UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: DICAMBA HERBICIDES LITIGATION	))))	Master Case No. 1:18-md-2820 SNLJ MDL Docket No. 2820

This Document Relates to All Cases

DEFENDANT BASF CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE CROP DAMAGE CLASS ACTION MASTER COMPLAINT

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DEFENDANT BASF CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE CROP DAMAGE CLASS ACTION MASTER COMPLAINT[1]

Plaintiffs' Crop Damage Class Action Master Complaint ("Master Complaint") is a product liability putative class action containing 94 causes of action. There is one claim asserted on behalf of a nationwide class, and the remaining 93 counts are state-law claims based on the laws of the eight different states on behalf of eight different state-specific soybean producer classes. As set forth below, the vast majority of these causes of action are deficiently pled, and this Court should dismiss them.

The claim asserted on behalf of the nationwide class is a Lanham Act claim. Plaintiffs' nationwide class allegations should be dismissed because, pursuant to the United States Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), this Court and the transferor courts lack personal jurisdiction over BASF Corporation for the claims of out-of-state class members. In addition, Plaintiffs' Lanham Act claim fails for lack of statutory standing because Plaintiffs do not allege an injury in the form of damaged business reputation or diversion of sales from Plaintiffs to BASF Corporation.

While there are material differences between the elements and standards among the eight sets of state-specific causes of action, the majority of the 93 state-specific causes of action fail as well for the following reasons:

- Plaintiffs' strict liability – ultrahazardous activity claims fail because ultrahazardous activity liability does not apply to mere manufacture of a product, the application of

[1] BASF Corporation does not waive its objection to the use of a master consolidated substantive complaint for all MDL plaintiffs for the reasons set forth in ECF Docket Nos. 34 and 42. The fact that Plaintiffs have included in the Master Complaint eight separate putative state subclasses, and 93 separate state-law counts for those eight subclasses, requires BASF to brief all subclasses and counts in a single motion to dismiss instead of in separate motions to dismiss as previously filed. BASF Corporation also reserves the right to address additional issues resulting from the omission of claims from the Master Complaint after the deadline for Plaintiffs to conform or voluntarily dismiss the underlying complaints has passed.

herbicides like those here is a matter of "common usage," Nebraska does not recognize the doctrine, and Mississippi and Missouri limit the doctrine to circumstances not present here;

- Plaintiffs' negligent training claims should be dismissed because Plaintiffs can provide no case from any jurisdiction that has ever imposed such a "duty to train," nor can they offer any sound policy reasons for such an extension;

- Plaintiffs' trespass claims fail because Plaintiffs do not allege that BASF Corporation directly interfered with Plaintiffs' land, and the only allegations of intentional conduct are limited to selling herbicides;

- Plaintiffs' breach of implied warranty of fitness and breach of implied warranty of merchantability claims fail because they were properly disclaimed by the Engenia® product label, and Plaintiffs' breach of express and implied warranty claims under Kansas law further fail because Plaintiffs fail to allege personal injury;

- Plaintiffs' civil conspiracy claims fail because Plaintiffs do not allege that BASF Corporation and Monsanto agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means, and because Plaintiffs plead no viable underlying intentional tort claim;

- Plaintiffs' nuisance claims fail because Plaintiffs have not alleged BASF Corporation had sufficient control to cause a nuisance, Illinois recognizes nuisance only by matter physically offensive to the senses, and South Dakota does not recognize nuisance by acts expressly authorized by statute;

- Plaintiffs' Illinois Consumer Fraud and Deceptive Business Practices Act claim fails because Plaintiffs do not allege that they received, saw, or read any of the allegedly deceptive materials or advertising;

- Plaintiffs' Nebraska Consumer Protection Act claim fails because the challenged conduct falls under the Act's exemption; and, finally,

- Plaintiffs' claims for 2016 damage in Missouri fail for lack of causation.

Despite Plaintiffs' kitchen-sink approach, they fail in large part to state any viable claims against BASF Corporation. Thus, the Court should dismiss vast majority of Plaintiffs' claims against BASF Corporation.

ALLEGED FACTS

Plaintiffs' claims center on a set of dicamba-resistant seed products and dicamba-based herbicide products produced by Monsanto Company ("Monsanto"), Roundup Ready 2 Xtend soybean ("Xtend soybeans") and XtendiMax with VaporGrip Technology ("XtendiMax"), and BASF Corporation's dicamba herbicide Engenia®.[2] (Master Compl. ¶¶ 19, 32). Plaintiffs challenge a variety of conduct by Monsanto and BASF Corporation ("Defendants").

Plaintiffs claim that Defendants developed a dicamba-resistant crop system that "poses an unreasonable risk of harm to susceptible plants and crops not resistant to dicamba." (Master Compl. ¶ 116). Plaintiffs further claim that Defendants ignored warnings regarding the potential danger of the dicamba-resistant crop system, (*id.* ¶¶ 118-30), and released the system without adequate warning or testing, (i*d.* ¶¶ 131-41). Plaintiffs assert that Monsanto prematurely released its Xtend seeds in 2015 "despite lack of EPA registration for in-crop application of dicamba," (*id.* ¶ 182), and that this caused farmers to buy and use older dicamba formulations that were not approved or appropriate for over-the-top use, (*id.* ¶¶ 182-91). They further claim that this happened again, on a "much larger scale," in 2016. (*Id.* ¶ 215). Plaintiffs allege the full dicamba-crop resistant system was available in 2017, but that Defendants continued "deceptive advertising," which supposedly included false statements and omissions regarding the crop system's volatility and propensity to harm off-target crops, (*id.* ¶ 253), and that the product labels for the dicamba-resistant crop system were "insufficient" and "deceptive," (i*d.* ¶¶ 255-89). Finally, Plaintiffs claim that the newer dicamba herbicides approved by EPA for in-crop use during the 2017 growing season were prone to drift and volatilization, again allegedly causing damage to non-target crops. (*Id.* ¶¶ 290-338).

[2] Although the Master Complaint also names BASF SE as a Defendant, Plaintiffs have not yet served BASF SE.

The named Plaintiffs in this case are soybean farmers and farming operations located in Arkansas, (*id.* ¶¶ 1-6), Illinois, (*id.* ¶ 7), Kansas, (*id.* ¶¶ 8-9), Mississippi, (*id.* ¶ 10), Missouri, (*id.* ¶¶ 11-14), Nebraska, (*id.* ¶ 15), South Dakota, (*id.* ¶ 16), and Tennessee. (*Id.* ¶ 15).[3] All Plaintiffs (except one) allege that in 2017 they grew non-dicamba resistant soybeans and "did not in 2017 spray dicamba over the top of any crops grown with seed containing the dicamba-resistant trait." (*Id.* ¶¶ 1-17). The remaining Plaintiff, Jerry Franks, makes the same allegations, but for 2016 instead of 2017. (*Id.* ¶ 14).

Plaintiffs' 94 counts can generally be divided into the following categories: (1) violation of the Lanham Act, (2) strict liability – ultrahazardous activity, (3) general negligence, (4) strict liability – design defect, (5) strict liability – failure to warn, (6) negligent design, (7) negligent failure to warn, (8) negligent training, (9) trespass, (10) breach of express and implied warranties, (11) civil conspiracy, (12) nuisance, and (13) violation of various different state-specific consumer protection acts. (*See id.* ¶¶ 383-1607).

[3] Several of the named Plaintiffs have not yet served their underlying complaints on BASF Corporation, namely: Bumper Crops Farms, LLC; 4-R Farms, Inc.; Marshall W. Scallion and Brooke W. Scallion (partners of Scallion Farms Partnership); Jerry Franks; Shane Greckel; and Kay Don Jons. BASF Corporation moves to dismiss the claims of these individual plaintiffs for lack of service of process under Fed. R. Civ. P. 12(b)(5). A federal court has no jurisdiction over a defendant who has not been properly served. *See Printed Media Services, Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir.1993). Although these plaintiffs' cases have been transferred to this MDL, "proper service must still be made on each defendant pursuant to the rules of the transferor court even after a transfer under § 1407." *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969). These named Plaintiffs should serve their underlying complaints on BASF Corporation in compliance with Fed. R. Civ. P. 4. *See Daley v. ALIA*, 105 F.R.D. 87, 89 (E.D.N.Y. 1985) (plaintiffs could serve an amended pleading on defendant by mail only if that defendant was served properly under Rule 4 with the original pleading); *In re Four Seasons Securities Laws Litig.*, 63 F.R.D. 115, 122 (W.D. Okla. 1974) ("[W]here a defendant has not been served with process in a case before it is transferred under § 1407, service on counsel who are representing that defendant in other cases in the multidistrict proceeding is not sufficient service of process on him unless his attorney is authorized by appointment or by law to receive service of process.").

LEGAL STANDARD

I. Legal Standard for Dismissal Under Fed. R. Civ. P. 12(b)(2)

A party seeking to establish personal jurisdiction over a defendant bears the burden of proof, and the burden does not shift to the party challenging jurisdiction. *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 647 (8th Cir. 2003). To survive a motion to dismiss for lack of personal jurisdiction, "a plaintiff must state sufficient facts in the complaint to support a reasonable inference that the defendant[] can be subjected to jurisdiction within the state. If the defendant controverts or denies jurisdiction, the plaintiff bears the burden of proving facts supporting personal jurisdiction." *Wells Dairy, Inc. v. Food Movers Int'l, Inc.*, 607 F.3d 515, 518 (8th Cir. 2010) (quotation omitted).

