UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,	)	
	)	**MDL No. 1:18-md-02820-SNLJ**
Plaintiff,	)	
	)	**Indiv. Case No. 1:16-cv-00299-SNLJ**
v.	)	
	)	
MONSANTO COMPANY and BASF CORPORATION,	)	
	)	
Defendants.	)	

MONSANTO COMPANY'S MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S LIABILITY THEORIES[1]

The Court should enter judgment as a matter of law in favor of Defendant Monsanto Company ("Monsanto") on all of Plaintiff's claims for the reasons stated in its Motion for Judgment as a Matter of Law on Plaintiff's Liability Theories (ECF #495), and Memorandum in Support (ECF #496) (collectively, "JAML Motion"), and the reasons set out below.

[1] The brief is being submitted in 13-point font per the Court's request. When formatted in 12-point font for text and 10-point font for footnotes, the brief complies with the 15-page limit for motions and briefs.

ARGUMENT

I. PLAINTIFF HAS NOT PRESENTED LEGALLY SUFFICIENT EVIDENCE TO PROVE ACTUAL CAUSATION FOR ANY MONSANTO PRODUCT.

A. Plaintiff Did Not Present Evidence that It Was Harmed by XtendiMax.

The Court should not submit Plaintiff's claims regarding XtendiMax® with VaporGrip® Technology ("XtendiMax") to the jury, because Plaintiff presented no evidence that it has ever been harmed by an application of XtendiMax. Dr. Baldwin, Plaintiff's sole liability expert, did not testify that Plaintiff's alleged exposure was due to an application of XtendiMax. Dennis Cravens testified only that he saw "packaging with the brand name XtendiMax" on Chad Fullerton's farm in 2017, the first year XtendiMax was marketed. *See* 2/3/2020 Trial Tr. (Cravens) at 854:1-855:10. But that testimony is insufficient to provide the evidentiary basis Plaintiff needs, because Mr. Cravens offered no other relevant information that could plausibly allow the jury to infer that Mr. Fullerton made an application of XtendiMax that harmed Plaintiff's orchards. Plaintiff did not present testimony that Mr. Fullerton misapplied XtendiMax in a manner that would permit its off-target movement, or even that he applied XtendiMax prior to the time that Mr. Bader discovered the alleged dicamba symptomology on the orchards. Without that testimony, the jury would be left with only speculation that (1) the orchards were exposed to Chad Fullerton's supposed XtendiMax application, and (2) that such exposure caused Plaintiff harm. Evidence that someone saw a package with the word "XtendiMax" on it is not sufficient to provide an evidentiary basis for a claim that XtendiMax caused Plaintiff's harm. *Nolte v. Pearson*, 994 F.2d 1311, 1316 (8th Cir.

1993). Because Plaintiff did not provide *any* evidence that XtendiMax caused its damage, all of Plaintiff's claims regarding XtendiMax fail. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007).

B. Plaintiff Did Not Present Sufficient Evidence That Monsanto's Xtend Seed Was The Actual Cause of Its Harm in Any Year.

The Court allowed Plaintiff to proceed to trial on a theory that Xtend seed was the actual and proximate cause of its damage. *See* 5/8/18 Mem. & Order (ECF #134) at 4; *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 720 (E.D. Mo. 2019); 12/31/2019 Mem. & Order (ECF #288) at 6. That theory fails as a matter of law, for the reasons stated in Monsanto's numerous prior briefs, which are incorporated here. But even if that theory were legally viable, Plaintiff failed to provide even the most basic evidence required to prove it—*i.e.*, evidence establishing that (1) Monsanto sold the seed, and (2) the dicamba herbicide that allegedly harmed the orchards was actually applied over the top of a crop grown from Xtend seeds. Plaintiff failed to meet this minimum requirement for each year from 2015 to 2018.

