UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

IN RE DICAMBA HERBICIDES LITIGATION	)	Master Case No. 1:18-md-02820-SNLJ
	)	
	)	MDL No. 2820

DEFENDANT MONSANTO COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFFS' MASTER ANTITRUST CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Defendant Monsanto Company ("Monsanto") respectfully submits this memorandum in support of its motion to dismiss Plaintiffs' Master Antitrust Complaint. ECF No. 138.

PRELIMINARY STATEMENT

The Master Antitrust Complaint is the latest salvo in a misguided attempt to shoehorn antitrust concepts into a dispute where they do not belong. The cases that comprise this MDL initially involved only tort and warranty claims based on allegations that Monsanto and others bore responsibility for alleged crop damage. Litigation of those claims had been well under way when the first complaint was filed introducing antitrust claims into this dispute, which was followed by five more such complaints. These complaints struggled to contort this dispute into an antitrust mold, offering a smorgasbord of different plaintiffs, defendants, markets, theories, and claims. The Master Antitrust Complaint abandons much of what came before—dropping all claims relating to cotton seed, dropping numerous plaintiffs (all but two), dropping all but one defendant, and abandoning all Section 1 claims—in favor of focusing exclusively on monopolization claims against Monsanto under Section 2 of the Sherman Act.[1] But this new complaint has no more merit than those that preceded it and has a number of fundamental flaws that require dismissal:

Sam Branum and Wapsie Farms (together, "Plaintiffs") lack standing as indirect purchasers. Under the Sherman Act, only "direct purchasers" have standing to pursue a claim for damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977). Notably, despite the fact that

[1] Plaintiffs are now attempting to park all cotton-related antitrust claims under the terms of this Court's Order Allowing Consolidated Master Complaints, which provides that parties that do not conform to the master complaints shall either dismiss or have their actions stayed. ECF No. 46. Other previously filed class cases that are not dismissed will, therefore, be stayed under the terms of the Court's Order. The Order, therefore, operates to toll the statute of limitations on these other putative classes until the stay is lifted. Such a result appears to stand in conflict with the Supreme Court's recent decision in *China Agritech*, which held that unlike individual actions, follow-on or successive class actions are not tolled by the operation of a pending class action. *See* 138 S.Ct. 1800, 1804 (2018). Accordingly, Monsanto will be moving to modify the Court's Order to require the dismissal of all class claims that are not dismissed or conformed to the master complaints.

Plaintiffs allege they purchased seed containing Monsanto traits, Plaintiffs do not claim to have purchased such seed from Monsanto. Plaintiffs also do not allege facts showing that they purchased genetically modified traits from Monsanto. The only factual allegations regarding any relationship between farmers and Monsanto concern an end-user trait license agreement. However, that end-user limited license merely enables Plaintiffs to purchase seed containing Monsanto traits from others and limits, within Monsanto's permissible field of use restrictions under its patents, how that technology may be used. The license does not reflect a purchase, much less a direct purchase, of seeds or traits.[2] Moreover, Plaintiffs do not allege that they paid any fee directly to Monsanto in order to use these traits. Courts have recognized that licensee status is insufficient to demonstrate "direct purchaser" standing, because a consumer can be both a licensee and an *indirect purchaser* of a product or technology, which is precisely the case here. *See, e.g.*, *Kloth v. Microsoft Corp.*, 444 F.3d 312, 320 (4th Cir. 2006). Plaintiffs simply do not plead facts showing that they were direct purchasers of any product from Monsanto, which is fatal to their lawsuit under *Illinois Brick*.[3]

Plaintiffs fail to plead a plausible antitrust violation as required by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Plaintiffs' claims rely on a highly implausible core theory: that Monsanto's decision to expend tens of millions of dollars to develop and bring to market dicamba-tolerant traits (*e.g.*, Roundup Ready 2 Xtend® Soybeans ("Xtend")) and a low-volatility dicamba formulation (*i.e.*, XtendiMax® with VaporGrip® Technology ("XtendiMax")) was not motivated

[2] *Monsanto Co. v. McFarling*, No. 4:00CV84 CDP, 2002 WL 32069634, at *3 (E.D. Mo. Nov. 5, 2002) (finding that a farmer "lacks standing to bring antitrust claims" against Monsanto because "[h]e is an indirect purchaser"), *aff'd on other grounds*, 363 F.3d 1336 (Fed. Cir. 2004).

[3] Plaintiffs also lack antitrust standing under the multi-factor test set forth in *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537-40 (1983) in light of, among other reasons addressed below, the indirect nature of their alleged injury, the speculative nature of their damages, and the existence of third parties (such as independent seed companies) who would have been more directly impacted by any supra-competitive trait pricing.

by any legitimate business purpose, but instead was done for the express purpose of causing injury to farmers' crops so that they would be forced to purchase dicamba-tolerant seeds. Plaintiffs' entire premise in the Master Antitrust Complaint fails to satisfy the Supreme Court's established requirement that antitrust claims must be based on "plausible" theories that make "economic sense." Plaintiffs' theory also requires the leap in logic that the federal agencies charged with regulating these technologies were either incompetent or somehow complicit in Monsanto's "scheme" to harm farmers. Plaintiffs also ignore the fact that glyphosate-resistant weeds are a serious problem for certain farmers and that Monsanto's Xtend seeds and XtendiMax herbicide provide farmers with a realistic solution. To that end, the facts alleged here are far more consistent with legitimate competitive efforts to introduce an innovative new technology that could fill an important need for farmers. Plaintiffs plead no facts that come close to supporting an inference otherwise; to the contrary, the complaint relies largely on allegations of lawful behavior that cannot support any inference of wrongdoing, such as licensing activities falling well within the scope of Monsanto's valid patent rights. Plaintiffs' failure to plead a plausible antitrust violation requires dismissal.

Plaintiffs fail to plead that Monsanto has market power in a viable relevant market, an essential threshold element of a Section 2 claim. Plaintiffs identify "herbicide-tolerant traits in soybean seeds" as the relevant product market. ECF No. 138 ("Compl.") ¶ 11. It appears that Plaintiffs are attempting to plead a technology market in traits in order to establish market power. But Plaintiffs have an obligation to plead a plausible relevant market in which the Plaintiffs either are purchasers or competitors. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Farmers do not purchase traits; they purchase soybean seeds that, in many cases, contain traits, or "traited seed." Plaintiffs' attempt to plead a "trait" technology market, therefore, is

factually unsupportable. Even assuming *arguendo* that Plaintiffs could purchase traits from Monsanto (which they cannot), Xtend soybeans are protected by patents issued by the U.S. Patent and Trademark Office and the lawful exercise of such patent rights cannot form the basis of "market power" under a Sherman Act claim. *See, e.g., Monsanto Co. v. Swann*, 2001 WL 34079480, at *2 (E.D. Mo. Sept. 19, 2001). Under the only plausible market here—a soybean seed market—it is undisputed that Monsanto's market share is well below the level required to support the inference of "market power" necessary to support a claim under Section 2 of the Sherman Act.[4] Plaintiffs' failure to identify a viable relevant market in which Monsanto has unlawful market power is fatal to all of their claims.

Plaintiffs fail to plead key elements of their Section 2 claims, including willfulness, specific intent to monopolize, and a plausible conspiracy. Assuming *arguendo* that Plaintiffs adequately pled that Monsanto had market power in a viable relevant market (which they do not), Plaintiffs' allegations do not support an inference that Monsanto used improper means to acquire or maintain any alleged monopoly power, had the requisite intent to do so, or that it conspired with BASF. Plaintiffs rely mainly on pejorative characterization of lawful licensing practices that fall well within the scope of Monsanto's valid patent rights and are far more plausibly explained as part of lawful, procompetitive efforts to satisfy market demand for products capable of addressing glyphosate-resistant weeds. It is well established that a plaintiff cannot plead the requisite intent or a conspiracy based on unsupported speculation that such facially lawful activity was part of an anticompetitive plot.[5]

[4] Plaintiffs also offer only a conclusory and impermissibly vague definition of the relevant geographic market—an independent deficiency.