II. Legal Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6)

"'[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.'" *Wilson v. Ark. Dep't of Human Servs.*, 850 F.3d 368, 371 (8th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). Failure to plead an essential element of a cause of action is a "fatal deficiency warranting dismissal." *Gatlin ex rel. Estate of Gatlin v. Gatlin*, 362 F.3d 1089, 1095 (8th Cir. 2004); *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999).

ARGUMENT

I. THE COURT SHOULD DISMISS THE NATIONWIDE CLASS ALLEGATIONS BECAUSE THIS COURT AND THE TRANSFEROR COURTS LACK PERSONAL JURISDICTION OVER BASF CORPORATION FOR THE CLAIMS OF NON-RESIDENT CLASS MEMBERS.

While Plaintiffs bring most of their claims of behalf of putative state-wide classes, Plaintiffs seek to bring their Lanham Act claim on behalf of a nationwide class. (Master Compl. ¶¶ 368-69, 383-97). The Master Complaint includes plaintiffs from eight states—Arkansas, Missouri, South Dakota, Nebraska, Kansas, Mississippi, Illinois, and Tennessee—each of whom filed a complaint in their home state. (*Id.* ¶¶ 1-17). Both this Court and the transferor courts lack personal jurisdiction over BASF Corporation for the claims of out-of-state class members under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

A MDL court's jurisdiction is coextensive with the transferor courts' jurisdiction. *In re Santa Fe Nat'l Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1213 (D.N.M. 2017) (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 n.11 (3d Cir. 2004)). Accordingly, the Court must assess personal jurisdiction with respect to the defendant's contacts in the forums in which the plaintiffs originally filed suit. *Id.* The MDL court "separately applies the state law pertaining to personal jurisdiction applicable in each of the transferor courts," but conducts this analysis according to the law of the circuit in which it sits. *See In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, 2017 WL 5514193, at *4 (D.N.H. Nov. 14, 2017). In this case, jurisdiction over BASF Corporation for the claims of out-of-state class members covered by the putative nationwide Lanham Act class would violate the Due Process Clause.

First, BASF Corporation is not subject to general jurisdiction in any of the eight transferor courts. General jurisdiction grants a court authority "to hear any and all claims

against" a party regardless of the relationship between the defendant's forum contacts and the cause of action. *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). General jurisdiction applies when a foreign corporation's "affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State," that is, "comparable to a domestic enterprise in that State." *See Daimler AG v. Bauman*, 134 S. Ct. 746, 754, 758 n.11 (2014). Absent exceptional circumstances, "at home" status applies only to the corporation's state of incorporation and principal place of business. *Id.* at 760-61. Because BASF Corporation is incorporated in Delaware and has its principal place of business in New Jersey (Master Compl. ¶ 22), it is not subject to general jurisdiction in any of the eight states at issue.

Because there is no general jurisdiction over BASF Corporation in any of the eight states at issue, each plaintiff must demonstrate specific jurisdiction over his or her claims. "Specific personal jurisdiction can be exercised by a federal court in a diversity suit only if authorized by the forum state's long-arm statute and permitted by the Due Process Clause of the Fourteenth Amendment." *Viasystems v. eBM-Papst St. Geogren GmbH & Co., KG*, 646 F.3d 589, 593 (8th Cir. 2011). The same analysis applies in federal question cases where the statute under which the plaintiff brings its claim is silent as to service of process, which includes the Lanham Act. *See Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014) (analyzing in federal question case whether the exercise of personal jurisdiction "'comports with the limits imposed by federal due process' on the State of Nevada"); Fed. R. Civ. P. 4(k)(1)(A); *see also Cortec Corp. v. Transilwrap Co., Inc.*, 2015 WL 164173, at *1 n.1 (D. Minn. Jan. 13, 2015). For that reason, the Fourteenth Amendment analysis of *Bristol-Myers* is fully applicable to Plaintiffs' federal Lanham Act claim. *See Roy v. FedEx Ground Package Sys., Inc.*, 2018 WL 2324092 at *9 (D. Mass. May 22, 2018) (holding that "there can be no doubt" that the *Bristol-Myers* applies to a federal claim in federal

court because the requirements of Rule 4 "indirectly bring the strictures of the Fourteenth Amendment into play"); *see also Maclin v. Reliable Reports of Texas*, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018) (applying *Bristol-Myers* to a FLSA collective action); *Prac. Mgmt. Support Servs.*, 301 F. Supp. 3d 840 (N.D. Ill. Mar. 12, 2018) (applying *Bristol-Myers* to a TCPA class action); *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *3, 8-9 (E.D.N.Y. Sept. 20, 2017) (applying *Bristol-Myers* in a federal question case).

The due process inquiry is dispositive here, so an analysis of each state's individual long-arm statute is not necessary.[4] To establish specific jurisdiction, each plaintiff must show "a connection between the forum and the specific claims at issue." *Bristol-Myers*, 137 S. Ct. at 1781. Applying this principle, the Supreme Court in *Bristol-Myers* held that a California court lacked specific jurisdiction over the claims of 592 non-California residents against a non-California corporation because the nonresident plaintiffs were not prescribed, did not purchase or ingest, and were not injured by the allegedly defective drug in California. *Id.* at 1781-82. The Court found it immaterial to the nonresidents' claims that other plaintiffs, who were prescribed, did purchase or ingest, and were allegedly injured by the same drug in California, could show specific jurisdiction there, because "a defendant's relationship with a … third party, standing

[4] Of the eight states at issue, four permit the assertion of jurisdiction to the fullest extent allowed by the Fourteenth Amendment's Due Process Clause. *See Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 647 (8th Cir. 2003) (Arkansas); *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1090 (10th Cir. 1998) (Kansas); *Harlem Ambassadors Prods., Inc. v. ULTD Entm't LLC*, 281 F. Supp. 3d 689, 692-93 (N.D. Ill. 2017) (Illinois); *Invisible Fence, Inc. v. Fido's Fences, Inc.*, 687 F. Supp. 2d 726, 734 (E.D. Tenn. 2009) (Tennessee). Missouri, Mississippi, Nebraska, and South Dakota each have narrower long-arm statutes. *See Viasystems v. eBM-Papst St. Geogren GmbH & Co., KG*, 646 F.3d 589, 593 (8th Cir. 2011) (Missouri); *Morrone Co. v. Barbour*, 241 F. Supp. 2d 683, 686 n.4 (S.D. Miss. 2002) (Mississippi); *Omaha Tribe of Neb. v. Barnett*, 245 F. Supp. 2d 1049, 1052-53 (D. Neb. 2003) (Nebraska); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387-89 (8th Cir. 1991) (South Dakota).

alone, is an insufficient basis for jurisdiction." *Id.* (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

The Court's reasoning in *Bristol-Myers* directly applies to the non-resident class members encompassed by Plaintiffs' putative nationwide Lanham Act class, because Plaintiffs purport to bring their Lanham Act claim on behalf of putative class members who have no connection to the forum states. As just one example, Plaintiff Bumper Crops from Illinois[5] seeks to bring Lanham Act claims on behalf of class members not just from Illinois, but from all states, including Maine, Minnesota, and California. These claims have absolutely no connection to Illinois. These class members' claims did not arise in Illinois, but rather in the state where the class member was allegedly harmed by Defendants' allegedly false representations regarding the Xtend seed crop system. (*See* Master Compl. ¶¶ 386-87, 391, 394-95). The mere fact that an *Illinois-based plaintiff* may have crops in Illinois that were allegedly injured by Defendants' allegedly false statements[6] does not allow the transferor court (or this Court) to assert specific jurisdiction over the similar claims of non-Illinois putative class members. That is exactly the type of piggyback jurisdiction that *Bristol-Myers* rejects. 137 S. Ct. at 1781. Because the transferor courts lack specific jurisdiction over BASF Corporation arising from out-of-state events and activities, the Court should dismiss the Lanham Act claims of putative class members from states other than the state where each underlying case was filed.

Many courts have applied *Bristol-Myers* to dismiss the claims of non-resident putative class members for lack of specific personal jurisdiction. *See Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc.*, 2018 WL 3474444 (N.D. Ill. July 19, 2018); *Maclin*, 2018 WL 1468821;

[5] The same analysis applies to the other seven states at issue.
[6] As explained below, the Lanham Act does not protect against this type of injury, and for that reason, Plaintiffs' Lanham Act claims should be dismissed on their merits.

