**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**SOUTHEASTERN DIVISION**

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| BADER FARMS, INC. and BILL BADER | ) | |
| Plaintiffs, | ) | Case No. 1:16-CV-00299-SNLJ |
| v. | ) | |
| MONSANTO COMPANY, *et al.* | ) | |
| Defendants. | ) | |

**MOTION TO DEFINE "DICAMBA-TOLERANT" AND "XTEND" "CROP SYSTEMS" AS PART OF VOIR DIRE STATEMENT AND SUBMISSION OF DEFENDANTS' PROPOSED VOIR DIRE STATEMENT**

Days from now, the court room will be filled with potential jurors who, in all likelihood, have never heard of dicamba, a "crop system," or any "Xtend" marketed product. They may not have an understanding of a herbicide formulation or a genetically engineered trait, much less any concept of a seed containing a trait that genetically modifies a plant to be tolerant to a certain herbicide. It will be the parties' job to educate jurors, present facts, and argue about whether certain products are defective, how they were intended and authorized to be used, and how they were actually used. But, before the parties can even begin those tasks, the Court will have an opportunity to succinctly present a statement of the case to the jury as part of a voir dire statement – so the jury may begin with at least a basic understanding of a few key concepts. Absent that foundation, a jury faced with these novel concepts will not only be confused, but will be subject to sleight of hand about these definitions and concepts. In particular, unless the Court defines for the jury a "dicamba-tolerant" and "Xtend" "crop system" at the outset, jurors will be subject to Plaintiffs' attempt to conflate marketing concepts with scientific ones, and tradenames with products.

Plaintiffs and Defendants have conferred in an attempt to reach agreement on the proposed case summary to be read to the prospective jurors in voir dire; however, the parties were not able to reach agreement, in large measure due to Plaintiffs' insistence that the case summary include a characterization of the Xtend system that the Defendants believe is misleading and inconsistent with Plaintiffs' Complaint. Therefore, Defendants separately submit their proposed voir dire statement, attached hereto as Exhibit A, and explain more fully below why this statement is the proper one for the Court to provide to

the jury.

### A. Contemporaneous Documents Define the Roundup Ready Xtend Crop System.

As set forth more fully in Monsanto's objections to Plaintiffs' jury instructions (ECF #357), Monsanto did not manufacture or design any product called the "Xtend system." And, thus, any submission of a product liability claim on such non-existent product would be error.[1] Nonetheless, the jury will hear this term (or a similar term) because Monsanto uses the marketing term "Roundup Ready Xtend Crop System" to refer to multiple products, consisting of dicamba-tolerant trait technology in Roundup Ready 2 Xtend Soybeans and Bollgard II Xtendflex Cotton, "plus" the single dicamba formulation of XtendiMax with VaporGrip Technology:


M-344.0006.[2] This is consistent with how Plaintiffs' Third Amended Complaint (as with prior complaints) defines the "Roundup Ready 2 Xtend crop system":

> Monsanto … sold its genetically modified ('GM'), dicamba-based Roundup Ready 2 Xtend crop system that includes Defendant Monsanto's dicamba-

[1] In any case, the Court has made clear that it is DT-seed that is at issue here. *See* ECF #288 at 5-6.

[2] As seen from the image, this marketed "system" was originally intended to include an additional product, Roundup Xtend with VaporGrip Technology, which was a dicamba and glyphosate pre-mix, but the product was never commercialized.

> tolerant ('DT') cotton seed … and allegedly low-volatility dicamba-based herbicides, XtendiMax with VaporGrip Technology ('XtendiMax') and Roundup Xtend with VaporGrip Technology ('Roundup Xtend').

ECF #168, at ¶ 5; *see also id.* at ¶ 39 (alleging the "system" as defined on Monsanto's website). Plaintiffs did not allege that the "crop system" included the myriad dicamba-based herbicide formulations that pre-dated the existence of the dicamba-tolerant trait, but rather that that the "system" was "incomplete" in 2015 and 2016. *See, e.g.*, *id.* at ¶ 36. Nor could they, because Monsanto's own documents demonstrate that Monsanto expressly disclaimed that any older dicamba formulations were part of the "crop system." *See infra.*

