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

IN RE: DICAMBA HERBICIDES LITIGATION	)	
	)	
This Document Relates To:	)	
	)	
ALL CASES CONFORMING TO THE CROP DAMAGE CLASS ACTION MASTER COMPLAINT AND ALL OTHER CASES TO THE EXTENT THEY INCLUDE THE SAME ALLEGATIONS AS THE CROP DAMAGE CLASS ACTION MASTER COMPLAINT[1]	)	MDL No. 2820

MONSANTO COMPANY'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS'
CROP DAMAGE CLASS ACTION MASTER COMPLAINT

[1] Pursuant to the Court's May 8, 2018 Order Allowing Consolidated Master Complaints (Doc. # 46), and the Court's June 29, 2018 Crop Damage Case Management Order (Doc. # 104), this Motion to Dismiss applies to the Master Complaint, all cases in which Plaintiffs file a Notice to Conform, and all other cases to the extent they have the same subject matter as the allegations and claims in the Master Complaint.

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PRELIMINARY STATEMENT

On August 1, 2018, Plaintiffs filed their proposed master complaints and unexpectedly limited their Crop Damage Class Action Master Complaint (Doc. # 137) ("Master Complaint" or "M.C.") to a narrow subset of the claims transferred into this MDL for coordinated pretrial proceedings. Rather than consolidating all of the pending crop claims into a single complaint, the so-called Master Complaint omits all claims for damage in 2015, all non-Missouri claims for damage in 2016, and all claims for alleged damage to crops other than soybeans. The only claims asserted in the Master Complaint are those for alleged dicamba damage to soybeans in 2017 and in 2016 in Missouri. This selective approach was not contemplated by the Court's Order Allowing Consolidated Master Complaints (Doc. # 46). And, depending on whether Plaintiffs voluntarily dismiss or conform their underlying lawsuits to the Master Complaint, it could leave a significant subset of the transferred claims -- including putative class claims -- stayed for an indeterminate period. Defendant Monsanto Company ("Monsanto") reserves the right to address additional issues arising from the omission of claims from the Master Complaint after the deadline for Plaintiffs to conform or voluntarily dismiss the underlying complaints has passed.

INTRODUCTION

As Monsanto predicted in opposing the use of master complaints in this MDL proceeding, Plaintiffs' Crop Damage Master Complaint is substantively improper and unfairly prejudices Defendants. The Master Complaint is crafted to obscure through aggregation the deficiencies of Plaintiffs' individual claims and causes of action, to avoid jurisdictional limits, and to achieve procedural advantages for Plaintiffs to which they are not entitled. Plaintiffs' Master Complaint presents the Plaintiffs' claims at a level of generality not permitted by the

Federal Rules. It includes claims over which this Court lacks jurisdiction. It presents an unmanageable collection of ninety-three (93) separate causes of action based on the non-uniform laws of eight (8) different states. It improperly splits Plaintiffs' claims into a narrow subset of favored claims to be litigated first as part of the Master Complaint, while reserving the majority of claims to be advanced at an unspecified later point in this MDL proceeding.[2] Monsanto is entitled to dismissal of the Master Complaint and the claims alleged therein for these and other reasons explained in Monsanto's prior briefing,[3] and under Federal Rules of Civil Procedure 9(b), 12(b)(2) and 12(b)(6) for the reasons stated below:

- Plaintiffs fail to state a claim against Monsanto because they do not plead that any Monsanto product actually caused any Plaintiff's injury;
- Plaintiffs fail to state a claim under the Lanham Act because they do not allege an injury within the zone of interests protected by the Act, and do not allege proximate causation;
- This Court lacks jurisdiction over the nationwide Lanham Act class claims asserted against Monsanto by Plaintiffs whose claims originated outside Missouri;
- The Arkansas Plaintiffs fail to state a claim against Monsanto because they admit Monsanto did not sell XtendiMax in Arkansas in 2017 (and therefore could not have caused Plaintiffs' alleged damage), but that another dicamba herbicide approved for in-crop use with Xtend seeds was available in 2017;
- Plaintiffs fail to state a claim for ultrahazardous activity because the doctrine does not apply to the design and sale of products, because herbicides are commonly used, because Nebraska has not adopted the doctrine, and because Missouri has limited the doctrine to specific activities not alleged here;
- Plaintiffs fail to state a claim for trespass because Plaintiffs fail to plead intent, and because product manufacturers are not liable for alleged post-sale trespass of their products;

[2] At noted in the Preliminary Statement, *supra*, Monsanto reserves the right to provide additional briefing addressing these points after Plaintiffs have filed their notices to conform and/or voluntary dismissals of the underlying cases.

[3] Monsanto reasserts and incorporates herein, by reference, its objections to the use of master complaints in this MDL proceeding as set forth in Defendant Monsanto Company's Brief in Opposition to the Use of Master Complaints (Doc. # 33), and Defendants' Report of Meet and Confer and Supplemental Brief in Opposition to Use of Master Complaints in the Crop Cases (Doc. #42).

- Plaintiffs fail to state a claim for nuisance, because product manufacturers are not liable for nuisances allegedly created by post-sale use of their products;

- Plaintiffs fail to state a claim for conspiracy because they fail to state a claim for any alleged underlying intentional tort;

- Plaintiffs' failure to warn claims and their consumer fraud claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA");

- Plaintiffs' failure to warn claims are inadequately pled because Plaintiffs do not allege that different warnings would have prevented the alleged harm;

- Plaintiffs fail to state a claim for negligent training because the claim is not recognized and is duplicative of Plaintiffs' failure to warn claims;

- The Kansas Plaintiffs fail to state a claim for breach of express or implied warranties because they lack privity and do not allege injury to person;

- The Arkansas, South Dakota and Tennessee Plaintiffs fail to state a claim for breach of implied warranties regarding XtendiMax because those states recognize the express disclaimer of warranties on the XtendiMax label;

- Plaintiffs fail to state a claim for defective design of Xtend seeds, because the challenged design (dicamba-tolerance) is an intended feature of the product;

- Plaintiffs fail to state a claim for violation of the Illinois and Nebraska consumer protection statutes because they lack standing to assert claims under the statutes, because a regulatory safe harbor precludes their claims, because they fail to meet statutory causation requirements, and because they fail to satisfy Rule 9(b);

- The Missouri Plaintiffs fail to state a claim for violation of the Missouri Crop Protection Act because they do not allege intent, because they have not alleged the involvement of any Monsanto product in their alleged crop loss, and because they do not meet the statutory causation requirement;

- The only 2016 Plaintiff fails to state a claim against Monsanto because Monsanto did not manufacture, distribute or sell the dicamba herbicide alleged to have caused his crop loss and Plaintiffs do not allege any other facts supporting a duty owed by Monsanto, and because the facts alleged demonstrate the Monsanto was not the proximate cause of the alleged crop loss.

The Master Complaint and claims asserted therein should be dismissed for these reasons.

ALLEGATIONS OF THE MASTER COMPLAINT

Plaintiffs' 261-page, 1,607-paragraph Master Complaint asserts 93 state law causes of action and one (1) federal cause of action on behalf of twenty-one (21) Plaintiffs from eight (8) different states -- Arkansas, Illinois, Kansas, Mississippi, Missouri, Nebraska, South Dakota, and Tennessee. M.C. ¶¶ 1-17. In addition to bringing their own claims, Plaintiffs seek to represent a national class pursuing claims under the Lanham Act, and eight state classes -- two Missouri classes, and one class for each remaining state except Nebraska -- pursuing state law claims. *Id.* at ¶¶ 367-370.[4] With one exception, all of the Plaintiffs allege only that they grew non-dicamba-tolerant soybeans in 2017 that were damaged by a dicamba herbicide. *Id.* at ¶¶ 1-17. The remaining Plaintiff, Jerry Franks (Missouri), makes the same allegation for 2016.

Plaintiffs challenge Monsanto's commercialization of Bollgard II® XtendFlex® Cotton in 2015 and Roundup Ready 2 Xtend® Soybeans in 2016 (collectively "Xtend seeds"). M.C. ¶¶ 182 (Xtend cotton), 211 (Xtend soybeans). Plaintiffs contend that commercialization of the seeds in 2015 and 2016 was premature and improper because the U.S. Environmental Protection Agency ("EPA") had not yet approved a dicamba herbicide for use over the top of crops grown from those seeds. *Id.* ¶¶ 179-186, 211-213. Yet, Plaintiffs admit that the U.S. Department of Agriculture issued its deregulation decision for Xtend seeds in January 2015, permitting their commercialization. *Id.* ¶ 179. Plaintiffs also admit that Xtend seeds are tolerant not only to dicamba, but also to other herbicides, including Monsanto's glyphosate-based Roundup-branded herbicides. *Id.* at ¶¶ 48, 88, 101, 114. And Monsanto has explained that crops grown from Xtend seeds have higher yield potential than earlier varieties. *Id.* at ¶¶ 243-44.

[4] The Master Complaint fails to define a Nebraska class, M.C. at ¶¶ 367-370, but later references such a class, M.C. Counts LX - LXX.

Plaintiffs also challenge the design and sale of Monsanto's new low-volatility dicamba herbicide, XtendiMax® with VaporGrip® Technology ("XtendiMax") and BASF's new low-volatility dicamba herbicide Engenia for in-crop application to Xtend crops. *See e.g.*, M.C. ¶¶ 253, 420-422. Plaintiffs acknowledge that EPA approved XtendiMax and Engenia, for in-crop use in November 2016 and December 2016 respectively, permitting their use during the 2017 growing season. M.C. ¶¶ 229-230. Despite EPA's contrary findings, Plaintiffs contend that both XtendiMax and Engenia are unsuitable for in-crop application because they are volatile and prone to move off-target and damage nearby sensitive crops. M.C. ¶ 253. Plaintiffs claim these federally-approved herbicides are defective and ultrahazardous and should not have been commercialized. *See, e.g.*, M.C. Counts II, IV.

Dicamba herbicides have been on the market since the 1960s, M.C. at ¶ 75, but those older dicamba herbicides are not approved for in-crop use due to their volatility, *id.* at ¶¶ 179-180, 217, 70. Nevertheless, Plaintiffs allege that these products were unlawfully applied to Xtend crops at least in 2016. *See, e.g.*, M.C. ¶¶ 213, 221. Plaintiffs do not claim that Monsanto manufactures, distributes or sells any of those older dicamba herbicides, or that it had any dicamba herbicide on the market in 2015 or 2016. The only dicamba herbicide Plaintiffs allege Monsanto sells is XtendiMax, which was introduced in 2017. M.C. ¶ 238.

Plaintiffs do not assert any claims predicated on their own purchase or use of any product manufactured or sold by Monsanto. M.C., ¶¶ 1-17. Nor do they allege that any Monsanto product actually caused the alleged damage to their particular crops. The Master Complaint fails to identify when or where the dicamba that allegedly damaged a Plaintiff's crops was applied, by whom it was applied, what dicamba herbicide it was, whether it was applied according to the label, or what caused it to move off-target. The only facts alleged about the Plaintiffs themselves

are that they grew non-dicamba-tolerant soybeans in 2016 or 2017, did not apply dicamba herbicides themselves, but observed symptomology consistent with dicamba exposure on their soybean crops resulting in unspecified yield loss. M.C. ¶¶ 1-17, 366.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The purpose of a motion to dismiss under Rule 12(b)(6) "is to test the legal sufficiency of the complaint." *Smith v. Planned Parenthood of St. Louis Region*, 2005 WL 2298202, at *1 (E.D. Mo. Sept. 21, 2005). "In considering a motion to dismiss, courts accept the plaintiff's factual allegations as true, but reject conclusory allegations of law and unwarranted inferences." *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997). "The court may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record." *Detroit Gen. Ret. Sys. v. Medtronic, Inc.*, 621 F.3d 800, 805 (8th Cir. 2010) (quotation marks and citations omitted). Rule 9(b) requires that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). 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).