Chavez v. Church & Dwight Co., 2018 WL 2238191 (N.D. Ill. May 16, 2018); *Prac. Mgmt. Support Servs.*, 301 F. Supp. 3d 840; *Anderson v. Logitech*, 2018 WL 1184729 (N.D. Ill. Mar. 7, 2018); *DeBernardis v. NBTY, Inc.*, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); *McDonnell v. Nature's Way Products, LLC*, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017); *Wenokur v. AXA Equitable Life Ins. Co.*, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017); *see also Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 WL 3129147 (E.D. Pa. July 24, 2017); *Demedicis v. CVS Health Corp.*, 2017 WL 569157 (N.D. Ill. Feb. 13, 2017). The key principle from *Bristol-Myers*—that a court cannot exercise specific jurisdiction over non-residents' claims merely because they are similar to residents' claims—applies with equal force in the class action context, which is just another form of joinder under the Federal Rules. *See* Fed. R. Civ. P. 20, 23. Indeed, because the Rules Enabling Act forbids interpreting the Federal Rules to "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b), Rule 23's class action device cannot be used to prevent a defendant from litigating defenses to individual claims, including lack of personal jurisdiction. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). The fact that this is a class action therefore does not change the applicability of *Bristol-Myers* and the Court should dismiss the Lanham Act claims of non-resident putative class members.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THE LANHAM ACT.

The Court should dismiss Plaintiffs' Lanham Act claim because they lack statutory standing and fail to plead the type of injury Section 1125(a) of the Lanham Act intends to redress—injury to business reputation or a diversion of sales from a plaintiff to a defendant.

As a threshold matter, Plaintiffs must plead facts sufficient for them to demonstrate that they "fall[ ] within the class of plaintiffs whom Congress has authorized to sue" under the Lanham Act. *See Tovar v. Essentia Health*, 857 F.3d 771, 774 (8th Cir. 2017) (quotation

omitted). There is a two-step process to determine whether a plaintiff possesses this "statutory standing": a zone of interest inquiry and a proximate cause analysis. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014). Plaintiffs do not fall within the Lanham Act's zone of interests; therefore, the Court should dismiss Plaintiffs' Lanham Act claim.

Whether Plaintiffs fall within the Lanham Act's zone of interest is an issue of statutory interpretation and is decided as a matter of law. *See id.* at 1387; *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1271 (10th Cir. 2000). The Lanham Acts "protect[s] persons engaged in … commerce [within the control of Congress] against unfair competition." 15 U.S.C. § 1127. Thus, to come within this statute's zone of interest, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in business reputation or sales. *Lexmark*, 134 S. Ct. at 1390. In the context of the Lanham Act, "sales" means a "direct diversion of sales" from the plaintiff to the defendant. *Bluetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1182 (8th Cir. 2011); *John Bean Techs. Corp. v. Morris & Assocs., Inc.*, 2018 WL 3039734, at *6 (W.D. Ark. June 19, 2018). Courts reject Lanham Act claims that fail to allege lost sales in the form of *diverted sales* or *sales withheld from the plaintiff*—that is, a competitive injury. For example, in *Locus Telecommunications, Inc. v. Talk Global, LLC*, 2014 WL 4271635 (D.N.J. Aug. 28, 2014), the plaintiff sued the defendant for allegedly making false statements about its product, PIN numbers used to add minutes to prepaid cellphones. The plaintiff alleged that it relied on defendant's claims in purchasing the PIN numbers for resale, but the PIN numbers did not work, precluding the plaintiff and its customers from being able to redeem them and causing plaintiff to lose sales and goodwill. The court dismissed plaintiff's claim because "the injury of which [plaintiff] complains does not stem from conduct by [defendant] which unfairly diminishes plaintiff's competitive position in the marketplace." *Id.* at *2. Rather, "a Lanham Act claim for false

advertising requires some deception by the defendant *which causes consumers to withhold trade from the plaintiff*." *Id.* (emphasis added) (citing *Lexmark*, 134 S. Ct. at 1391).

Plaintiffs do not allege such an injury. Plaintiffs generically assert that they "were and continued to be damaged as a result of Defendants' material misrepresentations," (Master Compl. ¶ 394), but they do not allege: (1) that any statement by any Defendant injured their business reputation; (2) that they have suffered or are likely to suffer an injury from a direct diversion of their sales to any Defendant or by a loss of goodwill associated with their products; or (3) that any deception caused consumers to withhold trade from any Plaintiff. *See Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1187 (D. Neb. 2015). The entire crux of the Master Complaint is that allegedly defective dicamba herbicides and dicamba-tolerant seeds damaged Plaintiffs' crops, (*see, e.g.*, Master Compl. ¶¶ 390, 465, 636), not that Plaintiffs have been injured "either by direct diversion of sales from [themselves] to defendant or by a loss of goodwill associated with [their] products," which is an essential requirement for a Lanham Act claim under Eighth Circuit law. *Bluetow*, 650 F.3d at 1182. Like in *Locus Telecommunications*, Plaintiffs do not allege a competitor relationship with Defendants or an injury that stems from Defendants' actions as a competitor. *See* 2014 WL 4271635, at *2-3. Plaintiffs therefore cannot make any credible claim that they fall within the Lanham Act's zone of interest, and this Court should dismiss Plaintiffs' Lanham Act claim.

III. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A STRICT LIABILITY – ULTRAHAZARDOUS ACTIVITY CLAIM.

Next, Plaintiffs claim BASF Corporation's sale of Engenia® is an ultrahazardous activity. The determination of whether an activity is "ultrahazardous" is a question of law. *Pruit v. Sw. Energy Co.*, 2013 WL 588998, at *4 (E.D. Ark. Feb. 13, 2013); *Marmo v. IBP, Inc.*, 362 F. Supp. 2d 1129, 1133 (D. Neb. 2005); *Am. Ins. Co. of New York v. Heneghan Wrecking &*

Excavating Co., 46 N.E.3d 859, 867 (Ill. App. Ct. 2015); *Pullen v. West*, 92 P.3d 584, 592 (Kan. 2004); *Concklin v. Holland*, 138 S.W.3d 215, 223 (Tenn. Ct. App. 2003); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 165 (Miss. 1999); *Fleege v. Cimpl*, 305 N.W.2d 409, 415 (S.D. 1981). Generally, a defendant who performs an abnormally dangerous or ultrahazardous activity is subject to liability for harm to the person, land, or chattels of a plaintiff resulting from the activity, regardless of whether defendant has exercised the utmost care to prevent the harm. *In re Chicago Flood Litig.*, 680 N.E.2d 265, 279 (Ill. 1997); *Clay v. Missouri Highway & Transp. Comm'n*, 951 S.W.2d 617, 623 (Mo. Ct. App. 1997); *Laterra By & Through Commercial Nat. Bank v. Treaster*, 844 P.2d 724, 730 (Kan. Ct. App. 1992); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 171 (Miss. 1999); *Watson v. Great Lakes Pipeline Co.*, 182 N.W.2d 314, 319 (S.D. 1970); *N. Little Rock Transp. Co. v. Finkbeiner*, 420 S.W.2d 874, 881 (Ark. 1967).

While this approach has been adopted in many states, there is variation such that the application of each state's standard to the specific facts alleged by each plaintiff will require an individualized evaluation. For example, "the doctrine of strict liability for ultrahazardous activities has not been adopted in Nebraska." *In re Derailment Cases*, 416 F.3d 787, 796 (8th Cir. 2005) (quoting *Anderson v. Nashua Corp.*, 519 N.W.2d 275, 281 (Neb. 1994)). In contrast, Mississippi recognizes ultrahazardous activity claims only involving explosives. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 171 (Miss. 1999) (acknowledging that "[t]he lower court correctly held that strict liability for ultrahazardous activity has only been found by this Court in cases involving explosives."); *see also, e.g.*, *Teledyne Exploration Co. v. Dickerson*, 253 So. 2d 817, 818 (Miss. 1971); *Cent. Exploration Co. v. Gray*, 70 So. 2d 33, 36 (Miss. 1954). Missouri, on the other hand, has found only two activities to be ultrahazardous: blasting and radioactive nuclear emissions. *See Kirk v. Schaffer Group USA, Inc.*, 2016 WL 928721, at *1 (W.D. Mo.

Mar. 9, 2016) (citing *Rychnovsky v. Cole*, 119 S.W.3d 204, 211 (Mo. Ct. App. 2003)). Finally, Arkansas recognizes that an activity is ultrahazardous if it (1) necessarily involves a risk of serious harm to the person or chattels of others that cannot be eliminated by the exercise of the utmost care; and (2) is not a matter of common usage. *Mangrum v. Pigue*, 198 S.W.3d 496, 499-500 (Ark. 2004).

A. The Sale or Manufacture of a Product Is Not an Ultrahazardous Activity.

Plaintiffs base their ultrahazardous activity claims solely on BASF Corporation's selling, designing, manufacturing, and disseminating Engenia®. (Master Compl. ¶¶ 398-416, 570-89). However, merely *selling a product*, even if its use can create "hazards," cannot give rise to strict liability for ultrahazardous *activity*. *See, e.g.*, *Elmore v. Dixie Pipeline Co.*, 245 So. 3d 500, 507 (Miss. Ct. App. 2017) ("The fact that liquid propane can ignite and become explosive does not mean activities that involve it are ultrahazardous for purposes of strict liability"); *Ind. Harbor Belt R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) ("[T]he manufacturer of a product is not considered to be engaged in an abnormally dangerous activity merely because the product becomes dangerous when it is handled or used in some way after it leaves his premises, even if the danger is foreseeable."). This is because absolute liability attaches only to abnormally dangerous *activities*—not substances. *See, e.g.*, *Ind. Harbor Belt*, 916 F.2d at 1181. Characterizing product manufacture as an "ultrahazardous activity" would make manufacturers "the insurer for such products as explosives, hazardous chemicals or dangerous drugs even though such products are not negligently made nor contain any defects." *United States v. Union Corp.*, 277 F. Supp. 2d 478, 494 (E.D. Pa. 2003). Thus, for absolute liability to attach, "'[t]he activity itself must cause the injury and the defendant must have been engaged directly in the injury-producing activity.'" *Richardson v. Holland*, 741 S.W.2d 751, 754–55 (Mo. Ct. App. 1987) (quoting *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1267 (5th Cir. 1985)); *see also Martin v.*

Harrington and Richardson, Inc., 743 F.2d 1200, 1202 (7th Cir. 1984); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1297 (Ill. Ct. App. 1985).