Xtend (as in Roundup Ready 2 Xtend), XtendiMax, and XtendFlex are all tradenames owned by Monsanto. The "Roundup Ready Xtend Crop System" was a means by which to promote several different Monsanto products, ***which can be – but do not have to be – used together***. For instance, Bollgard II XtendFlex cotton is naturally tolerant to hundreds of herbicides, but also contains genetically engineered traits making it tolerant to additional herbicides, *i.e.*, a glyphosate-tolerant trait, a glufosinate-tolerant trait, and a dicamba-tolerant trait. Thus, in addition to all the herbicides to which cotton is naturally tolerant, growers with this seed may also spray certain glyphosate, glufosinate, and dicamba formulations. There are formulations ***of each*** that are approved to spray over the top, and formulations of each that are not approved to be sprayed over the top. *See* Ex. B. Monsanto does not design or manufacture any glufosinate formulation, but manufactures a single dicamba and multiple glyphosate formulations that are approved to spray over XtendFlex cotton. Numerous other companies

manufacture glufosinate, dicamba, and glyphosate formulations, both those approved and not approved to be sprayed over XtendFlex cotton. *See id.*[3]

Not only can a consumer buy one Xtend branded product and use it with a non-Xtend-branded (and thus non-Monsanto) product, but a consumer can also buy DT-seed and use it ***without any dicamba at all***. In fact, this is what Bill Bader did. He purchased Roundup Ready 2 Xtend soybeans, but never made a dicamba application. Ex. C, F. Baldwin Dep., 8/13/19, at 95.[4] In much the same way, a consumer could buy Roundup Ready 2 Xtend soybeans or Bollgard II XtendFlex cotton and elect not to spray glyphosate or glufosinate over the top, despite the seed containing a glyphosate-tolerant trait and, in the case of cotton, a glufosinate-tolerant trait.

**B. Contemporaneous Documents Define the DT System.**

Also relevant in this case is a "dicamba-tolerant system," or "DT system," which was a technology concept rather than a marketing one. The "DT system" is not interchangeable with the "Roundup Ready 2 Xtend Crop System." Unlike the latter, which refers only to Xtend-branded products designed and sold by Monsanto (and in many cases licensed to and sold by others), the "DT system" refers to seed with the DT-trait plus dicamba herbicides approved by EPA for use over such seed (currently limited to Engenia, FeXapan, and XtendiMax). At the pre-trial hearing, Plaintiffs incorrectly suggested that the DTSA defines the "System" to include Clarity. They cite to Paragraph

[3] Monsanto has even recommended non-Monsanto herbicides to be used over Roundup Ready 2 Xtend soybean and paid incentives to growers to purchase these other products for weed control. Ex. D, M-370.

[4] He may well have applied glyphosate to the crop, since it also contains a glyphosate-resistant trait. In that case, he may or may not have used a Monsanto-manufactured formulation.

1.52, the definition of "DT System Crop Protection Product," and its reference to "a BASF DGA Herbicide." *See, e.g.*, TAC ¶ 110. In fact, however, the DTSA definition of "DT System Crop Protection Product" is limited to any DGA or BAPMA dicamba "Commercialized" by Monsanto or BASF. Ex. E, B-672, at ¶ 1.52. Under the DTSA, a "DT System Crop Protection Product" is not "Commercialized" until it is, *inter alia*, permitted for use by the grower as part of the DT System "in accordance with the terms of … [the] label." *Id.* at ¶ 1.25. Clarity's label has never allowed commercial use over DT-seed and, as such, Clarity has never been "Commercialized" or, by extension, become part of any DT System. Moreover, the DTSA definition explicitly excludes any non-DGA or BAMPA dicamba herbicide. *Id.* at ¶ 110. Thus, for instance, Banvel, which is not a DGA or BAPMA dicamba but is instead the DMA salt of dicamba, cannot possibly be part of the DT System.

The DTSA's definition is consistent with rulings of the Court, which has explained that "'dicamba-based products' – which are the subject of this lawsuit" are "(1) Monsanto's dicamba-tolerant cotton and soybean seed, (2) Monsanto's new dicamba herbicides, and (3) BASF's new dicamba herbicide," and thus, by extension, does not include Banvel, Clarity or any other herbicide that pre-dated DT seed. ECF #132 at 6; *see also id.* at 3 (defining these "new" dicamba herbicides as XtendiMax with VaporGrip Technology and Engenia). The Court referred to this suite of products as a "crop system." *Id.* at 10.

### C. Plaintiffs Seek to Define the Xtend System In a Manner Inconsistent With Plaintiffs' Complaints, the Evidence and the Court's Rulings.

At pre-trial conference on January 9, 2020, and in their proposed voir dire statement, Plaintiffs' counsel state that "the System is the seed and ***any dicamba*** used with it." In doing so, Plaintiffs – for the first time ever – have proposed to define "the System" to include any dicamba-containing herbicide which they can prove was used over the top of Roundup Ready 2 Xtend soybean or Bollgard II Xtendflex cotton seed. Because many brands and varieties of these herbicides are not manufactured by Monsanto or BASF (*see* Ex. B), Plaintiffs are now seeking to argue, through sleight of hand, that Defendants should be jointly liable for "a System" consisting of ***a seed that neither Defendant designed or manufactured*** and ***a herbicide that neither Defendant designed or manufactured***. Indeed, there are over 100 different products registered with EPA for commercial agricultural use that contain the active ingredient dicamba, including products such as Banvel (DMA), Diablo (DMA), Oracle (DMA), and Vanquish (DGA) (*see* ECF #220, BASF SUMF at Ex. I, Ex. 11). While it is unclear whether Plaintiffs' reference to "the System" was to the "Roundup Ready 2 Xtend Crop System" or the "DT System," in either case they are wrong.

