

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION

MONSANTO COMPANY

PLAINTIFF

V. CASE NO. _____

ARKANSAS STATE PLANT BOARD;
AND ARKANSAS STATE PLANT BOARD
MEMBERS IN THEIR OFFICIAL CAPACITIES:
WALTER “BRUCE” ALFORD; KYLE BALTZ;
RUSSELL BLACK; RUSSELL BRAGG;
ROBERT CAMPBELL; DR. RICK CARTWRIGHT;
MARTY EATON; DANNY FINCH;
BARRY WALLS; TERRY FULLER;
GREG HAY; OTIS HOWE;
JERRY HYDE; LARRY JAYROE;
THOMAS POST; DR. CRAIG ROTHROCK;
DENNIE STOKES; AND MATTHEW MARSH

DEFENDANTS

**COMPLAINT FOR DECLARATORY JUDGMENT
AND PERMANENT INJUNCTIVE RELIEF**

Comes now Plaintiff Monsanto Company (“Monsanto”) for its Complaint against the Defendants Arkansas State Plant Board and its named members solely in their official capacities (collectively the “Plant Board”), for their unconstitutional and *ultra vires*, arbitrary, capricious and otherwise unlawful acts not based on substantial evidence in regulating certain pesticides within the State of Arkansas, and alleges as follows:

1. This action seeks to prevent the Plant Board from continuing to regulate the use of Monsanto’s new low-volatility dicamba herbicide, XtendiMax[®] with VaporGrip[®] Technology (“XtendiMax”), within the State of Arkansas in a manner that: (a) is *ultra vires*, arbitrary and capricious, and not based on substantial evidence; (b) violates the Arkansas Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201-219, the Arkansas Pesticide Use and Application Act, Ark. Code Ann. §§ 20-20-201-227, and the Arkansas Pesticide Control Act, Ark. Code

Ann. § 2-16-401-419; (c) deprives Monsanto of its protected property interests in its federal and state pesticide registrations and classifications without the due process of law guaranteed by the United States Constitution; and (d) violates the Commerce Clause of the United States Constitution.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the Plant Board, and venue is proper in Pulaski County Circuit Court, pursuant to Ark. Code Ann. § 20-20-221 (authorizing claims in this Court seeking to set aside actions of the Plant Board), Ark. Code Ann. § 25-15-214 (authorizing action in this Court for an order commanding a state agency to take action), and Ark. Code Ann. § 25-15-207 (declaratory judgment actions to challenge a state agency rule can be filed in this Court), and this Court has personal jurisdiction over the members of the Plant Board acting in their official capacities because the Plant Board is an agency of the State of Arkansas located in Pulaski County and conducts its business in the State of Arkansas under the direction of its board members.

3. This action presents an actual case or controversy between Monsanto and the Defendants because the Defendants have acted arbitrarily and capriciously and beyond their statutory authority in first passing, and then refusing to initiate rulemaking to modify, a regulation that reclassified Monsanto's XtendiMax herbicide from a Class A to a Class H herbicide and imposed date restrictions that effectively prevent its in-crop use with dicamba-tolerant soybean and cotton crops.

PARTIES

4. Monsanto is a corporation organized and existing under the laws of the State of Delaware with its corporate headquarters and principal place of business in St. Louis County,

Missouri. Monsanto is registered to conduct business in Arkansas and manufactures agricultural products for sale and use within the State of Arkansas.

5. The Arkansas State Plant Board is a division of the Arkansas Agriculture Department and a regulatory body created by Arkansas statute. *See* Ark. Code Ann. § 2-16-206. The Plant Board's powers are defined by statute pursuant to Ark. Code Ann. § 2-16-201-401 and various related statutes pertaining to agriculture. The Plant Board is governed by its 18 board members determined pursuant to Ark. Code Ann. § 2-16-206.

6. The members of the Plant Board are sued solely in their official capacities whereby they adopt regulations and otherwise direct actions of the Plant Board.

FACTUAL ALLEGATIONS

I. OVERVIEW

7. In November 2016, just days after Monsanto secured federal and state regulatory approval for the in-crop use of XtendiMax in Arkansas, the Plant Board adopted a new regulation banning such use. Ark. Reg. on Pesticide Use, Ark. Code R. § 209.02.4- XIII(B)(2) (amended Jan. 2017). In doing so, the Plant Board:

- (a) announced a new, unwritten research requirement for maintaining a Class A pesticide registration years into the approval process and after it was already too late for Monsanto to secure the required research;
- (b) required the submission of information it had not prescribed by regulation and, thus, exceeded its statutory authority under the Arkansas Pesticide Control Act;
- (c) applied that new requirement to prevent the in-crop use of Monsanto's XtendiMax, but not the in-crop use of other dicamba pesticides for which the new research requirement also was not met;
- (d) approved regulations changing the classification and restricting the use of XtendiMax without considering the scientific evidence specified by statute;

(e) acted outside its statutory authority in refusing to consider any research not conducted by researchers at the University of Arkansas in approving regulations changing the classification and restricting the use of XtendiMax;

(f) assumed that XtendiMax was injurious to the environment, without considering the relevant findings of the U.S. Environmental Protection Agency (“EPA”), and thus exceeded its authority under the Arkansas Pesticide Control Act;

(g) refused to consider the studies EPA deemed sufficient to permit federal registration of XtendiMax (or any of the other research data submitted by Monsanto); and

(h) failed to consider the research findings EPA itself made in support of its determination to register XtendiMax.