[5] Further, the Court lacks jurisdiction over the national class claims brought by Plaintiff Wapsie Farms. Plaintiff Wapsie Farms originally filed this action in the United States District Court for the Northern District of Iowa. Compl.

FACTUAL BACKGROUND

A. Monsanto Develops Innovative Technologies that Benefit Farmers

Monsanto is a global leader in genetically engineered crops. By developing innovative agricultural products, Monsanto has reduced pressures and burdens on farmers and helped them improve crop yields and quality for decades. Compl. ¶¶ 50, 52-53. For example, with the development of the non-selective Roundup®-branded herbicides and crop seeds resistant to Roundup®-branded herbicides, Monsanto provided farmers for the first time with tools that allowed them to control weeds by spraying a herbicide "over-the-top" of their crops without harming those crops. *Id.* ¶¶ 54-60. Roundup Ready® crops were a significant improvement on the more expensive and labor-intensive weed control methods used previously and were extremely well received by farmers. *Id.* ¶¶ 60-66.

Over time, however, weeds with resistance to glyphosate-based herbicides such as Roundup®-branded herbicides have become more prevalent in certain geographic locations, and Monsanto as well as its competitors, recognizing that farmers would be less able to effectively fight weeds, began looking for additional modes of action to address glyphosate resistant weeds. *Id.* ¶¶ 70, 82. After dicamba came off patent, Monsanto invested a substantial amount of time and resources to develop dicamba-resistant soybeans as well as a new low-volatility dicamba formulation. *Id.* ¶¶ 73-74, 82. Monsanto was awarded several patents related to its dicamba-resistant trait technology. *See* U.S. Patents Nos. 7,838,729; 7,884,262; 7,939,721; 8,420,888;

¶ 4. Monsanto is not subject to general jurisdiction in Iowa because it maintains its corporate headquarters and principal place of business in Missouri. *Id.* ¶ 9. Monsanto also is not subject to specific jurisdiction in Iowa for the claims brought on behalf of putative class members who are not residents of Iowa. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S.Ct. 1773 (2017). Because the transferor court lacks jurisdiction over the nationwide class claims brought by Plaintiff Wapsie Farms, so does this Court. *See In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, 288 F.Supp.3d 1087, 1213 (D.N.M. 2017). Thus, this Court should dismiss those nationwide class claims for lack of jurisdiction. Fed. R. Civ. P. 12(b)(2).

8,725,661, 9,447,428; RE45,048; RE46,292; *see also* Compl. ¶ 82 ("Monsanto patented a new GM trait that, when inserted into the DNA of a soybean seed, allowed crops grown from those seeds to tolerate being sprayed with dicamba.").

B. The Seeds and Traits Business is Characterized by Different Companies that License or Sell Different Products to Different Customers

The soybean seeds that farmers like Plaintiffs purchase for planting typically represent the merger of at least two components: (i) germplasm (genetic tissue conferring certain natural characteristics conveyed to a specific variety through conventional breeding); and (ii) traits (genetically modified material introduced into the germplasm that confers characteristics such as insect resistance or herbicide tolerance).[6] Farmers do not purchase these components separately from Monsanto or any other seed company. Farmers simply purchase soybean seeds in bags, plant that seed, harvest the crop, and sell the resulting product. Monsanto's genetically modified traits are not a separate "product" that can be purchased by farmers independently of seed.

Monsanto's business model with respect to trait technology involves either: (a) incorporating traits into its branded seed, which Monsanto sells almost entirely to distributors; and/or (b) licensing traits to seed companies, including seed companies with breeding programs that introduce the trait into their own germplasm. *See* Compl. ¶¶ 5-6, 94, 168. Unlike farmers, who do not license traits for the purpose of introgressing them into germplasm, seed companies with breeding programs pay royalties to Monsanto for the right to incorporate the trait into their seed.

Many licensing agreements between Monsanto and the seed companies require, among other things, that seed they produce and sell with Monsanto traits only be sold to farmers who have

[6] Farmers commonly also purchase soybean seed with seed treatments.

signed a Monsanto Technology / Stewardship Agreement ("MTSA"). *Id.* ¶ 164. MTSAs protect Monsanto's patent rights and stewardship goals by, for example, prohibiting farmers from replanting seed containing Monsanto traits in subsequent growing seasons. *See id.* ¶¶ 163-67. The use restrictions set forth in the MTSAs have been consistently upheld by courts as lawful and well within the scope of Monsanto's valid patent rights. *See infra* Section IV.A (citing case law).

Here, Monsanto widely licensed its dicamba-tolerant trait technology to competing trait developers (*e.g.*, DuPont (now part of Corteva) and BASF) and other independent seed companies to ensure its availability to growers. Compl. ¶¶ 168-71.[7] These arrangements often involve reciprocal licenses to complementary technologies. For example, Monsanto entered into a reciprocal license agreement with BASF, the original developer of dicamba herbicide, whereby Monsanto licensed its dicamba-tolerant trait technology to BASF in exchange for a license to BASF's dicamba formulations. *Id.* ¶¶ 84, 87. This permitted the two companies to employ their respective expertise and complementary intellectual property to develop dicamba-related products. *Id.*

C. Regulators Extensively Review and Approve Monsanto's Dicamba-Tolerant Soybean Traits and Various Formulations of Dicamba Herbicide

The sale and use of herbicides and genetically modified seeds are highly regulated. The U.S. Department of Agriculture ("USDA") regulates genetically modified crops under the Federal Plant Protection Act ("PPA") and a detailed genetically modified crop-specific regulatory regime. *See* 7 U.S.C. § 7701 *et seq*. Genetically modified seeds typically cannot be sold in the U.S. until they are deregulated by the USDA's Animal and Plant Health Inspection Service ("APHIS"). *See*

[7] As a result, there are various sources of the Xtend trait in soybean seeds other than Monsanto. Some of those companies, such as DuPont, have the ability to sell their traited seed without the requirement of a MTSA and, in fact, sell the seed under their own version of an end-user license agreement. Despite Plaintiffs' bald assertion that they are "direct purchasers of Monsanto," Plaintiffs entirely fail to identify in their Master Antitrust Complaint the source of the "dicamba resistant traits in soybean seeds" that they allegedly purchased, a further ground requiring dismissal.

7 C.F.R. §§ 340.0(a) & n.1, 340.1. Herbicides are regulated by the U.S. Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). Federal law prohibits the sale and distribution of herbicides that are not registered under FIFRA. 7 U.S.C. § 136a(a).

In July 2010, Monsanto filed an application with the USDA seeking deregulated status for its dicamba-tolerant trait for use in soybean seeds, which is included in soybean seeds sold as Roundup Ready 2 Xtend® Soybeans. Compl. ¶¶ 72, 82, 93. In 2015, following five years of review, the USDA granted that application. *Id.* ¶ 92. The requirements for obtaining deregulated status are extensive and require APHIS to consider, *inter alia*, experimental data, field test reports from trials, and all known unfavorable information about the organism. *See, e.g.*, 7 C.F.R. § 340.6.

In July 2012, Monsanto filed an application with the EPA for approval of its low-volatility dicamba formulation, which is sold under the XtendiMax brand. Compl. ¶ 89. Obtaining EPA approval to sell a particular herbicide requires an extensive inquiry in which the EPA must conclude that the herbicide "will not generally cause unreasonable adverse effects on the environment" when "perform[ing] its intended function" and "when used in accordance with widespread and commonly recognized practice." 7 U.S.C. § 136a(c)(5). FIFRA requires that the EPA take into "account the economic, social, and environmental costs and benefits of the use of any pesticide [including herbicides]." 7 U.S.C. § 136(bb).

In November 2016, the EPA approved XtendiMax herbicide for in-crop applications, making XtendiMax herbicide available for the 2017 growing season in states permitting dicamba use. Compl. ¶ 121. Soon after, the EPA also approved BASF's low volatility dicamba herbicide, Engenia, and DuPont's low volatility dicamba herbicide, FeXapan. *Id.* ¶¶ 121, 124-25.