ARGUMENT

I. THE COMPLAINT FAILS TO PLEAD THAT ANY MONSANTO PRODUCT ACTUALLY CAUSED ANY PLAINTIFF'S INJURY.

The Court should dismiss Plaintiffs' claims against Monsanto because the Master Complaint fails to plead facts sufficient to support a finding that any individual Plaintiff is entitled to relief from Monsanto. Despite its 261 pages and 1,607 paragraphs, Plaintiffs' Master Complaint fails to allege that any Monsanto product actually caused any Plaintiff's alleged crop damage. The individual Plaintiffs actually appear in only 17 paragraphs of the Master Complaint -- less than one paragraph per Plaintiff. These 17 paragraphs identify only the name, corporate status, and residency of each Plaintiff, and generically assert that each Plaintiff grew non-dicamba-resistant soybeans and did not make any in-crop applications of dicamba herbicide in 2017 (or 2016 for one Plaintiff). M.C., ¶¶ 1-17. Noticeably lacking are even the most basic allegations connecting Monsanto's products to any Plaintiff's alleged harm.[5]

This omission from the pleading is apparently by design and it crystalizes for the Court a central dispute between the parties in this litigation. Despite unanimous case law to the contrary, Plaintiffs recently have made the incredible claim that they are not required to prove their alleged crop damage was caused by any particular Defendant's product. Plaintiffs could not be more wrong. *See* 63 Am. Jur.2d *Products Liab.* § 75 (2016) ("[A] threshold requirement for a products liability action is that the plaintiff identify the manufacturer or supplier responsible for

[5] Master complaints are not exempt from the pleading requirements of the Federal Rules of Civil Procedure. *See, e.g.*, *Rhodes v. Mcic, Inc.*, 2017 WL 25375, at *3 (D. Md. Jan. 3, 2017) (applying Rule 8 to dismiss master complaint where plaintiffs relied on "broad conclusions and formulaic recitation[s,] . . . lumped all Defendants together generally and . . . made no effort to allege facts particular to any Defendant"); *In re Buffets, Inc. Sec. Litig.*, 906 F. Supp. 1293, 1297-99 (D. Minn. 1995) (similar).

placing the injury-causing product into the stream of commerce; this is the traditional requirement that plaintiff establish causation.").[6] Such proof is required to establish causation.

To state a claim against Monsanto, Plaintiffs were required to plead that alleged wrongful conduct by Monsanto was both a "but-for" and the "proximate" cause of their injuries. *See, e.g.*, *Budden v. United States*, 15 F.3d 1444, 1452 (8th Cir. 1994); *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) ("When ruling on a motion to dismiss, we look to whether the plaintiffs' allegations suffice to show the required causal connection between the defendant's wrongful conduct and the plaintiffs' losses."). Yet Plaintiffs fail to allege even but-for causation for their claims against Monsanto. To sufficiently plead but-for causation for their 2017 claims, Plaintiffs were required to allege, at a minimum, that it was Monsanto's dicamba herbicide XtendiMax that allegedly moved off-target and damaged their crops. But the Master Complaint fails to include that allegation for *any* of the Plaintiffs bringing 2017 claims. And to plead but-for causation for Mr. Franks' 2016 claims, even under Plaintiffs' seed-based liability theory for 2016 (when Monsanto's dicamba herbicide was not on the market), he would have had

[6] *See also Fields v. Wyeth, Inc.*, 613 F. Supp. 2d 1056, 1060 (W.D. Ark. 2009) ("A basic requirement of products-liability actions under Arkansas law is product identification, i.e. that the actual product manufactured or distributed by the defendant caused injury to the plaintiff."); *Hanks v. Korea Iron & Steel Co.*, 993 F. Supp. 1204, 1211 (S.D. Ill. 1998) ("In a products liability action in Illinois, whether based on strict liability or negligence, plaintiff must identify the manufacturer of the product and must show a causal relationship between the injury and the product."); *Mays v. Ciba-Geigy Corp.*, 661 P.2d 348, 360 (Kan. 1983) (Under Kansas law, plaintiff in strict products liability case must prove that his injury resulted "from a condition of the product" that "existed at the time it left the defendant's control"); *Moore v. Mississippi Valley Gas Co.*, 863 So.2d 43, 46 (Miss. 2003) ("[I]t is incumbent upon the plaintiff in any products liability action to show that the defendant's product was the cause of the plaintiff's injuries."); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. banc 2007) ("where a plaintiff claims injury from a product, actual causation can be established only be identifying the defendant who made or sold that product."); *In re Darvocet, Darvon, & Propoxyphene Prods Liab. Litig.*, 756 F.3d 917, 948 (6th Cir. 2014) (noting that Nebraska law "limits product liability claims based on the doctrine of strict liability to 'the manufacturer of the product or part thereof claimed to be defective.'" (quoting Neb. Rev. Stat. § 25–21, 181)); *Barnes v. Kerr Corp.*, 418 F.3d 583, 589 (6th Cir. 2005) (under Tennessee law, "it is essential that [the plaintiff] prove that that the product manufactured and sold by [the defendant] or the warnings provided by [the defendant] proximately caused the injuries" alleged. (internal quotations omitted; rejecting argument that defendant could be held liable simply because it held significant market share)); *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1179 (D. S.D. 1984) ("It is a fundamental principle that a plaintiff must prove, as an essential element of his case, that the defendant manufacturer actually made the particular product in question." (citation omitted)).

to plead, at the very least, that the non-Monsanto dicamba herbicide that allegedly damaged his 2016 soybean crop was applied to a crop grown from Monsanto's Xtend seeds.[7] But that allegation is also missing.

The Complaint does not actually allege that XtendiMax injured any Plaintiff's crops. At most, the Complaint alleges that Monsanto makes one of many dicamba herbicides on the market, that one use of certain dicamba herbicides is for over-the-top application to Xtend seeds, and that *dicamba from some unspecified manufacturer* caused damage to each Plaintiff's crops. But that is not enough to survive a motion to dismiss. *See Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1093 (8th Cir 2013) (affirming district court's grant of motion to dismiss against defendant product manufacturers where complaint failed to allege that plaintiff was exposed to defendants' products); *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 940 (6th Cir. 2014) (affirming grant of motion to dismiss where "none of [the] plaintiffs specifically allege [defendant] manufactured the [] product they ingested"). Having previously confirmed that "defendants will not lose any rights under the substantive-consolidated-master-complaints approach," Doc. # 46 at 4, the Court should dismiss Plaintiffs' claims against Monsanto for failure to state a claim upon which relief can be granted.

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE LANHAM ACT

A. Plaintiffs Lack Standing to Assert Claims under the Lanham Act

Plaintiffs' Lanham Act claim should be dismissed in its entirety for lack of standing, because Plaintiffs are not in the zone-of-interest protected by the Act.[8] To establish standing for

[7] Monsanto disputes that it can be held liable for damage allegedly caused by application of non-Monsanto herbicides to Xtend crops. But even if it could, Plaintiffs have failed to plead facts supporting such a theory.

[8] Courts have alternatively dismissed Lanham Act claims for lack of standing under Rule 12(b)(1) and Rule 12(b)(6). *See, e.g., United States ex rel. Univ. Loft Co. v. Avteq, Inc.*, 2015 WL 13548950, at *9 (W.D. Tex. Dec. 23, 2015), *report and recommendation adopted*, 2016 WL 9461763 (W.D. Tex. Jan. 8, 2016) (12(b)(1)); *Cook Drilling Corp. v. Halco Am., Inc.*, 2002 WL 84532, at *10 (E.D. Pa. Jan. 22, 2002) (12(b)(6)).

a Lanham Act false advertising claim, a plaintiff must adequately plead: (1) an injury within the "zone-of-interest," *i.e.*, "to a commercial interest in sales or business reputation," (2) that was "proximately caused by the defendant's misrepresentations." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134, 140 (2014). Here, Plaintiffs' Lanham Act claims fail because they do not allege injuries that are within the zone of interest protected by the Act.

In addition, Plaintiff Franks' Lanham Act claim also fails for lack of standing because, under the Lanham Act, the unlawful act of the third-party who applied the dicamba that allegedly damaged his crops is an intervening and superseding cause of the alleged harm. Plaintiff Franks Lanham Act claim should be dismissed for lack of standing for this additional reason.

1. Plaintiffs Do Not Allege an Injury within the Zone-of-Interest.

A cognizable Lanham Act injury, by its nature, relates to the impact of the defendant's conduct on consumers' ***willingness to purchase the plaintiff's products***. Thus, the injury that the Lanham Act protects against is "either … direct diversion of sales from [the plaintiff] to defendant or ... a loss of goodwill associated with [the plaintiff's] products." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998). Plaintiffs allege neither. The injury alleged here is Plaintiffs' own reduced yield based on direct, physical property damage -- not consumers' reduced demand for Plaintiffs' products based on consumers' reliance on misleading advertising or product descriptions. Plaintiffs do not plead any reduced willingness by consumers to buy Plaintiffs' soybeans, or to buy products in which soybeans are an ingredient. The supposedly misled individuals are not Plaintiffs' customers, or even customers of Plaintiffs' customers, but rather other farmers who allegedly damaged Plaintiffs' property. Indeed, Plaintiffs do not allege that any of their soybean customers heard Monsanto's allegedly false statements at all – much less heard them and declined to buy Plaintiffs' soybeans as a result.

Rather, in a complete distortion of the interest that the Lanham Act is designed to protect, Plaintiffs allege that (1) other farmers, who are producers of the same product as Plaintiffs on the same level of the production chain, (2) heard false advertisements that caused those other farmers to purchase seeds and herbicides, neither of which Plaintiffs sell, (3) which those other farmers used in a manner that caused physical damage to Plaintiffs' property. Because this injury is not within the Lanham Act's zone-of-interest, the Court should dismiss for lack of standing. *See, e.g., Wall & Assocs., Inc. v. Better Bus. Bureau of Cent. Va., Inc.*, 685 F. App'x 277, 278-79 (4th Cir. 2017) (affirming dismissal for lack of standing where plaintiff did not identify "a single consumer who withheld or cancelled business with it or point[] to a particular quantum of diverted sales or loss of goodwill and reputation resulting directly from [consumer's] reliance on any false or misleading representations by Defendants"); *Roadtec, Inc. v. Road Sci., LLC*, 2013 WL 12123358, at *10 (E.D. Tenn. Aug. 29, 2013) (holding that plaintiff lacked standing where it did not allege that any consumer who saw the alleged misrepresentation "decided not to purchase one of [plaintiff's] products or to otherwise discontinue its relationship with [plaintiff] as a result").

2. Plaintiff Franks' 2016 Lanham Act Claim Fails for the Additional Reason that It Is Based on Intervening Unlawful Conduct.