8. Responding to the Plant Board’s action, on January 4, 2017, Governor Asa Hutchinson sent a letter to the Plant Board stating that its rulemaking concerning the introduction of new pesticide technologies must be “more clearly defined,” and ordering the Plant Board to clarify the “methods that are used and the research on which the Plant Board relies,” as state law explicitly requires. Letter from Asa Hutchinson, Governor of Ark., to Otis Howe, Chair. Ark. Plant Bd. (Jan. 4, 2017). The Governor instructed the Plant Board to provide him with a solution “within forty-five (45) days, *which provides clear rules to industry as to what the Plant Board expects in terms of prior study and testing by independent third party research.*” *Id.* (emphasis added).

9. Nearly a year later, the Plant Board has failed to comply. On at least five (5) separate occasions in the past eight (8) months, Monsanto has asked the Plant Board to provide Monsanto with a copy of its study and testing requirements for approval of the use of new pesticides within the State. Each time, the Plant Board has refused.

10. Instead, the Plant Board continues to regulate in an *ultra vires*, arbitrary, capricious and *ad hoc* manner, in which the rules and standards change frequently and from

registrant to registrant, and the standards and end points against which pesticides are judged are unknown and variable.

11. On September 7, 2017, despite the Plant Board's failure to provide any greater clarity regarding the requirements for approval of XtendiMax for in-crop use, Monsanto formally petitioned the Plant Board to: (a) initiate new rulemaking to undo its *ultra vires* regulation and allow in-crop use of XtendiMax within the State during the 2018 growing season, consistent with the actions of EPA and every other soybean-producing state in the nation; and (b) reject a proposal to ban the in-crop use of all dicamba herbicides within the State in 2018. The Plant Board denied Monsanto's Petition, again refusing to consider any of the studies submitted by Monsanto and relied on by EPA, and instead relying on hearsay statements regarding the alleged results of incomplete studies that have not been published or otherwise made available to the public, the Plant Board, or Monsanto.

12. At the same time, the Plant Board also adopted a proposal to effectively ban the in-crop use of all dicamba herbicides within the State in 2018.¹ That proposed rule, set for public hearing on November 8, 2017, has provoked an outcry from Arkansas farmers who need the new dicamba technology to control resistant pigweed and other hard-to-control weeds that damage their crops. More than 300 farmers responsible for farming over 1.3 million acres of cropland in the State of Arkansas have signed an informal petition opposing the ban, and on September 28, 2017, a subset of those farmers filed a formal Petition for Rulemaking with the Plant Board, in opposition to the Plant Board's proposed ban on the in-crop use of all dicamba

¹ Monsanto will be submitting written comments in opposition to the adoption of this proposed regulation and will also present its comments at the public hearing on November 8, 2017. If the proposed regulation is adopted, Monsanto may amend its Complaint to add a challenge to the new regulation. Monsanto is filing this Complaint at this juncture because the Plant Board voted to deny Monsanto's Petition on September 21, 2017, and the Arkansas Pesticide Use and Application Act requires that a party aggrieved by the Plant Board's failure to act must file a complaint within 30 days. Ark. Code Ann. § 20-20-221(a).

herbicides for 2018. The Plant Board held a Special Plant Board Meeting on October 19, 2017 to consider the Petition, and voted to deny it.

13. The Plant Board acted arbitrarily and capriciously, and outside its statutory authority, by requiring that Monsanto submit unavailable testing data not required by any existing regulation if Monsanto wanted to prevent the Plant Board from changing the registration classification of XtendiMax and restricting its use within the State. The Arkansas Pesticide Control Act specifically identifies the information applicants must submit for pesticide registration, as well as the information the Plant Board “may require” for “any pesticide on which restrictions are being considered.” Ark. Code Ann. § 2-16-407(d). While the Act does permit the Plant Board to require additional information, it specifies that any such information must be prescribed “*by regulation.*” Ark. Code Ann. § 2-16-407(e). *See also* Ark. Code Ann. 25-15-203 (requiring that rules of practice and procedure be filed and made available for public inspection).

14. The Plant Board also acted arbitrarily and outside its statutory authority by refusing to consider the decisions of EPA in evaluating whether XtendiMax is injurious to the environment. While the Arkansas Pesticide Control Act grants the Plant Board authority, “after due notice and opportunity for a hearing” to determine that a pesticide is “injurious to the environment,” it specifically directs that “[t]he board shall be guided by the United States Environmental Protection Agency regulations in this determination.” Ark. Code Ann. § 2-16-406 (emphasis added). *See also* Ark. Code Ann. § 20-20-206(a)(2) (requiring Plant Board to “give consideration to pertinent research findings and recommendations of other agencies of this state, the federal government, or other reliable sources”). The Arkansas Administrative Procedures Act also requires the Plant Board to regulate based upon “the best reasonably

obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to” a given regulation, Ark. Code Ann. § 25-15-204(b)(1). The Plant Board continues to act outside its statutory authority by ignoring these requirements.