1. Plaintiff provided no evidence the orchards were exposed to dicamba applied to an Xtend crop in 2015.

Plaintiff failed to produce any evidence that it was exposed to dicamba applied to an Xtend crop in 2015. Dennis Cravens testified that he was *not* aware of any application of dicamba over any Xtend crop in that year. *See* 2/3/20 Trial Tr. (Cravens) at 856:07-13. Bill Bader could provide only speculation that Plaintiff was harmed by Gary Murphy, Chad Fullerton, Jeff Todd, or Bruce Dawson applying dicamba over Xtend cotton in 2015. 2/5/2020 Trial Tr. (Bader) at 1055:12-1056:18. And on cross

examination, Mr. Bader admitted he had no actual knowledge whether the dicamba he believes caused Plaintiff's harm was applied over corn, cotton, soybeans, as a burndown, or for any other use. *Id.* at 1088:11-15.

Dr. Baldwin's testimony also cannot satisfy Plaintiff's burden. Dr. Baldwin readily conceded that he could not determine whether Plaintiff's alleged dicamba exposure came from dicamba applied over corn or some other crop not manufactured or sold by Monsanto. *See* 2/7/2020 Trial Tr. (Baldwin) at 1411:03-07. In fact, Dr. Baldwin's *only* basis for asserting that Plaintiff was harmed by dicamba applied over Xtend crops was that some Xtend seed sales were registered to addresses around Bader Farms in 2015. *Id.* at 1298:18-1300:06. But this evidence is insufficient to support Plaintiff's case for two reasons. First, as Monsanto's District Sales Manager Greg Starling testified, a seed sale registered to a particular address does not mean the seed was actually planted at that address. *See* 1/31/2020 Trial Tr. (Starling Dep. at 261:25-263:22). Second, Dr. Baldwin conceded that other companies apart from Monsanto manufactured and sold Xtend seeds during the years relevant to Plaintiff's claims. *See* 2/7/2020 Trial Tr. (Baldwin) at 1513:21-1514:13. Plaintiff failed to present any evidence that the seed sales captured by the registry Dr. Baldwin relied upon reflected purchases of Xtend seeds manufactured or sold ***only by*** Monsanto. For that reason, Plaintiff did not provide a sufficient evidentiary basis—beyond mere speculation—that the orchards were damaged by dicamba applied to a crop grown from Xtend seeds. Monsanto is therefore entitled to judgment as a matter of law with respect to Plaintiff's 2015 claims.

2. Plaintiff failed to introduce evidence sufficient to support a finding that its orchards were exposed to dicamba applied to an Xtend crop in 2016.

In its attempt to link its alleged 2016 damage to dicamba applied over an Xtend crop, Plaintiff relied in part on Dr. Baldwin's testimony regarding the seed sale registry discussed above. For the reasons already addressed, the seed sale registry is insufficient to provide the evidentiary basis Plaintiff needs. Plaintiff also presented testimony from Dennis Cravens and Bill Bader to support its 2016 claims. For the reasons explained in Monsanto's JAML Motion, that testimony was also insufficient to make a submissible case for Plaintiff's claims in that year. *See* JAML Motion (ECF #496) at 12-13.

3. Plaintiff failed to introduce evidence sufficient to support a finding that its orchards were exposed to dicamba applied to an Xtend crop in 2017-18.

For its 2017 and 2018 claims, Plaintiff relied solely on the seed sale registry to show that in those years its orchards were exposed to a dicamba herbicide applied over an Xtend seed. *See* 2/6/2020 Trial Tr. (Baldwin) at 1316:07-16, 1323:21-1324:04. Again, for the reasons addressed above, the seed registry provides an insufficient evidentiary basis for Plaintiff's claims.

* * *

In all, Plaintiff has failed to provide sufficient evidence that—in any year relevant to its claims—it was exposed to dicamba as a result of an application to an Xtend crop.

For that reason, Plaintiff has failed to provide an evidentiary basis for its seed theory of liability.[2]

C. Any Claim That a So-Called "Xtend System" Or "Dicamba-Tolerant System" Caused Plaintiff's Harm Fails As A Matter Of Law.

Despite the Court's clear pretrial rulings that Plaintiff's claims are based solely on Xtend seed, Plaintiff has claimed in various submissions and at trial that the product underlying its claims is a so-called "Xtend system."[3] *See* Pl. MSJ Opp. (ECF #243) at 3; Third Am. Compl. (ECF #168) ¶ 5. Plaintiff has further asserted that the "Xtend system" consists of (1) Monsanto's dicamba-tolerant Xtend seeds, (2) Monsanto's XtendiMax and Defendant BASF's Engenia, and sometimes even (3) any other dicamba herbicide. This theory of liability fails as a matter of law.

