

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION

OMP FARMS, LLC; OZARK MOUNTAIN POULTRY, INC.;
FREEDOM TO FARM FOUNDATION, INC.;
JASON MCGEE; TIM GANNON; LESLIE BROWN;
AND HOLLIS MANKIN

PLAINTIFFS

V. CASE NO. _____

ARKANSAS STATE PLANT BOARD;
AND ARKANSAS STATE PLANT BOARD
MEMBERS IN THEIR OFFICIAL CAPACITIES:
WALTER “BRUCE” ALFORD; KYLE BALTZ;
TOMMY ANDERSON; REYNOLD MEYER;
DARRELL HESS; MARTY EATON;
BARRY WALLS; TERRY FULLER;
MARK HOPPER; BRAD KOEN; SAM STUCKEY
TERRY STEPHENSON; DR. KEN KORTH;
DR. NATHAN SLATON; MATTHEW MARSH;
JASON PARKS; SCOTT MILBURN; AND
MARK MORGAN

DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT
AND PERMANENT INJUNCTIVE RELIEF

Come now Plaintiffs OMP Farms, LLC, Ozark Mountain Poultry, Inc., Freedom To Farm Foundation, Inc., Jason McGee, Tim Gannon, Leslie Brown, and Hollis Mankin (collectively “Plaintiffs”), and for their Complaint against the Defendants Arkansas State Plant Board and its named members solely in their official capacities (collectively the “Plant Board”), for their arbitrary, capricious, ultra vires, and otherwise unlawful acts not based on substantial evidence in regulating certain pesticides within the State of Arkansas, and allege as follows:

1. This action seeks to prevent the Plant Board from implementing its recently promulgated rule that allows the use of pesticides containing dicamba through June 30 (the “Final 2021 Dicamba Rule”), within the State of Arkansas. The Final 2021 Dicamba Rule (a) is arbitrary

and capricious, exceeds the Plant Board's authority and is not based on substantial evidence; (b) violates the Arkansas Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201 to -219 and the Arkansas Pesticide Use and Application Act, Ark. Code Ann. §§ 20-20-201 to -227, and (c) injures or threatens to injure the Plaintiffs in their property and business.

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. § 25-15-207 that authorizes an action for declaratory judgment in this Court seeking to determine the validity of a rule of the Plant Board, 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.

PARTIES

3. OMP Farms, LLC is a limited liability company organized and existing under the laws of the State of Arkansas with its corporate headquarters and principal place of business in Independence County, Arkansas. OMP Farms is in the business of purchasing soybeans and corn that have not been genetically modified ("non-GM soybeans and corn") for use as a feed ingredient for chickens for an identified non-GM poultry market, which requires OMP Farms to represent that its supply chain is secure and free of genetic modification. OMP Farms contracts to purchase over 10 million bushels of non-GM soybeans and corn each year from Arkansas farmers to meet the market demand for non-GM poultry. All of the acres accounting for this production are vulnerable to damage from dicamba exposure. In the short term, a non-GM soybean and corn crop damaged by dicamba would require OMP Farms to outsource its feed ingredients from other states at significantly higher

costs. In the long term, OMP Farms will be forced to pay higher premiums to farmers for non-GM soybeans and corn to account for the risks of losing a crop to dicamba damage and will face a shortage of Arkansas farmers willing to plant non-GM crops because of the same risks. The Final 2021 Dicamba Rule increases the risk that the non-GM soybeans and corn that OMP Farms would otherwise purchase will be damaged by dicamba, resulting in significantly higher costs to OMP Farms.

4. Ozark Mountain Poultry, Inc. is a corporation organized and existing under the laws of the State of Arkansas with its corporate headquarters and principal place of business in Benton County, Arkansas. Ozark Mountain Poultry is in the business of using and purchasing specialized feed with the primary ingredient being non-GM soybeans and corn, which is used to raise chickens processed and sold as non-GM human food under the brand Georges Farmers Market® label. The non-GM soybeans and corn that Ozark Mountain Poultry uses to raise its non-GM poultry are vulnerable to damage from dicamba exposure. A soybean or corn crop damaged by dicamba would result in less production Ozark Mountain Poultry could commit to the non-GM poultry market as a whole and would impact its ability to satisfy contractual commitments with its purchasers. The Final 2021 Dicamba Rule increases the risk that Ozark Mountain Poultry will, among other things, produce less non-GM poultry or will increase its costs to produce the same amount.