15. The Plant Board’s application of *ad hoc* and unpredictable regulatory standards with respect to XtendiMax also has violated, and continues to violate, Monsanto’s federal due process rights. The Plant Board has deprived, and continues to deprive, Monsanto of its protected property interests in its state and federal registrations of XtendiMax without providing the most basic fundamentals of due process – such as reasonable notice and a meaningful opportunity to be heard.

16. The Plant Board’s arbitrary approach also has deprived, and if left unchecked will continue to deprive, Arkansas farmers of the best weed management tools available – tools that are available to farmers in every other soybean- and cotton-producing State in the nation.

17. In addition, the Plant Board’s unwritten requirement that pesticide applicants submit research performed by researchers at the University of Arkansas in order to gain approval for use of new pesticides within the State is unconstitutional under the Commerce Clause. The dormant commerce clause of the U.S. Constitution prohibits the State of Arkansas from insisting that companies funnel research dollars into research programs at in-state universities, in order to secure privileges within the state. The Plant Board’s unwritten “Arkansas researchers only” requirement is discriminatory, on its face, against out-of-state researchers, and also unduly burdens interstate commerce. Thus, it violates the Commerce Clause. U.S. Const., Art. I, § 8, cl.

3.

18. Because the regulation prohibiting the in-crop use of XtendiMax violates state statutory and federal constitutional requirements and was adopted by Defendants outside their statutory authority, it is invalid and unenforceable. *See* Ark. Code. Ann. § 25-15-204(h). Monsanto is entitled to a declaration to that effect, and to permanent injunctive relief prohibiting the Plant Board members from enforcing it and directing them to modify the regulation to permit the sale and in-crop use of XtendiMax.

II. MONSANTO OBTAINED FEDERAL REGULATORY APPROVAL FOR XTENDIMAX AND DICAMBA-TOLERANT COTTON AND SOYBEAN SEEDS.

19. More than a decade ago, in response to farmers' need for additional tools to combat hard-to-control weeds, Monsanto began working to develop genetically-engineered ("GE") soybean and cotton seeds that would be tolerant to the herbicide dicamba, and also to develop a low-volatility dicamba herbicide that could be applied safely over the top of crops grown from those seeds.

20. Monsanto succeeded on both fronts, and promptly sought the required federal regulatory approvals for its new products.²

21. On January 14, 2015, APHIS granted Monsanto's petition to deregulate its new dicamba-tolerant soybean and cotton seeds, permitting their sale in the United States.

22. On November 9, 2016, based on the scientific studies submitted by Monsanto and the public comments it received, EPA approved XtendiMax for in-crop applications, making

² The U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") regulates the introduction and dissemination of GE crops under the Federal Plant Protection Act ("PPA") and a detailed GE-specific regulatory regime. *See* 7 U.S.C. § 7701, *et seq.* At the same time, the manufacture, formulation, labeling and distribution of pesticides are regulated by the U.S. Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* Federal law prohibits the sale of pesticides that have not been registered by the EPA, except as permitted by FIFRA. 7 U.S.C. § 136a; 40 C.F.R. § 152.42 ("An application for new registration must be approved by the Agency before the product may legally be distributed or sold, except as provided by § 152.30.").

XtendiMax available for use with Monsanto's new dicamba-tolerant soybean and cotton seeds in the 2017 growing season.

III. MONSANTO SATISFIED ALL ARKANSAS REQUIREMENTS AND OBTAINED AN ARKANSAS CLASS A REGISTRATION FOR XTENDIMAX.

23. While it was seeking federal regulatory approvals for its new dicamba technology, Monsanto was also seeking approval for in-crop use of XtendiMax in the State of Arkansas. Monsanto began meeting with the Plant Board regarding its new dicamba technology as early as 2011, and continued through 2016.

24. On December 18, 2014, the Plant Board moved to consider changes to the Arkansas regulations on pesticide classifications to allow the introduction of XtendiMax. The Plant Board received comments on the proposed regulations and approved the changes.

25. The new regulation classified XtendiMax (among other dicamba products) as a Class A Pesticide. The new regulation classifying XtendiMax as a Class A Pesticide contained no date restrictions on use and only contained application requirements.

26. Following this change in the regulations, XtendiMax was registered for use in Arkansas in 2015, and that registration was renewed in 2016. Arkansas registered XtendiMax for in-crop use on dicamba-tolerant soybeans on November 15, 2016, and on dicamba-tolerant cotton on December 9, 2016. Those registrations were renewed through December 31, 2017.

27. At no time during the registration process did the Plant Board inform Monsanto that additional research would be required to maintain the registration of XtendiMax as a Class A pesticide, or to permit the in-crop use of XtendiMax in the State.

IV. THE PLANT BOARD ACTED OUTSIDE ITS STATUTORY AUTHORITY IN ARBITRARILY RECLASSIFYING XTENDIMAX AS A CLASS H PESTICIDE, AND PROHIBITING ITS IN-CROP USE.

A. The Plant Board Acted Outside Its Statutory Authority in Arbitrarily Reclassifying XtendiMax and Prohibiting Its In-Crop Use Based on Monsanto's Failure to Submit Research Not Required by Regulation.

28. Shortly after Monsanto secured both federal and state registration for the in-crop use of XtendiMax with dicamba-tolerant soybean and cotton crops, the Plant Board adopted a new regulation preventing its in-crop use within the State.³ Ark. Reg. Pesticide Use, § 209.02.4-XIII(B)(2).

