IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

COY'S HONEY FARM, INC.	)	
	)	**MDL No.: 1:18-md-02820-SNLJ**
PLAINTIFF	)	
	)	
VS.	)	**Indiv. Case No. 1:21-cv-00089-SNLJ**
	)	
	)	
BAYER CORPORATION;	)	
BAYER U.S., LLC;	)	
BAYER CROPSCIENCE	)	
ARKANSAS, INC.;	)	
BASF CORPORATION;	)	
and BASF SE	)	
	)	
DEFENDANTS	)	

PLAINTIFF'S RESPONSE TO THE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

The major issue presented by the Defendants' Motion to Dismiss the Second Amended Complaint is whether the statute of limitations applicable to the Plaintiff's claims asserted in Counts II through IV, and VIII and IX is to start running as to all of the claims from July 2017, when Richard Coy, a vice-president of the Plaintiff, realized that "something was wrong" with the dicamba herbicides in their impact on plants that were not genetically engineered to be tolerant of the herbicides.

Defendants insist that the Plaintiff's claims in those Counts should be barred from that 2017 date, although the Complaint does not allege that Plaintiff suffered any damage in 2017 – only that Plaintiff was aware that problems were being attributed to the Defendants' herbicides. However, the controlling statute, Arkansas Code Ann. §16-116-203, plainly states that the three (3) year limitation period runs from the date on which the damage occurred. If Plaintiff sustained no damage until 2018, the limitation period does not run until that damage occurred, regardless of whether Defendants' dicamba herbicides were known to, or suspected of, causing damage to non-resistant crops and other plants before that time.

In addition, Defendants further assert that, if the 2017 date is used, any damage caused by its herbicides would be a "continuing tort," and the limitation period under §16-116-203 would entirely bar Plaintiff's claims under the Counts in question. However, the 2017 date cannot be used for the reason that Plaintiff does not claim to have been damaged in 2017, and for the further reason that the law of Arkansas recognizes claims such as these asserted by Plaintiff to be "reoccurring" torts, and that the statute of limitations for such torts commences to run for each tort as it occurs.

The "reoccurring tort" theory will be explored in greater detail herein.

I. Plaintiff Has Met The Rule 8(A) Standard For Pleading Its Claims

In Section II of their Brief in Support of their Motion to Dismiss the Second Amended Complaint (herein, "Defendants' Brief"), Defendants again assert that the Plaintiff's claims for damages are barred by the three-year statute of limitations contained in Arkansas Code Ann. §16-116-203, claiming that "Plaintiff tries to reframe its claims generically alleging that because applications of dicamba are seasonal, 'separate damages were inflicted upon Plaintiff's bees and honey production in the years 2018, 2019, 2020 and 2021.'"

The allegations of the Second Amended Complaint are far more specific than that. The allegations regarding the annual effect of the application of Defendants' dicamba herbicides include the following:

> 42. As a result of the extensive use of the Herbicides in the Plaintiff's areas of operation in east Arkansas, and the resulting drift and volatilization of the Herbicides from the intended area of application to adjoining areas, many plants in east Arkansas (other than those crops from genetically-modified seeds) have been damaged or decimated. The continued use of the Dicamba Herbicides in eastern Arkansas will continue to cause widespread destruction and decimation of plant life in the area.
> …
>
> 45. As a result of the foreseeable drift and volatilization of the Herbicides to fields, undeveloped areas, gardens and other vegetated areas not intended for the application of the Herbicides, and the damage to or decimation of those vegetated areas, Plaintiff's bees were, *in and after 2018*, unable to obtain the nectar and pollen

necessary for continued production of honey, and the Plaintiff sustained and continues to sustain a loss of sales of honey.

…

70. As a direct result of the Defendants' Dicamba Herbicides drift and/or volatilization onto areas outside the boundaries of the target fields. *Beginning in the summer of 2018*, Plaintiff's bees began to suffer from a loss of plants from which to obtain nectar and pollen, and began to be contaminated with high levels of dicamba, both of which caused the eventual death of bees by starvation or herbicide poisoning, or both, and loss of honey and wax production.

71. After analysis of the decline in production of honey by Defendant's bees in the Fall of 2018, and review of reports and information from weed scientists such as those named above, Plaintiff determined that the Dicamba Herbicides produced and marketed by Defendants were damaging and destroying the food supply of the bees, thereby causing the reduction in production of honey and death of bees.

…

76. *The application of the Defendants' Dicamba Herbicides is seasonal,* and the usual period of time for such application is in the Spring of each year. Under regulations of the Arkansas Plant Board that were effective from the years 2018 to May, 2021, *dicamba herbicides could only be applied by spraying over-the-top of the subject crops (soybeans, cotton, etc.) by no later than May 25 of each year.* Thus, *separate damages were inflicted upon Plaintiff 's bees and honey production in the years 2018, 2019, 2020 and 2021*.

…

76.[sic] Plaintiff should be granted judgment of and from the Defendants, jointly and severally, for its *loss of income and loss of bees sustained each year since 2018* to the date of judgment and any reasonably foreseeable losses in the future.