Plaintiff Franks also lacks standing under the Lanham Act for the additional reason that his alleged injury – property damage resulting from the unlawful spraying of dicamba by neighboring farmers in 2016 – is entirely contingent upon the unlawful acts of third parties.[9] The Supreme Court has held that standing exists only if an injury in fact is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party who is not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)

[9] There were no dicamba herbicides approved for in-crop use with Xtend seeds in 2016. M.C. ¶¶ 179-80, 224.

(alterations omitted). While this Court previously held that intervening criminal conduct did *not necessarily* cut off the chain of causation under Missouri *state law*, intervening criminal conduct does break the causal nexus under *federal* standing requirements.

Intervening criminal conduct deprives a plaintiff of the ability to show the causal connection required to demonstrate Article III standing. *See, e.g.*, *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 565 (6th Cir. 2007). In *Alston*, the Sixth Circuit has held that parents of minor children lacked Article III standing to bring claims based on allegations that alcohol manufacturers'/ distributors' advertisements caused illegal, underage drinking because "causal connection between the defendants' advertising and the plaintiffs' alleged injuries is broken by the intervening criminal acts of the third-party sellers and the third-party, underage purchasers." *Alston*, 494 F.3d at 565. District courts within the Eighth Circuit have held similarly. In *U.S. Hotel & Resort Mgmt., Inc. v. Onity Inc.*, 2014 WL 3748639, at *1 (D. Minn. July 30, 2014), an engineer published a study showing how to open hotel door locks using a homemade device, which led to several hotel owners filing a class action against the lock manufacturer. The court found that plaintiffs lacked standing because "no such unauthorized entry could occur unless and until that third party acted with criminal intent." *Id.* at *4. Mr. Franks additionally lacks Article III standing because his theory of liability is necessarily contingent on intervening criminal acts of third parties.

B. Plaintiffs Do Not Adequately Plead Proximate Causation.

The Court should dismiss Plaintiffs' Lanham Act claim for the additional reason that Plaintiffs' alleged injuries are too remote to meet the proximate causation requirement for the claim. "[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark*, 572 U.S. at 133. Here, Plaintiffs claim to be the indirect victims of allegedly false advertising by Monsanto. The direct victims

are alleged to be the farmers who purchased Xtend seed and a dicamba herbicide. As the United States Supreme Court has recently stressed, however, an alleged "indirect victim" may not assert a Lanham Act claim where his injury "is not surely attributable to the [injury to the direct victim] (and thus also to the defendant's conduct), but might instead have resulted from 'any number of [other] reasons.'" *Lexmark*, 572 U.S. at 140 (citation omitted).

In *Lexmark*, the defendant disparaged and falsely described refurbished printer cartridges as illegal. 572 U.S. at 121. The plaintiff was not the refurbished cartridge manufacturer, but a component manufacturer who sold microchips that were both (1) necessary for and (2) had no other use than the refurbished printer cartridges. *Id.* at 139. Thus, applying the "surely attributable" rule, proximate cause there was "more or less automatic[]"; accepting the plaintiff's allegations as true, there was "likely to be something very close to a 1:1 relationship between the number of" refurbished printer cartridges sold and the number of plaintiff's own microchips sold. *Id.* at 139-40. The Supreme Court affirmed, however, that these "unique circumstances" did not invalidate the "general tendency not to stretch proximate causation beyond the first step." *Id.* (quoting *Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258, 271 (1992)). Here, though Plaintiffs claim to be the indirect victims of allegedly false advertising by Monsanto directed to Monsanto's customers, there is nothing close to a "1:1 relationship" between the soybean sales of Monsanto's customers – ***who are not alleged to have lost any sales at all*** – and the soybean sales of Plaintiffs.[10] Thus, Plaintiffs have failed to allege injuries sufficiently proximate to the alleged misconduct to meet the proximate causation requirement of the Lanham Act.

[10] The necessary 1:1 relationship under *Lexmark* is between the lost sales of the allegedly misled consumer, *i.e.*, the Xtend seed farmers, and the lost sales of the indirect victim, *i.e.*, Plaintiffs.

C. The Court Should Dismiss for Lack of Jurisdiction the Lanham Act Claims Brought on Behalf of a Nationwide Class by Non-Missouri Plaintiffs.

If the Court does not dismiss Plaintiffs' Lanham Act claim in its entirety, it should dismiss the Lanham Act claims against Monsanto for lack of jurisdiction, to the extent it is brought on behalf of a nationwide class by Plaintiffs whose cases originated outside Missouri. Fed. R. Civ. P. 12(b)(2). Under the Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017), none of the transferor courts outside of Missouri has personal jurisdiction over the nationwide class claims alleged against Monsanto. Monsanto maintains its corporate headquarters and principal place of business in Missouri. M.C. ¶ 18. And Plaintiffs do not allege that Monsanto is incorporated in the state where any transferor court sits. Thus, Monsanto is alleged to be subject to *general jurisdiction* only in Missouri. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 758 n.11 (2014). Monsanto also is not subject to *specific jurisdiction* in any of the transferor courts for claims brought on behalf of class members who are not residents of the states in which those transferor courts sit. *Bristol-Myers Squibb*, 137 S. Ct. 1773.

Thus, this Court lacks jurisdiction over the nationwide Lanham Act claims to the extent they are brought against Monsanto by Plaintiffs whose cases were transferred from courts outside of Missouri. *See In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, 288 F. Supp. 3d 1087, 1213 (D.N.M. 2017) (a MDL court's jurisdiction is coextensive with the transferor court's jurisdiction) (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 n.11 (3d Cir. 2004)). This Court should dismiss the putative

nationwide class claims brought by Plaintiffs from Arkansas, Illinois, Kansas, Mississippi, Nebraska, South Dakota, and Tennessee. M.C. ¶¶ 1-10, 15-17.[11]

III. ARKANSAS PLAINTIFFS FAIL TO STATE A CLAIM AGAINST MONSANTO.

The Court should dismiss the seven Arkansas Plaintiffs' claims against Monsanto for failure to plead proximate causation or duty. The Arkansas Plaintiffs seek to recover for alleged dicamba damage to their soybean crops in 2017, but they concede that Monsanto's dicamba herbicide was not available in Arkansas in 2017. M.C. ¶ 458. Moreover, because BASF's Engenia was available in Arkansas in 2017 and could lawfully be used with crops grown from Xtend seeds, this Court's prior reasoning in *Bader Farms* cannot support the Arkansas Plaintiffs' claims against Monsanto.[12] The Court should dismiss the Arkansas Plaintiffs' claims against Monsanto for failure to plead proximate causation and also because the facts alleged demonstrate that Monsanto did not owe them a duty of care.

A. The Arkansas Plaintiffs' Claims Fail for Lack of Causation Because They Concede that Monsanto Did Not Manufacture the Herbicide that Caused their Alleged Crop Damage.

The Arkansas Plaintiffs fail to state a claim against Monsanto upon which relief can be granted because Arkansas law requires product liability plaintiffs to prove that the product that caused their injury was manufactured by the defendant, and Plaintiffs admit that Monsanto did not manufacture the dicamba that allegedly injured their crops. M.C. ¶ 458 (acknowledging that XtendiMax was not available in Arkansas in 2017). "A basic requirement of products-liability

[11] Even though putative class members are not currently parties to the litigation, and Monsanto expects class certification to be denied, Monsanto raises its anticipated jurisdictional objection out of an abundance of caution, to ensure that it is preserved and not waived.

[12] This Court previously held that 2015 and 2016 claims for alleged dicamba damage could proceed against Monsanto even though it did not sell dicamba herbicide in those years, on the ground Monsanto sold Xtend seeds in 2015 and 2016 without an accompanying approved dicamba herbicide (and allegedly encouraged unlawful use of unapproved dicamba with the seeds during those years). That reasoning does not apply in 2017, because a dicamba herbicide approved for in-crop use with Xtend crops was available in 2017. Moreover, as explained in Sections XIII and XVI, *infra*, Monsanto denies that it can be held liable based on its sale of Xtend seeds in 2015 and 2016.

actions under Arkansas law is product identification, *i.e.* that the actual product manufactured or distributed by the defendant caused injury to the plaintiff." *Fields v. Wyeth, Inc.*, 613 F. Supp. 2d 1056, 1060 (W.D. Ark. 2009) (citing *Chavers v. General Motors Corp.*, 79 S.W.3d 361, 370 (Ark. 2002)); *see also Fullington v. Pfizer, Inc.*, 2010 WL 3632747, at *2 (E.D. Ark. Sept. 17, 2010) ("A plaintiff in a product liability action must allege that the actual product manufactured or distributed by the defendant caused the injury to the plaintiff."), *aff'd*, 720 F.3d 739, 743-44 (8th Cir. 2013). Courts have held that this requirement is to be strictly construed and "artful pleading simply cannot be used to circumvent" it. *Fields*, 613 F. Supp. 2d at 1060.[13]

Here, the Arkansas Plaintiffs allege that their crops were damaged in 2017 as a result of exposure to a non-Monsanto dicamba herbicide that allegedly moved off-target and onto their crops.[14] The Arkansas Plaintiffs do not allege that their crops were exposed to any dicamba herbicide manufactured or sold by Monsanto. M.C. ¶¶ 227, 458. Rather, they allege that BASF was the sole manufacturer and seller of a low-volatility dicamba herbicide in the state of Arkansas during 2017. *See* M.C. ¶ 458. As such, Plaintiffs' claims against Monsanto must be dismissed under basic principles of Arkansas product liability law, because they fail to meet the "basic requirement" of alleging that a product manufactured by Monsanto caused their alleged crop damage.

[13] This requirement applies to all Arkansas claims, no matter how denominated. *See Neal v. Teva Pharms. USA, Inc.*, 2010 WL 2640170, at *2 (W.D. Ark. July 1, 2010) ("although Plaintiff has brought this action under various state law theories for recovery, her claims are still product liability claims"); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1092 (8th Cir. 2013) ("broad language" of Arkansas Product Liability Act "encompasses [plaintiff]'s various claims regardless of her theory of recovery.").

[14] *See, e.g.*, M.C. ¶ 370(a) (defining the Arkansas Soybean Producers Class as "persons and entities who in 2017 were Arkansas producers…of soybeans not resistant to dicamba which exhibited physical symptoms of dicamba injury"); ¶ 415 (alleging that "Arkansas Plaintiffs and other members of the Arkansas Soybean Producers Class were harmed from exposure to dicamba and loss of yield..."); ¶ 458 (acknowledging that XendiMax was not available in Arkansas in 2017).

B. The Arkansas Plaintiffs' Claims Fail Because They Have Not Alleged Facts Demonstrating that Monsanto Owed Them a Duty of Care.

The Arkansas Plaintiffs' claims also fail because they have not pled facts sufficient to support a finding that Monsanto owed them a duty of care, an essential element of all their claims. In Arkansas, "[t]he issue of whether a duty exists is always a question of law, not to be decided by a trier of fact." *Holloway v. Stuttgart Reg'l Med. Ctr.*, 970 S.W.2d 301, 302 (Ark. App. 1998); *Marlar v. Daniel*, 247 S.W.3d 473, 476 (Ark. 2007) (same). "Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other." *Marlar*, 247 S.W.3d at 476. Here, the Master Complaint fails to allege a relationship demonstrating that Monsanto owed a duty of care to the Arkansas Plaintiffs.

