's own trade and lobbying organization (American Crop Protection Association) refused to support BASF's opposition. PX291. Commissioner Vogel bluntly responded to BASF's opposition: “[BASF] has eroded public respect for the registration process.” RFA1428 (emphasis added).

The EPA rejected BASF's opposition. RFA412-13;Tr.2669:17-2670:20;Tr. 2689:5-9. Minnesota and Montana officials also considered a Rule 24(c) label for Poast Plus after learning that North and South Dakota had done so. RFA414;1064;1449 (“[BASF] believe[s] the state of Minnesota may also have granted a 24(c) registration for

¹⁴. BASF's reaction to the North and South Dakota 24(c) registrations was predatory and predictable. BASF, through a personal telephone call from Executive William Wisdom, *maliciously threatened to personally sue North Dakota Commissioner Vogel*. Tr.1759:14-25-1760:1-11.

Poast Plus for the same uses.”). The matter was rendered moot for *Minnesota and all other states* because, after the actions of North and South Dakota and commencement of the *Tompkins* class action in North Dakota, BASF reduced the price of Poast to equal Poast Plus nationwide in 1997 (RFA1732-54):

C. Price Reduction. After filing of Plaintiffs’ lawsuit, in contemplation of the 1997 growing season, BASF Corporation determined unilaterally to effect a nationwide price reduction of the Poast Product, thereby causing the price of Poast to be equivalent to the price of Poast Plus on a per acre basis. Clerk Doc. 563.

F. BASF’s Deceit Was Complete

Said a unanimous *Peterson II*, 657 N.W.2d at 862:

The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of “off-label” use, despite the fact that Poast Plus had been approved for minor crops. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called “rule 24(c)” special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

Testified Farmers’ FIFRA expert, Dr. Charles Benbrook: “It was, for approximately a five-, six-year period, price gouging.” Tr.1939:17. Commissioner Vogel

and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: “[I] can take hard answers, but don’t lie. Just - - you don’t lie.” Tr.1878:5-6;1559;1746:2-23;1748:22-1749:9;1753:14-15;1756:1-7;1758:13-20;1765:17-1766:5;1788:6-11;1830:19-25;1878:7-1879:14.

BASF’s management conceded that BASF’s marketing for Poast Plus was misleading:

- A. (Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.
- Q. *Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?*
- A. *Yes, I would consider that.*

Tr.461:11-20.

ARGUMENT

I. **BATES EMBRACES PETERSON CONFIRMING BASF’S FRAUDULENT “MARKETING AND PRICING” SCHEME**

Bates holds that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA:

- FIFRA is not intended to deprive injured parties of compensation under state claims addressing pesticide sellers’ marketing responsibilities to consumers;
- Jury verdicts do not establish “labeling and packaging” requirements; and
- Off-label claims are off the radar of preemption.

Id. at 1798-1801.

A. A Presumption Against Preemption

The Supreme Court said:

[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action. ... In areas of *traditional state regulation*, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.' ... The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.

125 S.Ct. at 1801 (emphasis added).¹⁵

¹⁵. The Minnesota Attorney General (AG), in its amicus brief submitted to this Court in *Peterson III*, bluntly states that BASF's preemption complaint would *gut consumer protection laws* across the United States:

BASF contends that a federal labeling law can preempt state consumer protection law claims based on marketing practices other than repetition of label language itself, such as deliberately misleading testimony before state agricultural authorities and decisions about how to hide from farmers–consumers the true [EPA registration status] of the product. No case law supports such an expansive view of the preemptive effect of federal labeling laws.

Attorneys General regularly bring multi-state consumer protection cases that involved businesses operating under such labeling laws [as FIFRA] or under federal product regulatory approvals, such as Food and Drug Administration requirements [footnote citing recent Minnesota actions omitted]. If BASF's position were to prevail, public law enforcement against regulated industry could be substantially narrowed.

RFADD29-30 (emphasis added).

B. Jury Verdicts For Fraudulent Marketing Schemes Do Not Establish “Labeling And Packaging” Requirements

The Supreme Court rejected BASF’s complaint that state claims challenging a pesticide seller’s product marketing “require” a change in the EPA-approved label:

For a particular [state claim] to be preempted, it must satisfy two conditions. First, it must be a *requirement “for labeling or packaging”*; rules governing the design of the product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is “*in addition to or different from those required under [FIFRA].*”

It is perfectly clear that many of the [state claims] upon which [farmers] rely *do not satisfy the first condition*. Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for “labeling and packaging.”

* * *

A requirement is a rule of law that must be obeyed; an event, such as a *jury verdict*, that merely motivates an optional decision is not a requirement.