Defendants first object that these allegations are "conclusory," and "lack supporting factual matter required to state a claim for relief." The quoted paragraphs from the Amended Complaint contain facts, not conclusions. For example, the allegations that "As a result of the extensive use of the Herbicides in the Plaintiff's areas of operation in east Arkansas, and the resulting drift and volatilization of the Herbicides from the intended area of application to adjoining areas, many plants in east Arkansas (other than those crops from genetically-modified seeds) have been damaged or decimated" is a factual statement supported by other allegations in the Amended Complaint, including the quotation set forth in ¶34 of the Amended Complaint from the report of Dr. Trey Koger to the Arkansas Plant Board in 2018 that:

> *Dicamba-like symptomology was prevalent in every city, town and community I visited. …* In summary, *dicamba injury was prevalent to sensitive trees, roadside plants, and non-dicamba crops throughout many of the areas in eastern AR in which made [sic] evaluations.*

All of the allegations quoted above, and others contained in the Amended Complaint are *factual* allegations, not conclusions. The allegations relating to the characteristics of the Defendants' Herbicides to drift and volatilize to other properties, and to kill or damage all plant life not genetically engineered to withstand dicamba are *factual* allegations, not conclusions. The allegations relating to the impacts of the massive loss of plant life in the east Arkansas region on Plaintiff's bees and honey production are *factual* allegations, not conclusions.

Facts alleged in the complaint are assumed to be true, and the complaint should be reviewed in the light most favorable to the plaintiff, *McMorrow v. Little,* 109 F.3d 432, 434 (8th Cir.1997). It is true that the Supreme Court explained in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and in *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) that:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*.

The Plaintiff's Amended Complaint easily passes this test. Read as a whole, the Amended Complaint clearly alleges with facial plausibility facts to the effect that, as a result of the Defendants manufacturing and marketing of the dicamba herbicides each crop year, beginning in 2018, Plaintiff's honey production was diminished and its bees harmed in each year.

II. Plaintiff's Product Liability Claims Are Based On Reoccurring (Not Continuous) Events And Are Not Barred By The Statute Of Limitations

Defendants again claim that the statute of limitations contained in Arkansas Code Ann. §16-116-203 bars Plaintiff's claims under the Arkansas Product

Liability Act. That statute provides that "All product liability actions shall be commenced within three (3) years after the date on which the death, injury, or *damage complained of* occurs."

This statute does not prevent Plaintiff's claims under the Act from proceeding because, as noted above, the "damage complained of" by the Plaintiff occurred as a result of completely separate events; *i.e.*, drift or volitalization of dicamba from separate applications of dicamba herbicide that occurred at separate times and in separate locations in east Arkansas during and within the three years immediately prior to the filing of the initial Complaint, which occurred on May 25, 2021.

As alleged in the Amended Complaint, the application of the Defendants' dicamba herbicides occurs seasonably, and that separate damages were inflicted upon the Plaintiff's bees and honey production in each of the years 2018 through 2021. (Second Amend. Complaint, ¶76). In Arkansas, dicamba herbicides were required by Plant Board rules to be applied by sprayer over-the-top of the crops by no later than May 25 during the 2018-2020 planting season, and by June 30 of 2021.

The Defendants seem to be assuming in their Brief that, once dicamba damage is inflicted upon an area, no further damage occurs in future years, so that if Plaintiff was damaged in 2018, Plaintiff would be barred from claiming any

damage in later years. However, the Complaint does not allege that, after the *initial* applications of the herbicides, the herbicide damage *permanently* prevented the replanting or regrowth of crops, ornamental bushes and natural plants that flowered in following years. Even though farmers and other property owners sustained damage to non-tolerant crops in 2017 and in subsequent years, many of them replanted crops, yard plants and flowers in the years after such damage. Many of the native plants that were damaged from a herbicide application in, say, 2018, survived and bloomed in a subsequent year or years. Subsequent damage to those plants was caused by new applications of dicamba herbicides in subsequent years.

Thus, any damage that occurred in each year after May 25, 2018 would be within three (3) years after "the date on which the … damage complained of" occurred.

In an effort to avoid potential liability for the three years prior to the filing of Plaintiff's Complaint, the Defendants attempt to characterize this as a "continuous tort" theory, but that characterization is wrong. The "continuous tort" theory is based on a *single* negligent act with *on-going* injury (*Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993)). It is distinguishable from a "recurring" harm, in which the tortfeasor commits separate and distinct acts that cause separate and distinct injuries to the person or property.

While Arkansas does not recognize the "continuous tort" theory, it has long recognized the "recurring harm" doctrine in a variety of types of cases, holding that separate acts causing injury give rise to separate statutes of limitation that commence running from the date of each injury. See *Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 274 S.W.2d 63 (1955) (flooding); *Daniels v. City of Batesville*, 189 Ark. 1127, 76 S.W.2d 309 (1934) (flooding); *Board of Directors, St. Francis Levee Dist. V. Barton*, 92 Ark. 406, 123 S. W. 382, 25 L. R. A. (N. S.) 645, 135 Am. St. Rep. 191 (flooding); *Sewell v. Phillips Petroleum Co.*, 197 F.Supp.2d 1160 (W.D. Ark. 2002) (In Arkansas, for a trespass that is continuing by virtue of the fact that there are multiple occurrences, "… there may be as many successive recoveries as there are injuries.").