29. Even though the initial registration for XtendiMax had not expired, and it had not yet been marketed in the State, the Pesticide Committee decided to review the current regulations for XtendiMax and other dicamba herbicides.

30. At a Special Meeting on November 21, 2016, the Plant Board passed a new regulation reclassifying XtendiMax from a Class A Pesticide to a Class H Pesticide. The new regulation also added a date restriction prohibiting the use of XtendiMax between April 15 and September 15, thus effectively preventing its in-crop use.

31. The new regulation did not impose the same restrictions on other low-volatility dicamba herbicides, such as BASF's herbicide Engenia. The Plant Board explained that it was placing greater restrictions on XtendiMax than it was placing on other low-volatility dicamba herbicides in the same class, because Monsanto did not provide the Plant Board with additional volatility studies conducted by researchers from the University of Arkansas, which the Plant Board claimed were required by an unwritten policy.

³ Minutes of the 407th Ark. Plant Bd. Mtg., at 9-10 (Nov. 21, 2016); Minutes of the 408th Ark. Plant Bd. Mtg., at 3 (Dec. 12, 2016) (revising and readopting rule changes passed at Nov. 21st meeting); *see also* Ark. Code. R. § 209.02.4-XIII(B)(2) (prohibiting the use of products containing DGA salts, which includes XtendiMax, from April 15 through September 15 each year).

32. As Monsanto learned later, similar restrictions were not placed on BASF's Engenia, despite the fact that BASF also failed to provide two years of volatility testing conducted by the University of Arkansas for Engenia.

B. Monsanto Was Not Given Sufficient Notice of the Unwritten Research Requirement to Have Any Opportunity to Meet It.

33. Monsanto was not given sufficient notice of the newly-announced unwritten research requirement to have an opportunity to comply. In July 2016, just four months before the Plant Board's November 21, 2016 vote (and after four years of discussions with Monsanto), the Plant Board informed Monsanto, for the first time, that Monsanto needed to submit two years of volatility research on XtendiMax conducted by researchers at the University of Arkansas or the Plant Board would reclassify it and prohibit its in-crop use within the State.

34. The Plant Board informed Monsanto that it would consider *only* research conducted by researchers at the University of Arkansas, and would not consider any third-party research in evaluating XtendiMax.

35. Monsanto had no prior notice that two years of research from University of Arkansas researchers would be required to gain approval for in-crop use of its new dicamba herbicide in the State, or that studies performed by Monsanto and other researchers would not be considered. According to the Plant Board, the requirement is an unwritten policy.

36. After the Plant Board reclassified XtendiMax and prohibited its in-crop use, based on Monsanto's failure to meet the unwritten requirement that it submit two years of research from the University of Arkansas, the Plant Board has considered (and is currently considering) prescribing the requirement by regulation. It still has not done so.

C. The Plant Board Acted Outside Its Authority in Arbitrarily Reclassifying XtendiMax and Prohibiting Its In-Crop Use without Considering Research It Was Required by Statute to Consider.

37. During the November 21, 2016 hearing on the proposed regulation that would prohibit in-crop use of XtendiMax within the State, Monsanto's Technology Development and Agronomy Lead informed the Plant Board that only days earlier EPA had approved XtendiMax for in-crop use, based on an extensive body of research.

38. Despite learning that EPA had just granted a federal registration for in-crop use of XtendiMax, the Plant Board expressed no interest in reviewing EPA's decision or the volatility research supporting it. During a brief discussion following the public comments, a Plant Board member was asked whether EPA considered volatility of the new dicamba formulations in deciding whether to register them. The Plant Board member responded: "[T]hey do have certain standards that have to be met federally before a label is registered, however I do not know what they are." Representatives of BASF and Monsanto then informed the Plant Board members that they had included volatility studies in their data packages to EPA.

39. Nevertheless, the Plant Board immediately voted to approve its new regulation prohibiting in-crop use of XtendiMax, without considering EPA's findings or the volatility research supporting them.

V. THE PLANT BOARD ARBITRARILY AND CAPRICIOUSLY REFUSED TO AMEND ITS *ULTRA VIRES* RESTRICTIONS ON XTENDIMAX FOR 2018.

40. On September 7, 2017, Monsanto submitted a formal Petition to the Plant Board pursuant to § 25-15-204(d) of the Arkansas Administrative Procedure Act. In its Petition, Monsanto asked the Plant Board to amend the Regulations on Pesticide Use that it approved, *ultra vires*, in November 2016, reclassifying XtendiMax as a Class H pesticide and prohibiting its in-crop use. Among other things, Monsanto asked the Plant Board to:

- (a) Allow the use of low-volatility formulations of dicamba products, including those that contain diglycolamine salt and sodium salt of dicamba and carry the trade name XtendiMax[®] with VaporGrip[®] Technology, for in crop use;
- (b) Allow low-volatility dicamba, including XtendiMax, to be used during the growing season for over the top use without date restrictions; and
- (c) Allow the use of low-volatility dicamba, including XtendiMax, with restrictions no greater than those included on the EPA- approved labels for the products.

41. Monsanto submitted its request for rulemaking to serve as an administratively complete Petition pursuant to the Arkansas Administrative Procedure Act and provided evidence in support of its request. Monsanto provided the Plant Board with copies of several volatility studies, described the findings of multiple other scientific studies on volatility, and explained the aforementioned flaws in the Plant Board's actions.