125 S.Ct. at 1798-99 (emphasis in original and added).

BASF’s conduct so completely fails the *Bates* preemption test, that any suggestion otherwise is absurd. The jury verdict against BASF, under the NJCFA, does not impose a “requirement for ‘labeling and packaging.’” The jury verdict does not impede the EPA’s mandate under FIFRA to evaluate the safety of products for people and the environment. The unanimous jury found that BASF violated honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than honestly market its product.

C. Off-Label Claims Are Off The Radar Of Preemption

BASF fails the “labeling and packaging” test for an independent reason. Farmers’ claims in *Peterson* are off-label claims of lies, deceit and smoking gun memoranda discussing, for example, the “risk” of farmers and state regulatory authorities discovering that cheaper Poast Plus was registered by the EPA for the same crops as Poast, based on the same residue data. The Supreme Court confirmed that off-label claims – fraudulent “marketing and pricing” are off the radar of preemption:

To the extent that [farmers] warranty and *fraud* claims are based on oral representations made by Dow’s agents, they fall outside [FIFRA] for *an independent reason*. Because FIFRA defines labeling as “all labels and all other written, printed, or graphic matter” that accompany a pesticide [FIFRA cite omitted], any requirement that applied to a sale agent’s *oral* representations would not be a requirement for “labeling or packaging.”

125 S.Ct. at 1799, n. 17 (emphasis in original and added).

D. EPA “Misbranding” Standard For False “Label” Claims Like *Bates* Has No Application To *Peterson* – An “Off-Label” Fraudulent Marketing Scheme

The Supreme Court acknowledged that state claims challenging product efficacy statements *on the EPA-approved label* as dishonest, may be preempted if the claims are not “generally equivalent to” the EPA’s “misbranding” standard governing false label-based claims. “A pesticide is ‘misbranded’ if its label contains a statement that is ‘false or misleading in any particular,’ including a false or misleading statement concerning the efficacy of the pesticide.” 125 S.Ct. at 1795.

The “misbranding” standard for “label” claims like *Bates* has no application to

Peterson – an “off-label” fraudulent marketing scheme. “[F]armers here are not asserting that BASF’s registration and container labels were false or misleading” *Peterson III*, 675 N.W.2d at 70. “[F]armers ... consumer fraud claim is not based on BASF’s labels but rather on fraudulent marketing techniques.” *Id.*

II. BATES CONFIRMS THAT REGULATORY COMPLIANCE HAS NO RELATION TO CONSUMER FRAUD

Bates affirms that state claims by farmers challenging the effectiveness of the product, even though the EPA under FIFRA approved the product label, are not preempted. *Bates* recognizes the obvious – regulatory compliance has no relation to consumer fraud. 125 S.Ct. at 1798-99 (state claims challenging pesticide sellers’ marketing responsibilities to consumers, and jury verdicts on those claims, are not requirements “for labeling and packaging”).

A. EPA Allows “Split And Subset Labeling” But Does Not Address Marketing Strategies

As recognized in *Peterson I*, 618 N.W.2d at 824, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b) (“split and subset labeling”). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e).

The EPA does not ascertain why companies split or subset label their pesticides, beyond a demonstration that a split or subset label “*would not significantly increase the*

risk of any unreasonable adverse effect on the environment". 40 C.F.R. § 152.113(b) (emphasis added). Acknowledged BASF's registration specialist in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." RFA1289 (emphasis added). Simply stated, the *EPA does not address company marketing and pricing schemes*.

B. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' fraud claims were based on BASF's "marketing scheme and exploitation of federal regulations" and not based on "technically accurate" product labels. *Peterson II*, 657 N.W.2d at 865. During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's EPA regulatory expert – Daniel Barolo

- Q. And the same thing would be true of a company who went through all the process of registering a crop with both the EPA and states, *they could still commit consumer fraud*.
- A. *I presume they could*.

Tr.2697:7-11.

BASF's marketing expert – Dr. Dale Dahl

- Q. That is regardless of *whether or not your product is registered with either the EPA or the state*, because they're separate registrations, a company can still commit *consumer fraud by lying* about its product; right?

A. *Sure.*

Tr.3352:5-17.

BASF'S management – William Wisdom

Q. And you will agree and tell the jury that the *EPA does not concern itself with BASF's marketing practices*, does it?

A. *That's correct.*

Q. But *consumer fraud laws do*, don't they?

A. *Yes, sir.*

Q. The *EPA registration process* that we have been talking about *does not concern market[ing]*; right?

A. *That's correct.*

Tr.1017:7-15.