Under Arkansas law, a defendant product manufacturer does not owe a duty of care to prevent injuries from products it did not manufacture or distribute. *See Bell v. Pfizer, Inc.*, 716 F.3d 1067, 1093 (8th Cir. 2013) (Arkansas law does not support extending "[a product manufacturer's] duty of care to the customer of a competitor using a competing product"); *Bell v. Mine Safety Appliances*, 2016 WL 797582, at *4 (W.D. Ark. Feb. 26, 2016) (noting that to establish a duty "in a products liability case, the plaintiff must actually demonstrate that the [defendant's] product was used"). Allegations that it was foreseeable to the defendant that another company's products might cause injury to the plaintiff are insufficient to create a duty. *See Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1093 (8th Cir. 2013) (affirming district court grant of motion to dismiss claims of plaintiff not exposed to defendants' products and rejecting plaintiff's argument that defendants owed her a duty of care under Arkansas law because her injuries were foreseeable to them); s*ee also Fields*, 613 F. Supp. 2d at 1060 n.1 (limiting holding to proximate causation, but noting that it also was doubtful that a duty existed even though plaintiff alleged that it was foreseeable that information provided by defendants would be used to prescribe

competitor's drug to plaintiff). The imposition of such a duty would work an unprecedented expansion of Arkansas product liability law beyond the power of this Court. The Arkansas Plaintiffs' claims against Monsanto should be dismissed.

IV. PLAINTIFFS FAIL TO STATE AN ULTRAHAZARDOUS ACTIVITY CLAIM.

The Court also should dismiss Plaintiffs' ultrahazardous activity claims for two separate reasons.[15] *First*, courts are unanimous that allegations that the defendant sold a dangerous product fail to state a claim for ultrahazardous activity. *Second*, even if the ultrahazardous activity doctrine could apply, the sale of dicamba-tolerant seeds and dicamba-based herbicides is not ultrahazardous, as a matter of law.[16]

Additionally, Nebraska has not adopted the ultrahazardous activity doctrine at all, and Missouri courts have limited the doctrine to blasting and nuclear emissions. Because this Court cannot expand existing state law, these additional reasons further support dismissal of the ultrahazardous activity claims brought by the Nebraska and Missouri Plaintiffs.

A. The Ultrahazardous Activity Doctrine Does Not Apply To The Design, Promotion, and Sale of Products.

Plaintiffs premise their ultrahazardous activity claims on the design, promotion, and sale of dicamba-resistant seeds and dicamba. *See, e.g.*, M.C. ¶¶ 398–416. But the ultrahazardous activity doctrine does not apply to the design, promotion, or sale of products -- even allegedly dangerous products. Rather, it is black-letter law that the "manufacture of a product or substance will not be considered, as a matter of law, an ultra-hazardous activity." *Akee v. Dow Chem. Co.*, 293 F. Supp. 2d 1140, 1144 (D. Haw. 2002) (collecting cases). And "the marketing of a consumer product is not within the purview of the kinds of activities" that the doctrine

[15] *See* Counts II (Arkansas); XIV (Illinois); XXV (Kansas); XXXVII (Mississippi); L (Missouri); LX (Nebraska); LXXI (South Dakota); and LXXXIV (Tennessee).

[16] The determination of whether an activity is ultrahazardous is a matter of law. *See, e.g., Fleege v. Cimpl*, 305 N.W.2d 409, 415 (S.D. 1981) (citing Restatement (Second) of Torts § 520 cmt. h).

encompasses. *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1265 n.43 (5th Cir. 1985). That conclusion has been echoed by courts across the country. *See, e.g.*, *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) ("ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas"); *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 465-66 (R.I. 1996) ("Absolute liability attaches only to ultrahazardous or abnormally dangerous *activities* and not to ultrahazardous or abnormally dangerous *materials*.") (emphasis in original).[17]

This exclusion applies even when the product is "dangerous when it is used or handled in some way after it leaves [the manufacturer's] premises, [and] even if the danger is foreseeable." *Indiana Harbor Belt*, 916 F.2d at 1180. *See also Traube v. Freund*, 775 N.E.2d 212, 215 (Ill. App. 2002) ("a 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 the manufacturer's premises, even if the danger is foreseeable."). As Plaintiffs premise the ultrahazardous claims on the design, promotion, and sale of dicamba-resistant seeds and dicamba herbicides, *e.g.*, M.C. ¶¶ 398–416, the claims fail as a matter of law.

B. Monsanto's Products Are Not "Ultrahazardous" As a Matter of Law.

Plaintiffs' ultrahazardous activity claims fail for another reason. The ultrahazardous activity doctrine does not apply to activities that are "common usage." *See, e.g.*, *Mangrum v.*

[17] *See also Copier ex rel. Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 836 (10th Cir. 1998) (only use or misuse of a gun, not its manufacture, may be an ultrahazardous activity); *Leslie v. United States*, 986 F. Supp. 900, 910 n.5 (D.N.J. 1997) ("While New Jersey common law recognizes a cause of action for ultrahazardous activity, a claim not presented here, New Jersey law, as noted, does not recognize a distinct cause of action for ultrahazardous products."), *aff'd mem.*, 178 F.3d 1279 (3d Cir. 1999); *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1327-28 (W.D. Okla. 1996) ("Oklahoma has not extended such absolute liability beyond explosive users, to persons who manufacture or sell explosives, to whom manufacturers' products liability is applicable."); *Hatfield v. Atlas Enters., Inc.*, 262 S.E.2d 900, 901 (S.C. 1980) ("While those engaged in abnormally dangerous activities have been held strictly liable for damages . . . Restatement of Torts 2d § 519 (1977), this doctrine has not been extended to the manufacturers or distributors of ultrahazardous products outside of the context of 402A . . . .").

Pigue, 198 S.W.3d 496, 500 (Ark. 2004).[18] Here, Plaintiffs allege that dicamba and dicamba-tolerant seeds are in widespread use. *See, e.g.*, M.C. ¶ 354 (alleging planting of millions of acres of dicamba-tolerant soybeans). For this reason alone, the allegations cannot state a claim for ultrahazardous activity liability as a matter of law.

Indeed, courts across the country agree that application or use of herbicides does not give rise to ultrahazardous activity liability. *See, e.g.*, *Mangrum*, 198 S.W.3d at 500 (no ultrahazardous activity liability because herbicide "is commonly used in the farming community and is available for sale to the general public"); *June v. Laris*, 618 N.Y.S.2d 138, 140 (N.Y. App. Div. 1994) ("MU-17 has been Federally approved since 1966 and, although posing certain risks if improperly applied [citation omitted], its application on [plaintiff's] farm cannot be considered an abnormally dangerous activity"); *Bennett v. Larsen Co.*, 348 N.W.2d 540, 553 (Wis. 1984) ("[P]esticide application to control severe pest infestations is a common activity which is necessary to ensure healthy crop growth.... Accordingly, we hold that pesticide application is not an ultrahazardous activity...."); *see also Desaire v. Solomon Valley Coop., Inc.*, 1995 WL 580064, at *5 (D. Kan. Sept. 14, 1995); *Hampton v. Loper*, 402 S.W.2d 825, 828 (Mo. App. 1966); *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. 2002). Because the use of herbicides is a common activity, it is not an ultrahazardous activity as a matter of law.

C. This Court Should Not Expand the Doctrine Beyond the Explicit Limits Recognized by Nebraska and Missouri Courts.

Plaintiffs' ultrahazardous activity claims brought under the laws of Nebraska and Missouri fail for the additional reason that the courts in those states either have not adopted the

[18] *See* Restatement (Second) of Torts § 520 (1977) (instructing courts to consider the "extent to which the activity is not a matter of common usage" and the "inappropriateness of the activity to the place where it is carried on"); *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 244 (Ill. App. 1995) (no liability where use of product "is a matter of common usage"); *City of Neodesha v. BP Corp. N. Am., Inc.*, 287 P.2d 214, 220 (Kan. 2012) (same); *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 867 n.13 (Mo. App. 1985) (same); *Fleege*, 305 N.W.2d at 415; *Leatherwood v. Wadley*, 121 S.W.3d 682, 700 (Tenn. Ct. App. 2003) (same).

doctrine at all, or have expressly limited it to activities other than those alleged by Plaintiffs. The Nebraska Supreme Court has declared that "strict liability for ultrahazardous activities has not been adopted in Nebraska." *Anderson v. Nashua Corp.*, 519 N.W.2d 275, 281 (Neb. 1994). And Missouri courts have explicitly noted that the state has not expanded the doctrine beyond "blasting operations or exposure to radioactive emissions at a nuclear plant." *Rychnovsky v. Cole*, 119 S.W.3d 204, 211 (Mo. App. 2003); *accord Kirk v. Schaeffler Grp. USA, Inc.*, 2016 WL 928721, at *1 (W.D. Mo. Mar. 9, 2016). This Court should not expand the ultrahazardous activity doctrine beyond the explicit limits imposed by courts in those states. *See Orion Fin. Corp. v. Am. Foods Grp., Inc.*, 281 F.3d 733, 739 (8th Cir. 2002) ("As a federal court, our role in diversity cases is to interpret state law, not to fashion it."); *see also In re Darvocet*, 756 F.3d at 937 ("When given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, [federal courts] should choose the narrower and more reasonable path.").

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR TRESPASS.[19]

Plaintiffs' Master Complaint also fails to state a claim for trespass against Monsanto because product manufacturers are not liable for trespass after the product leaves their possession and control. Plaintiffs' trespass claims allege that Monsanto sold dicamba to third-party farmers, and that those farmers -- not Monsanto -- then used that dicamba in a manner that permitted it to move off -target and onto Plaintiffs' lands. *See, e.g.*, M.C. ¶¶ 543–544. But that theory of trespass fails as a matter of law. Thus, the Court should dismiss Plaintiffs' trespass claims for failure to state a claim for relief.

[19] *See* Counts XII (Arkansas); XXI (Illinois); XXXIV (Kansas); XLIX (Missouri); LVII (Missouri); LXVII (Nebraska); LXXXI (South Dakota); XCIII (Tennessee).

"In accordance with the Restatement principles, courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989). Thus, merely selling products that are alleged to have later entered Plaintiffs' land does not give rise to a private trespass claim against the manufacturer. Courts widely agree that trespass claims cannot survive against a manufacturer whose product is alleged to cause injury after the product was sold. *See, e.g.*, *id.* (seller not liable for contamination allegedly caused by PCBs after sale); *Town of Westport v. Monsanto Co.*, 2015 WL 1321466, at *5 (D. Mass. Mar. 24, 2015) (same); *Dine v. W. Exterminating Co.*, 1988 WL 25511, at *9 (D.D.C. Mar. 9, 1988) (same; insecticide); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (same; asbestos); *Ward v. Ne. Tex. Farmers Coop. Elevator*, 909 S.W.2d 143, 150–51 (Tex. App. 1995) (same; herbicide drift), *abrogated on other grounds by Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).

Allegations that the seller knew that contamination would occur when the product was used are also insufficient to support liability. As one federal MDL court recently explained:

> [P]laintiffs have not cited any case in which a trespass claim was allowed against a seller of a product on the basis that the seller knew that the product would end up interfering with the property of non-purchasers if the seller did not cause the interference itself. In the absence of such of an example of any court having recognized such a claim, the Court concludes that plaintiffs may not state a claim for trespass here under this theory.

In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1210-11 (D. Kan. 2015). The same analysis applies here and requires dismissal of Plaintiffs' trespass claims.

