

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

COY'S HONEY FARM, INC.,	)	
	)	MDL No.: 1:18-md-02820-SNLJ
Plaintiff,	)	
	)	Indiv. Case No. 1:21-cv-00089-SNLJ
v.	)	
	)	
BAYER CORPORATION; BAYER	)	
U.S., LLC; BAYER CROPSCIENCE	)	
Arkansas Inc.; BASF CORPORATION;	)	
and BASF SE	)	
	)	
Defendants.	)	

**DEFENDANTS' MEMORANDUM IN SUPPORT OF  
THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendants Bayer Corporation, Bayer U.S., LLC, Bayer Cropsience Arkansas Inc., and BASF Corporation<sup>1</sup> are entitled to complete dismissal of Plaintiff's First Amended Complaint, pursuant to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6), because the allegations of the First Amended Complaint fail to state a claim against Defendants upon which relief can be granted. The claims alleged by Plaintiff against Defendants are hardly new; in fact, most of these same claims have already been considered and dismissed by this Court.

Yet, as compared to the typical off-target movement lawsuit, Plaintiff's alleged injuries are even more attenuated. Plaintiff does not claim that off-target herbicide movement injured *its* crops, plants, or other vegetation. Rather, Plaintiff, a commercial bee-keeper and honey producer, claims that dicamba damaged unknown and unspecified weeds, plants, trees, and other

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<sup>1</sup> BASF SE is also named as a defendant in Plaintiff's First Amended Complaint, but BASF SE has not been served.

vegetation on properties owned by *others*. As a result of such alleged, unspecified damage, Plaintiff claims that its bees were unable to collect sufficient pollen and nectar and, consequently, were unable to produce honey to be sold by Plaintiff. In short, Plaintiff's claims are multiple layers removed from the manufacture, advertising, sale, or use of XtendiMax or Engenia than the typical plaintiff.

Moreover, Plaintiff's other claims are substantively deficient and are subject to dismissal on multiple grounds. Specifically, the following claims fail as a matter of law and should be dismissed:

1. Plaintiff's Lanham Act claim (Count I) fails for lack of standing because Plaintiff is not within the zone of interests protected by the Lanham Act and for failure to state a claim because Plaintiff has not alleged a loss of goodwill or any direct diversion of sales from itself to Defendants.
2. Plaintiff's breach of implied warranty of merchantability claim (Count V) fails because Defendants disclaimed all implied warranties on their product labels and because Plaintiff failed to plead the statutorily required pre-suit notice.
3. Plaintiff's nuisance claim (Count VI) fails because Plaintiff does not allege that any of the Defendants owned or otherwise used land in Arkansas, much less in the vicinity of Plaintiff's hives—an essential element of the cause of action.
4. Plaintiff's trespass claim (Count VII) fails because Plaintiff failed to plead intent, product manufacturers are not liable for trespass after a product leaves their control, and particulate matter does not constitute a physical invasion under Arkansas's traditional view of trespass.
5. Plaintiff's strict liability – ultrahazardous/abnormally dangerous activity claim (Count X) fails because ultrahazardous activity liability does not apply to mere product manufacturers and herbicide application, including application of dicamba-based herbicides, is a matter of common usage.
6. Plaintiff's claim under the Arkansas Deceptive Trade Practices Act (Count XI) fails because the statute provides a safe harbor for regulated transactions such as the manufacture and sale of herbicides, and Plaintiff has failed to plead fraud with particularity.

In addition, Plaintiff's product liability related claims (Counts II, III, IV, V, VIII, and IX) are untimely. Although Plaintiff knew of its claimed injuries and alleged connection to Defendants' products back in 2017, Plaintiff delayed filing the current suit until May 2021, more than a year after the applicable three-year statute of limitations had run.

### **FACTUAL BACKGROUND**

Plaintiff Coy's Honey Farms, Inc. is a bee-keeping and honey-producing operation that was based in the Jonesboro, Arkansas area. (Dkt. 590, First Amended Complaint ¶ 19 [hereinafter "FAC"]). Plaintiff's claims center on alleged off-target movement of certain dicamba-based herbicide products, including those produced by Monsanto Company ("Monsanto") (XtendiMax® with VaporGrip® Technology ("XtendiMax")) and BASF Corporation (Engenia® ("Engenia")). (FAC ¶ 15).