III. ALL COURTS AND STATE ATTORNEYS GENERAL RECOGNIZE THAT FRAUDULENT "MARKETING AND PRICING" SCHEMES ARE NOT PREEMPTED BY FEDERAL HEALTH AND SAFETY LAW

A. *Tompkins v. BASF Corp.* Rejected BASF's Preemption Defense

In *Tompkins v. BASF Corp.*, No. A2-96-S1 (D.N.D. 1996), the North Dakota class action litigating the facts of this case, the Honorable Rodney S. Webb, Chief U.S. District Court Judge for North Dakota dismissed BASF's federal preemption complaint in a July 12, 1996 Order: "This case is not as much about labeling and packaging *as it is about pricing and marketing*. RFA2313-18; Clerk Doc.77 (emphasis added).

Judge Webb reached the nub of this case in *one sentence*. Judge Webb's efficient ruling highlights the absurdity of BASF's eight years of scorched-earth litigation to avoid payment of the money judgment.

B. Recent National Class Actions With Similar Claims Rejected Preemption Defense

In recent years several class actions of “United States” consumers with similar claims involving deceptive marketing of a federally-regulated product as different products for different uses, at widely-varying prices, have been certified and settled with substantial payments to victimized consumers. *See Kropinski v. Johnson & Johnson*, Docket No. L-88886-96 (Sup.Ct.N.J. 1997), RFA255-58 (deceptive marketing of a contact lense as different lenses, and exploitation of FDA regulatory process, to exact a premium price from consumers); *Roberts v. Bausch & Lomb, Inc.*, Case No. 94-C-1144-W (N.D. Alabama 1997), RFA268-78 (same); *Kramer v. Bausch & Lomb, Inc.*, Index No. 110972/95 (N.Y. App. Div. 1999), RFA260-67 (deceptive marketing of a contact lense solution as several different products, and exploitation of the federal FDA regulatory process, to exact a premium price from consumers). Published *settlements* to defrauded U.S. consumers: *Kropinski* (\$840 million); *Roberts* (\$67 million); *Kramer* (\$12 million).

C. Seventeen Attorneys General Rejected Preemption Defense

In a 1997 prosecution of Bausch & Lomb under consumer protection laws, *Seventeen Attorneys General* (including Minnesota), procured a cease-and-desist order rejecting Bausch & Lomb’s defense that the FDA had approved three different lense container (marketing) labels:

Bausch & Lomb: (a) represented, directly and by implication, that its practice of marketing identical contact lenses under different names and at differing prices was approved by the United States Food and Drug

Administration (“FDA”) or was due to the need to comply with FDA requirements governing the labeling of contact lenses, when in fact *the FDA has neither approved nor required such Bausch & Lomb pricing and marketing practices* and (b) *by such false, misleading and deceptive representations violated the States’ consumer protection laws*

RFA191, at ¶ 4 (emphasis added).

IV. BASF’S REMAND BRIEF IS A GAME OF “DO-OVER”

A. BASF’s Deceit Has Moved From The Boardroom To The Courtroom

BASF resorts to bald misrepresentations of the law and record to delay payment of the money judgment. Before the Supreme Court, BASF and its coordinated chemical industry complained – without record citation – that “[Farmers’] contend that the federal registration of Poast Plus for minor crops imposed a duty on BASF to sell Poast Plus to minor crop farmers.” BASF Feb. 3, 2005 Supp. Br., p. 6; *see* RFADD17-18 (Farmers’ Feb. 9, 2005 letter accusing BASF of a “*gross misrepresentation* of the record to the [Supreme Court].”); *see generally* R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 6.30, p. 430 (8th ed. 2002) (“The Court relies heavily upon the good faith of petitioner’s counsel in accurately stating or summarizing the pertinent facts ...”). On remand, BASF resorts to *mis-cited record citations* – hoping Farmers and this Court will not hold BASF accountable.¹⁶

¹⁶. A sample of BASF’s mis-cited references to Farmers’ trial testimony:

- BASF Br., p. 14 (Purported testimony that Poast and Poast Plus are “identical” citing Tr. 1224:18-10 and 563:7-8. The testimony BASF did not cite *clarifies* that the witnesses are referring to the same “active ingredient,” Tr.1224:8-14 and same crop “registrations,” Tr.563:5-12);

B. BASF's Stealth Amicus Arguments To Supreme Court In *Bates* – Arguing *Peterson* Without Notice To Farmers – Were Unfair, Likely Unethical And Rejected

On November 24, 2004, BASF filed an amicus brief arguing *the merits of its Peterson petition* before the Supreme Court in *Bates*. Without serving notice and a copy of its *Bates* amicus brief on Farmers' counsel, BASF complained: "The Court's decision in [*Bates*] may substantially affect BASF's pending [*Peterson* petition]." RFADD19.