During the long EPA review process for XtendiMax herbicide and competitors' dicamba herbicides, the EPA specifically studied the possibility of drift and volatility causing damage to non-target crops. *See generally* 11/9/2016 *EPA Final Registration of Dicamba on Dicamba-Tolerant Cotton and Soybean*, https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0959.[8] Indeed, the very purpose of Monsanto's VaporGrip technology is to reduce dicamba's volatility. Compl. ¶ 89. Moreover, together with the EPA and others, Monsanto developed labeling and application instructions specifically designed to reduce dicamba vaporizing or drifting. *See Final Label for XtendiMax® With VaporGrip® Technology*, Approved 11/09/2016, https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0958. Only following this review did the EPA approve XtendiMax herbicide for in-crop use. Compl. ¶ 121.[9]

RELEVANT STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at

[8] A court reviewing a motion to dismiss may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012). This includes information published by federal agencies and reliable material from "widely available sources." *See, e.g.*, *Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 904 (8th Cir. 2017) (considering information from "widely available sources," including a dictionary and a Britannica Academic article, on a motion to dismiss); *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) (considering Department of Agriculture regulations on a motion to dismiss); *Paskar v. City of New York*, 3 F. Supp. 3d 129, 134 (S.D.N.Y. 2014) ("Official government reports and other types of government records are appropriate for judicial notice.").

[9] The EPA and other regulators have continued to evaluate the use of dicamba herbicides and have monitored allegations of damage to non-target crops. Indeed, in October 2017, the EPA agreed with Monsanto, BASF, and DuPont on voluntary label amplifications to further assist applicators in making on-target applications and restricting the use of certain dicamba products only to certified applicators with special training. *See* 10/12/2017 *EPA Approval of Registration Amendment*, https://www3.epa.gov/pesticides/chem_search/ppls/000524-00617-20171012.pdf.

678 (citing *Twombly*, 550 U.S. at 556). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Allegations that are "'merely consistent with' a defendant's liability" do not show a plausible entitlement to relief. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. (quoting Fed. R. Civ. P. 8(a)(2)).

ARGUMENT

I. PLAINTIFFS LACK ANTITRUST STANDING

A. Plaintiffs Lack Standing to Sue for Damages Under the Sherman Act Because They Are Not Direct Purchasers

"[O]nly the 'overcharged direct purchaser, and not others in the chain of manufacture or distribution' can sue for antitrust damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides a private right of action for violations of Section 1 [and 2] of the Sherman Act." *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1058 (8th Cir. 2018) (citing *Illinois Brick v. Illinois*, 431 U.S. 720, 729 (1977)); *see Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998) ("[O]nly the 'direct purchaser' from a monopoly supplier could sue for treble damages under § 4 of the Clayton Act."). Claims for damages under the Sherman Act should therefore be dismissed where the complaint fails to plead facts showing that plaintiffs were direct

purchasers. *See, e.g.*, *Campos*, 140 F.3d at 1169-72 (affirming district court dismissal of Sherman Act damages claims on ground plaintiff was not a "direct purchaser").[10]

Plaintiffs' conclusory assertion that they were "direct purchasers of Monsanto's dicamba-tolerant trait in soybean seeds," *e.g.*, Compl. ¶ 179, is unsupported by the factual allegations and should be disregarded. *See, e.g., Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 555 (courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). As an initial matter, this reference to traits being "in" seeds hints at the reality here: farmers do not purchase *traits*, they purchase *seed* from various different seed companies that has been genetically modified to confer certain traits. *See, e.g.*, Compl. ¶ 168 (alleging that, "[a]s is common in the industry, Monsanto licenses its herbicide-tolerant traits to other seed companies," which "use Monsanto's herbicide-tolerant traits with [the seed company's] own seed varieties"). Other allegations in the complaint further clarify that the product Plaintiffs purchase is "seed." *See, e.g.*, *id*. ¶ 3 (alleging to have "*purchased and planted soybeans* containing Monsanto's dicamba-tolerant GM trait" and referring to "those *seeds*") (emphasis added); *id*. ¶ 163 (referring to "farmers who *purchase seed* containing [Monsanto] herbicide-tolerant traits") (emphasis added). The complaint, however, conspicuously omits any mention of who sold Plaintiffs the seed that they purchased.[11] Plaintiffs have thus failed to plead facts showing that they are direct purchasers *from Monsanto* and, therefore, failed to establish standing to bring this lawsuit under *Illinois Brick*.

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[10] *See also In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 659-60 (E.D. Mich. 2011) (dismissing claims because the allegations did not permit the court to "determine whether any of the [plaintiffs] has standing by virtue of having directly purchased . . . from a Defendant").

[11] The reason for this omission is simple: Plaintiffs did not purchase seed directly from Monsanto. *Cf. Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988) ("[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.") (citation omitted).

To the extent Plaintiffs' conclusory assertion that they were "direct purchasers" is based on "traits," rather than seed, that would also fail to satisfy *Illinois Brick* in light of Plaintiffs' allegations regarding the nature of their relationship with Monsanto. The only factual matter in the complaint on this point concerns an end-user limited license to Monsanto trait technology that farmers can obtain by signing a "Monsanto Technology / Stewardship Agreement" or "MTSA." *Id*. ¶ 163; *see id*. ¶ 165 ("The MTSA is a limited use license that allows growers to use Monsanto patented traits and germplasm only during that growing season.").[12] But merely being a licensee of intellectual property does not establish an *Illinois Brick* "direct purchaser" relationship. *See, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 709 (D. Md. 2001) ("Although the EULA [End User License Agreement] may establish a direct relationship between Microsoft and the consumer, that relationship is not sufficient to make the consumer a 'direct purchaser' within the meaning of *Illinois Brick.* "), *aff'd*, *Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir.

[12] As the complaint makes clear, the MTSA enables farmers to "purchase seed" containing Monsanto traits, further reflecting that the product Plaintiffs purchase is "seed." *See, e.g.*, Compl. ¶ 163 ("Monsanto requires all farmers who *purchase seed* containing its herbicide-tolerant traits to sign a" MTSA) (emphasis added); *id*. ¶ 164 ("*[S]eed* containing Monsanto patented technologies can be sold only to growers who are properly licensed.") (emphasis added) (internal quotation marks omitted).

2006).[13] Any allegation that Plaintiffs are limited licensees of Monsanto[14] thus would not support an inference that they are direct purchasers within the meaning of *Illinois Brick*.[15]

The concerns underlying the "direct purchaser" rule further support a finding that Plaintiffs do not satisfy it. "In *Illinois Brick*, the Supreme Court barred indirect-purchaser suits for federal antitrust damages, reasoning that those suits 'would create a serious risk of multiple liability for defendants' and 'the possibility of inconsistent adjudications.'" *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d at 1058 (quoting *Illinois Brick*, 431 U.S. at 730); *see Campos*, 140 F.3d

[13] Licensee status alone simply does not speak to key questions at the heart of the direct purchaser inquiry, such as whether a plaintiff's claimed injury flows from "antecedent transactions." *See, e.g.*, *Campos*, 140 F.3d at 1169-70 ("An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.").

[14] Plaintiffs do not specifically plead that they had, in fact, signed a Monsanto trait license agreement or provide the terms thereof. *See* Compl. ¶ 163 (alleging generally that "farmers" sign such agreements); *id*. ¶ 167 (quoting from a Monsanto trait license agreement without specifying if that agreement had been executed by either of the Plaintiffs). It is possible for a farmer to buy seed with a Monsanto trait without signing a license agreement supplied by Monsanto. This is due to the fact that some third party seed companies are licensed by Monsanto to sell traited seed to growers pursuant to licenses supplied by those seed companies. As a result of Plaintiffs' failure to identify the source of the seed they allegedly purchased, it is not clear that any Monsanto license is relevant to that seed. If Plaintiffs purchased seed from a third party seed company that could license them directly, then that license – not a Monsanto MTSA – would be the license that was relevant to their use of the seed.