42. As exhibits to the Petition, Monsanto submitted copies of volatility studies it conducted with outside laboratories as well as a copy of EPA's Addendum to the Environmental Fate and Ecological Risk Assessment for the Section 3 New Use of on (sic) Dicamba-Tolerant Soybean, which specifically evaluated volatility data submitted in support of Monsanto's federal registration of XtendiMax. That study concludes, using a "multiple lines of evidence" approach, that "the primary route of off-field exposure is more likely to be a result of spray drift and runoff" than volatility.

43. The Plant Board considered Monsanto's Petition at a Plant Board meeting on September 21, 2017. At the hearing, a Monsanto representative made a presentation and also provided the Plant Board members with copies of 14 volatility studies performed by Monsanto and outside laboratories that had been submitted to EPA in support of Monsanto's application for federal registration of XtendiMax for in-crop use.

44. Also at the hearing on September 21, 2017, the Plant Board received testimony purporting to summarize the results of ongoing research being conducted by researchers from several universities, none of which had been completed or made public. The Plant Board was told that these unreported studies “indicate[] that the new forms of dicamba are volatilizing, and they’re volatilizing at appreciable levels that do cause damage to soybeans outside the treated area.” The Plant Board was not provided with a copy of the presentation or copies of any of the studies or study data discussed.

45. At the conclusion of the September 21, 2017 meeting, and without reviewing the 14 volatility studies submitted by Monsanto, the Plant Board voted to deny Monsanto's Petition in its entirety, including the request to permit the in-crop use of XtendiMax in the 2018 growing season.

46. On October 9, 2017, the Plant Board sent Monsanto a letter providing its written reasons for denying the Petition. It includes one paragraph addressed to Monsanto’s challenge to the Plant Board’s rulemaking reclassifying and prohibiting the in-crop use of XtendiMax. In it the Plant Board claimed that it acted within its authority in considering only research from the University of Arkansas:

Your Petition also states that Section [20-20-]206(a)(2) “does not give the Plant Board the authority to rely exclusively on research from the University of Arkansas.” Petition, page 31. However, Section 206(a)(2) *does require* the Board to consider pertinent research from “other agencies of the state.” The University of Arkansas is an agency of this state, and the Board is within its statutory authority to deem research conducted by the Division of Agriculture scientists... as “pertinent.” This research is considered even more pertinent when, as presented at the September 21 meeting, it aligns with that of universities from other states.

Letter from T. Walker, Ark. State Plant Bd., to S. Partridge and T. Vaughn, Monsanto (Oct. 9, 2017) at 2.

47. Also at its September 21, 2017 meeting, the Plant Board voted to approve a new version of “Regulation 7” that declares research by in-state universities to be the primary (though not exclusive) source to be considered by the Plant Board. The new proposed version of Regulation 7 published by the Plant Board for public comment states:

The Board considers the environment in Arkansas to be unique, (sic) therefore there will be a higher consideration given to research that is specific to Arkansas. Research conducted by scientists from universities within the state will be the primary source of expertise to allow the Board to determine if the data is scientifically sound and relevant to growing and cropping conditions in the State of Arkansas.

Regulation 7: Notice of Requirement for Additional Research and for Restricting Products Beyond EPA Approval (available at: <http://www.aad.arkansas.gov/arkansas-dicamba-information-updates>) (last visited 10/16/17).

48. The Plant Board has set this new version of Regulation 7 for a public hearing that will be held in conjunction with the Board’s next quarterly meeting on December 12, 2017.

CLAIMS FOR RELIEF

Count I

(Violations of the Arkansas Pesticide Use and Application Act, and the Arkansas Pesticide Control Act)

49. Paragraphs 1 through 48 above are incorporated herein by reference.

50. Section 20-20-221 of the Arkansas Pesticide Use and Application Act provides that “[a]ny person aggrieved by any action of the State Plant Board may obtain a review thereof by filing in the circuit court within thirty (30) days of notice of the action a written petition praying that the action of the board be set aside.” Ark. Code Ann. § 20-20-221(a).

51. Section 20-20-221 further provides that within thirty days of receiving a copy of a complaint praying that the Plant Board action be set aside, the Plant Board “shall certify and file

in the court a transcript of any record pertaining thereto, including a transcript of evidence received.” Ark. Code Ann. § 20-20-221(b).

52. After filing of the administrative record by the Plant Board, the court “shall then have jurisdiction to affirm, set aside, or modify the action of the board, except that the findings of the board as to the facts, if supported by substantial evidence, shall be conclusive.” Ark. Code Ann. § 20-20-221(b).

53. Monsanto is a “person” for the purposes of the Arkansas Pesticide Use and Application Act. Ark. Code Ann. § 20-20-203(19).

54. Monsanto has been “aggrieved” by the Plant Board’s September 21, 2017 denial of its Petition. Monsanto petitioned the Plant Board seeking an amendment of the Arkansas Regulations on Pesticide Use to allow the in-crop use of XtendiMax in Arkansas. By rejecting Monsanto’s Petition, the Plant Board has caused damage to Monsanto and its XtendiMax brand through the loss of direct sales of XtendiMax and the loss of indirect sales of XtendiMax via distribution and licensing agreements.