1. Unfair And Likely Unethical

Farmers learned of BASF's *Bates* brief on December 16, 2004, several weeks after the filing. When asked to explain why Farmers were not provided notice and a copy of the *Bates* amicus filing, BASF's counsel's response in an e-mail was that the filing is a

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- BASF Br., p. 15 (Purported testimony that BASF acted "dishonestly" in "labeling Poast Plus for major crops only" citing Tr.1397:19-1398:14 and 1449:13-21. The witnesses never used the word "dishonestly" and **actually testified** to the need to "obey" and "follow" the label and that BASF concealed the EPA "registration" of Poast Plus for the same minor crops as Poast);
 - BASF Br., pp. 29 and 35 (Purported testimony that BASF acted "wrongfully" and "[im]morally" in the registrations of Poast and Poast Plus, citing Tr.2176:3-15 and 1405:23-1406:8. In the cited testimony, the witnesses **never** mention "registration" and actually testify that it was morally wrong for BASF to use the state regulatory "enforcement" as a "marketing vehicle" to enforce a disparate price for Poast and Poast Plus.);
 - Other questionable transcript cites by BASF in support of specific arguments include, but are not limited to: BASF Br., p. 14, citing Tr.1239:3-4 and 1399:3-5; BASF Br., p. 15, citing Tr.588:23-589:5; BASF Br., p. 29, citing Tr.1403:25-1404:8; and BASF Br., p. 49, citing Tr. 205:15-16;381:1-14;1206:9-15;1206:9-15;1260:17-21;3770:3-11.

“publicly available government record.” RFADD20-21. BASF’s use of *Bates* to gain an unfair tactical advantage in *Peterson* was likely unethical. See, e.g., Minn.R. Professional Conduct 3.5(g)(2) (*lawyer must provide notice to opposing counsel of any effort to communicate merits of argument with judge in pending proceeding*).

2. Rejected

If BASF’s credibility on remand is not in tatters, a side-by-side comparison of BASF’s stealth *Bates* amicus arguments – all rejected by the Supreme Court in its *Bates* opinion – should elicit scorn. BASF complained that regulatory compliance, rejected as a defense in *Peterson III, II and I*, and rejected by BASF’s regulatory and marketing experts and management during trial, shields BASF from fraud claims:

The state court’s action held in effect that BASF should not have labeled and advertised two products with the same active ingredient with different product names for different approved uses, even though EPA regulations (1) required BASF to give the two pesticides different names and labels based on the products’ different chemical formulas, (2) explicitly allowed BASF to market the products with the subset of the EPA-approved uses on the label, and (3) strictly prohibited BASF from promoting any off-label use of its pesticides in its advertising. Such ad hoc regulation of pesticide labeling through state law-based jury verdicts necessarily erodes EPA’s exclusive authority to regulate the content of pesticide labels.

BASF’s *Bates* amicus brief, 2004 WL 2714004, at p. 10. The Supreme Court decisively rejected BASF’s complaint, recognizing that regulatory compliance – EPA approval of the container label – does not shield a pesticide seller from state claims by consumers alleging a violation of the pesticide seller’s marketing responsibilities:

Rules that require manufacturers to design reasonably safe products, to use

due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments *plainly do not qualify as requirements for “labeling and packaging.”*

125 S.Ct. at 1798 (emphasis added). BASF also complained:

[T]his Court should decisively affirm the Fifth Circuit’s reasoning that FIFRA preempts state-law claims of any kind that attack pesticide labeling, even if the plaintiffs rely in part on advertisements and off-label statements, as long as the defendant could avoid liability by changing it’s labeling. This would help ensure that plaintiffs cannot circumvent FIFRA preemption by creative pleadings – as the plaintiffs in *Peterson* have, so far, successfully done.

BASF’s *Bates* amicus brief, at p. 10. The Supreme Court rejected BASF’s complaint:

[T]he [Fifth Circuit] below reasoned that a finding of liability on these claims would “induce Dow to alter [its] label.” 332 F.3d, at 332. This effects-based test finds no support in the text of [FIFRA] 136v(b), which speaks only of “requirements.” A requirement is a rule of law that must be obeyed; an event, such as *a jury verdict*, that merely motivates an optional decision *is not a requirement*.

125 S.Ct. at 1799. The Supreme Court then said:

To the extent that petitioners’ warranty and *fraud* claims are based on oral representations made by Dow’s agents, they fall outside the text of 136v(b) for an *independent reason*. Because FIFRA defines labeling as “all labels and all other written, printed or graphic matter” that accompany a pesticide, 136(p)(2), any requirement that applied to a sales agent’s *oral* representations would not be a requirement for “labeling or packaging.”

Id. at 1799, n. 17 (emphasis in original and added). As off-label representations are not preempted, BASF’s lies, deceit and smoking gun memoranda, considered by the jury as off-label evidence of BASF’s fraudulent “marketing and pricing,” are off the radar of preemption. Additional examples of BASF’s stealth amicus arguments in *Bates*, all

rejected by the Supreme Court, are attached as RFADD1-3.