[15] Prior decisions involving Monsanto either support the conclusion that Plaintiffs are not direct purchasers or are irrelevant in light of the nature of Plaintiffs' allegations here. In one such decision, a court found that a farmer "lacks standing to bring antitrust claims" against Monsanto because "[h]e is an indirect purchaser." *McFarling*, 2002 WL 32069634, at *3. A few other decisions have, under different circumstances, found that factual disputes precluded resolution of the "direct purchaser" issue; for example, most of these decisions involved farmers who had alleged or presented evidence that the third parties from whom they bought seed were "agents" of Monsanto. *See Blades v. Monsanto Co.*, 400 F.3d 562, 568, n.4 (8th Cir. 2005) (plaintiffs allegedly purchased "from an agent of Monsanto"); *McIntosh v. Monsanto Co.*, 462 F. Supp. 2d 1025, 1031 (E.D. Mo. 2006) (accepting for purposes of summary judgment motion that the seed sellers at issue "act as agents of Monsanto"); *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1094 (E.D. Mo. 2003) (same); *see also Schoenbaum v. E.I. DuPont De Nemours & Co.*, 517 F. Supp. 2d 1125, 1141 (E.D. Mo. 2007) (citing *Blades* and declining to resolve "direct purchaser" dispute pending further factual development where such resolution would not have been dispositive of the action since plaintiffs had also asserted antitrust claims under state laws that permitted indirect purchaser claims), *vacated in part*, No. 4:05CV01108 ERW, 2007 WL 3331291 (E.D. Mo. Nov. 6, 2007). Plaintiffs here do not plead facts that could support finding an agency relationship between Monsanto and the (unidentified) third parties from whom Plaintiffs purchased the soybean seed at issue. Further, these decisions did not confront the *Microsoft*-like situation presented here, whereby the alleged factual predicate for "direct purchaser" standing is limited to an end-user limited license.

at 1170 ("[T]he direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.").[16]

The circumstances here implicate those precise concerns. Monsanto both sells its own branded seed containing traits mainly to distributors and licenses its traits to seed companies that, in turn, incorporate the traits into their own seed products. *See supra* Factual Background § B. The seed companies then sell that seed to farmers or, as Monsanto does with its branded seed, to distributors or retailers who, in turn, sell to farmers. *See id*. The farmers are the last link in this chain, and their relationship with Monsanto is merely that of a limited licensee who has been granted a license to buy seed containing Monsanto traits in exchange for agreeing to certain use restrictions.[17] *See, e.g., id.*; Compl. ¶¶ 163, 165.[18] If Monsanto were to charge improper supra-competitive prices for its traits, farmers would be impacted only if, and to the extent that, such overcharge had been passed on to them in the seed price by the direct purchasers of the trait (*i.e.*, seed companies) and/or by any other antecedent links in the chain (*i.e.*, distributors, retailers). Allowing farmers like Plaintiffs to sue for such alleged pass-through damages under the Sherman Act would thus risk giving rise to the very concerns about "multiple liability" and "possibility of inconsistent adjudications" that are the basis for the direct purchaser rule.

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[16] *See also Kloth*, 444 F.3d at 320 ("The Supreme Court relied on two rationales in adopting the [direct purchaser] rule. First, allowing indirect purchasers to recover damages at each level down the economic chain 'would create a serious risk of multiple liability for defendants.' Second, courts would be required to engage in highly complicated calculations to 'apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge.' This would 'add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.' By adopting the rule barring recovery by indirect purchasers, the risk of duplicative recoveries and overcompensation for the same antitrust injuries was eliminated.") (internal citations omitted).

[17] While Plaintiffs cite MTSA language providing that farmers also agree "[t]o pay all applicable royalties and technology fees," Compl. ¶ 167, Plaintiffs do not allege that they made any such payments to Monsanto with respect to the traits at issue in this case. Nor could they because Plaintiffs, in fact, made no such payments.

[18] And even that licensing relationship may be indirect if the license relevant to the seed purchase was granted by a third party seed company. *See supra* n.14.

The *Microsoft* cases are instructive. There, plaintiffs had purchased computers that had Microsoft software preinstalled, and claimed to be "direct purchasers" of Microsoft by virtue of a license agreement for the software. Rejecting that argument, the Fourth Circuit found:

> In this case, it is apparent that the plaintiffs were indirect purchasers because they did not buy products directly from Microsoft. Rather, they purchased computers from OEMs or retailers on which Microsoft operating systems and software had been preinstalled. The plaintiffs were thus at the end of the retail distribution chain with at least one and possibly more intermediaries between them and Microsoft.

Kloth, 444 F.3d at 320. That rationale applies equally here: "[I]t is apparent that the plaintiffs were indirect purchasers because they did not buy products directly from [Monsanto]. Rather, they purchased [seed] from [seed companies, distributors,] or retailers [i]n which [Monsanto] [traits] had been [incorporated]. The plaintiffs were thus at the end of the retail distribution chain with at least one and possibly more intermediaries between them and [Monsanto]." *Id.*[19]

B. Plaintiffs Lack Standing Due to the Speculative Nature of Their Alleged Injury and Because They Are Not Efficient Enforcers of the Antitrust Laws

The Supreme Court has made "clear that the [antitrust] standing question requires an evaluation of the plaintiffs' harm, the alleged wrongdoing by the defendants, and the relationship between them." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373 (8th Cir. 1983) (citing *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 534-35 (1983)). Specifically, a court must weigh the following factors: "(1) [t]he causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) [i]mproper

[19] Put another way, the plaintiffs in *Microsoft* were indirect purchasers because "the immediate economic transaction constituting the purchase occurs between the consumer and an OEM or retail seller," not between the consumer and Microsoft. 444 F.3d at 318. Similarly, the "immediate economic transaction constituting the purchase" here occurs between the farmer and a seed company, distributor, or retail seller, not between the farmer and Monsanto. *Id.*; *see Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1122 (9th Cir. 2008) (plaintiff was not a direct purchaser, despite a contract with the defendant who manufactured the goods, because "[t]he presence of a contractual relationship between [plaintiff] and [defendant] does not change the fact that [plaintiff] also had a contract with [a distributor], and it was that contract that ultimately effectuated the transfer of these goods").

motive; (3) [w]hether the injury was of a type that Congress sought to redress with the antitrust laws; (4) [t]he directness between the injury and the market restraint; (5) [t]he speculative nature of the damages; (6) [t]he risk of duplicate recoveries or complex damage apportionment." *Id*. at 1374.[20] None of these factors supports finding that Plaintiffs have standing here.

The first, fourth, and fifth factors weigh strongly against Plaintiffs in light of the indirect, remote, and speculative nature of the alleged harm. Plaintiffs rely on a long and implausible chain of causation, whereby Monsanto's licensing of dicamba-resistant traits to seed companies, the incorporation of the traits into seed, and the sale of that dicamba-resistant seed ultimately to farmers allegedly induces a level and type of use (including illegal use and misapplication) of dicamba by independent third-party applicators so as to cause enough off-target movement to risk damaging neighboring farmers' crops, thereby forcing those farmers to purchase dicamba-resistant seeds that they would not otherwise purchase. Further, the claimed harm is an unsupported allegation that this conduct allowed Monsanto to charge supra-competitive prices for its traits, which—as noted above—would impact farmers, if at all, only if such overcharge were passed on to them by seed companies and other intermediaries in the form of increased prices for seeds.

Courts reject such attenuated theories of harm, particularly when they involve supervening and independent causes and actors. *See, e.g., Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 935 (8th Cir. 2012) ("When the injury alleged is the result of actions by some third party, not the defendant, the plaintiff cannot satisfy the causation element of the standing inquiry."); *Midwest Commc'ns v. Minn. Twins, Inc.*, 779 F.2d 444, 451 (8th Cir. 1985) (the plaintiff "must be the target

[20] "These factors are meant to guide a court in exploring the fundamental issue of whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 WL 7378980, at *15 (S.D.N.Y. Dec. 20, 2016).

of the anticompetitive activity, 'not one who has merely suffered indirect, secondary, or remote injury'"); *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 792 (8th Cir. 2006) (finding that plaintiffs' "'vaguely defined links' in the chain of causation, even if alleged by the plaintiffs, would be insufficient to establish antitrust standing").