5. Freedom To Farm Foundation, Inc. is an Arkansas nonprofit corporation headquartered in Benton County, Arkansas. Freedom to Farm is organized “to promote and protect the freedom of Arkansas agriculture to choose how it farms.”

6. Jason McGee is an individual resident of the State of Arkansas domiciled in Cross County, Arkansas who farms and produces non-GM soybeans that are vulnerable to dicamba, which he sells to OMP Farms. McGee’s non-GM soybeans have suffered damage from exposure to dicamba in the past. The Final 2021 Dicamba Rule increases the risk that McGee’s non-GM soybeans will

suffer damage from exposure to dicamba.

7. Tim Gannon is an individual resident of the State of Arkansas domiciled in Monroe County, Arkansas who farms and produces non-dicamba tolerant soybeans that are vulnerable to dicamba exposure. Gannon's non-dicamba tolerant soybeans have suffered damage from exposure to dicamba in the past. The Final 2021 Dicamba Rule increases the risk that Gannon's non-dicamba tolerant soybeans will suffer damage from exposure to dicamba.

8. Leslie Brown is an individual resident of the State of Arkansas domiciled in Monroe County, Arkansas who farms and produces non-dicamba tolerant soybeans that are vulnerable to dicamba exposure. The Final 2021 Dicamba Rule increases the risk that Brown's non-dicamba tolerant soybeans will suffer damage from exposure to dicamba.

9. Hollis Mankin is an individual resident of the State of Arkansas domiciled in Desha County, Arkansas who farms and produces non-dicamba tolerant soybeans that are vulnerable to dicamba exposure. Mankin's non-dicamba tolerant soybeans have suffered damage from exposure to dicamba in the past. The Final 2021 Dicamba Rule increases the risk that Mankin's non-dicamba tolerant soybeans will suffer damage from exposure to dicamba.

10. The Arkansas State Plant Board is a division of the Arkansas Agriculture Department and a regulatory body created by Ark. Code Ann. § 2-16-206. The Plant Board's powers are defined by statute pursuant to Ark. Code Ann. §§ 2-16-201 to -419 and various related statutes pertaining to agriculture. The Plant Board is governed by its 18 board members, 2 of which are nonvoting, determined pursuant to Ark. Code Ann. § 2-16-206.

11. 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

12. Dicamba is a pesticide as defined in Ark. Code Ann. §20-20-203 that has been used for decades, and it kills a long list of crops and plants. Dicamba is known to be volatile—that is, as the ambient temperature increases dicamba becomes gaseous and after it is applied, it can move as a suspended gas, and land on other locations and farm fields without leaving a drift trail. The lack of a drift trail makes it unlikely the responsible party can be identified; a situation that is exacerbated with widespread use of dicamba in a concentrated farming area. Dicamba volatility can begin below 70 degrees F and the rate of volatility increases as the temperature increases. The United States Environmental Protection Agency (“EPA”) states that the volatility **“can occur, in the case of dicamba, for days after an application”**. (Emphasis added.) In other words, dicamba cannot be controlled. Dicamba’s off-target movement is a chemical trespass that damages or kills other people’s crops, gardens and plants. Because of this volatility, since 2019 the Plant Board’s “cut-off” date for farm use of dicamba in Arkansas has been May 25 (the “Cutoff Date”); thus, its use has been limited to periods of cooler temperatures

13. A new formulation of dicamba has recently been developed for use on soybeans and cotton that have been genetically modified to withstand exposure to dicamba. The manufacturers of these products contend the new formulation is not as volatile as the previous formulas.

14. The EPA first authorized the use of the new dicamba formula year-round in the United States in 2017 under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”). FIFRA allows a state to be more restrictive than federal requirements on such pesticide use; however, the Plant Board authorized the same EPA-approved dicamba use in Arkansas in 2017. But problems developed quickly and the Plant Board began receiving numerous complaints of crop damage due to dicamba exposure.

15. Due to the unprecedented number of complaints of damage from dicamba already received as of June 15, 2017, on June 16, 2017, the Pesticide Committee of the Plant Board

recommended that dicamba be banned for further use in the 2017 growing season. On June 23, 2017, in an emergency proceeding the Plant Board adopted that recommendation and banned use of dicamba for the remainder of that 2017 growing season. By the end of 2017 nearly 1,000 dicamba complaints were filed in Arkansas. Other states also experienced unprecedented dicamba complaints. As a result, the Governor of Arkansas appointed a Task Force to study the issue and make recommendations for regulation of dicamba products.

