2018-1614, -2044

In The
United States Court of Appeals
For The Federal Circuit

SYNGENTA CROP PROTECTION, LLC,

***Plaintiff – Appellant*,**

v.

WILLOWOOD, LLC, WILLOWOOD USA, LLC, WILLOWOOD AZOXYSTROBIN, LLC, WILLOWOOD LIMITED,

Defendants – Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA IN NO. 1:15-cv-00274-CCE-JEP, JUDGE CATHERINE C. EAGLES.

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Syngenta Crop Protection, LLC **v.** Willowood, LLC, et al.

Case No. 18-1614

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Willowood, LLC	None	Willowood USA Holdings, Inc.
Willowood USA, LLC	None	Lariat Partners LP
Willowood Azoxystrobin, LLC	None	Dream Acquisition, LLC
Willowood Limited	None	

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

8/16/2018
Date

/s/Steven E. Tiller
Signature of counsel

Please Note: All questions must be answered

Steven E. Tiller
Printed name of counsel

cc: Counsel of Record

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I. INTRODUCTION

Syngenta first responds to Willowood's cross appeal by arguing that because this appeal is conditional, it is improper and should be dismissed. Conditional appeals, just like Willowood's appeal here, however, are regularly heard by appellate courts, including this Court. Accordingly, Willwoood's cross appeal is proper.

Syngenta further argues that the district court's denial of Willowood's *Daubert* motion relating to Syngenta's damages expert, Dr. Benjamin Wilner ("Dr. Wilner"), was proper because benchmark-type analyses are generally appropriate and because Dr. Wilner spoke with a number of Syngenta employees to confirm that Syngenta's budgets (on which his opinions are so heavily reliant) are reliable. Willowood does not, however, contend that a benchmark-type analysis is, *per se*, improper. Rather, Willowood contends that Dr. Wilner's analysis *in this case* is improper, because, benchmark-type analyses, like any other expert analysis, must be based on accurate and reliable data, which, as will be shown below, Syngenta's budgets are not.

Further, while Dr. Wilner may have spoken to many Syngenta employees familiar with Syngenta's budgeting process, such discussions do not change the fact that Syngenta's budgets are historically inaccurate, and therefore, Dr. Wilner's reliance on them was improper. Moreover, Dr. Wilner's failure to verify or test Syngenta's budgets provides further support for the exclusion of his opinions. Accordingly, in the event that this matter is remanded to the district court upon

disposition of Syngenta's issues on appeal, Willowood respectfully requests that this Court reverse the district court's partial denial of Willowood's *Daubert* motion, with instructions on remand that Syngenta be precluded from submitting new or revised expert reports on damages.

II. REPLY IN SUPPORT OF CROSS APPEAL

A. Willowood's Conditional Appeal is Proper and Should be Heard by this Court.

Syngenta first seeks to avoid Willowood's cross-appeal of the district court's partial denial of Willowood's motion to exclude Dr. Wilner's expert testimony by arguing that the cross-appeal is procedurally improper because it does not seek to alter or reverse the judgment entered by the district court. Syngenta Reply Br. at 49-51 ("Reply Br."). Syngenta contends that because Willowood only seeks an "advisory opinion" on an issue that is best suited for the district court to address on remand, the cross appeal is procedurally deficient. Syngenta's position is, however, incorrect as appellate courts routinely have agreed to entertain and decide conditional, or "protective," cross-appeals.

For example, in *WesternGeco L.L.C. v. Ion Geophysical Corp*., 791 F.3d 1340 (Fed. Cir. 2015), *rev'd on other grounds*, 138 S. Ct. 2129 (2018), this Court ruled on a conditional cross appeal similar to Willowood's cross appeal here. In *WesternGeco*, a patent infringement case, the jury found each of the four asserted patents to be valid and infringed, awarding damages for lost profits and reasonable

royalties. *Id.* at 1342. The defendant appealed, arguing that WesternGeco was not the owner of three of the four patents, the district court applied an incorrect standard in granting summary judgement as to one claim, and that lost profits were impermissibly awarded for certain conduct undertaken outside the United States. *Id*. WesternGeco conditionally cross-appealed, arguing that if Ion succeeded on any of those three issues and the matter was remanded for further proceedings, the Court should set aside the damages award because the district court erred in preventing WesternGeco's expert from testifying as to reasonable royalties. *Id*. Because the district court's lost profits decision was reversed, resulting in a remand, the Court analyzed and ruled on WesternGeco's conditional cross-appeal. *Id*. at 1352-1353.