With respect to the second factor (improper motive), as established below, not only have Plaintiffs failed to allege any facts plausibly suggesting that Monsanto had any improper motive in developing its dicamba-related products but, quite to the contrary, Plaintiffs' allegations far more plausibly support the conclusion that Monsanto was driven by the proper and pro-competitive interest in innovating to satisfy a pressing market demand. *See infra* Section III.B. Plaintiffs' conclusory allegations to the contrary are not sufficient. *See, e.g., AGC,* 459 U.S. at 537.

The third factor (nature of injury) weighs against standing because Plaintiffs fail to adequately allege a harm of the type the antitrust laws were meant to prevent. Plaintiffs' conclusory assertion that they paid supra-competitive prices is insufficient. *See, e.g.*, *Nat'l ATM Council, Inc. v. Visa Inc.*, 922 F. Supp. 2d 73, 84 (D.D.C. 2013) (allegation that plaintiffs paid "supra-competitive" fees was insufficient because "plaintiffs do not allege facts to support the necessary allegation that . . . fees charged . . . were actually inflated"); *Kirkwood Florist, Inc. v. Hi-Float, Inc.*, 812 F. Supp. 2d 1000, 1007 (E.D. Mo. 2011) (claimed threat of supra-competitive prices was "too vague and conclusory to support a claim under the Sherman Act"). Nor can Plaintiffs' assertions that there were reduced choices undermine that conclusion. Not only does the complaint lack factual allegations necessary to support such a contention, but a "limitation of consumer choice, in itself, does not amount to 'antitrust injury.'" *Somers v. Apple, Inc.*, 729 F.3d 953, 966-67 (9th Cir. 2013); *see Hirsh v. Martindale–Hubbell, Inc.*, 674 F.2d 1343, 1349 n.19 (9th Cir. 1982) ("[I]ntru[sion] upon consumers' freedom of choice by compelling the purchase of

unwanted products . . . has been implicitly rejected by the Supreme Court as a sufficient independent basis for antitrust liability.") (citing *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977)).[21]

Finally, the sixth factor (risk of duplicative recoveries or complex damage apportionment) weighs against standing here because there are more direct victims of the alleged violation, such as the seed companies that pay royalties to Monsanto for its trait technology. *See, e.g.*, *AGC,* 459 U.S. at 545 ("[T]he potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the [plaintiff]'s antitrust claim."); *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 490 (8th Cir. 1984) (affirming dismissal in part because of "the presence of more directly affected parties," which "diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general"); *Leak v. Grant Med. Ctr.*, 893 F. Supp. 757, 764 (S.D. Ohio 1995) (finding lack of antitrust standing where "there are at least two more easily imagined efficient enforcers"), *aff'd*, 103 F.3d 129 (6th Cir. 1996); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 WL 7378980 at *17 ("[C]ourts examine whether there exists a class that suffered an antitrust injury more directly than the present class and therefore would be more suited to bring an antitrust claim.").

II. PLAINTIFFS FAIL TO SATISFY THE *TWOMBLY* PLAUSIBILITY STANDARD

The Master Antitrust Complaint should also be dismissed because it fails to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

[21] *See also Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 690 (6th Cir. 2016) ("A loss of consumer choice is often anything but anti-competitive. . . . Newer, cheaper, better technology frequently makes old technology unavailable, even to consumers who preferred the old ways and the old technology."); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) (allegations "of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition" because "[b]oth effects are fully consistent with a free, competitive market").

A. Plaintiffs' Monopolization Theory is Based on Unsupported Claims of an Alleged Plot to Intentionally Damage Crops that is Highly Implausible and Makes No Economic Sense

Plaintiffs' claims violate the principle that "[a]ntitrust claims must make economic sense." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) (citing *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 468-69 (1992)); *see also Twombly*, 550 U.S. at 565 (plausibility "turns on the suggestions raised by [the] conduct when viewed in light of common economic experience").[22]

The core of Plaintiffs' lawsuit is speculation that Monsanto, at the risk of catastrophic regulatory and public backlash, spent tens of millions of dollars to research and develop dicamba-resistant traits, petitioned and received government approval to put them in commerce, and created an elaborate sales and licensing program—all to induce farmers to spray dicamba over the top of soybeans with the specific intent that it move off target and damage neighboring non-dicamba tolerant soybean fields, for the purpose of allegedly forcing those farmers to buy dicamba-tolerant seeds to avoid future crop damage and permitting Monsanto to charge higher prices for the dicamba-tolerant trait than it otherwise could. Compl. ¶ 2. "Such an allegation is based on layer after layer of factual speculation as to make the theory utterly implausible." *Corr Wireless Commc'ns, L.L.C. v. AT & T, Inc.*, 893 F. Supp. 2d 789, 812 (N.D. Miss. 2012). Plaintiffs' theory is utterly implausible for several reasons.

[22] "[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 317 (8th Cir. 1986) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

1. Plaintiffs' Theory Makes No Economic Sense Because Crop Damage Naturally Hurts Monsanto's Economic and Reputational Interests

Plaintiffs' implausible theory ignores the direct and reputational costs to Monsanto of crop damage due to off-target movement. That theory requires the Court to believe that Monsanto developed the Xtend trait and XtendiMax herbicide for the purpose of injuring soybean farmers in order to force those farmers onto Monsanto's platform, despite the direct and reputational risks that would necessarily be associated with any allegations of such a scheme.

Even more problematic for Plaintiffs' theory is the fact that the alleged non-target damage could not be limited to the few crops for which dicamba-tolerant seed are available. Dicamba-tolerant traits are only available for soybeans and cotton. *See* Compl. ¶ 120. All other vegetation sensitive to dicamba—such as fruits, vegetables, and trees—would, under Plaintiffs' theory, be subject to non-target damage that could not possibly benefit Monsanto; such damage could only further injure Monsanto's reputation and risk irreparably harming its brand and business. *See id.* ¶ 85.

2. Plaintiffs' Theory Is Implausible in Light of the Close Regulatory Scrutiny of Traits and Herbicides

Plaintiffs' claim that Monsanto intended drift / volatilization to occur is impossible to reconcile with the highly regulated, scrutinized, and public environment in which Monsanto operates. Long before the USDA approved Monsanto's Xtend traits, it was public knowledge that certain older formulations of dicamba could be volatile and move off target when applied in certain conditions. Compl. ¶¶ 75-76. Potential off-target movement of older dicamba formulations was an issue that the industry has addressed for decades—and was not something that would ever plausibly fly under the radar.

Amid this scrutiny, mere allegations of non-target damage introduce increased regulatory risk for Monsanto's dicamba-resistant products. Plaintiffs acknowledge that even unsubstantiated

allegations of non-target damage have led to calls for restrictions on the application of dicamba. Compl. ¶ 144. Increased levels of scrutiny from federal, state, and foreign regulatory authorities all impose costs on Monsanto and create risks regarding domestic and international deregulation of dicamba-resistant crops. Under these circumstances, it would be utterly implausible to suggest that Monsanto wanted dicamba to damage crops; the claim Plaintiffs actually make, that Monsanto *plotted to cause such damage*, is beyond implausible—it is absolutely absurd.

Indeed, the notion that Monsanto implemented a scheme designed to intentionally damage crops suggests one of two "implausible" conclusions: (i) Monsanto attempted to carry off this fictional plot under the noses of sophisticated regulators whose job it is to regulate the appropriate use of both traits and associated chemicals, including by ensuring that such products do not present unreasonable risks associated with drift and volatilization; or (ii) these regulatory agencies were willing participants in a nefarious scheme. Of course, neither of these conclusions is even remotely believable. The highly regulated nature of Monsanto's business is simply incompatible with the core theory of Plaintiffs' case. *See, e.g.*, *Corr Wireless*, 893 F. Supp. 2d at 812 (dismissing claims as "utterly implausible" that were based on allegations that the defendant defrauded regulators as part of a multi-year monopolization plot).