16. Based on the Task Force recommendations, for 2018, the Plant Board set the dicamba Cutoff Date at April 15, which had been and still was the Cutoff Date for the older dicamba formulations. Nevertheless, the Plant Board received nearly 200 dicamba complaints during 2018, which indicates that the problems with dicamba applications persisted even after the April 15, 2018 Cutoff Date was established.

17. For 2019 and 2020, the Plant Board set a dicamba Cutoff Date of May 25 but also established buffer zone requirements to protect crops susceptible and vulnerable to dicamba exposure. Despite these protections, the Plant Board continued to received complaints of dicamba exposure - 210 dicamba complaints in 2019 and 217 dicamba complaints in 2020.

18. In October 2020, the EPA approved labeling for a new iteration of in-season dicamba products that contain volatility reducing agents (VRA), which manufacturers contend reduce the volatility of dicamba/glyphosate mixtures to a similar volatility of dicamba alone. The new nation-wide labels approved by EPA in October 2020 for “in-season” dicamba products allow for spraying dicamba until June 30 for application on soybeans and until July 30 for application on cotton.

19. The Plant Board held its regular quarterly meeting on December 2, 2020 (the “December 2020 Meeting”). In that meeting, the Plant Board addressed dicamba, specifically as it relates to the October 2020 EPA approved labels. After hearing presentations from BASF, a dicamba manufacturer, Dan Scheiman with Audubon Arkansas, and Dr. Jason Norsworthy with the University

of Arkansas Division of Agriculture, the Plant Board voted 13 to 1, with 1 abstaining, to keep the Cutoff Date of May 25 and to only apply the new federal label Cutoff Dates (June 30 for soybeans and July 30 for cotton) for the area east of the Mississippi River levee (the “December 2020 Dicamba Rule”).

20. On or about January 31, 2021, Tyler Hydrick filed a Petition for Rule Making with the Plant Board pursuant to Ark. Code Ann. § 25-15-204(d), requesting the “implementation of a full, federally approved label for all reduced volatility dicamba formulation in the State of Arkansas without additional restrictions” (the “Hydrick Petition”). **Exhibit 1.** The Plant Board heard the Hydrick Petition in its regular quarterly meeting on March 3, 2021. No information was submitted in support of the Hydrick Petition, other than the Hydrick Petition itself and an oral presentation with slides by Mr. Hydrick. The Hydrick Petition did not provide any new scientific, technical, economic or other evidence changing or rebuking the facts and technical information relied on by the Plant Board in its vote at the December 2020 Meeting to keep the May 25 Cutoff Date.

21. Instead of denying the Hydrick Petition and staying with the December 2020 Rule, the Plant Board voted to initiate rule-making and to adopt the Hydrick Petition - that is, adopt the federal label for “all reduced volatility dicamba formulation” (the “Proposed 2021 Dicamba Rule”).

22. The vote to adopt the Proposed 2021 Dicamba Rule was the result of a motion made by board member Sam Stuckey and seconded by Barry Walls, to wit: “Accept the Hydrick Petition for full federal label for dicamba over the top of dicamba tolerant crops.” (The “Stuckey March Motion”.)

23. A notice of the Proposed 2021 Dicamba Rule was published on March 24, 2021 announcing that public comment would be accepted for 30 days.

24. A public hearing for the Proposed 2021 Dicamba Rule was held on May 3, 2021.

25. The Plant Board held a special meeting on that same afternoon of May 3, 2021, to

consider the Proposed 2021 Dicamba Rule that adopted the new EPA federal label to extend the dicamba Cutoff Date to June 30 for application to soybeans and July 30 for application to cotton.

26. In the special meeting on May 3, 2021, the Plant Board did not adopt the Proposed 2021 Dicamba Rule. Instead, Board member Sam Stuckey made a motion to adopt a new rule similar to the existing Arkansas rules, but with a cutoff date of June 30 for the “in-season” dicamba (the “Stuckey May Motion”). The Stuckey May Motion was significantly different from the Stuckey March Motion that resulted in the Proposed 2021 Dicamba Rule to adopt the full federal label.

27. During the discussion of the Stuckey May Motion at the May 3 special meeting, multiple members of the Plant Board stated they were seeking a compromise on the dicamba rule

28. Nonvoting Plant Board Member Dr. Nathan Slaton of the University of Arkansas Division of Agriculture stated that no Arkansas science supports a change to the current dicamba rule for use of dicamba within the State of Arkansas.