Other circuits have similarly recognized the validity of a conditional cross-appeal. For example, in *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994), the Court held:

> In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment, his grievances will be determined as well. Some protective cross-appeals are "conditional" in the sense that the cross-appeal is reached only if and when the appellate court decides to reverse or modify the main judgment.
>
> The theory for allowing a conditional cross-appeal is that as soon as the appellate court decides to modify the trial court's judgment, that judgment may become "adverse" to the cross-appellant's interests and thus qualify as fair game for an appeal:

> A party who fully prevailed in the district court may have an equally obvious justification for cross-appeal, to protect interests that otherwise might be adversely affected by disposition of the appeal. Courts readily understand this principle, and have applied it without difficulty, permitting the cross-appeals but deciding them only if disposition of the appeal makes it appropriate….
>
> In this case, the fact that the USIA was the prevailing party on the merits in the 1979 trial court decision would not have precluded it from challenging class certification on conditional cross-appeal, since if the original liability dismissal was overturned, its potential exposure to new liability on remand would be enhanced by maintaining the suit as a class action.

Id. at 1465-1466 (quoting 15A Wright *et al*., *Federal Practice and Procedure*, §3902, p. 78 (2d Ed. 1992)). *See also*, *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp*., 626 F.2d 280, 290 (3d Cir. 1980)("[Appellee] has filed a cross-appeal that is conditional on our reversing the judgement in its favor. Inasmuch as we have reversed the judgment in its favor, we now turn to the claim by [cross-appellant] that it is entitled to a new trial."); *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975)("An otherwise nonfinal order may become cross-appealable upon the entry of a final order. Nor does it lack cross-appealability because the final order from which the direct appeal was taken was entirely favorable to cross-appellants. The risk that they might become aggrieved upon reversal on the direct appeal is sufficient.").

The Tenth Circuit, in *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008), also recognized this right of conditional cross-appeal. There, the defendants filed a conditional cross-appeal, asking the Court to consider their

assertion of Eleventh Amendment immunity only if the appellate court reversed the trial court's grant of summary judgment. *Id*. at 942. The appellate court affirmed the trial court's grant of summary judgment and therefore did not reach defendants' conditional cross-appeal. *Id*. The court, however, cited *Hartman* to support the validity of defendants' conditional cross-appeal. *Id*.

The Tenth Circuit again affirmed the validity of a conditional cross-appeal in *Cook v. Rockwell Int'l Corp*., 618 F.3d 1127 (10th Cir. 2010). The Court held that "[a] party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal because if the appellate court decides to vacate or modify the trial court's judgment, the judgment may become adverse to the cross-appellant's interests. *Id*. (citing *Orenduff*, 548 F.3d at 942). The court further stated, "[s]ome, but not all, of Plaintiff's cross-appeal issues are challenges this court could address in order to guide the district court on remand." *Id.* at 1152 (emphasis added). As such, Willowood's conditional appeal is proper.[1]

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[1] While Syngenta correctly notes that its copyright claim was dismissed prior to the district court's entry of its *Daubert* order, such timing is irrelevant to the Court's analysis here. Dr. Wilner's opinion regarding Syngenta's damages arising from its dismissed copyright claim was identical to his opinion regarding Syngenta's alleged damages arising from Willowood's alleged infringement of the '138 patent. Appx03912-3913 ("…I have…assumed that the profits Syngenta lost from the Defendants' alleged copyright infringement equals the profits Syngenta lost from the Defendants' alleged infringement of the '138 patent, which I calculated in Section B above."). Dr. Wilner's damages opinion regarding alleged infringement of the '138 patent was excluded as part of the Court's *Daubert* order, a decision which Syngenta has not appealed. Appx0050-0055.