3. Plaintiffs' Theory Is Contradicted by Monsanto's Efforts to Develop and Promote Low-Volatility Dicamba

Plaintiffs' alleged monopolization plot is premised on Monsanto's alleged desire to have off-target movement that results in damage to soybeans that are not dicamba tolerant. But Plaintiffs allege that Monsanto initially entered into an agreement with BASF to pursue a low-volatility dicamba for use over-the-top of crops. Compl. ¶ 87. They further allege that Monsanto abandoned that approach in favor of devoting massive resources to its innovative XtendiMax herbicide to further reduce volatility, and then developed strict labeling to advise applicators how

to avoid off-target movement. *See, e.g.*, *id.* ¶¶ 89, 113. It makes no sense for Monsanto to have invested substantial resources in the development and approval of new formulations of dicamba designed to limit off-target movement, if it were relying on the existence of off-target movement to drive adoption of Xtend seeds.

Rather than supporting Plaintiffs' monopolization theory, this alleged behavior is far more consistent with (1) recognition that older dicamba formulations prone to off-target movement presented a regulatory risk to the success of Monsanto's dicamba-tolerant traits (as discussed above), and (2) recognition that developing a better, low-volatility version of the dicamba herbicide presented an additional market opportunity to launch a new, innovative product (as discussed below). Potential off-target movement was a threat to Monsanto's success, not a mechanism of it—which is why Monsanto has invested heavily to develop low-volatility technology. *Id.* ¶¶ 89, 113.

B. Monsanto's Development of Dicamba-Resistant Traits Is More Plausibly a Legitimate, Pro-Competitive Effort to Satisfy a Genuine Market Demand

A complaint must be dismissed if conduct was "more likely explained by lawful, unchoreographed free-market behavior." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 567). "Truly new and innovative products are to be encouraged, and are an important part of the competitive process. For this reason, the acquisition or maintenance of monopoly power as a result of a superior product does not violate the Sherman Act." *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1003 (N.D. Cal. 1979). A vigorous effort to bring a product to market is not anticompetitive behavior, even if that product will capture a greater share of the market. *See id.* That is exactly the situation here.

Plaintiffs' story of an evil plot carried out over many years and with innumerable moving parts is especially implausible because the factual allegations are entirely consistent with

legitimate, competitive efforts to introduce a useful new product. With the onset of certain glyphosate-resistant weeds in some geographic locations, Plaintiffs concede that many farmers sought an additional mode of action to address those glyphosate-resistant weeds. Compl. ¶¶ 70-73. Plaintiffs cannot—and do not—dispute that Xtend technology provides an effective additional mode of action against such glyphosate-resistant weeds. Indeed, Plaintiffs allege that huge investments of time, money, experience, and research are necessary to develop herbicide-tolerant traits and obtain necessary regulatory approvals. *Id.* ¶¶ 26, 27. Further, they allege that Monsanto "account[s] for the overwhelming majority of all research and development for future traits." *Id.* ¶ 24. These allegations are consistent with Monsanto investing heavily to innovate and develop new technologies. Thus, instead of a fanciful conspiracy narrative, Plaintiffs' allegations show a wholly legitimate and pro-competitive purpose for Monsanto's product.

"When a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a [Sherman Act] violation." *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 549-50 (8th Cir. 2007) (citing *Midwest Radio Co., Inc. v. Forum Pub. Co.*, 942 F.2d 1294, 1297-1298 (8th Cir. 1991); *Paschall v. Kan. City Star Co.*, 727 F.2d 692 (8th Cir. 1984)). Here, the complaint leaves no doubt that such "valid business reason[s]" existed for Monsanto to develop dicamba-tolerant traits: they were another mode of action, for which there was a market need, to address glyphosate-resistant weeds. Compl. ¶ 73.

III. PLAINTIFFS FAIL TO PLEAD THAT MONSANTO HAS MARKET POWER IN A VIABLE RELEVANT MARKET

To state a Section 2 claim, a plaintiff must plead "the possession of monopoly power" in a "relevant market." *Grinnell*, 384 U.S. at 570-71. Plaintiffs have the burden of defining a "proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," and "explain[ing] why the market [he] allege[s] is in fact the relevant,

economically significant" market. *Swann*, 2001 WL 34079480 at *3; *see Sherr v. HealthEast Care Sys.*, 262 F.Supp.3d 869, 885 (D. Minn. 2017) ("The Eighth Circuit and district courts within the circuit consistently dismiss antitrust claims at the pleading stage where a plaintiff fails to adequately allege a viable relevant market."). Defining a relevant market includes two components—a product market and a geographic market. *Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995). The complaint fails to define either adequately or to plead monopoly power in any market.

A. Plaintiffs' Product Market Definition is Inadequate and Inconsistent

Plaintiffs identify the relevant product market as "[h]erbicide-tolerant traits in soybean seeds." Compl. ¶ 11. However, Plaintiffs do not adequately justify why the market in this case should be so defined.[23]

Plaintiffs appear to be improperly attempting to define a technology market, focused on traits, so that they can rely on Monsanto trait prevalence to show market power. However, to satisfy their burden, Plaintiffs must plead a market in which they participate. *See, e.g., Grinnell*, 384 U.S. at 570-71. Farmers like Plaintiffs do not purchase "traits."[24] The actual participants in a "traits" technology market would be competing trait developers and breeders of new soybean seed varieties that license Monsanto traits for incorporation into seed. *See supra* Factual Background § B.

[23] Indeed, in other complaints in this MDL, plaintiffs' allegations suggested that both herbicide-resistant and non-resistant seeds were part of a broader market. *See e.g.,* Am. Compl., *Smokey Alley*, Case No. 4:17-cv-02031, ECF No. 82 ¶ 495 ("The relevant markets are currently soybeans and cotton, as well as dicamba resistant soybeans and cotton); *id.* ¶¶ 54-85 (alleging that some plaintiffs grew herbicide-resistant seeds and some grew non-resistant seeds).

[24] *See, e.g., McFarling*, 2002 WL 32069634, at *4 ("[T]he trait and the seed . . . are not separate products . . . The farmer can't go buy these two separate places, and couldn't even in the absence of Monsanto's agreements, because the farmer can't do the genetic engineering. That has to be done in the production of the seed. These products . . . are inherently tied together as one single product, because the genetic trait is contained in the seed, and for there to be a seed capable of being planted, it has to have been propagated after the insertion of the gene, and so there is simply not two separate products.").