29. The US EPA Assessment dated October 26, 2020, which is part of the Plant Board’s dicamba rule making record and the subject of its dicamba discussions, states that at 75 degrees F and below the concern for wide-area exposure to volatilized dicamba is greatly reduced; however, the Assessment also states that it is more likely that large landscape exposure occurs beyond EPA’s 10-20 acre field scale used in EPA’s distance to effect (off target movement) studies.

30. On May 3, 2021 the Plant Board ultimately voted 9 to 5 to adopt the Stuckey May Motion in its final form, the most significant provisions of which are the following:

- (a) Extends the dicamba Cutoff Date from May 25 to June 30;
- (b) Reduces buffers for certified organic crops and commercial specialty crops from 1 mile to ½ mile;
- (c) Reduces buffers for other susceptible crops from ½ mile to ¼ mile; and

(d) The Rule was adopted as both an emergency rule and a permanent rule. See **Exhibit 2** (the “Final 2021 Dicamba Rule”).

31. On May 6, 2021, the Arkansas Supreme Court held that nine members of the Plant Board had been unconstitutionally appointed and ordered their removal from the Plant Board. *McCarty v. Arkansas State Plant Board*, 2021 Ark. 105 (2021).

COUNT I
THE PROPOSED 2021 DICAMBA RULE IS NOT WHAT
THE PLANT BOARD APPROVED ON MARCH 3, 2021.

32. Paragraphs 1 through 31 are incorporated herein by reference.

33. The Proposed 2021 Dicamba Rule is not what the Plant Board approved on March 3, 2021.

34. The Hydrick Petition was based on the EPA’s October 2020 approval of labeling for use of new formulations of reduced volatility dicamba products for “in-season” use only and specifically requested “the implementation of a full, federally approved label for **all reduced volatility dicamba formulation** in the State of Arkansas without additional restrictions.” (emphasis added). See **Exhibit 1**, page 4, item IIIa. The Plant Board approved the following Motion made by Sam Stuckey and seconded by Barry Walls: “Accept the Hydrick Petition for full federal label **for dicamba use over the top** of dicamba tolerant crops.” (emphasis added). (The “Stuckey March Motion”).

35. Chairman Fuller repeated the Stuckey March Motion before the vote. See **Exhibit 3**. Thus, the Stuckey March Motion was limited to relaxing the current Plant Board dicamba rule only for “reduced volatility” in-season/over the top use of dicamba products.

36. The Hydrick Petition requested “the implementation of a full, federally approved label for **all reduced volatility** dicamba formulation in the state of Arkansas without additional

restrictions.” (Emphasis added.) See **Exhibit 1**, page 4, item IIIa. The Stuckey March Motion was to adopt the Hydrick Petition, and Board Member Stuckey spoke only of “over the top” products in his Motion. The Hydrick Petition and the Stuckey March Motion describe one and the same class of dicamba products—the reduced volatility, a/k/a over the top or a/k/a in-season products.

37. An entirely separate class of dicamba is referred to as a “burn down” product, which is known to be more volatile than the “in-season” dicamba products. The burn down dicamba products were clearly not part of either the Hydrick Petition or the Stuckey March Motion.

38. There are important, material differences between the more volatile burn down products and the in-season/over the top products. These differences are clearly reflected in the dicamba regulations.

39. The proposed rule submitted to and approved by the Governor for the promulgation process, for which a notice was published for comment and which was the subject of the May 3, 2021 public hearing, was far broader than the Stuckey March Motion, as it stated that “**All** pesticides containing dicamba shall be used in compliance with their respective federal labels.” (Emphasis added). See **Exhibit 4**.

40. Thus, the proposed rule submitted for public comment also included lifting the Plant Board’s restrictions on dicamba products commonly referred to as “burn down” products and which are known to be more volatile, and not just the restrictions on “in season” or “reduced volatility” products that were the subject of the Hydrick Petition. Drafting the Proposed 2021 Dicamba Rule to include “**all pesticides** containing dicamba” is a material and dangerous departure from the current dicamba rules, was not part of the Stuckey March Motion, and thus was not approved by the vote of the Plant Board on March 3, 2021.

41. Consequently, the rule actually proposed in the Stuckey March Motion and approved by the Plant Board on March 3, 2021, has not yet been presented to the Governor for approval.

Likewise, the rule proposed and approved by the Plant Board on March 3, 2021, for public notice and comment, has not yet been presented to the Legislative Council (or the Joint Budget Committee) or the Secretary of State as required by Arkansas Code Ann. § 25-15-204(e)(1)(A).