B. Willowood's Purportedly False Representations to the EPA were Excluded from Admission at Trial and are Otherwise Irrelevant.

In a not-so subtle attempt to poison the Court's opinion of Willowood, Syngenta asserts that to obtain approval to market and sell its azoxystrobin containing products, Willowood "falsely represented" to the Environmental Protection Agency ("EPA") that it qualified for expedited review of its applications to sell azoxystrobin products under the EPA's "Formulator's Exemption." Syngenta Reply Br. at 43-44. In this regard, Syngenta contends that Willowood "falsely represented" that it was sourcing the azoxystrobin technical at issue in this case from Syngenta in violation of EPA's policies and regulations, and that the EPA relied on these allegedly false statements to approve Willowood's registrations of its products. *Id*. Indeed, these allegations formed the basis of Count VII of Syngenta's Complaint. Appx0268-0295.

The district court, however, dismissed Syngenta's Count VII based on these same factual assertions on the grounds that the EPA has exclusive jurisdiction over them. Appx10289-10291. Furthermore, Syngenta acknowledges (Reply Br. at 44, n.11) that in February 2014 it filed an administrative petition with the EPA seeking to cancel Willowood's azoxystrobin registration based on these very same

allegations, and that EPA has not yet acted on that petition.[2] The fact that the EPA has effectively "pocket-vetoed" Syngenta's petition to cancel by failing to act on it for more than four years is strong evidence that EPA does not believe Willowood's certification was improper.

Syngenta also fails to note that, largely for the very same reasons that justified the Court's dismissal of Count VII, the district court granted Willowood's pre-trial motion to prohibit Syngenta from referring to any alleged "false certifications" at trial. Appx0059-0064. The court likewise precluded Dr. Wilner from referring to or relying on any such "false" representations. *Id*. Thus, Syngenta's allegations of "false certification" and misuse of the Formulator's Exemption should play no part in this Court's review on appeal.[3]

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[2] Willowood filed an opposition to that petition noting that its Formulator's Exemption certification followed EPA's longstanding practice and policies. Appx10268-10288.

[3] Whether or not Willowood made any false representations to the EPA is ultimately irrelevant to the issue at hand as Willowood's appeal of the district court's partial denial of its *Daubert* motion is predicated on Dr. Wilner's reliance on fundamentally unreliable data as the primary support for his opinion. *See*, Section C, *infra*. Representations by Willowood to the EPA have nothing to do with Syngenta's inaccurate budget figures and Dr. Wilner's improper reliance on them.

C. The District Court Improperly Denied Willowood's Motion to Exclude the Testimony of Syngenta's Damages Expert.

In its original Brief, Willowood argued that because the data on which Dr. Wilner relied for his opinions was inaccurate, and thus, unreliable, such opinions should have been excluded. In particular, because Syngenta's budgets, on which every one of Dr. Wilner's opinions is based, are historically so inaccurate, and neither Syngenta nor Dr. Wilner offered any evidence regarding how those budgets were prepared, there was no basis on which Dr. Wilner could show that these budgets were reliable – a hurdle that Syngenta must overcome in order for Dr. Wilner's opinions to be admitted.

Syngenta does not identify any evidence to contradict this assertion. Rather, it argues that a "benchmark-type" analysis is an accepted method to calculate damages and that Dr. Wilner did not rely on Syngenta's historically inaccurate budgets. As will be set forth below, Syngenta's arguments miss the point and fail to offer any support for its position.

i. Dr. Wilner's Opinion Relies Almost Exclusively on Unreliable Data

As detailed in Willowood's original Brief, it is well settled that the admissibility of expert testimony is a preliminary question of law for the trial court, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), where the proponent bears the burden of demonstrating the testimony's admissibility.