VI. THE COMPLAINT FAILS TO STATE A CLAIM FOR NUISANCE.[20]

The Court also should dismiss Plaintiffs' nuisance claims because a product seller is not liable for a nuisance allegedly caused by the post-sale use of its products. To support their nuisance claims, Plaintiffs allege that Monsanto sold a product, and that a third party's use of that product then interfered with Plaintiffs' quiet use and enjoyment of their land. *See, e.g.*, M.C. ¶¶ 684–689. As with the trespass claims, the nuisance claims fail, as a matter of law.

The South Dakota and Illinois trespass claims fail for additional reasons. In Illinois, an alleged nuisance must be physically perceptible to the senses -- and the alleged dicamba drift is not. In South Dakota, activities expressly authorized by statute are immune from nuisance suits as a matter of law -- and herbicide sales are expressly authorized by statute. The Court should dismiss the South Dakota and Illinois trespass claims for these additional reasons.

A. Product Manufacturers Are Not Liable for Nuisance Caused by Post-Sale Use of Their Products.

The Court should dismiss Plaintiffs' nuisance claims because product manufacturers are not liable for an alleged nuisance caused by the post-sale use of their products. *See, e.g., Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (noting that "courts appear to agree" that "nuisance law does not afford a remedy against the manufacture of an asbestos-containing product to an owner whose building has been contaminated by asbestos following installation of that product in the building"); *City of Bloomington, Inc.*, 891 F.2d at 614 (seller of PCBs not liable for alleged nuisance under Indiana law when buyer's waste containing PCBs contaminated plaintiff's land); *Traube*, 775 N.E.2d at 216 (manufacturer of pesticide could not be held liable in nuisance for contamination of lake resulting from farmers' use of the pesticide in part because "the absence of a manufacturer's control over a product at the

[20] *See* Counts XXII (Illinois); XXXV (Kansas); XLI (Mississippi); LXVIII (Nebraska); LXXXII (South Dakota).

time the nuisance is created is generally fatal to any nuisance" claim); *Gary R. Prince Revocable Tr. v. Blackwell*, 735 F. Supp. 2d 804, 813 (M.D. Tenn. 2010) (physical control over property required to state a nuisance claim); *City of St. Louis v. Cernicek*, 2003 WL 22533578, at *2 (Mo. Cir. Ct. Oct. 15, 2003) (granting motion to dismiss nuisance claim based on sale of a product; "The attempt here is not only to blur, but obliterate, the line that separates public nuisance claims from those based on product liability law."); *In re Syngenta*, 131 F. Supp. 3d at 1213-15 (dismissing nuisance claims under laws of Arkansas, Illinois, Kansas, Mississippi, Missouri, Nebraska, South Dakota, Tennessee and other states based on "general rule recognized in the common law of nuisance" that product manufacturers are not liable for nuisance created by post-sale use of their products).[21]

Similar to trespass, a seller is not liable for nuisance *even where the seller allegedly knew that contamination would occur* when the product was used. *In re Syngenta*, 131 F. Supp. 3d at 1215. Because product manufacturers are not liable for nuisance created by post-sale use of their products, the Court should dismiss Plaintiffs' nuisance claims against Monsanto.

B. The South Dakota and Illinois Nuisance Claims Fail For Additional Reasons.

The Court also should dismiss the South Dakota and Illinois nuisance claims for additional reasons. Plaintiffs' South Dakota nuisance claims are barred by state statutory law, which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." S.D. Codified Laws § 21-10-2; *see also Joffer v. Cargill, Inc.*, 2010 WL 1409444, at *3-4 (D.S.D. Apr. 1, 2010) (grain warehouse cannot be a nuisance because expressly authorized by law). Both federal and South Dakota statutory law expressly authorize

[21] *See also Jordan*, 805 F. Supp. at 1582 (chemical seller not liable for nuisance contamination when buyer released the chemicals); *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 540 N.W.2d 297, 301 (Mich. App. 1995) (under Michigan law, gasoline seller not liable for nuisance caused by another's leaking of gasoline).

the sale of Monsanto's XtendiMax herbicides. *See* 7 U.S.C. § 136a (authorizing sale of registered pesticides); S.D. Codified Laws § 38-20A-4 (authorizing sale of registered herbicides within the state).

Moreover, under Illinois law, a nuisance must "consist of an invasion by something perceptible to the senses," for example, "smoke, fumes, dust, vibration, or noise." *In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997). But Plaintiffs make no allegation that airborne dicamba drift is perceptible, and thus have not alleged the basic facts necessary to state a claim for nuisance under Illinois law. *See Illinois Extension Pipeline Co. v. Juno Capital LLC*, 2016 WL 3387743, at *4 (C.D. Ill. Apr. 20, 2016) (dismissing nuisance claim where plaintiff only alleged a reduction in revenue-producing capacity and not something "physically offensive to [the] senses"). The Court should dismiss the Illinois and South Dakota nuisance claims for these additional reasons.

VII. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONSPIRACY.[22]

The Court should dismiss Plaintiffs' conspiracy claims against Monsanto for lack of an underlying intentional tort. Conspiracy is not an independent tort under the laws of any applicable state; rather, it requires an adequately pled predicate tort. *See, e.g., Hibbs v. Berger*, 430 S.W.3d 296, 320 (Mo. App. 2014) ("A civil conspiracy does not give rise to a civil action unless something is done pursuant to which, absent a conspiracy, would create a right of action against one of the defendants, if sued alone."); *see also State Auto Prop. & Cas. Ins. Co. v. Latture*, 2018 WL 2247241, at *1 (E.D. Ark. May 16, 2018) ("A claim for civil conspiracy requires proof of an underlying tort."); *Illinois State Bar Ass'n Mut. Ins. Co. v. Cavenagh*, 983 N.E.2d 468, 481 (Ill. App. 2012) ("A conspiracy is not an independent tort."); *Hokanson v.*

[22] *See* Counts XIII (Arkansas); XXIV (Illinois); XXXVI (Kansas); XLII (Mississippi); LIX (Missouri); LXX (Nebraska); LXXXIII (South Dakota); XCIV (Tennessee).

Lichtor, 626 P.2d 214, 221 (Kan. Ct. App. 1981) (same); *Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011) (same); *United Gen. Title Ins. Co. v. Malone*, 858 N.W.2d 196, 215 (Neb. 2015) (same); *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 186 (Tenn. App. 2007) (same); *Setliff v. Akins*, 616 N.W.2d 878, 889 (S.D. 2000) (same). Thus, "[i]f the underlying wrongful act alleged as part of a civil conspiracy fails to state a cause of action, the civil conspiracy claim fails as well," and where the complaint fails to state a claim for an independent, underlying predicate tort, a civil conspiracy claim may not proceed. *Hibbs*, 430 S.W.3d at 320 (citation omitted).

Moreover, because a conspiracy is, by definition, an intentional agreement to achieve a specific outcome, the predicate tort supporting a conspiracy cause of action must be an *intentional tort*. *See, e.g., Ho v. United States*, 2012 WL 6861343, at *8 n.17 (D. Minn. Dec. 11, 2012) (collecting cases). This Court directly so held in *Bader Farms*. *See Bader Farms* Order, Doc. # 132 at 10. Here, only the trespass count could provide the required predicate tort to sustain a conspiracy claim. But, as discussed *supra*, the Master Complaint fails to state a claim for trespass against Monsanto. Accordingly, the Court should dismiss the conspiracy claims for lack of an underlying intentional tort.

VIII. PLAINTIFFS' FAILURE TO WARN AND STATE CONSUMER PROTECTION ACT CLAIMS ARE PREEMPTED.

Plaintiffs' failure-to-warn claims[23] -- whether brought as strict liability or negligence claims -- and their state consumer fraud act claims[24] fail as a matter of law and should be dismissed because they are expressly preempted by the Federal Insecticide, Fungicide, and

[23] Count V and VII (Arkansas); Counts XVII and XIX (Illinois); Counts XXVII and XXIX (Kansas); Count XXXVIII (Mississippi); Counts XLV, XLVII, LIII, and LV (Missouri); Counts LXIII and LXV (Nebraska); Counts LXXIV and LXXVI (South Dakota); Counts LXXXVI and LXXXVIII (Tennessee).

[24] Count XXIII (Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2), and Count LXIX (Nebraska Consumer Protection Act, Neb. Rev. Stat. Ann. 59-1602).

Rodenticide Act ("FIFRA"). *See* 7 U.S.C. § 136v(b). FIFRA's express preemption provision states: "[A] state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[25] Plaintiffs do not allege that Monsanto failed to provide the FIFRA-compliant XtendiMax label approved by EPA, but rather claim that the federal label itself is inadequate. As a result, Plaintiffs' failure to warn claims seek to impose label requirements that are different from or in addition to those imposed by FIFRA, and the claims are preempted.[26]

The Supreme Court has held that failure to warn claims fall within FIFRA's preemptive scope, as they "are premised on common-law rules that qualify as 'requirements for labeling or packaging'" because they purport to "set a standard for a product's labeling." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005). Thus, Plaintiffs' failure to warn claims are preempted because they would impose labeling requirements that diverge from those set out in FIFRA, as determined by EPA.[27] As one federal court has explained:

> Plaintiffs have alleged, as a basis for their various claims, [the defendant]'s failure to warn . . . purchasers of its products. Because such warnings might ordinarily be included in materials accompanying the products, plaintiffs' complaints do

[25] FIFRA defines product labeling and packaging to include "all labels and other written, printed, or graphic matter" accompanying the products or to which the labels or packaging refers." *See* 7 U.S.C. §136(p).

[26] FIFRA establishes a comprehensive pesticide labeling regime with extensive requirements, which EPA must determine are satisfied before registering a pesticide. *See, e.g.*, 40 C.F.R. § 156.10 *et seq.* (federal pesticide labeling requirements); 40 C.F.R. §152.108 (requiring EPA to "review all draft labeling submitted with the application" for pesticide registration); 40 C.F.R. §152.112 ("EPA will approve an application [for pesticide regulation] . . . only if . . . (f) [t]he Agency has determined that the product is not misbranded as that term is defined in FIFRA sec. 2(q) and part 156 of this chapter, and its labeling and packaging comply with the applicable requirements of the Act, this part, and parts 156 and 157 of this chapter[.]"). Any claim that EPA erred in determining that the XtendiMax label meets FIFRA requirements would be subject to conflict preemption.

[27] Plaintiffs clearly challenge the federal labeling or packaging. *See, e.g.* M.C. ¶ 333 (alleging that "labels and instructions were inadequate"); ¶ 336 (alleging that "the revised labels continue to lack necessary and adequate warnings and the directions for use remain inadequate to prevent harm"); ¶ 478 (alleging that Monsanto "failed to provide adequate warning and instruction by label or otherwise"); ¶ 479 (claiming that the Monsanto's "[l]abels were false, misleading, and failed to contain warnings or instructions adequate to protect or prevent harm to the environment, including susceptible non-resistant plants and crops, including soybeans.").

> appear to include a claim that seeks to impose a labeling requirement not found among FIFRA's statutory requirements.