According to Plaintiffs, their crops were damaged when neighboring farmers applied dicamba to their fields. (*See, e.g.*, Master Compl. ¶ 295). The Master Complaint contains no allegations that Defendants sprayed herbicides or engaged in any activity beyond selling their respective products. Thus, Plaintiffs' allegations fail to state an ultrahazardous activity claim, and this Court should hold that the sale of herbicides is not ultrahazardous as a matter of law.

B. Selling Herbicides Is a Matter of Common Usage.

While Plaintiffs concede that dicamba has been used for decades as an herbicide, (Master Compl. ¶ 75), they contend that spraying dicamba over the top of crops was not a matter of common usage prior to 2017, (*id.* ¶¶ 414, 587, 739, 879, 1035, 1174, 1313, 1479). Plaintiffs' allegations miss the mark entirely: absolute liability attaches only to abnormally dangerous *activities*, not substances. The fact that Engenia was not sold until 2017 is immaterial because (1) herbicides have been sold and used for decades, (2) dicamba has been used and sold for decades, (*id*. ¶ 75), and (3) Plaintiffs predicate their ultrahazardous activity claims on BASF Corporation's *selling, designing, developing, and marketing* Engenia®—not applying it. (*See, e.g.*, *id.* ¶ 402).

An activity is a matter of common usage if it is an "activity customarily carried on by the great mass of mankind or by many people in the community." *Zero Wholesale Gas Co., Inc. v. Stroud*, 571 S.W.2d 74, 78 (Ark. 1978); *Leatherwood v. Wadley*, 121 S.W.3d 682, 700 (Tenn. Ct. App. 2003) (recognizing racing cars had "become a matter of common usage in the State of Tennessee and throughout the nation."). In *Mangrum*, the Arkansas Supreme Court concluded that "the spraying of the widely used herbicide, Roundup Ultra, was not an ultrahazardous activity," because RoundUp Ultra was commonly used in the farming community and available for sale to the general public. 198 S.W.3d at 500. If the use of herbicides is not an ultrahazardous

activity, neither can the manufacture or sale of it constitute a dangerous or uncommon activity—particularly in an agricultural state like Arkansas. *See Dye v. Burdick*, 553 S.W.2d 833, 840 (Ark. 1977) ("One reason often given for rejection of strict liability is the burden that would be placed upon a legitimate activity which is in the interest of utilization and development of natural resources and the state's economy, such as advancement of agriculture."); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 569 (S.D. Ill. 1994) (holding that although the buildings contained asbestos, selling property is a matter of common usage), *aff'd*, 54 F.3d 379 (7th Cir. 1995).

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR "NEGLIGENT TRAINING."

Plaintiffs assert claims for negligent training under the laws of six different states. These claims go far beyond anything recognized by any state's existing law. Plaintiffs ask this Court to create and impose upon product manufacturers a new common-law duty to proficiently train product users (regardless of whether the users purchased directly from Defendants) regarding any use of the product that might foreseeably cause injury to property. However, Plaintiffs cite no case—from any court—that has ever imposed a "duty to train," nor can they offer any sound policy reasons for such an extension of the law on negligence. *See, e.g.*, *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 583 (Minn. 2012) (holding "there is no duty for suppliers or manufacturers to train users in the safe use of their product" and "imposing a duty to train would be wholly unprecedented").

Moreover, even if this Court were to recognize Plaintiffs' negligent training claims, they would still fail because Plaintiffs have failed to plead the required element of causation. According to Plaintiffs, "education does not fix dicamba's volatility and propensity to move off target." (Master. Compl. ¶ 327). Plaintiffs cannot, therefore, assert that their alleged injuries

would not have occurred but for any failure by BASF Corporation to provide adequate education or training. *See Isham v. Booneville Cmty. Hosp.*, 2015 WL 4133098, at *2 (W.D. Ark. July 8, 2015) (dismissing negligence claim for lack of causation); *Garrido v. Team Auto Sales, Inc.*, 913 N.W.2d 95, 100 (S.D. 2018) (proximate cause required); *Drouhard-Nordhus v. Rosenquist*, 345 P.3d 281, 286 (Kan. 2015) (same); *Simmons v. Homatas*, 898 N.E.2d 1177, 1186 (Ill. App. Ct. 2008), *aff'd*, 925 N.E.2d 1089 (Ill. 2010) (same); *Trumbo, Inc. v. Witco Corp.*, 2003 WL 21946734, at *6 (Tenn. Ct. App. Aug. 11, 2003) (same); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (causation required).

Further, Plaintiffs predicate their negligent training claims on allegations that Defendants failed to provide adequate education through their respective stewardship programs. (*See, e.g.*, Master Compl. ¶¶ 170-71). These are essentially claims for educational malpractice. Courts routinely refuse to recognize such claims[7] due to public policy concerns, including: (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools." *Waugh v. Morgan Stanley & Co.*, 966 N.E.2d 540, 552 (Ill. App. Ct. 2012); *see also Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103, at *17 (D.S.D. Apr. 20, 2006). These same public policy concerns that have persuaded courts to dismiss claims based on educational malpractice against universities, flight training schools, and flight instructors are equally applicable to the instruction presently at issue, because

[7] *See, e.g., O v. Texarkana Behavioral Assocs., L.C.*, 2016 WL 4414809, at *1 (W.D. Ark. Aug. 16, 2016); *Thomas v. Meharry Med. Coll.*, 1 F. Supp. 3d 816, 828 (M.D. Tenn. 2014); *Dallas Airmotive, Inc. v. FlightSafety Intern., Inc.*, 277 S.W.3d 696, 701 (Mo. App. Ct. 2008); *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685, 693-94 (Kan. 1993).

the "duty" that Plaintiffs urge this Court to recognize exists only if the relationship between Plaintiffs and Defendants is tantamount to an educator-student relationship. Accordingly, Plaintiffs' negligent training claims should be dismissed.

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR TRESPASS.

Plaintiffs bring claims for trespass under the laws of Arkansas, Illinois, Kansas, South Dakota, Tennessee, Nebraska, and Missouri. In support of their claims, Plaintiffs contend that "Monsanto and BASF Corporation intentionally designed, developed, promoted, marketed and sold" genetically engineered seed to allow and encourage farmers to spray dicamba over the top of dicamba-resistant crops. (Master Compl. ¶¶ 541, 673, 828, 1005, 1119, 1256, 1429, 1579). According to Plaintiffs, trespasses were committed when "dicamba particles" were deposited onto their land without their permission. (*See, e.g., id.* ¶¶ 544-45).[8] For the reasons that follow, Plaintiffs' allegations are insufficient to state a claim for trespass.

A. BASF Corporation Lacked Sufficient Control to Be Liable for Trespass.

To bring a trespass claim under Arkansas and Missouri law, there must be intentional direct physical interference with the person or property of another. *Williams v. Pate*, 2015 Ark. 413, 2 (2015); *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 330 (Mo. Ct. App. 2014); *Baker v. Newcomb*, 621 S.W.2d 535, 537 (Mo. Ct. App. 1981) ("Although it is not necessary that the trespasser intend to commit a trespass [under Missouri law], or even know that the act will constitute a trespass, it is required for trespass that there be an intentional act; i.e. an intent to enter the land which results in the trespass."). Similarly, a trespass occurs in Illinois, South Dakota, Nebraska, Kansas, and Tennessee if a person causes a thing or a third person to enter the land of another. *Noble v. Am. Nat'l Prop. & Cas. Ins. Co.*, 297 F. Supp. 3d 998, 1006 (D.S.D. 2018) (quoting *Benson v. State*, 710 N.W.2d 131, 159 (S.D. 2006)); *Shoffner v. CSX Transp.*,

[8] Plaintiffs made identical trespass allegations for all of their state-specific trespass claims.

Inc., 2013 WL 11521840, at *6 (E.D. Tenn. Mar. 26, 2013) ("[i]n its broad and general sense 'trespass' is commonly understood to mean an entry upon the soil of another in the absence of lawful authority without the owner's license."); *Millers Mut. Ins. Assoc. v. Graham Oil Co.*, 668 N.E.2d 223, at 230 (Ill. App. Ct. 1996) (citing *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 556–59 (Ill. 1980)); *United Proteins, Inc. v. Farmland Indus., Inc.*, 915 P.2d 80, 83 (Kan. 1996); *Obermiller v. Baasch*, 823 N.W.2d 162, 174 (Neb. 2012).