Bourjaily v. US, 483 U.S. 171, 175-76 (1987). In *Daubert*, the Supreme Court explained that the trial judge must perform a "gatekeeping" function to ensure that expert testimony "rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. In furtherance of this principle, where "an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that…opinion testimony." *Amorgianos v. National Railroad Passenger Corp*., 303 F.3d 256, 266 (2d Cir. 2002).

Where an expert relies primarily on his client's budgets of revenue and profitability or other related forecasts to opine on his client's damages, the expert must establish that those budgets are reliable. Where those budgets are historically inaccurate or otherwise speculative, expert opinions based on those budgets must be excluded. *See, e.g., Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022 (D. Kan. 2006) (because of the historical inaccuracy of Plaintiff's sales projections, the court found that no reasonable jury would accept the expert's opinions based on those projections as valid predictors of actual sales, and therefore, the expert's opinions - which assume the accuracy of those projections - must be excluded); *Celebrity Cruises, Inc. v. Essef Corp.*, 434 F. Supp.2d 169 (S.D. N.Y. 2006) (because the Plaintiff's projections were historically inaccurate, the expert's damages analysis based on those projections must be excluded);

Silicon Knights, Inc. v. Epic Games, Inc., 2011 WL 67448518, at *11 (E.D. N.C. Dec. 22, 2011) (holding that an expert's "projections...were based on unreliable and speculative forecasts," and therefore, his "claims for lost profits...were too speculative" to be admitted).

Here, there is no dispute that Dr. Wilner's opinions relied heavily on Syngenta's annual sales budgets for both azoxystrobin and mesotrione products. As even Syngenta stated in its Reply Brief:

> Dr. Wilner...applied a benchmarking analysis in which he used Syngenta's actual and ***budgeted gross profits*** for the [azoxystrobin] products at issue [in the aggregate] to determine how much its ***budgeted gross profits*** Syngenta was able to achieve in the face of Willowood's early market entry and generic price pressure from Willowood ("Intra-AZ Benchmark"). To account for market factors that might have influenced Syngenta's budgets, Dr. Wilner also examined actual and ***budgeted gross profits*** on its mesotrione products, which...did not face generic competition from Willowood. As with the [azoxystrobin] products at issue, Dr. Wilner compared the actual and ***budgeted gross profits*** for Syngenta's mesotrione products ***to determine the extent to which Syngenta was able to achieve its budgeted mesotrione gross profits*** ("Intra-Meso Benchmark"). Dr. Wilner then applied the Intra-Meso Benchmark to adjust the lost profits he calculated using the "Intra-AZ Benchmark." That is, ***Dr. Wilner assumed Syngenta would have achieved the budgeted amount of gross profits for the AZ products at issue to the same extent that Syngenta achieved its budgeted amount of gross profits for its mesotrione products***.

Syngenta Reply Br. at 53-55 (emphasis added).

Syngenta also does not dispute Willowood's assertion that its budgets are historically inaccurate. Syngenta Reply Br. at 58-60 (*citing* Appx6830 at 166:4 -

6832 at 175:21; Appx8941-8942).[4] For example, Syngenta's 2009 budget for all of its azoxystrobin containing products in the aggregate overestimated both gross sales and profits by 39%, while its 2010 budget for these same products overestimated gross sales by 39% and profits by 50%. Syngenta's inaccurate budgeting process continued in subsequent years as Syngenta underestimated gross sales and profits for its azoxystrobin containing products by 39% in 2011, while overestimating gross sales and profits by 13% and 17%, respectively in 2013. This trend continued in 2014 as Syngenta overestimated gross sales and profits of all of its azoxystrobin containing products by 24% and 26%, respectively in that year.