In re Syngenta, 131 F. Supp. 3d at 1208 (granting motion to dismiss failure to warn claims as preempted by FIFRA); *see also Smith v. Hartz Mountain Corp.*, 2012 WL 5451726, at *3 (N.D. Ohio Nov. 7, 2012) ("Plaintiffs seek to hold Hartz liable for labeling UltraGuard Powder consistently with EPA's requirements, and FIFRA clearly proscribes any state-law labeling requirement that is in addition to or different from the FIFRA requirements."); *Wilgus v. Hartz Mountain Corp.*, 2013 WL 653707, at *6 (N.D. Ind. Feb. 19, 2013) ("Throughout the Complaint, then, the plaintiffs directly challenge the labeling of the UltraGuard product and argue that the defendants failed to adequately warn of certain alleged harms that could result from its use. All of the plaintiff's claims are implicitly, if not expressly, based on a failure to warn argument. As such, they are preempted by FIFRA."); *Orkins v. Spartan Chem. Co.*, 2005 WL 1661961, (D. Vt. July 14, 2005) (assertion that pesticide's label failed to warn of dangers was preempted by FIFRA).

Plaintiffs' state consumer fraud act claims also are preempted by the express preemption provision of FIFRA because they also would impose labeling requirements not equivalent to those imposed by FIFRA. *See Mortellite v. Novartis Crop Protection, Inc.*, 460 F.3d 483, 491 (3d Cir. 2006) (finding Plaintiffs' claims for statutory consumer fraud preempted by FIFRA "to the extent that those claims rely on written misrepresentations that qualify as 'labels' or 'labeling' as defined by FIFRA"); *DJ Coleman, Inc. v. Nufarm Americas, Inc.*, 693 F. Supp. 2d 1055, 1080-81 (D.N.D. 2010) (finding claims under North Dakota's Consumer Fraud Act preempted by FIFRA). Accordingly, the Court should dismiss the failure-to-warn and consumer protection claims as preempted by FIFRA.

IX. PLAINTIFFS' FAILURE TO WARN CLAIMS ARE INADEQUATELY PLED.

Even if Plaintiffs' failure to warn claims were not preempted, which they are, the Court still should dismiss them because they are inadequately pled. Plaintiffs' failure to warn claims against Monsanto -- whether sounding in strict liability or tort -- fail to state a claim because Plaintiffs do not allege that the users of Monsanto's products read the warnings provided by Monsanto or that different or additional warnings would have changed the result. To establish proximate cause in a failure-to-warn case, the plaintiff must "show that the warning would have altered the behavior of the individuals involved." *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 232 (Mo. App. 2012). *See also Wielgus v. Ryobi Techs., Inc.*, 2012 WL 1748156, at *7 (N.D. Ill. May 16, 2012) ("[T]he plaintiff pressing a failure-to-warn case must show that a better warning would have prevented his injuries."); *Conti v. Ford Motor Co.*, 743 F.2d 195, 199 (3d Cir. 1984) ("Ford cannot be held liable on a failure-to-warn theory merely because a jury concludes that more warnings are needed…Rather, liability may result only when there is sufficient evidence that additional warnings or reminders may have made a difference.").

A plaintiff may not "maintain a product liability action premised on a failure-to-adequately-warn theory" unless the product user "read the warnings that were given." *Kane v. R.D. Werner Co., Inc.*, 657 N.E.2d 37, 38-39 (Ill. App. 1995); *Brinkley v. Pfizer, Inc.*, 772 F.3d 1133, 1138 (8th Cir. 2014) ("the adequacy of the instructions made no difference in the outcome of [plaintiff]'s injury because [plaintiff] alleges her prescribing physician did not read those materials") (citations and quotation marks omitted). Courts across the country are in accord. *See, e.g., Bushong v. Garman Co.*, 843 S.W.2d 807, 811 (Ark. 1992); *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038 (Kan. 1984); *Palmer v. Volkswagen of Am., Inc.*, 904 So. 2d 1077, 1084 (Miss. 2005); *Jaurequi v. John Deere Co.*, 971 F. Supp. 416 (E.D. Mo. 1997), *aff'd*, 173 F.3d 1076 (8th Cir. 1999); *Karst v. Shur-Co.*, 878 N.W.2d 604, 613 (S.D. 2016); *Smith v. Pfizer*

Inc., 688 F. Supp. 2d 735, 746 (M.D. Tenn. 2010). Unless a product user read the label, "no warning [the] defendant could have given would have made any difference." *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 970 (Ala. 1985).

Plaintiffs here offer the conclusory allegation that they "foreseeably were damaged as a direct and proximate result of Defendants' failure to warn." *See, e.g.*, M.C. ¶ 480. That conclusory allegation is insufficient. *See, e.g., Cubbage v. Novartis Pharm. Corp.*, 2016 WL 3595747, at *6 (M.D. Fla. July 5, 2016) ("Plaintiff does not allege in his complaint that his physicians would have made a different prescribing decision had they been provided with an adequate warning. Thus, Plaintiff's claim should be dismissed on that basis."); *Park-Kim v. Daikin Indus., Ltd.*, 2016 WL 5958251, at *12 (C.D. Cal. Aug. 3, 2016) ("even if plaintiffs sufficiently alleged that 'defendants failed to adequately warn consumers' of certain health and safety risks ... plaintiffs' claims would nonetheless fail because the [complaint] fails adequately to plead causation. Plaintiffs do not plausibly allege that 'but for' defendants' failure to warn, the alleged injury to plaintiffs would not have occurred.") (granting motion to dismiss). Notably absent from the Master Complaint is any allegation that different or additional warnings would have prevented the alleged harm. To the contrary, Plaintiffs affirmatively allege that additional education and application restrictions would **not** prevent off-target movement of dicamba. M.C. at ¶ 327. Accordingly, Plaintiffs' allegations are missing a fundamental element of a failure-to-warn claim, and their failure-to-warn claims should be dismissed.

X. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENT TRAINING.[28]

Plaintiffs purport to assert claims for "negligent training" based on a theory that Monsanto failed to provide "adequate instructions and training" to growers regarding the use of

[28] Counts VIII, XX, XXX, XLVIII, LVI, LXXVII, and LXXXIX.

its products. M.C. ¶¶ 500-505. In these counts, Plaintiffs allege that Monsanto did not provide adequate instructions or training through its product labels or otherwise. *See, e.g., id.* at ¶ 503, 668. These "negligent training" claims are not recognized under the law and are duplicative of the failure-to-warn claims. *See, e.g., Stanley v. ConocoPhillips Pipe Line Co.*, 451 F. Supp. 2d 1286, 1289-90 (D. Kan. 2006) (noting that there is no duty to train outside the employer relationship and that alleged "duty to train" was "no different from the duty to warn because a warning may include [ ] education.").[29] In addition, Plaintiffs affirmatively allege that "[e]ducation... does not fix the dicamba herbicides' volatility and propensity for off-target movement...." M.C. ¶ 327. The Court should dismiss Plaintiffs' negligent training claims.

XI. THE COMPLAINT FAILS TO STATE A WARRANTY CLAIM UNDER KANSAS LAW.

The Kansas Plaintiffs fail to state a breach of warranty claim against Monsanto. Under Kansas law, a third party who did not purchase the product at issue can recover for breach of warranty only if the third party (1) is "expected to use, consume or be affected by the goods;" **and** (2) is "**injured in person** by breach of the warranty." Kan. Stat. Ann. § 84-2-318 (emphasis added). Kansas courts thus have held that a non-purchaser of a product cannot recover from the product's manufacturer unless the product allegedly caused ***physical*** injuries to the plaintiff. *See, e.g., Full Faith Church of Love West, Inc. v. Hoover Treated Wood Prods., Inc.*, 224 F. Supp. 2d 1285, 1292 (D. Kan. 2002) (dismissing warranty claims for lack of privity where

[29] *See also Horton v. Hoosier Racing Tire Corp.*, 2015 WL 12859316, at *1 (M.D. Fla. Dec. 15, 2015) (granting motion to dismiss negligent training claim; "the Plaintiff's claim for negligent failure to train is duplicative of his claim for negligent failure to warn."); *Kuligoski v. Brattleboro Retreat*, 156 A.3d 436, 455 (Vt. 2016) ("we find the amorphous concept of a 'duty to train' as a distinct cause of action unworkable, and note that such a duty, in contrast to the duty to warn as we have described it, lacks grounding in existing caselaw."); *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 583 (Minn. 2012) ("there is no duty for suppliers or manufacturers to *train* users in the safe use of their product. Indeed, imposing a duty to train would be wholly unprecedented"); *Adeyinka v. Yankee Fiber Control, Inc.*, 564 F. Supp. 2d 265, 285 (S.D.N.Y. 2008) (granting motion for summary judgment on "negligent training" claim and noting that plaintiff "failed to cite any case wherein a seller... has been found to owe a duty to train the users ...of its products on the operation of the products").

product allegedly caused property damage; "[O]ne cannot circumvent the privity requirement unless the unreasonably dangerous product causes **physical injuries**.") (emphasis added). Here, the Kansas Plaintiffs do not allege that they purchased any Monsanto product and do not allege any physical injuries. *See* M.C. ¶¶ 8-9, 370(c). Thus, they fail to state a claim for breach of warranty under Kansas law.

XII. THE ARKANSAS, SOUTH DAKOTA AND TENNESSEE PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF IMPLIED WARRANTY REGARDING XTENDIMAX.

The claims for breach of implied warranties alleged on behalf of the Arkansas, South Dakota, and Tennessee Plaintiffs fail because such claims are precluded by the specific disclaimer of warranties contained on the label of Monsanto's XtendiMax herbicide. These Plaintiffs allege claims for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. But the 2016 and 2017 XtendiMax label contains an express disclaimer of these two warranties. The label states, in part: "TO THE EXTENT CONSISTENT WITH APPLICABLE LAW, NO OTHER EXPRESS WARRANTY OR IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE OR MERCHANTABILITY IS MADE." *See* Exhibit A.[30]

Each of the above states' versions of the Uniform Commercial Code ("UCC") provides that a seller's exclusion of the implied warranty of merchantability is enforceable so long as it is in writing, conspicuous, and mentions merchantability. *See* Ark. Code Ann. § 4-2-316; S.D. Codified Laws § 57A-2-316; Tenn. Code Ann. § 47-2-316. Similarly, a seller may disclaim the implied warranty of fitness so long as the exclusion is in writing and conspicuous. *Id.* A term is

[30] In ruling on a motion to dismiss, court may consider materials that are "necessarily embraced by the pleadings." *John Beal, Inc. v. Roofpros, Inc.*, 2016 WL 7439214, at *1 (E.D. Mo. Dec. 27, 2016); *see also Taylor v. Lew*, 2014 WL 4724689, at *3 (E.D. Mo. Sept. 23, 2014). The product labeling for XtendiMax is necessarily embraced by the pleadings, because the Master Complaint expressly challenges that labeling.

"conspicuous" where it is "a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size." Ark. Code Ann. § 4-1-201(b)(10)(A); S.D. Codified Laws § 57A-1-201(b)(10)(A); Tenn. Code Ann. § 47-1-201(b)(10)(A). The warranty disclaimer in the XtendiMax label is displayed in ALL CAPS so it is more prominent than the surrounding wording and is conspicuous by definition, and it mentions merchantability. As such, the disclaimer is enforceable and precludes the implied warranty claims alleged under the laws of Arkansas, South Dakota and Tennessee.