Not only is this new definition a drastic departure from Plaintiffs' Complaint and contrary to definitions provided in Defendants' marketing materials and contracts, but it is ***expressly disavowed*** by Monsanto's own documents:


Ex. F, M-344.0043. Monsanto's Technology Use Guide ("TUG") also specifically warned that ***no dicamba herbicide*** was part of any "system" in 2015:

> **NOTICE: DO NOT APPLY DICAMBA HERBICIDES IN-CROP TO BOLLGARD II® XTENDFLEX™ COTTON IN 2015**. … YOU SHOULD NOT MAKE AND MONSANTO DOES NOT AUTHORIZE MAKING AN IN-CROP APPLICATION OF ANY DICAMBA HERBICIDE TO BOLLGARD II® XTENDFLEX™ COTTON IN 2015.

Ex. G, M-405. Monsanto added a similar warning related to Roundup Ready 2 Xtend soybean in 2016. *See* Ex. H, M-405. Plaintiffs' novel definition is so distorted that it would ***include herbicides not approved to be sprayed*** over the top of DT-seed and expressly warned against (*e.g.*, Banvel), while ***excluding herbicides actually approved*** to be sprayed over the top of Xtend-branded seed based on the addition of a new genetic trait (*e.g.*, Liberty, which may only be sprayed over the top of XtendFlex cotton because of the addition of the glufosinate-tolerant trait in 2015 and the corresponding new use approved by EPA for the Liberty label).[5]

[5] More than 50 herbicide formulations can be used over the top of Bollgard II Xtendflex cotton and Roundup Ready 2 Xtend soybean. *See* Ex. I, 1/10/20 Decl. of J. Griffin.

Plaintiffs' preposterous definition is also inconsistent with the Court's prior rulings. The Court has focused on whether the use of any dicamba not approved for use over the top of seed containing the DT-trait is an intervening and superseding cause breaking the chain of causation, or alternatively whether it was foreseeable – despite being unlawful – leaving the causal chain unbroken. *See, e.g.*, ECF #288 at 3, ECF #134 at 3, 6.[6] The Court has ruled that Plaintiffs may argue that certain warnings against using "non-system" dicamba formulations were insufficient; it has never suggested that Plaintiffs could argue that disavowed formulations could somehow form part of any "system." Plaintiffs may intend to argue at trial that DT-seed had no value without a dicamba-based herbicide to spray over the top, or that XtendiMax with VaporGrip Technology had no value without a DT-seed to spray over. Monsanto will argue, and provide ample evidence, that neither is true. In any case, each party may present their evidence and argument at trial. Such evidence and argument, however, are independent of how to define a "dicamba-tolerant crop system" and the "Xtend crop system" for the jury in order to avoid confusion regarding the products, marketing, and brand names at issue. The Court should not allow Plaintiffs to put the finger on the scale by arguing or implying that unapproved dicamba formulations, marketed by third-parties and used unlawfully, was part of a marketing "system" comprised of various Monsanto products, and thus bore Monsanto's imprimatur or endorsement.

[6] Monsanto believes that, despite the Court's rulings to date, Plaintiffs must prove product identification and that third-party grower's criminal conduct is an intervening and superseding cause as a matter of law. Monsanto preserves, and does not waive, all of its arguments regarding these issues.

## CONCLUSION & REQUEST FOR RELIEF

For the foregoing reasons, Monsanto respectfully requests that the Court adopt Defendants' proposed voir dire statement and reject the one proffered by Plaintiffs. As mentioned above, allowing Plaintiffs in their voir dire statement to define the system to include all dicamba formulations of any kind would allow Plaintiffs to amend their Complaint and adopt a definition of the products at issue that is false and misleading.

Monsanto requests that the Court define these terms in a manner consistent with the contemporaneous documents and the testimony in this case, in order to provide necessary foundation for the jurors to understand the evidence and argument to be presented to them by the parties, and to avoid juror confusion that would be introduced by Plaintiffs' misleading definition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 20th day of January, 2020, the foregoing was filed electronically via the CM/ECF system with the Clerk of the Court which will serve Notice of Electronic Filing upon all counsel of record via electronic mail.

*/s/ Christopher M. Hohn*