55. By fully participating in the Plant Board administrative process and formally petitioning the Plant Board seeking an amendment of the Arkansas Regulations on Pesticide Use to allow the in-crop use of XtendiMax in Arkansas, which was denied, Monsanto has exhausted its administrative remedies.

56. The Plant Board’s refusal to approve the use of XtendiMax was *ultra vires*, arbitrary, capricious, and not based on facts supported by substantial evidence. Therefore, it should be set aside in its entirety. *See* Ark. Code Ann. § 20-20-221.

57. The Plant Board had no authority whatsoever to prohibit the in-crop use of XtendiMax based on Monsanto's alleged failure to meet an unwritten Plant Board requirement that Monsanto submit two years of volatility research conducted by the University of Arkansas.

58. As Monsanto has set forth herein and in its Petition, by imposing this unwritten research requirement on Monsanto, the Plant Board unlawfully exceeded its statutory authority under its implementing statutes, including the provisions of Ark. Code Ann. § 2-16-407(e) (requiring the Plant Board to prescribe any additional information requirements to be imposed on pesticide registrants by regulation); *see also* Ark. Code Ann. § 25-15-203 (requiring that rules of practice and procedure be filed and made available for public inspection).

59. The Plant Board acted arbitrarily and capriciously and outside its statutory authority by unlawfully restricting XtendiMax based on failure to meet this unwritten research requirement, but not similarly restricting other low-volatility dicamba herbicides, even though they also failed to meet this unwritten research requirement.

60. The Plant Board arbitrarily and capriciously acted outside its statutory authority by refusing to consider research it was required by statute to consider. Specifically, the Plant Board refused to consider any research that was not conducted by the University of Arkansas, and thus ignored the very substantial body of research supporting the in-crop use of XtendiMax. Arkansas law requires the Plant Board to consider the pertinent findings of EPA and other reliable sources and to regulate based on the best reasonably obtainable scientific evidence and information available concerning the need for, consequences of, and alternatives to a given regulation. *See* Ark. Code Ann. § 20-20-206(a)(2); Ark. Code Ann. § 25-15-204(b)(1).

61. The Plant Board also acted arbitrarily and capriciously and outside its statutory authority by refusing to consider and be guided by the volatility research relied on by EPA

during the federal agency's approval of XtendiMax. Section 2-16-406 of the Arkansas Pesticide Control Act provides that "[t]he State Plant Board is authorized, after due notice and an opportunity for hearing, to: ... (3) Determine pesticides, and quantities of substances contained in pesticides, which are injurious to the environment." Ark. Code Ann. § 2-16-406(a)(3). Importantly, this section goes on to direct that "[t]he board shall be guided by the United States Environmental Protection Agency regulations in this determination." *Id.*

62. The Plant Board ignored this clear statutory mandate by repeatedly refusing to consider the research data and conclusions that Monsanto submitted to EPA and that EPA relied on in making its decision to approve the in-crop use of XtendiMax. Additionally, the Plant Board has failed to consider, address, or give any weight to EPA's ultimate approval of XtendiMax for in-crop use and the extensive underlying scientific evidence on which EPA's approval was based.

63. The Plant Board also arbitrarily and capriciously did not consider the research studies presented by Monsanto with its Petition and that Monsanto provided to the Plant Board at the September 21, 2017 meeting. Rather than consider this scientific evidence – evidence that EPA relied on in granting federal registration for in-crop use of XtendiMax – as required by Ark. Code. Ann. Sections 2-16-406(a)(3) and 25-15-204(b)(1), the Plant Board proceeded immediately, and arbitrarily and capriciously, to deny Monsanto's Petition.

64. Further, the "facts" relied on by the Plant Board are not supported by substantial evidence. The Plant Board received testimony concerning dicamba volatility immediately prior to voting to reject the Petition. The Plant Board accepted this testimony as fact, even though the Power Point presentation (a copy of which was not provided to the Plant Board) offered only unverified characterizations of the results of other researchers work in other states that has not

been completed or made publicly available. *See* Plant Board Response to Petition, Oct. 9, 2017. The Plant Board’s findings of fact are based on unverified hearsay, not substantial evidence, are contradicted by findings of EPA, and should be set aside.

65. Finally, in considering Monsanto’s Petition, the Plant Board conducted a cursory and pro forma review that did not include any meaningful consideration of the evidence presented by Monsanto in support of its Petition and failed to do any investigation or analysis of the facts presented by Monsanto. By failing to undertake reasonable review, the Plant Board failed to meet the minimum requirements of due process embodied in and safeguarded by the Arkansas Administrative Procedures Act (“AAPA”). *See* Ark. Code Ann. §§ 25-15-204(a)(3) & (b)(1).

66. The Plant Board’s decision denying Monsanto’s Petition for Rulemaking should be declared arbitrary and capricious and set aside.

Count II
(Violations of the Arkansas Administrative Procedure Act)

67. Paragraphs 1 through 66 above are incorporated herein by reference.

68. Section 25-15-214 of the AAPA provides a cause of action to “any person” that “considers himself or herself injured in his or her person, business, or property” by the failure of an administrative agency to take a specific action. Ark. Code Ann. § 25-15-214.