To state a cause of action for its claims against Monsanto, Plaintiff must *at least* identify a product Monsanto manufactured or sold, and present some evidence that the product caused its injuries. *See* MAI 25.04, 25.05, 25.09; *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007). Accordingly, any claims tied to a so-called "Xtend system" fail because the "Xtend system" is not a product that Monsanto manufactures or sells. Instead, "Xtend crop system" is a "marketing term" that refers to

[2] Monsanto also incorporates herein the arguments it made in Monsanto Company's Actual Causation Memorandum. *See* ECF #522.

[3] Monsanto's argument in this section applies with equal force to Plaintiff referring to Monsanto's product as the "dicamba-tolerant system." Monsanto does not sell a "dicamba-tolerant system" as a single product that can serve as the basis for a product liability claim.

various individual products—Xtend seeds, which are resistant to dicamba, glyphosate, and glufosinate—that are all sold separately. *See* 1/29/2020 Trial Tr. (Carey) at 620:15-622:12. Even more, as Boyd Carey's testimony made clear, the term "Xtend system" is not limited to dicamba herbicides, because it is important for farmers to use "multiple different herbicides with different modes of action" over the Xtend seed. *Id.* at 620:15-621:23. And the low-volatility dicamba herbicides that *were* included in the marketed "system" included brands from four different companies, not only the ones manufactured and sold by Defendants. *Id.* at 621:24-622:10 (low-volatility dicamba herbicides included brands marketed by Dow and Syngenta, in addition to XtendiMax with VaporGrip and Engenia). The "system" did not include any other dicamba herbicide. *Id.* Finally, Mr. Carey's undisputed testimony established that no company sold the dicamba-tolerant seeds and herbicides that comprise the "Xtend system" as a single product. *Id.* at 622:18-623:12 (testifying that the Xtend seed and herbicides are "independent products" that are sold separately).

It is thus nonsensical to refer to the "Xtend system" as the "product" underlying Plaintiff's product liability claims against Monsanto. Plaintiff's theory that it was harmed by Monsanto's manufacture or sale of an "Xtend system" fails as a matter of law, because the theory does not connect Plaintiff's injuries to an actual product that Monsanto manufactures or sells. *See City of St. Louis*, 226 S.W.3d at 115.

II. PLAINTIFF HAS NOT PRESENTED LEGALLY SUFFICIENT EVIDENCE TO PROVE PROXIMATE CAUSATION

"Once actual causation has been established, the issue becomes one of legal cause—also known as proximate cause—that is, whether the defendant should be held liable because the harm is the reasonable and probable consequence of the defendant's conduct." *City of St. Louis*, 226 S.W.3d at 114.

A. Plaintiff Failed to Introduce Evidence Sufficient to Support a Finding that Monsanto Proximately Caused Its Alleged 2015-2016 Damage.

Any potential dicamba application to an Xtend crop that could have injured Plaintiff's orchards in 2015 or 2016 was illegal and a violation of Monsanto's product labeling and, therefore, a superseding and intervening cause of Plaintiff's alleged injury.[4] Plaintiff's claims for 2015 and 2016 therefore fail as a matter of law. This Court has nonetheless ruled "that a third parties' misconduct cannot be deemed an intervening and superseding cause if it was foreseeable." *In re Dicamba Herbicides Litig.*, 2018 WL 2117633, at *2 (E.D. Mo. May 8, 2018). A third-party's misuse of a product is not foreseeable as a matter of law when the defendant warned the end-user against the specific misuse. *See Lindholm v. BMW of N. Am., LLC*, 862 F.3d 648, 652 (8th Cir. 2017). That is what the evidence showed here.

The undisputed evidence establishes that Monsanto undertook a concerted effort to warn farmers against applying old dicamba herbicides to the Xtend seed in 2015. *See* M-

[4] A superseding cause is a "new and independent force which so interrupts the chain of events initiated by defendant's negligence as to become the responsible, direct, proximate cause of the injury." *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 651 (Mo. App. 1989) (internal citations omitted).