Syngenta's budgets for each of its individual azoxystrobin-containing products are even less reliable, thus offering further proof that Syngenta's budgeting process yields results that are less reliable than random guesswork. In this regard, Syngenta's 2012 budgets for the eight (8) azoxystrobin products sold that year range from overestimates of 42% to underestimates of 72%. Appx9805-9806. Similarly in 2013, Syngenta's budgets for the ten (10) azoxystrobin products sold that year range from underestimates of 47% to overestimates of 28%. *Id.* Finally, Syngenta's

[4] Appx8941-8942 is a document authored and produced by Syngenta showing the historical inaccuracy of its budgets in the years leading up to 2014, when Syngenta alleges that Willowood's infringement of its patents began to cause it damages.

budgets for these same ten (10) azoxystrobin products were even less accurate in 2014 as they range from overestimates of 220% to underestimates of 165%. *Id*.

Syngenta's budgets for its mesotrione products – which Dr. Wilner relied on heavily to form his opinions – fare no better. In this regard, Syngenta's mesotrione budget projections for 2012 through 2015 range from overestimates of 100% to underestimates of over 5,000%. Appx9807-9808.

In response, Syngenta first argues that benchmark analyses have long been recognized by courts as a valid method of calculating lost profits in patent cases. Syngenta Reply Br. at 55. Willowood, however, does not contend that a benchmark analysis is, *per se*, improper. Rather it argues that such an analysis, like any other expert analysis, must be based on reliable and accurate data, which Dr. Wilner's analysis is not.

Syngenta next argues that Dr. Wilner did not rely on the many years of aggregate or individual product budgets detailed in Willowood's Brief to calculate damages, and therefore their inaccuracies are not relevant. *Id.* at 56-57. Syngenta, however, misses the point. Willowood concedes that Dr. Wilner did not *expressly* rely on the budgets for the years 2009-2013 to calculate damages. He did, however, heavily rely on Syngenta's budget numbers for the immediately succeeding years to calculate damages. The historical inacurracies in Syngenta's budgets over many years show that Syngenta's overall budgeting process is unreliable, and therefore,

Dr. Wilner had no basis to assume that the budget numbers for the specific years that he did use are, in fact, accurate and reliable. With no foundation on which to believe that *any* of the annual budgets are accurate, Dr. Wilner should not be permitted to rely on those budgets as the primary support for his opinion.

The central importance of the inaccuracy of Syngenta's budgets is highlighted by the fact that even a very slight adjustment in Syngenta's budgets would result in a dramatically different damages analysis. As set forth in its original Brief, Willowood's damages expert, John Jarosz, analyzed the impact of the budgets' inaccuracies on the overall damages analysis *using Dr. Wilner's exact methodology*. Appx7028 at 26:10 - 7029 at 28:16. In this regard, Mr. Jarosz testified that if Syngenta's 2014 budget (which overestimated Syngenta's revenue by 24%) had been a mere 20% lower, then, all else being equal, Syngenta's damages would have been zero. *Id*. Said another way, had Syngenta been only slightly more accurate in its budgeting process and overestimated its 2014 azoxystrobin budget by 19%, rather than 24%, Dr. Wilner's $75.6 Million Dollar damages estimate would have been $0. This fact makes clear why the historical inaccuracy of Syngenta's budgeting process is so critical, and why, with such overwhelming evidence that the budgets relied on by Dr. Wilner were inaccurate, his opinions lack any foundation and must be excluded.

ii. Dr. Wilner Failed to Test or Verify Syngenta's Budgets.

Willowood also argued that Dr. Wilner's failure to verify or test Syngenta's budgets, combined with Syngenta's failure to offer any specific details regarding how each of the budgets on which Dr. Wilner relied were prepared, provides additional grounds for the exclusion of Dr. Wilner's opinions. In response, Syngenta attempts to buttress Dr. Wilner's opinions by pointing to his discussions with "several Syngenta employees" having knowledge and experience with the sales, marketing, and finances relating to Syngenta's azoxystrobin, mesotrione and other products. Syngenta Reply Br. at 58. Syngenta also points to the "over two days of testimony by Syngenta employees" who purportedly explained the rigorous, multi-year process by which Syngenta prepares its budgets. *Id*. (citing Appx6817-6823; Appx6876-6880). This testimony, however, failed to provide any details regarding Syngenta's purportedly rigorous budget process, leaving Willowood, and more importantly, Dr. Wilner, in the dark as to exactly how Syngenta prepares its budgets.