Inconsistencies in the complaint also preclude a finding that Plaintiffs have met their burden of defining a relevant product market. Plaintiffs' "herbicide-tolerant traits in soybean seeds" market definition is inconsistent with their liability theory, which focuses on *dicamba*-tolerance, not *herbicide*-tolerance generally. *See, e.g.*, Compl. ¶¶ 2-4, 38, 160, 198; *see also id*. ¶ 181 (defining the putative class as purchasers of "Monsanto's *dicamba*-tolerant traits in soybean seeds") (emphasis added). And that fundamental inconsistency is just the tip of the iceberg: Plaintiffs refer to the market in a variety of different and inconsistent ways throughout the complaint. *See, e.g., id*. ¶ 44 ("the market for herbicide-resistant traits"); *id*. ¶ 171 ("the market for transgenic seeds"); *id*. ¶ 174 ("the market for herbicide-tolerant traits in soybeans"); *id*. ¶ 198 ("the market for herbicide-tolerant traits in all crops susceptible to dicamba, including soybeans"). Such inconsistencies underscore Plaintiffs' failure to adequately define the relevant market. *See, e.g., Satnam Distributors v. Altadis Inc.*, 140 F. Supp. 3d 405, 420 (E.D. Pa. 2015) ("Given these internal inconsistencies in Plaintiff's own allegations, . . . the Court finds that Plaintiff has failed to carry its burden of alleging a plausible product market."); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1195-96 (C.D. Cal. 2008) ("The allegations of the FACC are hopelessly muddled as to what product market (or markets) are at issue here . . . [A]ny number of markets might be intended . . ."). [25]

[25] *See also G.U.E. Tech, LLC v. Panasonic Avionics Corp.*, No. SACV1500789CJCDFMX, 2016 WL 6138422, at *5 (C.D. Cal. Feb. 4, 2016) ("G.U.E.'s increasingly creative—and sometimes contradictory—market definitions and antitrust allegations persuade the Court that there is no Sherman Act claim to be found here."); *Water, Inc. v. Everpure, Inc.*, No. CV 09-3389 ABC (SSX), 2009 WL 10670419, at *7 (C.D. Cal. Oct. 28, 2009) ("At various times, Water described the relevant market as 'water filtration products'… 'water delivery systems'… 'replacement cartridges'… and 'water systems that brew, soften and dispense water through a dedicated faucet'… But merely peppering the Complaint with characterizations of the products at issue does not allege the relevant market."); *CCPI Inc. v. Am. Premier, Inc.*, 967 F. Supp. 813, 818 (D. Del. 1997) (dismissing antitrust claims because of multiple and inconsistent formulations of the proposed relevant market).

B. Plaintiffs' Geographic Market Definition Is Inadequate

Plaintiffs also fail to adequately plead a relevant geographic market. A plaintiff has the burden of establishing that a proposed geographic area is economically significant and corresponds to commercial realities. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). The complaint here defines the geographic market with a single sentence as "areas of the United States where soybeans are grown and/or relevant sub-markets thereof." Compl. ¶ 15. This is too vague and conclusory.

First, the catchall "and/or relevant sub-markets thereof" renders Plaintiffs' geographic market definition vague, overbroad, and inconsistent. Courts dismiss claims premised on such vague definitions because they make it impossible to determine what market is actually alleged or whether a defendant possesses any power within that market. *See, e.g.*, *Acre v. Spindletop Oil & Gas Co.*, No. 4:09CV00421 JLH, 2009 WL 4016116, at *7 (E.D. Ark. Nov. 18, 2009) (dismissing complaint because "Arkansas and other surrounding states" failed to plead a relevant geographic market); *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1010 (N.D. Cal. 2013) (rejecting geographic market identified as "various regional markets in California and Oregon where Orchard and other retail sellers of power tools compete against one another" because it was "vague and conclusory").

Second, Plaintiffs' geographic market definition is wholly conclusory because they make no attempt to allege any factual or legal support for why all areas of the United States where soybeans are grown is a single market or, if submarkets exist, what those markets are and why they are distinct markets. *See, e.g.*, *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 688 F. Supp. 2d 443, 457 (E.D. Va. 2009) (dismissing complaint because "conclusory" allegations of whole U.S. market failed to plead a relevant geographic market).

The complaint also makes no allegations to support why or whether these particular plaintiffs—a Missouri farmer and an Iowa farm partnership—participate in a single market or distinct regional markets. Proposed geographic markets that do not "adequately address the question of where consumers could practicably go for alternative sources of" the product fail as a matter of law. *See, e.g.*, *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 709 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000); *see also Bathke*, 64 F.3d at 345–46 ("[T]here is still an absence of evidence on a critical question: where those gasoline consumers could practicably turn for alternatives.").

C. Plaintiffs Fail to Plead Market Power in Any Market

Independent of their failure to define a market, Plaintiffs also have not (and cannot) plead facts showing that Monsanto has unlawful market power in any market. The only factual allegations in the complaint regarding market share refer to the prevalence of Monsanto's patented trait in soybeans. *See* Compl. ¶¶ 25, 32. However, such figures include sales of seed containing Monsanto traits that were made by the many third party seed companies that license Monsanto traits, and thus cannot be used as the basis for measuring Monsanto's share of any market. *See, e.g.*, *Scruggs*, 342 F. Supp. 2d at 583 (noting that the plaintiffs, by focusing on the same type of trait prevalence figures cited by Plaintiffs here, "assume the propriety of including the market shares of Monsanto's seed partners in determining Monsanto's share of the relevant market," but "[n]o legal precedent supports such a remarkable position"; instead, "Monsanto's market share must be determined solely on the quantity of goods and/or services Monsanto sold").

Plaintiffs also cannot plead that Monsanto has unlawful market power in any market for "herbicide-resistant traits" because Monsanto has valid patents in all of the herbicide-tolerant traits that it licenses, including the dicamba-resistant trait that is the focus of this lawsuit. *See supra* Factual Background § A; Compl. ¶ 82 (acknowledging Monsanto's patent rights). The lawful

exercise of rights under a patent monopoly does not suffice as evidence to satisfy the "market power" inquiry under Section 2 of the Sherman Act. *McFarling*, 2002 WL 32069634 at *3-4 ("[Y]ou can't be liable under antitrust for exercising your valid patent rights."). Accordingly, courts have repeatedly cited Monsanto's patent rights as the basis for rejecting similar attempts to bring a Section 2 claim. *See, e.g.*, *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 582 (N.D. Miss. 2004) (proposed "market for Roundup® Ready [trait] technology" was improper because Monsanto has patents on the technology and "a patentee cannot be held liable under the antitrust laws for the natural monopoly afforded under the Patent Act"); *Monsanto Co. v. Swann*, 2001 WL 34079480, at *2 (E.D. Mo. Sept. 19, 2001) (dismissing Section 2 claims alleging monopoly in Roundup® Ready market because "[t]he plaintiff does not violate the Sherman Act by reason of a monopoly it has over its own product").

If Plaintiffs were claiming the relevant market to be "soybean seed," it is well established that Monsanto does not have shares in that market necessary to support a Section 2 claim. *See, e.g.*, *Scruggs*, 342 F. Supp. 2d at 583 (finding that "Monsanto possesses only a 25.6% market share in the [U.S.] market for soybean seeds," which was "insufficient to support a § 2 claim as a matter of law"); *McFarling*, 2002 WL 32069634, at *3-4 (finding, where relevant market was seed including a trait, that "even if I accepted the [opposing party's] experts' theories on this, it would not show that Monsanto has market power"); *see also Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp.*, 262 F. Supp. 2d 50, 74, 75 (S.D.N.Y. 2003) ("Courts have consistently held that firms with market shares of less than 30% are presumptively incapable of exercising market power.") (citing cases); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984) (30% share was not market power).

Monsanto's lack of market power in the soybean seed market is corroborated by data cited by Plaintiffs in this MDL. For example, the Master Antitrust Complaint cites an article reporting that Monsanto had a 28% share of that market in 2015. *See* Compl. ¶ 20; Aleksandre Maisashvili, et al., *Seed Prices, Proposed Mergers and Acquisitions Among Biotech Firms* (4th Quarter 2016) at p. 5, Table 2, https://ageconsearch.ummedu/bitstream/246985/2/cmsarticle_540.pdf; *see also* Am. Compl., *Smokey Alley*, Case No. 4:17-cv-02031, ECF No. 82 ¶ 490 ("According to 2017 estimates, Monsanto controls 28.2% of the soybean seed market").

IV. PLAINTIFFS FAIL TO PLEAD ESSENTIAL ELEMENTS OF THEIR SECTION 2 CLAIMS

A. Plaintiffs Fail to Plead that Monsanto Acted Willfully (Count I)

An essential element of a monopolization claim under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570-71; *see Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1280 (8th Cir. 1981) (a monopolist offends the antitrust laws only when it "take[s] measures *with the purpose* of preventing effective competition") (emphasis added).

Plaintiffs fail to satisfy this element given that, as established above, Plaintiffs allegations do not support a plausible inference that the claimed anticompetitive scheme occurred and, in fact, their allegations are far more consistent with lawful, procompetitive behavior and motivations rather than willful anticompetitive efforts. *See supra* Section II. Nor do any other allegations in the complaint support a different conclusion.