346; 1/28/2020 Trial Tr. (Magin Dep. at 370:13-373:20) (in addition to the sticker on the seed bags, Monsanto reached out directly to growers throughout the 2015 planting season to remind them that applying old dicamba was illegal). Monsanto even offered farmers rebates to purchase non-dicamba herbicides from Monsanto's competitors for the 2015 season. *See* 1/28/2020 Trial Tr. (Magin Dep. at 373:24-374:17). The information campaign and rebate program apparently worked, as (1) Dennis Cravens testified that he was not aware of any illegal applications around Plaintiff's orchards in 2015 (2/3/2020 Trial Tr. (Cravens) at 856:10-13); (2) Plaintiff's original petition alleged there were only 27 dicamba-related complaints made to the Missouri Department of Agriculture in 2015 (Bader Farms Petition (ECF #1-1) ¶ 126); and (3) Dr. Baldwin admitted that the number of off-target herbicide complaints in 2015 was low (*see* 2/6/2020 Trial Tr. (Baldwin) at 1302:06-17). The undisputed evidence further showed that Monsanto waged a similar information campaign before and during the 2016 growing season. M-348; 1/28/2020 Trial Tr. (Magin Dep. at 374:18-375:22); 1/29/2020 Trial Tr. (Carey) at 445:04-09 (testifying Monsanto "prepared a very aggressive communications plan to warn people" against applying old dicamba in 2016).

The evidence at trial does not support a finding that illegal applications of old dicamba to Xtend crops in 2015 and 2016 were foreseeable such that Monsanto could be held liable for damages allegedly caused by those illegal applications. Instead, the undisputed evidence showed that Monsanto undertook an aggressive information campaign in 2015 to warn farmers about applying old dicamba illegally, the 2015 campaign worked, and Monsanto renewed the same efforts before and during the 2016

planting season. Under these facts, any misuse of the Xtend seed by applying old dicamba over the top of the seed was not foreseeable as a matter of law. *Lindholm*, 862 F.3d at 652. Monsanto is entitled to judgment as a matter of law on Plaintiff's 2015 and 2016 claims, because the illegal third-party applications of old dicamba herbicides that constitute an intervening and superseding cause of Plaintiff's injury.

B. Plaintiff Failed to Introduce Evidence Sufficient to Support a Finding that Monsanto Proximately Caused Its Alleged 2017-2018 Damage.

At trial Plaintiff failed to identify a specific application of dicamba that it asserts caused its damage. Thus, Plaintiff cannot show that its damage was caused by a legal, label-compliant application of a dicamba herbicide over an Xtend seed. Plaintiff therefore did not provide an evidentiary basis for the jury to find that the *Xtend seed* proximately caused its damage, rather than the deficiencies in the herbicide allegedly applied over the seed or errors in the herbicide's application. Monsanto is thus entitled to judgment as a matter of law on Plaintiff's 2017 and 2018 claims as well.

III. MONSANTO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S PRODUCT LIABILITY CLAIMS (COUNTS I-IV).

A. Monsanto Is Entitled To Judgment As A Matter Of Law On Plaintiff's Design Defect Claims.

1. Use of the Xtend seed with a dicamba herbicide in 2015 and 2016 was not its reasonably anticipated use.

For its strict liability and negligent design defect claims, Plaintiff is required to show that the product underlying its claim was "in a defective condition unreasonably dangerous when put into a reasonably anticipated use," and that the product was "used in a manner reasonably anticipated." *Pree v. Brunswick Corp.*, 983 F.2d 863, 865 (8th Cir.

1993); *DG&G, Inc. v. FlexSol Packaging Corp.*, 576 F.3d 820, 825 (8th Cir. 2009) (dismissing negligent design defect claim because the plaintiff did not "establish a reasonably anticipated use").[5] Under Missouri law, "reasonably anticipated use" includes "misuse" that is "objectively foreseeable." *DG&G, Inc.*, 576 F.3d at 825. Plaintiff did not present sufficient evidence that the Xtend seed was defective when put to its reasonably anticipated use.