Plaintiffs fail to state a claim for trespass because they allege only that Defendants "intentionally designed, developed, promoted, and sold" their respective products. (*See, e.g.*, Master Compl. ¶ 541). A theory by which Defendants supposedly entered Plaintiffs' land through the sale and use of their dicamba-based products and their purchasers' use of dicamba based products, does not state a claim for trespass because, as multiple courts have held, a manufacturer has no control over its products post-sale and delivery. *See, e.g.*, *City of Bloomington v. Westinghouse Elec.*, 891 F.2d 611, 615 (7th Cir. 1989) (holding chemical manufacturer was not liable for trespass where product caused contamination after sale and delivery to buyer); *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1209–10 (D. Kan. 2015) ("[C]ourts have held in a number of cases that there is no liability for trespass for an injury or contamination caused by a product after it has left the control of its seller."); *Agric. Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 1996 WL 515088, at *9 (N.D. Ill. Sept. 6, 1996) ("[C]ourts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers.") Similarly, courts in multiple other jurisdictions have found that sales alone cannot sustain a trespass claim because it is not a physical act of intruding on property. *See Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1582 (S.D. Ga. 1992); *Dine v. Western Exterminating Co.*, 1988 WL 25511, at *9 (D.D.C. Mar.

9, 1988); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H 1984); *Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 664 (Alaska 2000); *Ward v. Ne. Tex. Farmers Co-op. Elevator*, 909 S.W.2d 143, 150–51 (Tex. Ct. App. 1995) (herbicide seller not liable for trespass when herbicide purchased by buyer drifted onto plaintiff's property), *abrogated on other grounds, Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015). Because courts do not impose trespass liability on sellers for injuries caused by their product after the product has left the seller's ownership and possession, Plaintiffs' trespass claims predicated on BASF Corporation's sale of Engenia® must be dismissed.

B. Trespass by Particulate Matter is Not a Cognizable Cause of Action Under Arkansas And Tennessee Law.

Plaintiffs' allegations that "dicamba particles" were deposited onto their land without their permission also fails to state a trespass claim under Arkansas and Tennessee law. In both states, physical contact with land is an essential element of a trespass claim. *Patton v. TPI Petroleum, Inc.*, 356 F. Supp. 2d 921, 930 (E. D. Ark. 2005); *Morrison v. Smith*, 757 S.W.2d 678, 681 (Tenn. Ct. App. 1988). To satisfy this element, the invasion constituting a trespass must involve unauthorized entry of tangible matter. *Int'l Paper Co. v. MCI WorldCom Network Servs., Inc.*, 442 F.3d 633, 636 (8th Cir. 2006) (holding Arkansas only recognizes trespass by tangible matter); *Barfield v. Sho-Me Power Elec. Co-op.*, 2012 WL 2368517, at *8 (W. D. Mo. June 21, 2012) (acknowledging that Arkansas law requires "direct physical interference with the person or property of another."); *Morrison*, 757 S.W.2d at 681 (holding under Tennessee law that "since it is the owner or tenant's right to exclusive possession that is being protected by the [trespass] action, it is generally held that the invasion of the close be physical and accomplished by a 'tangible matter.'"). Pesticide drift is considered an intrusion by "particulate matter" that is

"intangible" for purposes of trespass analysis. *See Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W. 2d 693, 705 (Minn. 2012) (finding that allegations of pesticide drift did not state a claim for trespass). Because these are the only intrusions alleged in the Master Complaint, Plaintiffs have failed to plead an essential element of their cause of action and their trespass claims should be dismissed.

VI. PLAINTIFFS HAVE NOT PLED ANY VALID BREACH OF IMPLIED WARRANTY CLAIMS.

Plaintiffs raise three species of warranty claims in their Master Complaint—breach of express warranty (under Arkansas, Kansas, Nebraska, South Dakota, and Tennessee law) and breach of the implied warranties of fitness and merchantability (under Arkansas, Kansas, Mississippi, South Dakota, and Tennessee law). The Arkansas, Kansas, South Dakota, and Tennessee implied warranty claims, as pled, fail as a matter of law because they were properly disclaimed. In addition, the Kansas implied and express warranty claims fail because the Kansas putative class members did not purchase the products at issue.

A. BASF Corporation Disclaimed All Implied Warranties on the Engenia® Label.

As a threshold matter, Plaintiffs' warranty claims fail because BASF Corporation disclaimed all implied warranties in the sale of Engenia®. Engenia®'s product label states:

Conditions of Sale and Warranty

The **Directions For Use** of this product reflect the opinion of experts based on field use and tests. The directions are believed to be reliable and must be followed carefully. However, it is impossible to eliminate all risks inherently associated with the use of this product. Crop injury, ineffectiveness or other unintended consequences may result because of such factors as weather conditions, presence of other materials, or use of the product in a manner inconsistent with its labeling, all of which are beyond the control of BASF CORPORATION ("BASF") or the Seller. To the extent consistent with applicable law, all such risks shall be assumed by the Buyer.

BASF warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes referred to in the **Directions For Use**, subject to the inherent risks, referred to above.

TO THE EXTENT CONSISTENT WITH APPLICABLE LAW, BASF MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY OF FITNESS OR MERCHANTABILITY OR ANY OTHER EXPRESS OR IMPLIED WARRANTY.

TO THE EXTENT CONSISTENT WITH APPLICABLE LAW, BUYER'S EXCLUSIVE REMEDY AND BASF'S EXCLUSIVE LIABILITY, WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, OR OTHERWISE, SHALL BE LIMITED TO REPAYMENT OF THE PURCHASE PRICE OF THE PRODUCT.

TO THE EXTENT CONSISTENT WITH APPLICABLE LAW, BASF AND THE SELLER DISCLAIM ANY LIABILITY FOR CONSEQUENTIAL, EXEMPLARY, SPECIAL OR INDIRECT DAMAGES RESULTING FROM THE USE OR HANDLING OF THIS PRODUCT.

BASF and the Seller offer this product, and the Buyer and User accept it, subject to the foregoing **Conditions of Sale and Warranty** which may be varied only by agreement in writing signed by a duly authorized representative of BASF. 1108

(Ex. A at 16, 24).[9]

Under the UCC, a seller may disclaim implied warranties if the disclaimer mentions merchantability and is conspicuous, and may exclude the implied warranty of fitness if the exclusion is in writing and conspicuous.[10] Ark. Code Ann. §§ 4-2-314, 4-2-316; Kan. Stat. Ann. § 84-2-316(2); S.D. Codified Laws § 57A-2-316; Tenn. Code Ann. § 47-2-316. A "conspicuous"

[9] The Engenia® product label and warranty can be considered by the Court in ruling on a motion to dismiss because the label is necessarily embraced by the pleadings, as the Master Complaint challenges the labeling, and neither party contests the label's authenticity. *See Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017); *see also Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) ("Though matters outside the pleading may not be considered in deciding a Rule 12 motion to dismiss, documents necessarily embraced by the complaint are not matters outside the pleading.").

[10] Although the Kansas Consumer Protection Act ("KCPA") prohibits the exclusion of implied warranties in consumer transactions, *see* Kan. Stat. Ann. § 50-639(a), the Kansas plaintiffs have not alleged facts showing that they are consumers or that they entered into a consumer transaction covered by the KCPA.

term is one "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." Ark. Code Ann. § 4-1-201(b)(10); Kan. Stat. Ann. § 84-1-201(b)(10); S.D. Codified Laws § 57A-1-201(b)(10); Tenn. Code Ann. § 47-1-201(b). The Engenia® warranty disclaimer is conspicuous, as a matter of law, because it is in writing, contains the word "merchantability," and presents the text in bold, capital letters.

B. All of the Kansas Plaintiffs' Warranty Claims Fail Because They Were Not Buyers of The Products At Issue.

Under the Kansas UCC, generally only buyers of goods may assert breach of express or implied warranty claims. *See* Kan. Stat. Ann. §§ 84-2-313, -314, -315. A "buyer" is defined as "a person who buys or contracts to buy goods." Kan. Stat. Ann. § 84-2-103(1)(a). The Kansas UCC extends express or implied warranties beyond the buyer only to third parties who (1) are "expected to use, consume or be affected by the goods"; and (2) are "injured in person by breach of the warranty." Kan. Stat. Ann. § 84-2-318. In other words, Kansas law extends warranties to "non-privity manufacturers whose inherently dangerous products *cause physical injuries to buyers*." *Prof. Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898 (Kan. 1984) (emphasis added). A plaintiff who is neither a "buyer" nor suffers personal injury cannot state a claim for breach of express or implied warranties.[11] *See id.* at 898-99; *see also Full Faith Church of Love W., Inc. v. Hoover Treated Wood Prod., Inc.*, 224 F. Supp. 2d 1285, 1292 (D. Kan. 2002) (dismissing implied warranty claims where plaintiffs alleged damage only to property); *Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 541 (D. Kan. 1982) (granting summary judgment on implied warranty claims because the plaintiff did not

[11] Although the KCPA abolishes the privity requirement for consumer transactions, *see* Kan. Stat. Ann. § 50-639(b); *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233, 1243-44 (D. Kan. 2007), Plaintiffs have not alleged facts showing that they are consumers or that they entered into a consumer transaction covered by the KCPA.

suffer personal injury); *Limestone Farms, Inc. v. Deere & Co.*, 29 P.3d 457, 459-61 (Kan. Ct. App. 2001) (dismissing warranty claims where the plaintiff's landlord, rather than plaintiff himself, purchased the allegedly defective planter and plaintiff suffered lower crop yield).