C. Abusive Effort To Re-Argue Facts Of Five-Week Trial

BASF had its day in court; a five-week trial with a unanimous 12-member jury verdict for Farmers affirmed in *Peterson II* and *III*. BASF devotes much of its remand brief to factual complaints it lost before the jury.

1. Same Product

Poast and Poast Plus have the same active ingredient (sethoxydim), are EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. RFA611-90;Tr.2424:19-2425:10;2776:12-2777:13. *Poast and Poast Plus are indistinguishable when used by farmers* except that Poast was \$4.00/acre (\$32.00/gallon) more expensive than Poast Plus. RFA1013;Tr.1291:11-1294:13;2174:7-25;2236:1-2238:20. A unanimous 12-member jury and *Peterson III, II* and *I* readily understood that BASF fraudulently marketed Poast and Poast Plus as different products, at different prices, as a “system of deceit” to extract inflated prices from minor crop farmers. *Peterson III*, 675 N.W.2d at 69 (“*[E]vidence was presented* that Poast and Poast Plus are essentially the same product ... this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud.”); *Peterson II*, 657 N.W.2d at 864 (“jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and *we will not substitute our judgment for that of the jury*”)

(emphasis added); *see, e.g.*, PX117 (BASF July 3, 1995 internal memorandum discussing BASF's "*market strategies*" of "*differential pricing of the same active ingredient*") (emphasis added).

2. Crop Injury

BASF complains that the potential for crop injury prevented BASF from registering Poast Plus for minor crops. BASF Br., at pp. 38-40. BASF's EPA registration submission certified that Poast Plus was "tolerant" for the same minor crops as Poast. RFA611;623;636;648;656. BASF's Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies. Tr.1340:14-18;1343:1-8;2673:6-12. *Under trade names Vantage and Torpedo*, Poast Plus was legally used on hundreds of varieties of minor crops across the country, i.e., delicate roses and violets, without crop injury. RFA394;426;606;1198;1235;1248;Tr.2012:14-2013:18;3110:9-3117:1. *See Peterson II*, 657 N.W.2d at 867 ("There was *clearly evidence* ... that BASF believed that Poast Plus had been sufficiently tested for use on minor crops.") (emphasis added);

3. State Registration

BASF's state registration strategies for Poast and Poast Plus were a continuum of BASF's "fraudulent marketing" scheme to "opportunistically exploit" and extract an inflated price from minor crop growers nationwide. *Peterson II*, 657 N.W.2d at 867 (jury could conclude that BASF's state registration decisions were part of BASF's national

system of deceit); *see, e.g.*, PX117 (BASF July 3, 1995 internal memorandum discussing BASF's "*market strategies*" of "*differential pricing of the same active ingredient*" and the option of BASF foregoing future Poast state registrations in North Dakota – "label off the state of North Dakota" – to punish the state for its actions after uncovering BASF's fraud). Said a unanimous *Peterson II*:

[F]armers presented evidence from which *the jury* could reach a different conclusion. The farmers' expert testified that once a company obtains an EPA registration, it is "very easy" to obtain a state registration in the majority of the states. The process is generally regarded as a mere formality except in California, Wisconsin, New York, and Florida, unless the product is considered risky. Poast Plus is not considered risky. The expert explained that the states rely on the EPA label to ensure that the product has the proper residue tolerances, safety, and efficacy. For BASF to register Poast Plus for the additional minor crops in most states, he noted that it would merely have to include those crops on the EPA label, send a letter to the state departments of agriculture with a small fee, and ask that the additional crops be included on the state registration.

657 N.W.2d at 867; *see* Tr.2001:1-5 (EPA label becomes, in effect, the state label); Tr.1988:7-18 (state registration is a company "market" decision); Tr.2007-2009 (state registration is mostly a "very easy" process of the pesticide seller completing an annual two-page form, attaching the EPA label, and sending an application fee to the state).

Complaining anew that BASF did not register Poast Plus for minor crops in any state, BASF baldly attempts to deceive this Court. BASF Br., at pp. 2, 38-43. BASF ignores jury evidence that in a variation of its market-segmentation scheme, BASF re-named *Poast Plus* as *Vantage* and *Torpedo* (RFA394;606;1198;1235;1248), procured state registrations for use of those products on minor crops such as Christmas trees, citrus

fruits and flowers, and charged farmers – throughout the United States – *twice the price of identical Poast Plus*. RFA426; Tr.2012:14-2013:18;3110:9-3117:1.¹⁷