This "recurring harm" doctrine is described by the U.S. District Court for North Dakota in the case of *Roemmich v. Eagle Eye Development, LLC*, 386 F.Supp.2d 1089 (D. N.D., 2005), involving a plaintiff shareholder's claim of separate acts of "corporate freeze-out" by other shareholders, in which that court explained:

> In the present case, there are multiple instances of wrongdoing alleged by Roemmich against officers and directors of Eagle Eye during a time period from 1995–2004. As the Court views the allegations, they are not interdependent but *each constitute a potential breach of fiduciary duty standing alone*. The facts as alleged do not support a continuing tort but instead *a series of separate torts combined in one lawsuit with separate and successive injuries*. See *Young v. Young*, 709 P.2d 1254, 1259 (Wyo.1985)(holding that when there is a

> recurring tort, such as the repeated theft of oil and gas royalties, involving separate and successive injuries from separate and successive acts, a new action accrues and the statute of limitations begins to run from the date of each tortious act).
> 386 F.Supp.2d at 1094. (Italics added)

If there is any reasonable doubt as to the application of the statute of limitations, the question should be resolved in favor of the complaint standing and against the challenge. *State v. Diamond Lakes Oil Co.,* 347 Ark. 618, 66 S.W.3d 613 (2002); *Dunlap v. McCarty* 284 Ark. 5, 678 S.W.2d 361 (1984). The Plaintiff's claims on Counts II, III, IV, VIII and IX should be allowed to proceed.

III. Plaintiff's Claim For Damages Complies With the Rules

Finally, the Defendants contend that the Plaintiff has failed to separately enumerate its damages for each year in which damages are claimed. However, there is no requirement by statute or rule that requires such a level of specificity of damages to be pled.

Rule 8(3) of the Federal Rules of Civil Procedure simply require "a demand for the relief sought, which may include relief in the alternative or different types of relief." Plaintiff has pled a demand for damages in excess of $75,000.00.

Rule 54(c) even allows for a judgment to be granted for relief that a party has not pled in its Complaint, stating: "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. *Every other final*

judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

In *Gillespie v. Brewer*, 602 F.Supp. 218 (N.D. W.Va. 1985), that court explained the reason that there is no particular form for, or even necessity for, allegations as to damages:

> The Court perceives a serious problem with adopting a Plaintiff's ad damnum as the exclusive measure of the "benchmark" against which any relief obtained is compared. …The ad damnum is only an estimate by the drafter of the complaint of the "relief to which he deems himself entitled." Rule 8(a)(3) of the Federal Rules of Civil Procedure. The Plaintiff is not restricted or bound by the relief requested. See Rule 54(c); Steinmetz v. Bradbury Co., Inc., 618 F.2d 21 (8th Cir.1980); U.S. v. Metro Development Corp., 61 F.R.D. 83 (N.D.Ga.1973). The amount of monetary relief requested in a complaint is usually decided without benefit of precise calculations as to the damages the Plaintiff realistically expects to recover.

See also, *Tynes v. Food Lion, LLC,* E.D. Virginia, February 14, 2013 Not Reported in F.Supp.2d 2013 WL 589218, holding:

> The ad damnum clause is only an estimate of the relief to which the plaintiff is entitled, and "the [p]laintiff is not restricted or bound by the relief requested." *Gillespie v. Brewer,* 602 F.Supp. 218, 223 (N.D.W.Va .1985). Furthermore, "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. Pro. 54(c).

Plaintiff has pled the amount required to place jurisdiction of this case in the Federal Court, and has pled a specific amount, which upon discovery and leave of Court may be subject to change. In any event, it is not binding on a jury verdict or

judgment of a court. It meets the requirement for pleading sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."

CONCLUSION

The Plaintiff's Amended Complaint meets the test of Federal Rule of Procedure 8(a) in that it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, supra. The Plaintiff has pleaded factual content in the Amended Complaint that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* That is all that is required at this stage of the proceeding.

While most cases involve a single harm that provides a "start date" for the statute of limitations for claims to be asserted, this is a classic case for the application of the "reoccurring damage" doctrine of the statute of limitations. The allegations of the Amended Complaint are that the Defendants' dicamba herbicides were applied periodically, not continuously, over a period of several years, and that each application caused new damages. The Plaintiff's Counts II through IV, and VIII and IX should be reinstated.

Respectfully submitted,

Richard H. Mays
Arkansas Bar No. 61043
Attorney for Plaintiff
RICHARD MAYS LAW FIRM PLLC

2226 Cottondale Lane – Suite 210
Little Rock, AR 72202
Tel: 501-891-6116
Email: rmays@richmayslaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the date set forth below a copy of the above and foregoing Response was served upon counsel of record for the Defendants through the Court's ECF system. Counsel for Plaintiff is unaware of any other attorney or party who requires service through another means.

Dated: April 26, 2022.

/s/ Richard H. Mays
Richard H. Mays