XIII. THE DESIGN DEFECT CLAIMS DIRECTED TO MONSANTO'S DICAMBA TOLERANT SEEDS FAIL AS A MATTER OF LAW.

Plaintiffs allege design defect claims based on "[t]he dicamba-resistant trait, and seed containing that trait." *See, e.g.*, M.C. ¶¶ 617–637. These design defect claims fail as a matter of law because dicamba-resistance is an intended feature of the product and, thus, plaintiffs challenge is to the product, not its design. It is well-accepted that "[a] manufacturer is liable for injuries resulting from a product only if that product is 'defective' -- *i.e.*, has a defect in the sense that something is wrong with it." *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985). If the risks complained of arise from the function of the product itself, the product cannot be said to be defective. *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997). *See also City of Philadelphia v. Lead Indus. Ass'n*, 1992 WL 98482, at *3 (E.D. Pa. Apr. 23, 1992) ("Plaintiffs counter that they are challenging a defective design—the design of defendant's pigments. They argue that these products should not have been lead-based but rather zinc-based, as is zinc oxide pigment. This is akin to alleging a design defect in champagne by alleging that the manufacturer should have made sparkling cider instead. The challenge is to the product itself, not to its specific design.").

Courts across the country agree. *See, e.g.*, *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1299 (Ill. App. 1985) (rejecting claim where, "[i]n essence, plaintiffs complain not of the product's particular design, but of the product itself."); *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. App. 1987) (affirming dismissal of design defect claim against gun manufacturer and explaining that "'[a] product is in a "defective condition" where the condition is one not contemplated by the ultimate consumer..., which condition causes the product to fail to perform in a manner reasonably to be expected in light of its nature and intended function'") (quoting Restatement (Second) of Torts Section 402A comment g (1965)); *Erickson v. Monarch Indus., Inc.*, 347 N.W.2d 99, 110 (Neb. 1984) (a plaintiff asserting a strict liability design defect claim "must demonstrate that a useful and desirable product could have been made safer *without significant impact on product effectiveness*") (quoting *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 845-46 (N.H. 1978)).

When a product performs as intended, there can be no claim of a design defect -- even if the product is dangerous -- because, "[a]s a matter of law, a product's defect is related to its condition, not its intrinsic function." *Forni v. Ferguson*, 232 A.D.2d 176, 176 (N.Y. 1996). *See, e.g.*, *McCarthy*, 119 F.3d at 155 (affirming dismissal of design defect claim because "[t]he bullets were not in defective condition nor were they unreasonably dangerous for their intended use because the Black Talons were purposefully designed to expand on impact and cause severe wounding."); *Addison v. Williams*, 546 So. 2d 220, 224 (La. Ct. App. 1989) (ammunition manufacturer not liable for design defect for ammunition designed to cause severe wounding because "[t]here must be 'something wrong' with a product" for a design defect claim); *id.* ("A product cannot be said to be [defective] per se where the danger complaint of is the purpose and function of the product.").

According to the allegations in the Complaint, the design defect in the dicamba-tolerant seeds is the fact that they are dicamba-tolerant. But that is the very function of the seeds. It is a feature, not a bug. Accordingly, Plaintiffs cannot state a claim for strict liability - design defect. *See McCarthy*, 119 F.3d at 155. Where, as here, a product performs in the way it was "purposefully designed" to work, it is not defective, as a matter of law. *Id*. Because the alleged defect in the dicamba-resistant seeds is only that they worked precisely as designed, Plaintiffs' design defect claims directed to Monsanto's Xtend seeds fail as a matter of law.

XIV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE ICFA OR NCPA.

The only Illinois Plaintiff, Bumper Crop Farms, LLC ("Bumper Crop"), fails to state a claim against Defendants under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq*. M.C. Count XXIII. For similar reasons, the only Nebraska Plaintiff, Shane Greckel ("Greckel"), fails to state a claim under the Nebraska Consumer Protection Act ("NCPA"), Neb. Rev. Stat. Ann. § 59-1602. M.C. Count LXIX.

A. Bumper Crop and Greckel Lack Standing to Assert Consumer Fraud Claims Concerning Products They Never Purchased.

Bumper Crop and Greckel have not pled that they are consumers who may assert unfair and deceptive practices claims under the ICFA and NCPA. *See Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634, 638 (Ill. 1977) (plaintiffs who purchased no goods or services from college was not a "consumer" as defined by ICFA and therefore lacked standing to bring ICFA claim); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293, 301-02 (Neb. 2006) (plaintiffs who allege "derivative and remote" injury from tying of credit card arrangement lack standing to bring NCPA claim). Because neither Bumper nor Greckel allege they purchased products from Monsanto, let alone purchased Monsanto's products for a "household" as opposed to "business" use, they lack standing to assert deceptive and unfair practice claims. *Brown v. Veile*, 555

N.E.2d 1227, 1231 (Ill. App. 1990) (finding pre-owned mobile home dealer who purchased mobile home for business purpose is not a consumer entitled to bring claim under ICFA). Plaintiffs cannot bring a deceptive and unfair practice claims concerning merchandise purchased by others.

B. A Regulatory Safe-Harbor Precludes Bumper Crop's and Greckel's Claims.

Bumper Crop's and Greckel's statutory claims also should be dismissed under the regulatory safe-harbor provisions of the ICFA and NCPA. Both the ICFA and NCPA exempt from their coverage "[a]ctions or transactions specifically authorized by laws administered by any regulatory body . . . acting under statutory authority of . . . the United States." 815 ILCS 505/10b(1); *see also* Neb. Rev. Stat. Ann. § 59-1617 (""[T]he Consumer Protection Act shall not apply to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by ... any ... regulatory body or officer acting under statutory authority of this state or the United States."). These exemptions "reflect[] a legislative policy of deference to the authority granted by Congress . . . to federal and state regulatory agencies." *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 38 (Ill. 2005).

The exemptions require dismissal of claims against companies whose conduct "fall[s] within the boundaries established by federal law." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 941, 942-43 (7th Cir. 2001) ("If the parties are doing something *specifically authorized* by federal law, section 10b(1) will protect them from liability under the CFA."); *see also Hage v. Gen. Serv. Bureau*, 306 F. Supp. 2d 883, 890 (D. Neb. 2003) ("particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, the immunity arises if the conduct itself is also regulated"). Here, Plaintiffs plead consumer fraud claims concerning the sale and labeling of

products specifically approved by EPA and USDA. M.C. ¶¶ 179, 229. Thus, Monsanto's sale and labeling of these products is exempt from claims under the ICFA and NCPA.

C. Bumper Crop and Greckel Fail to Plead Causation.

Both the ICFA and NCPA require proof that the alleged loss occurred "as a result of" or "by" the unfair or deceptive conduct. *See* 815 ILCS 505/10a; Neb. Rev. Stat. Ann. § 59-1609. To satisfy this requirement, plaintiffs must prove they themselves were actually deceived by the alleged unlawful conduct. *De Bouse v. Bayer*, 922 N.E.2d 309, 314, 319 (Ill. 2009) (holding a consumer who "saw no advertising for" a prescription drug "and knew nothing of the drug prior to her doctor's providing her with a prescription" cannot show that her damages occurred as a result of the alleged deception). Because Bumper Crop and Greckel do not allege their injuries resulted from their own purchase of any products from Monsanto, their alleged crop loss necessarily required the intervening actions of non-parties. Their alleged harms are thus too remote to maintain an unfair or deceptive practices claim under these statutes. *See Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 161 (Ill. 2002) (ICFA requires an "'immediate' and 'direct' relationship between the wrongdoing and the injury"); *Kanne*, 723 N.W.2d at 302 ("Here, because appellants allege injuries that are derivative and remote, they also fail to state a claim under Nebraska's Consumer Protection Act.").

D. Bumper Crop's and Greckel's Allegations Fail to Satisfy Rule 9(b).

Rule 9(b)'s heightened pleading requirements apply to deceptive practices claims under the ICFA and NCPA. *See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736-37 (7th Cir. 2014). Thus, Bumper Crop and Greckel must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). And, because there are multiple defendants, they must also "distinguish between" the conduct of each defendant allegedly giving rise to the cause of action. *See, e.g.*, *Weske v. Samsung Elecs., Am., Inc.*, 934 F. Supp. 2d 698, 703 (D.N.J. 2013).

They do not. Instead, the Master Complaint alleges in boilerplate fashion collective deception by all defendants. *See* M.C. ¶ 693. Plaintiffs do not plead ***who*** sprayed a product that harmed their crops, ***what*** product was sprayed, ***when*** the product was sprayed, ***where*** the product was sprayed, ***how*** the product damaged their crops, or ***what*** conduct of Monsanto allegedly caused the harm. *See Camasta*, 761 F.3d at 737 ("[T]he pleading "ordinarily requires describing the who, what, when, where, and how of the fraud."). Plaintiffs' conclusory assertions do not satisfy Rule 9(b) and their consumer fraud claims should be dismissed.

XV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE MISSOURI CROP PROTECTION ACT.

The Missouri Plaintiffs fail to state a claim for knowing violation of the Missouri Crop Protection Act ("MCPA"), Mo. Rev. Stat. § 537.353.1, because they have not alleged that Monsanto knowingly damaged or destroyed any of the Missouri Plaintiffs' crops. *See In re Genetically Modified Rice Litig.*, 2011 WL 882954, at *3 (E.D. Mo. Mar. 11, 2011) (plaintiffs' claim dismissed because there was "no evidence that [defendant] intended to damage plaintiffs' crops"). Plaintiffs also fail to state a claim for a negligent damage or destruction of crops (Mo. Rev. Stat. § 537.353.2 or § 569.132.4) because they have not alleged that any Monsanto product caused their alleged crop loss. Further, Plaintiffs' claims are not the type that the MCPA was intended to redress. In Missouri, statutes are interpreted in a "reasonable and logical" manner and to "give[] meaning to the statute." *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. 2015). The only logical and reasonable reading of Missouri's crop protection statutes is that they are intended to allow recovery for negligent acts that directly damage or destroy crops (*e.g.*, a neighbor directly spraying herbicide on a plaintiff's crops). Plaintiffs allege that a Monsanto herbicide was purchased by farmers who used the product in a manner that allowed it to move off-target and damage Plaintiffs' crops. The MCPA was not intended to establish

liability on such an attenuated causal nexus between the defendant's conduct and the alleged crop damage. Thus, Count LVIII should be dismissed.

XVI. PLAINTIFF FRANKS' 2016 CLAIMS FAIL FOR LACK OF DUTY AND LACK OF PROXIMATE CAUSE.

While all of the other claims in the Master Complaint pertain to alleged crop damage that occurred during the 2017 growing season, Missouri Plaintiff Jerry Franks seeks recovery for alleged dicamba damage to his crops in 2016, and Plaintiffs seek to certify a 2016 Missouri class. Mr. Franks' 2016 claims are markedly different from the 2017 claims because Monsanto did not manufacture or sell any dicamba herbicide during the 2016 growing season. *See, e.g.*, M.C. ¶ 238 (alleging that Monsanto launched XtendiMax in 2017). As this Court is aware, Monsanto also included product labeling with all Xtend seeds sold in 2015 and 2016 advising purchasers not to apply dicamba herbicides to crops grown from those seeds. *See* Apr. 10, 2017 *Bader Farms* Mem. & Order (Doc. #50) at 8-9. Mr. Franks' 2016 claims should be dismissed because the Master Complaint does not allege facts sufficient to support the required duty and proximate cause elements of those claims. To the extent this Court's prior rulings are to the contrary, Monsanto respectfully submits that those rulings should be revisited.