Plaintiff generically claims that off-target movement of dicamba herbicides in eastern Arkansas damaged unknown and unspecified non-tolerant crops, plants, and vegetation surrounding Plaintiff's bee-keeping operations which "greatly diminished" the "pollen and nectar sources for Plaintiff's bees" (FAC ¶ 25) and resulted in reduced honey production and loss of bees. (FAC ¶¶ 43-44). Notably, Plaintiff does not allege any *direct* injury from off-target movement of XtendiMax or Engenia. Unlike the prototypical off-target movement lawsuit in which the plaintiff alleges that *its* crops were injured by off-target movement of herbicides, Plaintiff does not own *any* of the crops, plants, or other vegetation it alleges were damaged by off-target herbicide movement; nor does it otherwise claim to have been involved in the purchase or use of XtendiMax, Engenia, or any dicamba-tolerant seed. (FAC ¶¶ 21-22). Rather, Plaintiff claims that (1) off-target movement of dicamba herbicides damaged unknown and unspecified non-tolerant crops, trees, flowers, and other vegetation *owned by third parties*, which (2) reduced

the natural sources of pollen and nectar available to Plaintiff's bees, which (3) negatively impacted the ability of Plaintiff's bees to produce honey, and which, finally, (4) led to losses of bees and honey sales. (FAC ¶¶ 25-26, 43-44). Plaintiff lacks any knowledge as to the source or location of any dicamba applications, admitting that "it is difficult or impossible to identify any single application that caused or contributed to the damage to plant life" alleged by Plaintiff. (FAC ¶ 46).

Plaintiff asserts claims for (1) violation of the Lanham Act; (2) breach of duty of manufacturer; (3) breach of duty of manufacturer to warn; (4) breach of duty of manufacturer to instruct; (5) breach of implied warranty of merchantability; (6) nuisance; (7) trespass; (8) negligence; (9) strict liability – products liability; (10) strict liability – ultrahazardous or abnormally dangerous activity; (11) violation of the Arkansas Deceptive Trade Practices Act; and (12) punitive damages.

### **PROCEDURAL BACKGROUND**

Plaintiff filed this lawsuit on May 25, 2021, in the United States District Court for the Eastern District of Arkansas, Northern Division. *Coy's Honey Farm Inc. v. Bayer Corp., et al.*, 3:21-cv-00104. This lawsuit was tagged for transfer to *In re: Dicamba Herbicides Litigation* MDL (the "dicamba MDL") on May 28, 2021 (MDL Dkt. 160) and the Conditional Transfer Order was issued on June 10, 2021. (MDL Dkt. 587). Plaintiff filed its First Amended Complaint, the operative Complaint, on July 15, 2021. (MDL Dkt. 590).

On or about July 16, 2021, Plaintiff filed a Notice to Conform its claims to the Master Antitrust Class Action Complaint and/or Master Crop Damage Class Action Complaint (MDL Dkt. 591); however, Plaintiff subsequently withdrew its Notice to Conform and reaffirmed the allegations set forth in its First Amended Complaint. (MDL Dkt. 595). On August 4, 2021, the

Court lifted the stay with respect to this matter and set August 25, 2021, as the deadline for filing responsive pleadings to the First Amended Complaint. (Dkt. 11).

### **LEGAL 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.’” *Warmington v. Bd. Of Regents of Univ. of Minn.*, 998 F.3d 789, 795 (8th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). Failure to plead an essential element of a cause of action is a “fatal deficiency warranting dismissal.” *Gatlin ex rel. Est. of Gatlin v. Green*, 362 F.3d 1089, 1095 (8th Cir. 2004); *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999).

### **ARGUMENT**

#### **I. This Court Should Dismiss Plaintiff’s Lanham Act Claim.**

##### **A. Plaintiff does not have statutory standing to sue under the Lanham Act.**

The Court should dismiss Plaintiff’s Lanham Act claim because it lacks statutory standing and fails to plead the type of injury Section 1125(a) of the Lanham Act intends to redress—injury to business reputation or a diversion of sales from a plaintiff to a defendant.

As a threshold matter, Plaintiff must plead facts sufficient for it to demonstrate that it “fall[s] within the class of plaintiffs whom Congress has authorized to sue” under the Lanham Act. *See Tovar v. Essentia Health*, 857 F.3d 771, 774 (8th Cir. 2017) (quotation omitted). There is a two-step process to determine whether a plaintiff possesses this “statutory standing”: a zone

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