The Master Complaint does not allege that it or any of the putative Kansas class members bought Engenia®; in fact, the Master Complaint makes clear that the Kansas plaintiffs and putative class members *did not buy* dicamba-tolerant crops or dicamba herbicide by stating that the Kansas plaintiffs "did not in 2017 spray dicamba over the top of any crops grown with seed containing the dicamba-resistant trait" and by defining the proposed class as "persons and entities who in 2017 were Kansas producers … of soybeans *not resistant to dicamba*." (Master Compl. ¶¶ 8-9, 370(c) (emphasis added)). As non-buyers, the Kansas plaintiffs and putative class members cannot assert warranty claims unless they allege personal, physical injury. *See Owens-Corning*, 546 F. Supp. at 541; *Prof. Lens Plan*, 675 P.2d at 898-99; *Limestone*, 29 P.3d at 461. The Master Complaint, however, makes no allegation of personal versus merely economic injury. The Master Complaint thus fails to state a claim for breach of express or implied warranties on behalf of the Kansas plaintiffs and putative class members.

VII. PLAINTIFFS FAIL TO STATE A CIVIL CONSPIRACY CLAIM.

Plaintiffs bring civil conspiracy claims under Arkansas, Illinois, Kansas, Mississippi, Missouri, Nebraska, South Dakota, and Tennessee law. Plaintiffs allege that BASF Corporation and Monsanto conspired to fraudulently market, sell, and expand sales of dicamba-resistant seeds and dicamba based herbicides. (*See* Master Compl. ¶¶ 552, 704, 844, 925, 1139, 1278, 1444, 1590). Plaintiffs' civil conspiracy claims must be tied to an intentional tort, and because Plaintiffs' claims for trespass warrant dismissal for reasons outlined above, the civil conspiracy claims must fail.

To prove a civil conspiracy, a plaintiff must show that: (1) two or more persons (2) have combined to accomplish a purpose (3) that is unlawful or oppressive, or to accomplish some purpose not in itself unlawful or oppressive by unlawful, oppressive, or immoral means, (4) to the injury of another. *See Chambers v. Stern*, 64 S.W.3d 737, 743 (Ark. 2002); *Canel & Hale, Ltd. v. Tobin*, 710 N.E.2d 861, 873 (Ill. App. Ct. 1999); *Orr v. Morgan*, 230 So. 3d 368, 375 (Miss. Ct. App. 2017); *Salem Grain Co., Inc. v. Consol. Grain & Barge Co.*, 900 N.W.2d 909, 923–24 (Neb. 2017); *Rock Ivy Holding, LLC v. RC Properties, LLC*, 464 S.W.3d 623, 643 (Tenn. Ct. App. 2014). Three of the alleged sub-class states require Plaintiffs to prove a fifth element—a meeting of the minds on the object or course of action to be taken. *See Stoldt v. City of Toronto*, 678 P.2d 153, 161 (Kan. 1984); *M.W. v. S.W.*, 539 S.W.3d 910, 915 (Mo. Ct. App. 2017); *Huether v. Mihm Transp. Co.*, 857 N.W.2d 854, 861 (S.D. 2014).

First, Plaintiffs fail to allege that BASF Corporation and Monsanto agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means. Plaintiffs allege that "Defendants, in an unlawful, fraudulent, deceptive scheme and device to improperly market, sell, and expand sales and profits from the defective Xtend Crop System, conspired with each other to create fear-based demand for the dicamba-resistant trait, and correspondingly more sales and use of dicamba herbicide." (Master Compl. ¶¶ 552, 704, 844, 925, 1139, 1278, 1444, 1590). Nowhere do Plaintiffs explain how or when BASF Corporation and Monsanto agreed to pursue this alleged scheme. *See Garrison v. RevClaims, LLC*, 247 F. Supp. 3d 987, 990 (E.D. Ark. 2017) ("Conspiracy allegations must be supported with sufficient specificity and facts for a court to find a meeting of the minds"); *see also Illinois Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr. of S. Metro-E.*, 884 N.E.2d 700, 711 (Ill. 2008); *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 556 (Tenn. Ct. App. 2012)

("Civil conspiracy claims must be pled with some degree of specificity in order to survive a motion to dismiss . . . ."). In fact, the only allegations referencing any relationship between BASF Corporation and Monsanto involve development agreements for dicamba-based weed control products. (Master Compl. ¶¶ 83–87). But Plaintiffs fail to explain how those agreements constitute "unlawful or oppressive" activity that can support a civil conspiracy claim. *See Lane v. Chowning*, 610 F.2d 1385, 1390 (8th Cir. 1979); *Elizabeth Hosp., Inc. v. Richardson*, 269 F.2d 167, 169-70 (8th Cir. 1959); *Sw. Pub. Co. v. Ney*, 302 S.W.2d 538, 542-43 (Ark. 1957); *Birt v. Consol. Sch. Dist. No. 4*, 829 S.W.2d 538, 544 (Mo. Ct. App. 1992).

Where Plaintiffs do try to allege actual unlawful activity, their general allegations that Defendants "improperly market, sell, and expand sales," "proliferat[e] the dicamba-based system," and "encourage spraying" are either too conclusory to support a plausible conspiracy claim or reference activity that is not unlawful (i.e., it is not unlawful to "expand sales" or "encourage spraying"). (Master Compl. ¶¶ 552, 561); *see Garrison*, 247 F. Supp. 3d at 990; *Reuter v. MasterCard Int'l, Inc.*, 921 N.E.2d 1205, 1217 (Ill. 2010). Because joint development of dicamba-based products or encouragement of the sale or use of such products is entirely legal, such allegations do not plausibly allege an intentional unlawful purpose or unlawful means. *See Sw. Pub. Co.*, 302 S.W.2d at 542–43 (affirming dismissal of civil conspiracy claim against a citizens' group alleged to have induced violation of a contract because the only alleged acts were legal). Because Plaintiffs offer nothing more than conclusory, blanket accusations that BASF Corporation and Monsanto conspired to sell and market dicamba-based products, their claim for civil conspiracy fails.

Finally, in all of the states under which Plaintiffs bring their civil conspiracy claims, civil conspiracy is not a standalone tort; rather, it must be based on underlying tortious activity. *Atkins*

v. Heavy Petroleum Partners, LLC, 86 F. Supp. 3d 1188, 1207 (D. Kan. 2015); *Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011); *Brookewood, Ltd. P'ship v. DeQueen Physical Therapy & Occupational Therapy, Inc.*, 547 S.W.3d 461, 468 (Ark. Ct. App. 2018); *Merrilees v. Merrilees*, 998 N.E.2d 147, 162 (Ill. Ct. App. 2013); *Trimble v. Pracna*, 51 S.W.3d 481, 501 (Mo. Ct. App. 2001); *Salem Grain Co., Inc.*, 900 N.W.2d at 924; *Huether*, 857 N.W.2d at 861; *Levy v. Franks*, 159 S.W.3d 66, 82 (Tenn. Ct. App. 2004). A civil conspiracy further requires a specific intent to accomplish the contemplated wrong. *Chambers*, 64 S.W.3d at 743; *see also Nippert v. Jackson*, 860 F. Supp. 2d 554, 568 (M.D. Tenn. 2012) ("[A] civil conspiracy requires that the alleged conspirators possess the specific intent to commit an unlawful act or a lawful act by unlawful means."); *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 436 S.W.3d 445, 455 (Ark. 2014) ("A civil conspiracy is an intentional tort that requires a specific intent to accomplish the contemplated wrong."); *Kirlin v. Halverson*, 758 N.W.2d 436, 455 (S.D. 2008) ("A civil conspiracy is, fundamentally, an agreement to commit a tort."). As a result, the majority of courts have found that allegations of negligence alone will not support a civil conspiracy claim. *See, e.g.*, *Bader Farms, Inc. v. Monsanto et al.*, No. 1:16-cv-299-SNLJ, Dkt. 132, at *11 (E.D. Mo. Apr. 13, 2018) ("[T]wo parties cannot conspire to act negligently."); *Ho v. United States*, 2012 WL 6861343, at *8 & n.17 (D. Minn. Dec. 11, 2012) ("Federal courts considering the issue in civil cases have dismissed the idea that one can conspire to act unintentionally as a logical impossibility."); *Shirley v. Glass*, 241 P.3d 134, 157 (Kan. 2010) ("[P]arties cannot engage in a civil conspiracy to be negligent"). Plaintiffs claim only the intentional tort of trespass. For the reasons set forth above, Plaintiffs' trespass claims should be dismissed, and therefore the civil conspiracy claims likewise fail as a matter of law.