42. The Plant Board action taken on March 3, 2021, to adopt the Proposed 2021 Dicamba Rule is still sitting at the Plant Board, and it has not moved through the regulatory requirements for public notice, that in turn starts the 30-day comment period, which was the prerequisite for the public hearing and further deliberations of the Plant Board on May 3, 2021.

43. This is not a situation where the public comments and public hearing might lead to changes in the proposed rule that are a “logical outgrowth” of the initial draft. This is much different. Here, something materially different from what the Plant Board approved was put forward as the Plant Board’s action (before receiving any comments from the public).

44. The proposed rule presented to the Governor and published for comment and as to which notice was published and which was the subject of the May 3, 2021 special meeting is not the rule that the Plant Board approved on March 3, 2021. See the March 3, 2021 rule making package submitted to the Governor’s Office, attached as **Exhibit 4**. This situation is not covered by the “substantial compliance standard” of Ark. Code Ann. § 25-15-204(h), which alludes to procedure, because this situation involves a radically material change to the substance of what the Plant Board actually approved.

45. At the special meeting on May 3, 2021, Plant Board (or Department of Agriculture) attorney Wade Hodge stated that Mr. Stuckey “assured” him that the Proposed 2021 Rule as presented to the Governor and for which notice was published was what Mr. Stuckey intended with the Stuckey March Motion. The record, including the video and transcripts of the March 3 meeting and of the May 3 special meeting, does not support that statement.

46. Therefore, the Proposed 2021 Dicamba Rule and the Final 2021 Dicamba Rule have

not met the prerequisites for publication and public comment, and are, therefore, fatally flawed and the Final 2021 Dicamba Rule should be voided.

COUNT II
FAILURE TO PROVIDE PROPER NOTICE FOR RULE MAKING

47. Paragraphs 1 through 46 above are incorporated herein by reference.

48. Ark. Code Ann. § 25-15-204(a)(1) under the Arkansas Administrative Procedures Act requires that the notice of proposed rules and changes to rules include a statement of the terms or substance of the proposal or a description of the subject and issues.

49. Dicamba begins to volatilize below 70 degrees and the rate of volatility increases in warmer temperatures. **Exhibit 5.** Therefore, Cutoff Dates tied to historical temperature records and buffer distances to susceptible crops are critical to minimize the risk of crop damage, as are any proposed changes to those Cutoff Dates and buffers.

50. Notice of the Proposed 2021 Dicamba Rule was published on March 24, 2021. That notice stated simply: “The proposed changes will be to consider changes for use of dicamba in the State of Arkansas” (the “March 24 Notice”). See **Exhibit 6.** The March 24 Notice did not provide any information on whether or how Cutoff Dates or buffers would be affected. Given the history and complexity of dicamba usage in Arkansas, this general statement falls far short of the notice required by Ark. Code Ann. § 25-15-204(a)(1)(B), which requires a statement of the terms or substance of the proposed rule or rule change, or that describes the subject and issues.

51. Further, the March 24 Notice did not make any mention of whether and how it would relate to or be impacted by the preceding public notice for dicamba rule making initiated by the Plant Board’s vote on dicamba usage at the December 2020 Meeting. That rule making action left the May 25 Cutoff Date in place and left existing buffers in place, but it changed the Cutoff Date for a limited

area east of the Mississippi River levee. The public notice for that December 2020 act was published March 6, 2021 (the “March 6 Notice”), three days **after** the Plant Board met on March 3, 2021, and approved the Proposed 2021 Dicamba Rule. See **Exhibit 7**.

52. The Plant Board had the unique opportunity to include in the March 6 Notice the material fact that other changes to the dicamba rules had been approved three days earlier on March 3, 2021, and those other changes were moving to the comment period. But the March 6 Notice did not mention such.

53. The comment period for the March 6 Notice (**Ex. 7**) was still open when the March 24 Notice (**Ex. 6**) was published.

54. In addition to the lack of explanation about whether and how the March 6 Notice and March 24 Notice were related, the March 24 Notice contained no terms, no substance and no description of the subject and issues.

55. The March 6 Notice (**Ex. 7**) left the May 25 Cutoff Date in place, except in a limited area east of the Mississippi River levee, as specifically explained in the public notice. The March 24 Notice (**Ex. 6**), however, did not fairly apprise the public that the Cutoff Date could be changed to as late as July 30, that the buffers could be reduced from the current distance or whether and how the March 24 Notice was or was not a continuation of the March 6 Notice.