For 2015 and 2016, the undisputed evidence established that applying old dicamba to the Xtend seed was not the seed's reasonably anticipated use. Instead, the undisputed evidence showed that the seed contains valuable attributes in addition to its dicamba tolerance, and that it was sold in 2015 and 2016 so that farmers could benefit from those other attributes. *See* JAML Motion (ECF #496) at 28-30; *see also* 1/28/2020 Trial Tr. (Magin Dep. at 329:13-330:06, 372:19-374:17, 392:25-393:11). Indeed, even Dr. Baldwin confirmed that the seed has valuable attributes beyond its dicamba tolerance, and that he in fact recommended both the Xtend cotton and soybean seed to numerous farmers because of the seeds' "genetics." 2/6/2020 Trial Tr. (Baldwin) at 1404:18-22, 1406:14-1407:07; *see also id.* at 1288:18-1289:14.

[5] Negligent design and negligent failure to warn claims "have a higher threshold of proof" than their strict liability counterparts. *Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107, 1115 (8th Cir. 2007). Thus, if the Court finds that Plaintiff failed to present a submissible claim for its strict liability product liability claims, it must also grant Monsanto judgment as a matter of law on Plaintiff's negligence claims. *See Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296 n.2 (8th Cir. 1996).

Monsanto including a sticker on each bag of Xtend seed specifically warning users not to spray dicamba not approved for in-crop use—as well as Monsanto's outreach campaigns discussed *supra* in Section II.A.—precludes a finding that this type of misuse was the seed's "reasonably anticipate use" or that it was "objectively foreseeable," as a matter of law. *See* M-346, M-348; *Lindholm*, 862 F.3d at 651-52 ("We conclude that [the plaintiff's] misuse of the jack was not foreseeable as a matter of law, given the warnings that accompanied it."); Restatement (Second) of Torts § 402A, comment j.

2. Plaintiff failed to show that the Xtend seed that allegedly caused its harm in 2017 and 2018 was put to its reasonably anticipated use.

Plaintiff's design defect claims directed to Monsanto's Xtend seed for 2017 and 2018 fail because Plaintiff cannot show it was harmed by a third-party putting the Xtend seed to its reasonably anticipated use. JAML Motion (ECF #496) at 30-31. The undisputed evidence shows that the only dicamba herbicides reasonably intended to be applied over the Xtend seed in those years were low-volatility herbicides. *See, e.g.*, 2/3/2020 Trial Tr. (Orr Dep. at 30:05-10). Because Plaintiff cannot show it was harmed by an application of a low-volatility herbicide applied to an Xtend crop, Plaintiff's claims for 2017 and 2018 fail as a matter of law.

3. Plaintiff failed to prove its design claims as to XtendiMax.

Plaintiff also failed to provide sufficient evidence to support a jury finding that XtendiMax contained a design defect. As addressed in Monsanto's JAML Motion, Missouri law requires expert testimony for design defect claims involving complex products, such as the chemical components in an herbicide. At trial, Plaintiff failed to

present admissible expert testimony that XtendiMax contained a design defect. And because Plaintiff failed to identify a specific individual's application of XtendiMax that allegedly harmed it, Plaintiff failed to show that XtendiMax was "used in a manner reasonably anticipated" when the herbicide allegedly caused its damage. Thus, any design defect claim with respect to XtendiMax fails as well.

B. Monsanto Is Entitled to Judgment as a Matter of Law on Plaintiff's Failure to Warn Claims.

1. Plaintiff's failure to warn claims fail with respect to Xtend seed.

As addressed in Monsanto's JAML Motion, Plaintiff's strict liability and negligent failure to warn claims with respect to the Xtend seed fail for a variety of reasons. No witness testified that the Xtend seed's label or Monsanto's many warnings to farmers were inadequate in that a different label or warning would have prevented Plaintiff's alleged harm. In addition, to prove the allegedly inadequate warning caused its harm, it was Plaintiff's burden to present evidence that the third-party responsible for its harm, and who received the allegedly inadequate warning, was not already aware of the risks Plaintiff believes he should have been warned about. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. 1992). Only then would Plaintiff be entitled to a presumption that a different warning would have altered that third-party's behavior. *Id.* Plaintiff failed to lay that evidentiary foundation.