69. The Plant Board is an “agency” for the purposes of the AAPA that is subject to Section 25-15-214. Ark. Code Ann. § 25-15-202(2)(A).

70. Monsanto is a “person” under the provisions of the AAPA that can bring an action under Section 25-15-214. Ark. Code Ann. § 25-15-202(8).

71. Section 25-15-214 provides for a claim where the Plant Board “unlawfully, unreasonably, or capriciously fail[s], refuse[s], or delay[s] to act.” Ark. Code Ann. § 25-15-214.

72. In denying Monsanto's Petition, the Plant Board has unlawfully, unreasonably and capriciously refused to initiate rulemaking to allow the in-crop use of XtendiMax in Arkansas during the growing season.

73. The AAPA requires the Plant Board to regulate based upon "the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to" a given regulation, Ark. Code Ann. § 25-15-204(b)(1). The Plant Board continued to act outside its statutory authority by ignoring these requirements and denying Monsanto's Petition.

74. The Plant Board acted unlawfully, unreasonably and capriciously by failing to meaningfully consider the evidence presented by Monsanto in support of its Petition, failing to do any investigation or analysis of the facts presented by the Petition, and by failing to make any findings whatsoever with regard to Monsanto's Petition. By failing to undertake any kind of reasonable review, the Plant Board failed to meet the minimum requirements of due process embodied and safeguarded by the AAPA. *See* Ark. Code Ann. § 25-15-204(a)(3) & (b)(1).

75. Not only did the Plant Board fail to provide reasonable consideration of Monsanto's Petition and the science supporting it, the Plant Board voted to reject Monsanto's Petition before formulating any of the "reasons" set forth in the Plant Board's October 9, 2017 response to Monsanto's Petition. Thus, the Plant Board's vote itself was arbitrary and capricious and cannot be supported by *post hoc* rationalizations. *See, e.g.*, Ark. Code Ann. § 25-15-210 (providing for reasons to be provided prior to finalization of decision in cases of adjudication).

76. Monsanto also has been "injured in [its] business, or property" as a result of the Plant Board's vote to reject Monsanto's Petition. Ark. Code Ann. § 25-15-214. Monsanto petitioned the Plant Board seeking an amendment of the Arkansas Regulations on Pesticide Use

to allow the use of XtendiMax in Arkansas. By rejecting Monsanto's Petition, the Plant Board has caused damage to Monsanto and its XtendiMax brand through the loss of direct sales of XtendiMax and the loss of indirect sales of XtendiMax via distribution and licensing agreements.

77. By fully participating in the Plant Board's administrative process and formally petitioning the Plant Board seeking an amendment of the Arkansas Regulations on Pesticide Use to allow the in-crop use of XtendiMax in Arkansas, which was denied, Monsanto has exhausted its administrative remedies.

78. The Plant Board's refusal to initiate rulemaking regarding the in-crop use of XtendiMax during the 2018 growing season and beyond was arbitrary, capricious, not supported by substantial evidence and should be set aside.

Count III
(Declaratory Judgment)

79. Paragraphs 1 through 78 above are incorporated herein by reference.

80. The AAPA provides for a cause of action against an administrative agency for declaratory judgment where a "rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property." Ark. Code Ann. § 25-15-207(a).

81. The AAPA defines a "rule" as a state "agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice of a state agency and includes, but is not limited to, amendment or repeal of a prior rule." Ark. Code Ann. § 25-15-202(9)(A).

82. The Plant Board's regulation prohibiting in-crop application of XtendiMax is a "rule" of the Plant Board adopted outside of its statutory authority.

83. The Plant Board's *ultra vires* rule prohibiting in-crop use of XtendiMax is causing and will continue to cause injury to Monsanto's business. Monsanto petitioned the Plant Board

seeking an amendment of the Arkansas Regulations on Pesticide Use to allow the in-crop use of XtendiMax in Arkansas. By rejecting Monsanto's Petition, the Plant Board has caused damage to Monsanto and its XtendiMax brand through the loss of direct sales of XtendiMax and the loss of indirect sales of XtendiMax via distribution and licensing agreements.

84. By fully participating in the Plant Board's administrative process and formally petitioning the Plant Board seeking an amendment of the Arkansas Regulations on Pesticide Use to allow the in-crop use of XtendiMax in Arkansas, which was denied, Monsanto has exhausted its administrative remedies.

85. A declaratory judgment action "seeks to avoid uncertainty and insecurity with respect to rights, status, and other legal relations" under a statute, municipal ordinance, contract or franchise. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 474, 209 S.W.3d 344, 348 (2005); *see also* Ark. Code Ann. 16-111-102.

86. The Plant Board's continued ultra vires, arbitrary and capricious refusal to approve the use of XtendiMax culminating in the denial of the Petition has created lasting uncertainty regarding XtendiMax and is injuring and will continue to injure Monsanto's business.

87. In light of the Plant Board's actions in 2016 banning the in-season use of XtendiMax and the Plant Board's adoption of an emergency rule in July of 2017 banning the use of all dicamba-containing herbicides for 120 days, Monsanto filed its Petition seeking rulemaking from the Plant Board to amend the Arkansas Regulations on Pesticide Use to provide certainty and security regarding the status of XtendiMax for 2018.

88. The Plant Board's arbitrary and capricious denial of the Petition has furthered the uncertainty regarding XtendiMax and is injuring and will continue to injure Monsanto's business.