Beyond the dishonesty of BASF’s “state registration” complaint, it is an abusive effort to re-argue causation resolved in *Peterson III* and *II* and beyond the scope of *Bates*. Causation is a quintessential jury issue. *Dunnell Minn. Digest*, Torts, § 1.03 (4th ed. 2000) (historical case cites). BASF ignores the unanimous jury verdict that Farmers showed an ascertainable loss for each year – across the United States – from 1992-96. *See Peterson IV* (A04-1553), slip op. at pp. 5-6 (“The farmers proved, *and the jury found*, aggregate damages of \$15 million.”) (emphasis added). Evidence at trial abundantly showed that farmers deceived by BASF’s Poast/Poast Plus market-segmentation scheme lost the opportunity to protest, complain, petition government agencies and legislative representatives, litigate, or otherwise refuse to purchase Poast – the more expensive version of BASF’s same sethoxydim herbicide. *Peterson III*, 675 N.W.2d at 72-73. Said *Peterson II*:

[Farmers showed causation] by evidence that they lost the opportunity to protest, petition for relief from government agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast.

657 N.W.2d at 868.

¹⁷. *See, e.g., In re Boucher*, 837 F.2d 869 (9th Cir. 1988) (conscious misrepresentation of the record); *United States v. Lachman*, 803 F.2d 1080 (9th Cir., 1986) (misrepresentation of the record), *In re Chakeres*, 101 N.M. 684, 687 P.2d 741 (1984) (gross exaggeration); *see generally* Minn. Stat. § 481.15, subd. 1(2) (dishonest argument not tolerated).

D. Abusive Effort To Re-Argue Indefensible And Waived Legal Complaints Resolved In *Peterson III, II And I*

BASF devotes the balance of its remand brief to indefensible legal complaints waived after *Peterson I* and *II* in violation of law-of-the-case and waiver doctrines. *Peterson III*, 675 N.W.2d at 57 (“BASF waived its opportunity to have [class certification] considered by us and we will not address [class certification] in this appeal.”); *Hoyt Investment Co. v. Bloomington Commerce & Trade Ctr. Assoc.*, 418 N.W.2d 173 (Minn. 1988) (issue not appealed when ripe is waived); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456-57 (8th Cir. 1990) (law-of-the-case doctrine prevents re-litigation of issue decided by prior appellate ruling).

1. “Federal Preemption” – Waived After *Peterson I*

BASF petitioned this Court to review *Peterson I*. BASF *only argued causation* rejected by *Peterson I* and did not petition for further review of class certification or *federal preemption*:

1. Did the Court of Appeals properly create a new duty requiring an agriculture manufacturer to provide an ‘*opportunity to purchase*’ a herbicide for a specific use before necessary state government herbicide approvals have been obtained for that use and before crop safety tests have been completed?
2. Did the Court of Appeals properly create a new ‘*lost opportunity to choose to buy*’ *measure of damages*, engraft that novel measure onto a New Jersey statute, and allow that measure to apply to a nationwide class action?

RFA203 (BASF’s “Legal Issues” In *Peterson I* petition for further review) (emphasis added). The foregoing issues are devoid of any reference to “federal preemption.” BASF

waived its federal preemption complaint after not seeking further review after *Peterson I*.

2. “In Connection With The Sales Or Advertisement ... Of Merchandise” – Disingenuous And Waived After *Peterson II*

BASF complains its deceitful statements should not have been admitted as trial evidence because its statements were “not” in connection with the “sales and advertisement of merchandise” under NJCFA § 56:8-2. BASF Br., at p. 47, n. 10.

BASF’s attempt to raise this specious complaint from the dead on remand is absurd:

- Completely rejected in *Peterson II*, 657 N.W.2d at 872-73 (“*all relevant evidence is admissible*”) (emphasis added);
- Never articulated as an issue in BASF’s petition for further review of *Peterson II*, RFADD23 (“Statement of Issues” at p. 1 of petition) (class certification, preemption, First Amendment); and
- Complete violation of this Court’s June 14, 2005 scheduling order limiting “briefing ... *to the effect of [Bates] on the preemption issue*” (emphasis added).¹⁸

3. “Jury Instruction” – Irrelevant, Dishonest, Harmless Error, And Waived After *Peterson II*

After eight years of litigation and attempted train wrecks addressed in *Peterson IV* and *V* – “abuse of process and interference with Farmers’ property” – and stealth argument before the Supreme Court and dishonest argument before this Court on remand,

¹⁸. See *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (D.N.J. 1994) (“merchandise” as subject matter of the NJCFA must be construed in light of the overriding purpose of the NCFCA, which is to protect the consumer in the context of the ordinary meaning of that term in the marketplace); *Jorgenson v. Agway, Inc.*, 627 N.W.2d 391 (N.D. 2001) (sunflower seed is “merchandise” and North Dakota Consumer Fraud Act “clearly and unambiguously” applies to alleged deceptive marketing of sunflower seed to farmers).