The first portion of testimony cited by Syngenta (Appx6817-6823) is that of Syngenta's Director of Marketing, Jeff Cecil. Mr. Cecil testified, in pertinent part, that:

> For the 2018 budget,[5] we really started planning for that budget last June, so 2016, June is when that planning process would have started. And what it really is, ***is understanding what the market assumptions***

[5] Mr. Cecil's testimony about the 2018 budget process was offered by Syngenta to explain the annual budgeting process for each year.

are. So you take the information going into June. The product leads or product managers for our company would look at each of the individual product lines. ***They would then make assumptions based on what has happened, what they see is going to happen using market intelligence, using different market research information, to build out what that set of assumptions looks like, to talk about their product plans for each of the different products that they're responsible for.*** Once that product plan is put together, usually sometime around October that's finalized for the -- for each of the product plans.

Then it goes through a peer-review process. ***So what that means is each of the different product leads from the different parts of the business, in other words, herbicides, fungicides, insecticides, seed care will all come together in one room and debate the assumptions that are being used for each of the product plans….***

So from June '16 to October '16, there is an enormous amount of work done on each of the product plans. ***That is really the kickoff of our budgeting process, so each product individually going down to the fine detail for each of the products. And then they go through a peer-review process.***

Once the peer-review process is done, the plans will then be presented to the Crop Protection Leadership Team, generally in December. Sometimes it falls into January. But December, they will review those plans in a Crop Protection Leadership Team meeting, where they're either signed off or rejected or told to go back and work it again, but that's generally when it's signed off.…

So we start out by building out what our pricing for the following year would look like. ***And then we start to look at, okay, based on that price, if we take that price, what kind of volumes can we actually sell in the marketplace.***

And then, what we do with that information is we start with the commercial units. So the people that are in the field, we start working with them to talk about, okay, does this feel realistic, ***is there good information from your customers that says this is the right assumption to take, how much volume could you sell based on these***

> ***prices and this assumption base***. That goes on for a series of weeks and months, actually….
>
> Corn is a commodity product. So the farmer only makes money if he's selling corn for a reasonable price. ***So we obviously have to consider what the price of corn is going into the year based on what the USDA is telling us.***
>
> ***We would also make assumptions around what weather patterns are, what we expect to happen as a result of those weather patterns. You really have to look at things like inventories, understanding what were the patterns of use the year before, based on what happened in the marketplace and what will they project to use in the year coming.***

(Emphasis Added).

Notably absent from Mr. Cecil's testimony, however, is any detail about what specific information was analyzed during the budget process for each year and how that information was applied. For example, Mr. Cecil testifies that Syngenta considers commodity prices, as well as weather patterns and inventories, as part of its budgeting process, yet he offers no testimony about what information Syngenta relied on regarding those specific issues in each of the years on which Dr. Wilner relied on Syngenta's budgets (2014 – 2017). Mr. Cecil also perfunctorily mentioned "market assumptions," "market intelligence," and other "market research information," yet offered no testimony about the specific market assumptions, intelligence, or research information relied on in each year. Dr. Wilner also failed to offer any testimony in that regard at trial, or even in his report. Appx3869-3971.

The additional testimony on which Syngenta relies in its Reply Brief (Appx6876-6880), that of Robert Fisher, Syngenta's Digital AG Solutions Marketing Manager, also fails to provide any meaningful details regarding Syngenta's budgeting process. In this regard, Mr. Fisher testified, in pertinent part, that:

> We set up every year a two- to three-day peer review. All of the product leads will sit in a room and hear of the five-year strategy budget proposals; and then we will -- from peer review, ***we'll challenge assumptions to try to get a better product, a better budget….***
>
> It's a rigorous process. ***I mean, we start with our five-year strategy, which is a full year ahead; and through the second half of the year, we're, you know, peer reviewing and getting the five-year strategy set forth on -- by brand***. We're not doing by month yet.
>
> Then about March/April time frame, of, you know, the next year, ***we'll start to refine those assumptions***. ***You, obviously, learn a lot more about the agricultural market and the competitors, et cetera, and so you update those assumptions.***
>
> Following that, May/June, ***I'll set a proposal for price and volume by brand and even break it down by customer unit***. So a customer unit -- we have four regions. We're spread -- across the United States that have, you know, marketing and commercial managers and then sales reps that -- by four different regions. ***We will meet with them and do peer reviews with each of those CUs on those budgets for their CU so they can build that together.***

Appx06876-06877 (emphasis added). Like Mr. Cecil, Mr. Fisher failed to offer any detail about what specific information was analyzed during the purportedly rigorous budget process for each year and how that information was applied. For example, while discussing the two to three day peer-review process and the development and

refinement of certain assumptions to ultimately determine the budgets, Mr. Fisher offered no details regarding the assumptions considered, how those assumptions were refined, and how each of those assumptions was ultimately relied on to prepare the budgets. As set forth above, Dr. Wilner did not, in his report or testimony, provide any further details in this regard. Syngenta thus offered no concrete evidence to support its claim – and Dr. Wilner did not attempt to confirm – that Syngenta's budgeting process was in fact "rigorous" or reliable. As such, there is no evidence that Dr. Wilner tested or validated Syngenta's assumptions in any way. Appx6936 at 114:10-23; Appx6937 at 117:12-118:10; Appx6937 at 119:10-14. As a result, when all the evidence was in, Syngenta's vaunted budgeting process remained a black box, devoid of any meaningful specifics other than its unreliable and inaccurate results.

It is well established that "[w]hen an expert relies on information given to [him] by a party or counsel, [he] must independently verify that information before utilizing it in his calculations." *King-Indiana Forge, Inc. v. Millenium Forge, Inc.*, 2009 WL 3187685, at *2 (S.D. Ind. Sept. 29, 2009). *See also*, *State Farm Fire & Cas. Co. v. Electrolux Home Prod., Inc.*, 980 F. Supp. 2d 1031, 1048 (N.D. Ind. 2013). An expert's reliance upon data supplied by counsel or a party, without independent verification, is generally unreliable, and therefore, any opinion based on that data is inadmissible. *Munoz v. Orr*, 200 F.3d 291 (5th Cir. 2000). *See also,*

SF Meritor LLC v. Eaton Corp., 646 F. Supp. 2d 663, 667 (D. Del. 2009) (excluding testimony of expert who "did not apply his own assumptions, based upon his expertise, to any financial data in order to project the party's future performance" but who instead "relied on" the party's own internal financial budgets "without knowing...the validity of the underlying data and assumptions upon which the [budgets] were based."); *Ask Chemicals, LP v. Computer Packages, Inc.*, 59 F. App'x. 506, 510 (6th Cir. 2014) (holding that the expert's "wholesale adoption of plaintiff's estimates, without revealing or...evaluating the bases for these estimates, goes beyond relying on facts or data, and instead cloaks unexamined assumptions in the authority of expert analysis."). The fact that Dr. Wilner simply adopted Syngenta's historically inaccurate budgets without verifying or testing those budgets in any meaningful way provides additional and independent support for the exclusion of his opinions from trial.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Willowood's original Brief, Willowood LLC, Willowood USA, LLC, Willowood Azoxystrobin, LLC, and Willowood Limited respectfully request that in the event that this matter is remanded for any further proceedings, this Court should reverse the district court's partial denial of Willowood's *Daubert* motion, with instructions on remand, that Syngenta shall be precluded from submitting new or revised expert reports.

Dated: August 16, 2018

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of August, 2018, I caused this Corrected Reply Brief of Cross-Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of copies of the Reply Brief of Cross-Appellants will be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit in accordance with the Federal Circuit Rules.

/s/ Steven E. Tiller
Counsel for Cross-Appellants

CERTIFICATE OF COMPLIANCE

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Dated: August 16, 2018

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