89. As set forth herein, the Plant Board's actions are *ultra vires*, arbitrary and capricious, not supported by substantial evidence, and should be declared invalid by the Court.

Count IV
(Violation of Due Process under the United States Constitution)

90. Paragraphs 1 through 89 above are incorporated herein by reference.

91. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

92. Monsanto has a vested and protected property interest in its state and federal registrations of XtendiMax for in-crop use, and in its original classification of XtendiMax as a Class A pesticide in Arkansas.

93. The Plant Board has deprived Monsanto of its protected property interest in its federal and state registrations and classifications without due process of law.

94. Due process requires that a party be provided advance notice of the standards to be applied before it may be deprived of property. The Plant Board's failure to provide Monsanto with advance notice of the administrative standards that would be used in its decision-making process violated Monsanto's due process rights in its federal and state pesticide registrations.

95. Due process also requires that administrative standards be applied consistently and not in a manner that is arbitrary and capricious. Thus, the Plant Board also violated Monsanto's federal due process rights by applying research requirements to Monsanto that it did not apply to other registrants of dicamba herbicides for in-crop applications.

Count V
(Violation of the Commerce Clause of the United States Constitution)

96. Paragraphs 1 through 95 above are incorporated herein by reference.

97. The Plant Board's unwritten requirement that pesticide registrants engage researchers from the University of Arkansas to complete two years of product testing before they can obtain regulatory approval for use of their products within the State violates the dormant commerce clause of the U.S. Constitution.

98. The dormant commerce clause prohibits states from enacting laws that discriminate against out-of-state economic interests or unduly burden interstate commerce. It specifically prevents state and local governments from using their regulatory power to favor local enterprise by effectively prohibiting the patronage of their out-of-state competitors. And it prevents states and their political subdivisions from promulgating protectionist policies favoring in-state interests.

99. The requirement that products be tested by researchers from the University of Arkansas before they can be approved for use within the State violates the dormant commerce clause, because it is facially discriminatory against the economic interests of out-of-state researchers in favor of the economic interests of in-state researchers.

100. The requirement that products be tested by researchers from the University of Arkansas before they can be approved for use within the State violates the dormant commerce clause for the additional reason that the local interest purportedly served by the requirement does not justify the burden it imposes on interstate commerce, and that interest could be served equally well through alternative means having a lesser impact on interstate commerce.

101. On its face, the unwritten Arkansas research requirement discriminates against the economic interests of out-of-state researchers, in favor of the economic interests of researchers

within the State, by forcing pesticide registrants to funnel their research dollars into the hands of in-state researchers, instead of contracting with out-of-state researchers. Out-of-state researchers stand to lose considerable research work as new product testing by pesticide registrants is moved into the hands of researchers at the University of Arkansas. The unwritten research requirement also harms registrants who are unable to work with other researchers unless they want to voluntarily duplicate their research spend.

102. Arkansas' requirement that pesticide registrants submit research conducted by researchers at the University of Arkansas to gain approval for use of their products within the state favors in-state economic interests by rendering useless registrants' hiring of researchers from universities or research laboratories in other states to conduct the research needed to gain approval for use of their pesticides within the State of Arkansas.

103. The requirement that registrants submit research conducted by researchers at the University of Arkansas also burdens out-of-state registrants in a way that it does not burden in-state registrants, because it deprives out-of-state registrants of the opportunity to work with researchers at their home state universities where they are likely to have ongoing relationships and may be able to secure quality research more economically.

104. The Arkansas research requirement also unduly burdens interstate commerce, because the local interest purportedly served by the requirement – obtaining the results of research conducted in Arkansas's "unique" environment - does not justify the burden it imposes on interstate commerce, and could be served equally through alternative means having a lesser impact on interstate commerce – *i.e.*, requiring the submission of research conducted in Arkansas by qualified researchers regardless of their affiliation.

105. The requirement that registrants submit University of Arkansas research to secure approval for the use of their products in the State results in differential treatment of in-state and out-of-state economic interests in ways that benefit the former and burdens the latter, in violation of the Commerce Clause of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Monsanto respectfully prays for relief and judgment granting the following relief in Plaintiff's favor and against Defendants:

- a. Entering judgment against the Plant Board and its members in their official capacities and in favor of Plaintiff for each count alleged in this Complaint;
- b. Entering declaratory judgment that Arkansas Regulation of Pesticide Use, Ark. Code R. § 209.02.4-XIII(B)(2), which prohibits the use of XtendiMax from April 15 through September 15 of each year, violates state law and federal constitutional requirements and that the Plant Board and its members in their official capacities, therefore, lack authority to enforce it and must rescind it;
- c. Permanently enjoining the Plant Board and its members in their official capacities from prohibiting the use of XtendiMax in the State of Arkansas from April 15 through September 15 of each year pursuant to Arkansas Regulation of Pesticide Use, Ark. Code R. § 209.02.4-XIII(B)(2);
- d. Permanently enjoining the Plant Board and its members in their official capacities from requiring pesticide registrants to submit research conducted by researchers at the University of Arkansas in order to gain approval for use of the products within the State of Arkansas; and
- e. Any other relief the Court deems just or proper.

Dated: October 20, 2017

Respectfully Submitted,

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