Not only did Plaintiff fail to present testimony that the *unidentified* third-party who allegedly caused its harm lacked knowledge of the seed's risk, Dr. Baldwin actually testified that the seed's risks *were well-known*. He testified that the volatility risks of old

dicamba herbicides have been well-known since the 1960s. *See* 2/6/2020 Trial Tr. (Baldwin) at 1264:23-1266:13. He also directly acknowledged that old dicamba's volatility risks were precisely the reason farmers had refrained from applying the herbicide for many years:

> Another thing that has limited [dicamba's] use is, it's known to be a volatile compound. In the acid form, dicamba is volatile, and you've heard a lot of discussion on that as well. That has limited somewhat the use of the herbicide through the years.

2/6/2020 Trial Tr. (Baldwin) at 1264:07-15. Plaintiff's failure to show that the unidentified farmer who made the alleged unlawful application of dicamba to an Xtend crop lacked knowledge of what Plaintiff believes he should have been warned about is alone sufficient to grant Monsanto judgment as a matter of law on these claims. *See Williams v. Ford Motor Co.*, 2013 WL 3874751, at *8 (E.D. Mo. July 25, 2013) (Limbaugh, J.); *American Auto. Ins. Co. v. Omega Flex, Inc.*, 2013 WL 2628658, at *13 (E.D. Mo. June 11, 2013). But Dr. Baldwin's repeated testimony that the volatility risks of old dicamba were well-known makes it even more apparent that Plaintiff has failed to lay an evidentiary basis for the causation element of these claims. The Court should therefore grant Monsanto's motion for judgment as a matter of law on Plaintiff's failure to warn claims.[6]

[6] In addition, as the Court intimated after Plaintiff closed its case, Plaintiff is simultaneously arguing that Monsanto's warnings to farmers were not adequate, while also arguing that no warning would have been enough to protect Plaintiff from harm. *See* 2/10/2020 Trial Tr. at 1678:14-18. Indeed, Plaintiff's argument is not submissible under Missouri law, because it is inherently inconsistent with a finding that the allegedly inadequate warning caused Plaintiff's damages.

2. Plaintiff's failure to warn claim with respect to XtendiMax fails.

FIFRA imposes extensive pesticide labeling 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(f) ("EPA will approve an application [for pesticide registration] . . . only if (f) the 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.").[7] Congress determined that the federal requirements for pesticide labeling should be exclusive and, thus, included an express preemption provision in FIFRA, which directs that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b).

Interpreting that provision in the context of common law failure to warn claims, the U.S. Supreme Court held that the statute preempts all claims that seek to impose requirements other than those set out in FIFRA. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 452 (2005) ("The provision also pre-empts any statutory or common-law rule

[7] Under FIFRA, a pesticide is misbranded (and thus cannot be registered by EPA) if, *inter alia*: "(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 136a(d) of this title, are adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(A); *see also* 40 CFR § 156.10(a).

that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations."). Thus, a plaintiff's exclusive path to proving a failure warn claim for a federally-registered pesticide is to establish a violation of the federal labeling requirements set out in FIFRA. *Id*. at 454 ("[A] manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA."); *id*. at 451 (allowing state law claims "*that enforce federal misbranding requirements*"). Indeed, the court went on to hold that, if a failure to warn claim proceeds to trial, "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards." *Id*. at 454.

Here, Plaintiff's failure to warn claims directed to XtendiMax are preempted in their entirety because Plaintiff failed to introduce any evidence that Monsanto sold XtendiMax without its federally-approved labeling, or that its federally-approved labeling fails to comply with FIFRA. Even more, Plaintiff needed to present expert testimony to provide an adequate evidentiary basis for the jury to find that XtendiMax's labeling fails to comply with FIFRA, which it failed to do. Dr. Baldwin was not qualified to—and did not—offer that opinion. For these reasons, the Court should enter judgment as a matter of law in favor of Monsanto on Plaintiff's failure to warn claims directed to XtendiMax.

Even if there were no preemption issue with respect to the XtendiMax label, Plaintiff's failure to warn claim with respect to XtendiMax would still fail. As with Plaintiff's claims in connection with the Xtend seed, Plaintiff failed to specifically identify a third-party whose use of XtendiMax allegedly caused its harm. Plaintiff thus

could not provide evidence that the third-party who applied XtendiMax, and who received the allegedly inadequate warning, was not already aware of the full scope of the herbicide's risks. Thus, Plaintiff failed to provide sufficient evidence for the causation element of this claim as well.

