

February 24, 2020

Ms. Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: FRAP Rule 28(j) Notice in *National Family Farm Coalition et al. v. Environmental Protection Agency et al.*, Case No. 19-70115 (Hawkins, McKeown, W. Fletcher, Circuit Judges) (oral argument scheduled for April 21, 2020).

Dear Ms. Dwyer:

Intervenor's dicamba drift crisis has produced hundreds of damages cases. The first, *Bader Farms v. Monsanto & BASF*, Individ. Case No. 1:16-cv-00299-SNLJ (E.D. Missouri), MDL No. 1:18-md-02820-SNLJ, recently concluded a three-week trial. *Bader*, Docket Entries 549, 550, 551 (Feb. 14 & 15, 2020). Bader Farms, a Missouri peach orchard, experienced significant drift damage from neighboring crop fields.¹ The jury found in Bader's favor on all counts, awarding \$15 million in actual damages and \$250 million in punitive damages. Docket Entries 550, 551, 558.² It found Monsanto and BASF liable for negligent design of their products and failure to warn. Docket Entry 550. It also found the companies conspired to create an "ecological disaster" of off-target pesticide movement and damage to increase profits. Docket Entry 551.³

¹ Hettinger, *Jury orders Monsanto, BASF to pay peach farmer \$250 million in punitive damages*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING (Feb. 15, 2020),

<https://investigatamidwest.org/2020/02/15/jury-fines-monsanto-basf-250-million-in-punitive-damages/>.

² *Id.*

³ Ruff, *Monsanto, BASF Will Pay \$250 Million in Punitive Damages in First Dicamba Trial*, ST. LOUIS PUBLIC RADIO (Feb. 15, 2020),

Over 180 company documents presented in the trial showed—contrary to their arguments to this Court—that Monsanto knew XtendiMax would move off-field and cause harm.⁴ *Compare* ECF 61 at *e.g.*, 13, 26, 28. Monsanto projected thousands of drift incidents, and prohibited testing of drift properties to more easily obtain EPA registration.⁵ Documents conceded drift despite label-compliant application, and drift-caused yield loss.⁶ *Compare* ECF 61 at 30, 33. The jury rejected Monsanto’s defense that damage was because of farmer misapplication, not their pesticide.⁷ Consolidated cases of hundreds (if not thousands) of other farmers follow later this year. *In Re: Dicamba Herbicides Litigation*, 1:18-md-02820-SNLJ.⁸

<https://news.stlpublicradio.org/post/monsanto-basf-will-pay-250-million-punitive-damages-first-dicamba-trial>.

⁴ Hettinger, *Five key takeaways from trial of peach farmer’s lawsuit vs. Bayer, BASF*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING (Feb. 14, 2020), <https://investigatamidwest.org/2020/02/14/reporters-notebook-five-key-takeaways-from-trial-of-peach-farmers-lawsuit-vs-bayer-basf/>. While damage included the 2015/2016 season from older dicamba formulations, it dramatically increased in 2017, *id.*, after EPA’s approval of the Monsanto and BASF pesticides at issue here. ER0004-5, tbl.2.

⁵ *Id.* n.4.

⁶ *Id.* n.4.

⁷ *Id.* n.4.

⁸ Hettinger, *For Dicamba Lawsuits, Bader Verdict is Just the Beginning*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING (Feb. 20, 2020), <https://investigatamidwest.org/2020/02/20/for-dicamba-lawsuits-bader-verdict-is-just-the-beginning/>.

Respectfully submitted,

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