Plaintiffs appear to rely heavily on allegations relating to Monsanto's patents and associated licensing practices to attempt to show the requisite willfulness. But those allegations support no such inference, nor do they support any inference of wrongdoing whatsoever. While Plaintiffs do not challenge any of Monsanto's patents,[26] they weave undeveloped insinuations throughout the complaint that appear to be aimed at leaving the impression that Monsanto's licensing practices pursuant to those patents are somehow improper. *E.g.*, Compl. ¶¶ 35, 43, 94. Such insinuations cannot stand given that Monsanto's patent usage and licensing programs have been repeatedly upheld by courts. *See, e.g.*, *Bowman v. Monsanto Co.*, 569 U.S. 278, 281, 285 (2013) (affirming lawfulness of license providing that farmers may "plant the purchased seeds [with Monsanto traits] in one (and only one) season" and "may not save any of the harvested soybeans for replanting," and noting that to rule otherwise would mean that "Monsanto's patent would provide scant benefit"); *Scruggs*, 459 F.3d at 1338-41 (rejecting monopolization and patent misuse claims, and affirming legality of Monsanto trait licenses, royalties, and use restrictions); *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004) (affirming legality of use restrictions in Monsanto licenses for Roundup Ready soybeans); *McFarling*, 2002 WL 32069634, at *3-4 ("[T]he single use licenses that have been issued in this case have been upheld by the courts.").[27]

Nor do the alleged "agreements and collaborations with BASF," Compl. ¶¶ 204-12, support an inference that Monsanto engaged in willful anticompetitive conduct. Plaintiffs' conclusory

[26] *Cf. Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 873 (Fed. Cir. 1997) (holding that where "conduct underlying the allegations of misuse does not amount to patent misuse, the same conduct cannot support a judgment that [the patentee's] conduct violated the Sherman Act").

[27] Indeed, Plaintiffs devote ten paragraphs of their complaint to a 2009 patent infringement lawsuit that Monsanto *successfully* brought against a competitor, in which the competitor defensively raised antitrust counterclaims. Compl. ¶¶ 97-106. It strains logic for Plaintiffs to suggest that these allegations support their claims—to the contrary, that 2009 litigation is yet another demonstration of how Monsanto's advantage over its competitors comes lawfully from its innovative, market-leading, and patent-protected intellectual property. Indeed, in that very matter, a federal jury found that the competitor was, in fact, violating Monsanto's patent rights. *Monsanto Co. v. E.I. DuPont de Nemours & Co.*, Case No. 09-0686, ECF No. 1569 (E.D. Mo. Aug. 1, 2012).

speculation that such "agreements and collaborations" were in any way improper is wholly unsupported by any specific allegations of wrongful conduct. The only factual matter pled with respect to those "agreements and collaborations" concern lawful reciprocal licensing activity that cannot support an inference of wrongdoing. Plaintiffs do not identify a single Monsanto or BASF employee who entered any conspiratorial agreement, let alone when that agreement was reached or what its content was. Plaintiffs allege only the existence of publicly known cross-licensing agreements and research efforts between Monsanto and BASF—agreements that have long been recognized as procompetitive, lawful conduct. *See, e.g., Townshend v. Rockwell Int'l Corp*., No. C99-0400SBA, 2000 WL 433505, at *8 (N.D. Cal. Mar. 28, 2000) ("Generally, cross-licensing is considered a pro-competitive practice because it can facilitate the integration of complementary technologies."); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.0 (2017) ("[T]he Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive."). A plaintiff cannot satisfy its burden of pleading willful acquisition of market power by pejoratively labeling facially lawful behavior as anticompetitive.

B. Plaintiffs Fail to Plead Specific Intent to Monopolize (Counts II, III)

Plaintiffs' attempted monopolization and conspiracy-to-monopolize claims also fail because they do not allege any facts supporting a finding that Monsanto had the specific intent to monopolize. Such claims require a showing of the "specific intent . . . to produce monopoly power[, which] does not merely mean intent to prevail over one's rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably." *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987); *SuperTurf, Inc.*, 660 F.2d at 1280; *see also Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 975 (8th Cir. 1968) ("The complaint fails to allege acts or conduct which would show the requisite intent.").

Plaintiffs concede that they have no direct evidence of intent and instead assert that it can be inferred circumstantially from the alleged conduct. *See, e.g.*, Compl. ¶ 208 ("Monsanto acted with specific intent to monopolize *as expressed through its actions…*") (emphasis added). But the conduct Plaintiffs cite consists principally of lawful reciprocal licensing agreements which, as discussed above, support no inference of wrongdoing whatsoever, much less a specific intent to achieve a monopoly through improper means. *See supra* Section IV.A. Moreover, as also discussed above, Monsanto's conduct is far more consistent with legitimate, procompetitive behavior than it is with any unlawful intent. *See supra* Section II.B.

Plaintiffs simply do not allege any conduct that "has no legitimate business justification but to destroy or damage competition," as required to plead specific intent. *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 45 (D.D.C. 1998); *see Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (it is when the alleged conduct "has no rational business purpose other than its adverse effects on competitors[] [that] an inference that it is exclusionary is supported").[28]

C. Plaintiffs Fail to Adequately Plead a Conspiracy (Count III)

To "withstand a motion to dismiss, a plaintiff must go further than merely alleging a conspiracy existed, for a bare bones accusation of conspiracy without any supporting facts is insufficient to state an antitrust claim." *Sherr*, 262 F. Supp. 3d at 883. There must be allegations that show "that the [co-conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). There must also be allegations tending to exclude the possibility of independent action.

[28] Nor, with respect to the conspiracy claim, do Plaintiffs plead the requisite intent on the part of BASF. *See, e.g., SuperTurf, Inc.*, 660 F.2d at 1283 ("[I]t must be shown that the defendant's alleged coconspirators . . . shared its specific intent to create a monopoly . . .").

See, e.g., *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 423 (8th Cir. 2009) ("[A]ppellants' claims of antitrust conspiracy were appropriately dismissed. The record shows that appellants failed to exclude the possibility of independent action.").

Plaintiffs' conspiracy claim is based on "agreements and collaborations with BASF." Compl. ¶¶ 204-12. As explained above, however, the only factual matter pled with respect to those "agreements and collaborations" concerns lawful licensing activity that cannot support an inference of wrongdoing. *See supra* Section IV.A. Plaintiffs offer nothing beyond that lawful conduct to support their conspiracy theory. Rather, Plaintiffs allege only that damage to non-target crops occurred, and then rely on speculation and conclusory statements to imply that Monsanto and BASF must have intended that damage occur, and entered an agreement with that intent as part of a grand conspiracy. That is insufficient to plead the existence of an anticompetitive conspiracy. *See, e.g.*, *Nitro Distrib.*, 565 F.3d at 423 ("[C]onduct that is as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (internal citations and quotations omitted); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 753 F. Supp. 2d 912, 924 (E.D. Mo. 2010) (dismissing conspiracy-to-monopolize claims due to plaintiff's failure to plausibly allege a conspiracy); *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 236 (E.D.N.Y. 2009) (same).[29]

[29] The plausibility of Plaintiffs' conspiracy claim is further undermined by their allegations, *e.g.*, Compl. ¶ 32, that Monsanto was already a monopolist prior to any agreements with BASF. *See, e.g.*, *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 5:16-CV-06370-EJD, 2017 WL 4310767, at *7 (N.D. Cal. Sept. 28, 2017) ("Plaintiff's theory that [Defendant] and the Settling Manufacturer are involved in a conspiracy to restrain trade makes no economic sense in the face of allegations that [Defendant] is already a monopolist . . . If [Defendant] desired to increase prices or set price terms, it would be far easier for [Defendant] to do just that than to collude with another company, given its purported level of control over the relevant market.") (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Master Antitrust Class Action Complaint should be dismissed in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ John J. Rosenthal