A. Plaintiff Franks' 2016 Claims Fail for Lack of Duty.

The allegations do not establish that Monsanto owed a legal duty to Plaintiff Franks in 2016 because he does not allege that he had any relationship with Monsanto that might have created such a duty.[31] "The common denominator that must be present is the existence of a relationship between the plaintiff and the defendant that the law recognizes as the basis of a duty of care." *Ford v. GACS, Inc.*, 265 F.3d 670, 681 (8th Cir. 2001) (citation omitted). Plaintiffs

[31] As this Court has previously recognized, "[w]hether a duty exists is purely a question of law." *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005) (quoting *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 155 (Mo. banc 2000)).

concede that Monsanto did not manufacture, distribute or sell the dicamba herbicides that allegedly damaged his crops. *See* M.C. ¶¶ 14, 238. In fact, the Master Complaint does not allege that Plaintiff Franks had any relationship whatsoever with Monsanto. Thus, based on the allegations of the Master Complaint, Monsanto did not owe a duty of care to him.

It is hornbook law that product manufacturers do not have a duty to prevent harms caused by products they did not manufacture or sell. The Eighth Circuit has affirmed this settled rule, "joining the majority of courts" in "conclud[ing] the brand name manufacturers did not owe a duty of care to users of their competitor's generic products." *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1092 (8th Cir. 2013); *Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 171 (4th Cir. 1994) ("As Wyeth has no duty to the users of other manufacturers' products, a negligent misrepresentation action cannot be maintained against it on the facts of this case."); *Barnes v. Kerr Corp.*, 418 F.3d 583, 590 (6th Cir. 2005) ("Although a product manufacturer generally has a duty to warn of the dangers of its own products, it does not have a duty to warn of the dangers of another manufacturers' products."). Thus, Monsanto did not have duty to protect Plaintiff Franks from harm allegedly caused by dicamba herbicides it did not manufacture, distribute or sell.

In *Landers*, this Court ruled that the plaintiff's allegation that Monsanto encouraged the unlawful application of old dicamba herbicides to Xtend crops created a "special circumstance" sufficient to impose a duty of care owed by Monsanto to the plaintiff in that case. *Landers* Aug. 17, 2017 Mem. and Order (Doc. #20) at 11. Monsanto respectfully submits that this ruling should be revisited because it improperly expands Missouri law by finding "special circumstances" outside the limited contexts authorized by the Missouri courts. But even under this Court's expansive view of Missouri's "special circumstances" case law, the allegations of the Master Complaint fall short. Here, Plaintiffs do not allege that any Monsanto representative

encouraged any particular individual to make the illegal application of dicamba that allegedly caused Plaintiff Franks' crop damage. To the extent the Court did not previously require such specific allegations, the Court should revise its prior ruling, because Missouri's "special circumstances" case law requires, in order to impose a duty on the defendant, that the defendant know that the particular third-party individual who allegedly caused the harm was likely to cause harm to the plaintiff. *See Advance Rental Ctrs., Inc. v. Brown*, 729 S.W.2d 644, 646 (Mo. App. 1987) ("'Special circumstances' include those in which a known dangerous or violent individual is present or where an individual present has conducted himself so as to indicate danger, and sufficient time exists to prevent injury."). Plaintiffs have failed to allege facts sufficient to support a finding that Monsanto owed a duty to Mr. Franks -- even if Missouri's "special circumstances" case law applied -- and the Court should dismiss his 2016 claims.

B. Plaintiff Frank's 2016 Claims Also Fail for Lack of Proximate Causation

Plaintiff Franks' 2016 claims also should be dismissed because the allegations of the Master Complaint preclude a finding that Monsanto was the proximate cause of his alleged 2016 crop loss, for two separate reasons: (1) Monsanto did not manufacture, distribute or sell the dicamba herbicide that allegedly caused his crop loss; and (2) the alleged unlawful use of dicamba herbicides with Monsanto's Xtend seeds in 2016 constitutes an intervening and superseding cause of the alleged harm.

In the *Bader Farms* case, this Court ultimately held that proximate cause turned on foreseeability and was a question of fact for the jury. *See Bader Farms* May 8, 2018 Order (Doc. # 134) at p. 6. That ruling was contrary to an earlier tentative ruling by the Court and, Monsanto respectfully submits, also contrary to controlling law. Whether conduct is too remote to constitute the proximate cause of an alleged injury is a question of law for the court. *See, e.g., Kutilek v. Union Pac. R.R.*, 454 F. Supp. 2d 871, 875 (E.D. Mo. 2006) (legal limit of

"[p]roximate cause is a question of law for the trial court") (citing *Payne v. City of St. Joseph*, 135 S.W.3d 444, 451 (Mo. App. 2004)).[32] And, under Missouri law, a threshold requirement for establishing proximate cause in a product liability case is proof that the defendant manufactured, distributed or sold the product alleged to have caused the injury. *See, e.g., Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243-47 (Mo. 1984) (plaintiffs could not meet proximate causation requirement without proof that defendant manufactured the product alleged to have caused injury). Monsanto respectfully submits that the Court's May 8, 2018 *Bader Farms* ruling was contrary to established law, and asks the Court to reject its reasoning and apply its earlier April 10, 2018 ruling in *Bader Farms*, which recognized that Monsanto's "conduct was simply too attenuated to establish proximate cause." *See Bader Farms* Apr. 10, 2017 Order (Doc. # 50) at 7.

1. Franks Cannot Prove Proximate Causation Because Monsanto Did Not Manufacture the Dicamba that Allegedly Caused His Loss

A threshold requirement for establishing proximate causation in a product liability case under Missouri law is proof that the defendant manufactured the injury-causing product. *See City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007) ("where a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product"); *Zafft*, 676 S.W.2d at 243-47 (plaintiffs could not meet proximate causation requirement without proof that defendant manufactured the product alleged to have caused injury). *See also* 63 Am. Jur. 2d *Products Liab.* § 75 (2016) ("[A] threshold requirement for a products liability action is that the plaintiff identify the manufacturer or supplier responsible for placing the injury-causing product into the stream of commerce; this

[32] *See also Poage v. Crane Co.*, 523 S.W.3d 496, 512-13 (Mo. App. 2017) ("'proximate cause' is a ***legal determination***") (emphasis in original); *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 353 (Mo. App. 2012) ("While causation in fact is a question for the jury, '[p]roximate cause is a question of law for the trial court.'") (quoting *Payne*, 135 S.W.3d at 451); *Patrick v. Perfect Parts Co.*, 515 S.W.2d 554, 556 (Mo. banc 1974) (affirming trial court finding that, as a matter of law, defendant's conduct was not proximate cause of injury).

is the traditional requirement that plaintiff establish causation."). Allegations that it was foreseeable that the injury-causing product might be used in combination with the defendant's own product are insufficient. *See, e.g., Ford*, 265 F.3d at 681 (car manufacturer not liable under Missouri law for injury caused by ratchet system it approved for use in transporting its automobiles). Here, Plaintiffs fail to allege proximate causation because they concede that Monsanto did not manufacture, distribute or sell the dicamba herbicide that allegedly damaged Plaintiff Franks' crops in 2016. Thus, the Court should dismiss his claims against Monsanto for lack of proximate causation.

2. The Unlawful Application of Dicamba Constitutes an Intervening and Superseding Cause of the Alleged Crop Loss.

Monsanto also cannot be deemed the proximate cause of Plaintiff Franks' alleged crop damage, as a matter of law, because the unlawful application of dicamba herbicides to Xtend crops in 2016 was an intervening and superseding cause of the alleged damage. In herbicide damage cases, misapplication of the herbicide is deemed the proximate cause of any resulting damage and precludes a finding that the manufacturer of the herbicide proximately caused the damage. *See, e.g., Walton v. Sherwin-Williams Co.*, 191 F.2d 277, 283 (8th Cir. 1951) ("The finding that the rice farmers or the pilot failed to use ordinary care [in applying the herbicide 2,4-D] presents a sufficient and proximate intervening cause of the damage which would afford complete defense to the defendant [manufacturer]."); *Herrick v. Monsanto Co.*, 874 F.2d 594, 599 (8th Cir. 1989) ("In order to demonstrate that the breach [of warranty] was the proximate cause of the damages, it was necessary for Herrick to prove that he correctly followed instructions, that he did not misuse the herbicide.").[33] Here, Monsanto is yet an additional step

[33] *See also E.I. du Pont de Nemours & Co. v. Baridon*, 73 F.2d 26, 30-31 (8th Cir. 1934) ("For the plaintiff to recover damages in this case, we think it was necessary ... [t]hat the plaintiff used [the herbicide] strictly in accordance with the recommendations and directions ...."); *Talquin Elec. Coop., Inc. v. Amchem Prods., Inc.*, 427

back from the herbicide manufacturer. If the causal connection does not even extend back far enough to reach the *manufacturer of the misapplied herbicide*, it cannot extend yet another step back to the *manufacturer of the seeds that grew into the crops to which the herbicide was misapplie*d - a much more remote alleged cause. Monsanto cannot be deemed the proximate cause of Mr. Franks' alleged crop loss for this additional reason.

Moreover, the Master Complaint acknowledges that any in-crop application of dicamba to crops grown from Xtend seeds in 2016 was unlawful. *See* M.C. ¶¶ 180, 195, 205, 207, 208. Courts have long-held that a defendant product manufacturer is not the proximate cause of injuries allegedly resulting from unlawful use of its product. *See, e.g., Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 670, 673 (8th Cir. 2009); *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1315 (W.D. Okla. 1996), *aff'd*, 160 F.3d 613 (10th Cir. 1998); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004).[34] Here, Monsanto did not even manufacture the dicamba herbicide that allegedly was used unlawfully.

This Court correctly recognized, in a prior tentative order in *Bader Farms*, that illegal use of a product of *another* manufacturer breaks the chain of causation:

> [E]ven if Monsanto was negligent in its release of the GE seeds without a corresponding [approved dicamba] herbicide, it appears that its conduct was simply too attenuated to establish proximate cause. Instead, plaintiffs' injuries stem directly from an intervening and superseding cause—the unforeseeable independent

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So. 2d 1032, 1033 (Fla. Dist. App. 1983) (affirming summary judgment in favor of manufacturer where application of herbicide "was contrary to the label" and stating "[t]he knowing misuse of a product does not render the manufacturer liable").

[34] Allegations that it is foreseeable that some purchasers of a lawful product will use it illegally are insufficient to support liability. *See, e.g., Finocchio v. Mahler*, 37 S.W.3d 300, 303 (Mo. App. 2000) ("Although criminal conduct can hardly be said to be unforeseeable in this day and age, there remains consensus that liability should not be lightly assessed when the injury would not have happened but for criminal conduct."); *Ashley Cty., Ark.*, 552 F.3d at 670 (cold medicine manufacturers were not the proximate cause of methamphetamine injury "*even if the manufacturers knew* that cooks purchased their products to use in manufacturing methamphetamine") (emphasis added).

> acts by the third-party farmers who unlawfully sprayed dicamba on their crops. **Again, this is not a case in which a plaintiff's use or a third-party's use of a defendant's defective product caused damage to plaintiff, because Monsanto did not manufacture, sell or apply the dicamba.**

See Bader Farms Apr. 10, 2017 Order (Doc. # 50 at 7) (emphasis added). The Court should apply that same reasoning here and dismiss Mr. Franks' 2016 claims.

CONCLUSION

For the foregoing reasons, Plaintiffs' Master Complaint and the claims asserted therein should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of August 2018, the foregoing was filed electronically via the ECF/CM system with the Clerk of Court and which will serve Notice of Electronic Filing upon counsel of record via electronic mail

/s/ A. Elizabeth Blackwell