VIII. PLAINTIFFS FAIL TO STATE A CLAIM FOR NUISANCE.

Plaintiffs bring nuisance claims under Illinois, Kansas, Nebraska, Mississippi, and South Dakota law. Plaintiffs allege that BASF Corporation's sale of Engenia® constitutes a private nuisance and that selling Engenia® resulted in substantial physical damage to their property and crops. (Master Compl. ¶¶ 687, 841,922, 1268, 1442.) As a threshold matter, South Dakota law mandates that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." S.D. Codified Laws § 21-10-2; *Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 761 (S.D. 1996). Selling herbicides is specifically authorized by the South Dakota legislature. *See* S.D. Codified Laws § 38-20A-4 ("Before any person whose name or brand name appears on a pesticide may distribute, sell, or offer for sale or distribution in this state any pesticide, the person shall file with the secretary of agriculture an application for the registration of the pesticide."). Therefore, Plaintiffs' South Dakota nuisance claims fail as a matter of law. *See Joffer v. Cargill, Inc.*, 2010 WL 1409444, at *3 (D.S.D. Apr. 1, 2010) (operation of grain warehouses not a nuisance because they are expressly authorized by law); *see also Kuper* 557 N.W.2d at 761 (rural electric cooperatives authorized by law and not a nuisance).

A. BASF Corporation Lacked Sufficient Control To Be Liable for Nuisance.

Merely selling a product that later causes harm cannot give rise to a private nuisance claim. A private nuisance is an "invasion of another's interest in the private use and enjoyment of land." *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1212-13 (D. Kan. 2015) (citing Restatement (Second) of Torts § 821D); *see also Smith v. Kan. Gas Serv. Co.*, 169 P.3d 1052, 1061 (Kan. 2007); *In re Chicago Flood Litig.*, 680 N.E.2d 265, 204 (Ill. 1997); *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857, 859-60 (Miss. 1988) (citing Restatement (Second) of Torts § 822); *Hall v. Phillips*, 436 N.W.2d 139, 145 (Neb. 1989). Courts widely agree that nuisance claims cannot survive against a manufacturer whose

product causes injury after leaving the seller's control.[12] The Master Complaint contains no allegations suggesting BASF Corporation maintained control over Engenia® post-sale. On the contrary, Plaintiffs allege they were harmed by their neighbors' application of dicamba formulations in a manner that resulted in off-site movement of the herbicide onto the Plaintiffs' farms. (*See, e.g.*, Master Compl. ¶ 295). Absent allegations that BASF Corporation controlled Plaintiffs' neighbors' application of Engenia®, BASF Corporation cannot be held liable on a nuisance theory predicated on post-sale use. *See, e.g., In re Res. Tech. Corp.*, 662 F.3d 472, 475 (7th Cir. 2011) ("[T]he key to [nuisance] liability is not ownership; it's control."); *City of Bloomington*, 891 F.2d at 614 (holding "[s]ince the pleadings do not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to Westinghouse, we agree with the district court that Monsanto cannot be held liable on a nuisance theory."); *Schiller v. Mitchell*, 828 N.E.2d 323, 330 (Ill. App. Ct. 2005) (holding that nuisance liability will not attach where the harm is caused by a superseding act or if a plaintiff does not sue the people who actually performed the acts constituting the invasion).

[12] *See, e.g., Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993); *City of Bloomington v. Westinghouse Elec.*, 891 F.2d 611, 615 (7th Cir. 1989); *In re Syngenta Mass Tort Actions*, 2017 WL 1277898, at *11 (S.D. Ill. Apr. 3, 2017) ("[A] seller of a product is not liable for a private nuisance caused by the use of that product after it has left the seller's control . . . ."); *Johnson Cty., Tenn. v. U.S. Gypsum Co.*, 580 F.Supp. 284, 294 (E.D. Tenn. 1984) (dismissing nuisance claim based on sale of asbestos-containing products), *set aside in part on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985); *Ward v. Ne. Tex. Farmers Co-op. Elevator*, 909 S.W.2d 143, 150–51 (Tex. Ct. App. 1995) (herbicide seller not liable for trespass or nuisance when herbicide purchased by buyer drifted onto plaintiff's property), *abrogated on other grounds, Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015); *Schiller v. Mitchell*, 828 N.E.2d 323, 330 (Ill. App. Ct. 2005); *Rosenfeld v. Thoele*, 28 S.W.3d 446, 452 (Mo. Ct. App. 2000).

B. Plaintiffs Fail To State a Private Nuisance Claim Under Illinois Law Because Plaintiffs Did Not Allege that Dicamba Particles Were Physically Offensive To Their Senses.

To constitute a nuisance in Illinois, "the interference with the use and enjoyment of property must consist of an invasion by something perceptible to the senses." *In re Chicago*, 680 N.E.2d at 278. The Illinois Supreme Court has explained that a nuisance is "something that is offensive, *physically*, to the senses and by such offensiveness makes life uncomfortable." *Id.* (emphasis added); *Rosehill Cemetery Co. v. City of Chicago*, 185 N.E. 170, 176 (Ill. 1933). Typical examples include "smoke, fumes, dust, vibration, or noise produced by defendant on his own land and impairing the use and enjoyment of neighboring land." *In re Chicago*, 680 N.E.2d at 205-06; *see also, e.g.*, *Dobbs v. Wiggins*, 929 N.E.2d 30, 41 (Ill. Ct. App. 2010) (noise); *People ex rel. Traiteur v. Abbott*, 327 N.E.2d 130, 133-34 (Ill. Ct. App. 1975) (noise and odors); *Woods v. Khan*, 420 N.E.2d 1028, 1030 (Ill. Ct. App. 1981) (odors and flies from a poultry farm). The common thread of these examples is that each interference is perceptible to one of the five human senses and is capable of making life physically uncomfortable. *See Illinois Extension Pipeline Co., LLC v. Juno Capital LLC*, 2016 WL 3387743, at *4 (C.D. Ill. Apr. 20, 2016). Plaintiffs, in contrast, vaguely assert that Defendants "interfered with the use and enjoyment of land," (Master Compl. ¶ 685), and that such interference resulted in substantial physical harm, (*id.* ¶ 687). Because these allegations are "devoid of any showing that the [alleged] 'invasion' is physically offensive to [Plaintiffs'] senses and makes life (as opposed to revenue-producing capacity) uncomfortable," Plaintiffs have failed to allege a cognizable interference sufficient to state a claim for private nuisance. *See Illinois Extension Pipeline Co.*, 2016 WL 3387743, at *4 (dismissing nuisance claim where plaintiff failed to allege an invasion physically offensive to the senses and only alleged a reduction in revenue-producing capacity).

IX. PLAINTIFFS' ICFA CLAIM SHOULD BE DISMISSED.

To plead a private cause of action for a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade or commerce; and (4) the defendant's deceptive or unfair practice caused actual damage to the plaintiff. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574 (7th Cir. 2012). "[A] private cause of action brought under [the ICFA] requires proof that the damage occurred 'as a result of' the deceptive act or practice." *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160 (Ill. 2002) (quoting 815 ILCS 505/10a(a)). This language imposes a proximate causation requirement—a showing that the plaintiff was deceived in some manner and damaged by the deception. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513–14 (7th Cir. 2006); *Oliveira*, 776 N.E.2d at 164. Moreover, "to maintain an action under the Act, the plaintiff must actually be deceived by a statement or omission that is made by the defendant. If a consumer has neither seen nor heard any such statement, then she cannot have relied on the statement and, consequently, cannot prove proximate cause." *De Bouse v. Bayer*, 922 N.E.2d 309, 316 (Ill. 2009). Thus, where a plaintiff fails to allege he was deceived by the defendant, the ICFA claim fails as a matter of law. *See Oliveira*, 776 N.E.2d at 163 (dismissing complaint where plaintiff failed to allege he saw defendant's advertisements).

Plaintiffs' Master Complaint relies on conclusory allegations that "Defendants engaged in numerous deceptive and/or unfair acts." (*See, e.g.*, Master Compl. ¶ 693.) But "to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the Act, a plaintiff must allege that *he* was, in some manner, deceived." *Oliveira*, 776 N.E.2d at 164 (emphasis added). Plaintiffs do not allege that they received, saw, read, or were deceived by any of the allegedly deceptive materials or advertising, and that is fatal to their

claim. *See id.* at 163; *see also De Bouse*, 922 N.E.2d at 316 (failure to see or hear the allegedly deceptive statement defeats proximate cause).

X. THE NEBRASKA CONSUMER PROTECTION ACT (NCPA) CLAIM FAILS BECAUSE THE CHALLENGED CONDUCT FALLS UNDER THE NCPA'S EXEMPTION.

Plaintiff Greckel's claim for violation of the Nebraska Consumer Protection Act ("NCPA"), Neb. Rev. Stat. § 59-1601 *et seq.*, must be dismissed because the NCPA exempts federally regulated conduct (such as BASF Corporation's) under § 59-1617.