IV. NO EVIDENCE SUPPORTS A FINDING THAT PLAINTIFF IS ENTITLED TO LOST PROFITS OR FUTURE DAMAGES.

Plaintiff alleges in its Third Amended Complaint that "[e]very acre of [its] orchards, fields, and crops has suffered dicamba damage, resulting in substantial yield loss and lost profits." Third Am. Compl. (ECF #168) ¶ 559. The calculation that Plaintiff's damages expert, Dr. Guenthner, employed assumed that Plaintiff would be out of business by 2019:

> Q: So if your model is based on being out of business in 2019 and 2020 and Mr. Bader actually still is in business in 2020, your model looking forward is—would be incorrect; right?
>
> A: It would. . . . .

2/7/2020 Trial Tr. (Guenthner) at 1621:01-06.[8]

But Dr. Guenthner's assumption has been disproven by the undisputed evidence Plaintiff presented at trial. Bill Bader testified that Plaintiff's peach farm operations were active in 2019 and would continue into 2020. *See* 2/5/2020 Trial Tr. (Bader) at 1021:14-1022:02, 1023:25-1024:01. Mr. Bader further testified that, in 2017 and 2018, he purchased additional peach orchards to farm, and that he recently spent more than $1

[8] Monsanto incorporates herein the arguments it made in its Motion and Memorandum to Strike the Testimony and Opinions of Plaintiff's Expert Dr. Guenthner (ECF #504), which was renewed on 1/12/20.

million for an additional peach farm. *Id.* at 1128:05-1131:06. Mr. Bader is also continuing to purchase peach trees to plant, including 2,000 new trees for 2020. *Id.* at 1130:25-1131:6. Dr. Guenthner stated that he relied upon Dr. Baldwin's expert opinion for his assumption that Plaintiff's peach operations would be out of business by this year. *See* 2/7/2020 Trial Tr. (Guenthner) at 1573:15-1574:03. That reliance was misplaced. At trial, Dr. Baldwin freely admitted that he was wrong that Bader Farms would go out of business in 2019. 2/6/20 Trial Tr. 1430:21-1431:4. Dr. Baldwin even testified that when he visited Bader Farms in 2019, "his peach operation was like a bee hive, and they almost needed a deputy sheriff to direct traffic." 2/6/2020 Trial Tr. (Baldwin) at 1431:05-11. Because Dr. Guenthner concedes that the facts introduced at trial discredit his entire damages calculation, that calculation cannot be used to support a verdict that Plaintiff is entitled to lost profits damages, future damages, or any amount of damages. *See, e.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

Nor is there any other evidence in the record that would support a finding that Plaintiff is entitled to lost profits damages or future damages. Indeed, Bill Bader even conceded that Plaintiff's annual profits from 2015 through 2018—the years it supposedly experienced dicamba damage—were *higher* than its annual profits from 2011 through 2014. *See* 2/6/2020 Trial Tr. (Bader) at 1214:18-1215:20. Plaintiff's failure to produce any evidence that it has lost profits as a result of the alleged dicamba exposure requires a judgment in Monsanto's favor that Plaintiff is not entitled to lost profits or future

damages. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 54-55 (Mo. 2005).[9]

CONCLUSION

For all of the foregoing reasons, and for those previously stated in Monsanto's prior JAML Motion, Monsanto respectfully requests that this Court enter judgment as a matter of law in its favor, and grant such other and further relief as this Court deems appropriate.

Dated: February 13, 2020

Respectfully Submitted,

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[9] The Court should also grant Monsanto judgment as a matter of law on Plaintiff's civil conspiracy and joint venture claims, for the reasons stated in Monsanto's JAML Motion. *See* JAML Motion (ECF #496) at 39-43.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of February, 2020, the foregoing was filed electronically via the ECF/CM system with the Clerk of Court which will serve Notice of Electronic Filing upon all counsel of record via electronic mail.

/s/ A. Elizabeth Blackwell