BASF begs for a new trial. BASF complains that *Bates* requires submission of FIFRA instructions to the jury. BASF Br., at pp. 50-54. BASF's complaint is irrelevant, disingenuous, harmless error (assuming hypothetical error for sake of argument), and waived.

a. Irrelevant

This case presents no genuine issue of fact concerning whether BASF complied with the EPA regulatory process:

[F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The Court of Appeals agreed. It held that "the Farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging."

Peterson III, 675 N.W.2d at 70; *Peterson II*, 657 N.W.2d at 865; *Peterson I*, 618 N.W.2d at 824 (focus on compliance with EPA regulations "is misplaced.").

Beyond BASF's "misplaced" focus, its deceitful "off-label" statements rendered its compliance with FIFRA an irrelevant jury inquiry for an *independent reason*. The NJCFA is intended to protect consumers even when the merchant acts in good faith. *See, e.g., Gennari v. Weichert Co, Realtors*, 691 A.2d 350 (N.J. 1997) (*NJCFA is broadly designed to protect the public, even when a merchant acts in good faith*); *Leon v. Rite Aid Corp.*, 774 A.2d 674 (N.J. App. Div. 2001) (intent not a defense for affirmative misrepresentations); *Gross v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 696 A.2d 793 (N.J. Super. 1997) (same).

b. Dishonest

BASF misrepresents *Bates*. *Bates* is a “**label**” case: state claims that company statements on the EPA-approved label were false and, therefore, misbranded under FIFRA. “A pesticide is ‘misbranded’ *if its label* contains a statement that is ‘false or misleading in any particular,’ including a false or misleading statement concerning the efficacy [effectiveness] of the pesticide.” 125 S.Ct. at 1795. *Peterson* is an “**off-label**” case: “[F]armers here are not asserting that BASF’s registration and container labels were false or misleading” *Peterson III*, 675 N.W.2d at 70. “[F]armers ... consumer fraud claim is not based on BASF’s labels but rather on fraudulent marketing techniques.” *Id.* Said the Supreme Court:

If a case proceeds to trial, the court’s jury instructions must ensure that nominally equivalent labeling requirements are *generally* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable under a state **labeling** requirement ... unless the manufacturer is also liable for **misbranding** as defined by FIFRA.

125 S.Ct. at 1804 (emphasis added in original and added).

The Supreme Court’s jury instruction suggestion only relates to state label-based claims, like *Bates*, that the pesticide seller’s statements *on the EPA-approved label* were false or inadequate. The Supreme Court simply said that a pesticide seller should not be found liable for making false statements on the label concerning product effectiveness, unless the statements would also be deemed false under “equivalent” FIFRA misbranding

requirements. The Supreme Court's suggestion is practical to avoid debate about the similarity of state *label-based* claims and FIFRA *misbranding* requirements.

Peterson III, II and I understood that Farmers' fraudulent "marketing and pricing" claim – an off-label claim – does not challenge the accuracy of the product labels.

Peterson II squarely rejected BASF's claim that the district court erred in failing to include FIFRA regulations in the jury instructions:

BASF's proposed instructions *do not relate directly to the charge before the jury*, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final argument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

657 N.W.2d at 871.

BASF admits "[w]itnesses and experts from both sides" testified during trial about FIFRA requirements. RFADD32 (BASF's Response To Plaintiff's [Trial] Motion #7, at p. 3, Dec. 4, 2001). During the five-week trial, BASF's EPA regulatory expert, Daniel Barolo, testified extensively about FIFRA and state requirements. *See* Tr.2538-2718.

Mr. Barolo acknowledged:

- Q. And the same thing would be true of a company who went through all the process of registering a crop with both the EPA and states, *they could still commit consumer fraud.*
- A. *I presume they could.*

Tr.2697:7-11.

Judge Kraker granted BASF's motion to submit FIFRA regulations to the jury as

“*substantive evidence*” and allowed BASF’s counsel to “argue to the jury in closing argument ... *what the impact or effect of the factual basis might be* for [regulatory] compliance, noncompliance of those matters.” Tr. 3576:14-25; 3577:1-2.¹⁹ And then, BASF submitted the following “substantive” exhibits to the jury.

- 615: Guidance On FIFRA § 24(c) Registrations
- 1140: It is a violation of federal law to use this product in a manner inconsistent with its labeling;
- 1141: A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use;
- 1142: A company having a registered product is permitted ... to market the product in a variety of ways. The product maybe be marketed under different brand names ... Or it may be marketed under the same brand name, but bearing different subsets of approved uses;
- 1143: [N]o person ... may distribute or sell ... any pesticide that is not registered;
- 1145: The exact same name cannot be used for different products by any one registrant;
- 1146: A registration issued by a State under this subsection shall not be effective for more than ninety days if disapproved by the [EPA] Administrator within that period;
- 1147: Special local need means an existing or imminent pest problem within a state for which the state lead agency, based upon satisfactory supporting information, has determined that an appropriate federally registered pesticide product is not sufficiently available;
- 1149: The Agency may determine that an alternate formulation must be separately registered.