The NCPA does not apply "to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by … any other regulatory body or officer acting under statutory authority of this state or the United States." Neb. Rev. Stat. § 59-1617. While "conduct is not immunized merely because the person so acting falls within the jurisdiction of a regulatory body," actions that are or can be regulated by an existing regulatory body, such as selling and marketing a pesticide, are exempt. *Kuntzelman v. Avco Fin. Servs. of Neb., Inc.*, 291 N.W.2d 705, 707-08 (Neb. 1980) (installment loan provided by defendant exempt from NCPA because the defendant was "strictly regulated by the Department of Banking and Finance" and the Department had the power to order any entity to desist from conduct found to violate the regulations); *see also Hydroflo Corp. v. First Nat'l Bank of Omaha*, 349 N.W. 2d 615, 622 (Neb. 1984) (bank's failure to require corporate resolution to open a corporate account exempt from the NCPA because the Department of Banking and Finance had "broad authority over proper banking standards"); *Mirandette v. Nelnet*, 720 F. App'x 288 (6th Cir. 2018) (student-loan servicer's practices related to crediting payments exempt from the NCPA because the conduct was subject to Department of Education); *In re ConAgra Foods*, 908 F. Supp. 2d 1090 (C.D. Cal. 2012) (labeling and advertising of cooking oils regulated by the FDA exempt from the NCPA).

In this case, Plaintiffs claim that BASF Corporation made false and misleading statements regarding Engenia® to the press, on its website, and in brochures. (Master Compl. ¶ 1272). These actions, however, fall under regulation of the Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* FIFRA requires that all pesticides[13] sold in interstate commerce must be registered with the EPA. 7 U.S.C. § 136a. A manufacturer seeking to register a pesticide must submit to the EPA "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for use," as well as certain supporting data. 7 U.S.C. § 136a(c)(1)(C), (F). The EPA will register the pesticide if it determines the proposed claims are warranted, the label complies with the statute's prohibition on misbranding, and the pesticide will not cause unreasonable adverse effects on the environment. 7 U.S.C. § 136a(c)(5); 40 C.F.R. § 152.112(f); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 438 (2005). In addition to regulating labeling, FIFRA prohibits a manufacturer from selling a pesticide "*if any claims made for it as a part of its distribution or sale* substantially differ from any claims made for it as a part of the statement required in connection with its registration." 7 U.S.C. § 136j (emphasis added). As the EPA explains in its Label Review Manual, this provision means that "advertising and collateral literature or verbal claims for the product may not substantially differ from any claims made on the label or labeling." (Ex. B, EPA Label Review Manual Ch. 12 at 12, https://www.epa.gov/sites/production/files/2017-10/documents/chap-12-nov-2013.pdf).[14] The

[13] The definition of "pesticide" under FIFRA includes herbicides such as Engenia®. *See* 7 U.S.C. § 136(u).

[14] This Court can take judicial notice of regulatory records and reports. *See United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008) ("Judicial notice is appropriate for records and 'reports of administrative bodies.'"); *Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891 (8th Cir. 2017) (upholding district court's judicial notice of EPA Fact Sheet).

EPA "may require advertising used in the marketing of the product to be submitted upon request and reviewed to see that it is in compliance" with § 136j. *Id.*

As this regulatory scheme reveals, BASF Corporation's sale, labeling, and advertising of Engenia®, including the statements challenged by Plaintiffs, are subject to regulation by the EPA under FIFRA. These actions are thus exempt from the NCPA, and Plaintiffs' NCPA claim fails.

XI. THE CLAIMS FOR 2016 DAMAGE IN MISSOURI FAIL FOR LACK OF CAUSATION.

Plaintiff Jerry Franks brings negligence, strict liability, and trespass claims for alleged 2016 damages against BASF Corporation. (Master Compl. ¶¶ 14, 942-1017). This Court already held in *Bader Farms*, No. 1:16-cv-00299-SNLJ (Dkt. 132 at 9-11), that negligence and strict liability claims premised on 2016 damage cannot proceed against BASF Corporation because BASF Corporation did not sell the dicamba-resistant seed that was released without an approved over-the-top herbicide in 2015 or 2016. The Court should reach the same result here.

"In all tort cases, the plaintiff must prove that each defendant's conduct was an actual cause … of the plaintiff's injury." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. banc 2007). Plaintiff must therefore "establish some causal relationship between the defendant and the injury-producing agent." *Id.* at 115 (quoting *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243-44 (Mo. banc 1984)). When a defendant did not manufacture or supply the product alleged to have caused injury, no claim can proceed against that defendant. *See Long v. Cottrell*, 265 F.3d 663, 669 (8th Cir. 2001) ("Missouri courts require that an entity place a product in the stream of commerce before it can be liable under a products liability claim"); *Ahearn v. Lafayette Pharmacal, Inc.*, 729 S.W.2d 501, 504 (Mo. Ct. App. 1987) (dismissing claim against defendant that never supplied drug the hospitals where plaintiff was treated).

Plaintiff Franks bases his 2016 claims of damage on the release of dicamba-resistant cotton and soybeans in 2015-2016 without an accompanying dicamba herbicide approved for over-the-top use. (*See* Master Compl. ¶¶ 944, 950, 967-70, 975, 986, 992, 998, 1005). Plaintiffs acknowledge, however, that it is Monsanto who sells Xtend soybeans and Xtend cotton (*id.* ¶ 19), that "Monsanto … commercialized Xtend cotton for the 2015 growing season" (*id.* ¶ 182), and that "Monsanto released Xtend soybeans for the 2016 growing season" (*id.* ¶ 211). Plaintiffs recognize that BASF Corporation, on the other hand, "markets and sells its own dicamba herbicide Engenia," (*id.* ¶ 32), and that Engenia® was not approved for use until December 2016, (*id.* ¶ 230). While Plaintiffs allege that farmers sprayed older versions of dicamba in 2016, (*id.* ¶ 213), Plaintiffs do not allege that these older versions of dicamba were negligently designed, developed, or sold. These allegations compel the same conclusion this Court reached in *Bader*: "the fact is each company sells its own products—separately. Other than allegedly agreeing to conspire with Monsanto, it is difficult to see how BASF played any role in releasing an allegedly defective crop system in 2015 and 2016." *Bader*, No. 1:16-cv-00299-SNLJ (Dkt. 132 at 10). As in *Bader*, Plaintiffs have not alleged a causal relationship between BASF Corporation and the dicamba-tolerant seed alleged to have caused its 2016 injuries, because BASF Corporation admittedly did not sell the dicamba-tolerant seed in 2016. (Master Comp. ¶ 967).

Plaintiff Franks attempts to rope BASF Corporation into Monsanto's sale of the dicamba-resistant seed by alleging that "BASF entered into one or more agreements with Monsanto to jointly design, develop and commercialize that [dicamba-resistant] trait and seed containing it." (Master Compl. ¶ 952). This allegation, as an initial matter, does not change the fact that "each company sells its own products—separately." *Bader*, No. 1:16-cv-00299-SNLJ (Dkt. 132 at 10).

Moreover, this allegation demonstrates that Plaintiffs are relying entirely on allegations of a conspiracy between Monsanto and BASF Corporation to tie BASF Corporation to Plaintiff Franks' 2016 damages. But "two parties cannot conspire to be negligent," as this Court held in *Bader*, No. 1:16-cv-00299-SNLJ (Dkt. 132 at 11) (citing *Ho v. United States*, 2012 WL 6861343, at *8 (D. Minn. Dec. 11, 2012)). Therefore, Plaintiff Franks' negligence and strict liability claims for 2016 damage, which are premised solely on an alleged conspiracy with Monsanto, cannot proceed against BASF Corporation and should be dismissed.[15]

CONCLUSION

For the reasons stated above, the Court should dismiss the claims as set forth in this Memorandum.

[15] Plaintiffs acknowledge that older versions of dicamba allegedly applied in 2015 and 2016 were not "registered for use over the top of growing crops." (Master Compl. ¶ 945; *see also id.* ¶¶ 180; 955; 968; 975). In other words, these products were illegally applied over the top of Monsanto's dicamba-resistant seed. While BASF Corporation acknowledges that this Court decided in *Bader* that 2015-2016 claims against Monsanto could proceed despite these illegal third-party applications, No. 1:16-cv-00299-SNLJ (Dkt. 134 at 5-7), BASF Corporation preserves the argument that, even assuming BASF Corporation was involved with the 2015-2016 release of dicamba-resistant seed (which BASF Corporation contests), the illegal use of that product by third-party farmers is a superseding cause of Plaintiff's crop damage, and liability cannot attach to BASF Corporation. *See, e.g.*, *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 670-72 (8th Cir. 2009) (manufacturer of cold medicine was not proximate cause of damages when purchasers used product to illegally make methamphetamine); *Walton v. Sherwin-Williams Co.*, 191 F.2d 277, 283 (8th Cir. 1951) (farmers' failure to use ordinary care in spraying herbicide presented a "proximate intervening cause of the damage"); *see also Finocchio v. Mahler*, 37 S.W.3d 300, 303 (Mo. Ct. App. 2000) (citing cases where illegal third-party conduct broke the chain of causation). Additionally, manufacturers owe no duty of care to protect against the illegal use of its product by unknown third parties. *See, e.g.*, *Advance Rental Centers, Inc. v. Brown*, 729 S.W.2d 644, 645 (Mo. App. 1987) ("There is no general duty to protect a party against the intentional criminal conduct of unknown third persons.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

/s/ John P. Mandler