RFADD33-62.

¹⁹. Judge Kraker’s instructions to the jury tracked – virtually verbatim – the New Jersey Supreme Court’s model NJCFA instructions taken from the New Jersey Model Jury Charges, § 4.23 (State of New Jersey Judiciary, Model Civil Charges 1998). Compare RFA1761-73 (*Peterson* jury instructions) with RFA1774-78 (New Jersey model instructions); see generally www.judiciary.state.nj.us/charges/civil.

Thereafter, BASF's counsel argued to the jury – *81 pages of transcript* – the relevance of FIFRA and state regulatory requirements to BASF's market-segmentation scheme. *See* BASF Closing Argument, Tr.3665-3746. BASF's counsel admitted BASF's container label decisions were “*marketing*” decisions:

[BASF's counsel] The EPA is aware, is it not, that *manufacturers subset label for marketing reasons*? Key question in this case, isn't it? Key, crucial question in this case. *Yes*, ... And the EPA knows people – knows companies put some [crops] on the label for *marketing* reasons and don't put some on the other label for *marketing* reasons. *Correct*.

Tr.3682:12-23.

c. Harmless Error

Although *Peterson* was submitted to a 12-member jury readily reaching a unanimous verdict for Farmers, BASF's unconscionable misconduct – a calculated “risk” of farmers discovering the truth – violated the NJCFA as a matter of law. The district court has broad latitude in selecting jury instructions. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Jury instruction decisions are not overturned unless abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Even if the district court submitted incomplete instructions, a new trial is *not required where the jury's determination appears correct as a matter of law*. *See, e.g., Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992), *citing Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 660 (Minn. 1987).

Judge Kraker met every possible obligation to inform the jury of FIFRA

regulations. The FIFRA regulations were discussed at length during the trial by experts, addressed during closing arguments, and provided to the jury during deliberations as “*substantive evidence*.” See *Andrews v. State Farm Mutual Automobile Ins. Co.*, 1998 WL 217197, slip op. at 2 (Minn. App. 1998) (*no prejudice where appellant had full opportunity to present argument on applicable statute during trial*) (RFADD63-64).

d. Waived

BASF did not articulate a “jury instruction” complaint in its petition for further review of *Peterson II*. See RFADD23 (BASF’s “Statement of Issues” at p. 1 in *Peterson II* petition for further review). BASF never articulated a single word in its petition for further review, anywhere, about “jury instructions.” And BASF cannot argue that *Bates* changed the law. *Bates* embraces *Peterson* confirming BASF’s violation of its duty of honesty.

CONCLUSION

BASF’s fraudulent “marketing and pricing” – a national “system of deceit” – was addressed by the Fargo (ND) *Forum* editors in 1996, after BASF’s Poast/Poast Plus deceit was uncovered by the North Dakota Department of Agriculture:

Shame on chemical company Its not just the money. BASF has been caught with their pants down. They have seriously undermined farmer confidence in the *honesty* of chemical companies and the *integrity of safety rules*. Shame on them.

Clerk Doc. 562 (emphasis added).

BASF’s remand brief is a child’s game of “do-over” – an effort to re-argue facts

of the five-week trial it lost, and indefensible legal complaints, with no relation to *Bates*, resolved in *Peterson III, II* and *I*. Farmers die, retire and lose their ability to prove a claim from the long-ago class period of 1992-96, while BASF – the world’s largest chemical company – attempts every effort to delay payment of the money judgment. This Court should readily conclude that *Peterson* is not at odds with *Bates*, reinstate *Peterson III* reported at 675 N.W.2d 57, and again affirm the district court.

Dated: August 4, 2005

Respectfully submitted,



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STATE OF MINNESOTA
IN SUPREME COURT

Ronald Peterson, et al,

Plaintiffs/Respondents,

v.

BASF Corporation, a foreign
corporation,

Defendant/Appellant.

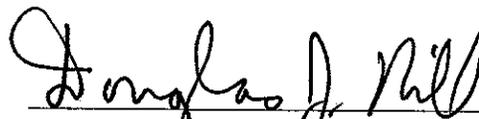
**CERTIFICATION OF
BRIEF LENGTH**

Appellate Court Case No. C3-02-857

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional 13-point font. The length of this brief is 13,236 words. This brief was prepared using WordPerfect 12.0 software.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).