56. Due to the lack of explanation of whether and how the separate notices of dicamba rule making were related, and failure to fairly apprise interested parties of the subject and issues of Cutoff Dates and buffers that would be considered, the Plant Board failed to give proper notice and the Final 2021 Dicamba Rule is invalid. Any rule making for dicamba must start over.

COUNT III
VIOLATION OF THE ARKANSAS ADMINISTRATIVE PROCEDURES ACT -
SCIENCE AND OTHER TECHNICAL INFORMATION

57. Paragraphs 1 through 56 above are incorporated herein by reference.

58. Ark. Code Ann. § 25-15-204(b)(1) provides that an agency shall not adopt, amend, or repeal a rule unless the rule is based on the best reasonably obtainable scientific, technical, economic or other evidence and information available concerning the need for, consequences of and alternatives to the rule. Notably consistent with that statute is Ark. Code Ann. § 20-20-206(a)(2) in the Arkansas Pesticide Use and Application Act that requires the Plant Board, when issuing regulations, to give consideration to pertinent research findings and recommendations of other agencies of this state, the United States Government, or other reliable sources. The Plant Board failed to comply with these statutes.

59. The Plant Board members who voted to approve the Final 2021 Dicamba Rule did not discuss or refer to any scientific or record information that justifies, shows the safety of, or otherwise supports changing the dicamba Cutoff Date from May 25 to June 30 or reducing buffers as required by Ark. Code Ann. §§ 25-15-204(b)(1) and 20-20-206(a)(2). More particularly, the Plant Board members who voted to approve the Final Rule did not discuss or provide any information as to how a June 30 Cutoff Date or reduced buffers reconcile with or overcome the following:

a. Dicamba can begin to volatilize below 70° F, the rate of volatility increases as the air temperature increases, and records show Arkansas temperatures regularly reach 85 degrees F by the end of May, **Exhibit 5**;

b. The EPA confirms that the volatility can occur for days after application, **Exhibit 8**;

c. EPA reports that temperature reductions have been demonstrated to reduce the volatility of dicamba.... At 75 degrees F... concerns for wider area exposure are greatly reduced. See **Exhibit 9**, page 9.

d. A representative of BASF, a dicamba manufacturer, confirmed to the Plant Board that

temperature is a key driver of dicamba volatility. See **Exhibit 10**.

e. EPA concluded that it is more likely that there is vapor phase exposure associated with these [wide-area] distances, especially on large landscape scales beyond the 10-20 acre field scale used for distance to effect studies. Therefore, EPA cannot definitively exclude the potential impact of vapor phase drift in the wide area zone based on an evaluation of available large field off-field movement studies. See **Exhibit 9**, page 3.

f. EPA reports dicamba off target movement of over 1.5 miles. See **Exhibit 9**, page 4.

g. University of Arkansas research stations in Lee, Mississippi and Desha Counties, in spite of being protected by a 1 mile buffer, suffered dicamba damage in 2018, 2019 and 2020. See **Exhibit 11**.

h. University of Arkansas scientists report, including in the meeting on May 3, 2021, that no Arkansas science supports changing the current dicamba rule (current May 25 Cutoff Date). See **Exhibit 12**.

60. Instead of basing its decision on scientific and other technical information, several of the Plant Board members who voted to approve the Final 2021 Dicamba Rule clearly stated they were seeking a compromise, but they provided no technical information supporting the safety of any date later than the existing May 25 Cutoff Date or for shortening the existing buffers.

61. The Plant Board acted unlawfully, unreasonably and capriciously and exceeded its authority by failing to meaningfully consider the evidence presented in support of maintaining the May 25 dicamba Cutoff Date and buffers. The Final 2021 Dicamba Rule must be voided and set aside.

COUNT IV VIOLATION OF EMERGENCY RULE MAKING LAW

62. Paragraphs 1 through 61 above are incorporated herein.

63. The Plant Board adopted the Final Rule as both an emergency rule and a permanent

rule. See **Exhibit 2**, page 5.

64. Ark. Code Ann. §25-15-204(c)(1)(3) provides that an emergency rule may be effective no longer than 120 days, and subparagraph (4) thereof allows for a successive emergency rule. This emergency rule statute does not allow for an emergency rule to extend beyond the two 120-day increments and requires at least a 30-day break between them. The emergency rule statute does not allow an emergency rule to be combined with a permanent rule.

65. The Plant Board's attempt to combine an emergency rule with a permanent rule is an illegal attempt to avoid administrative law processes, notices and timelines for rule making and exceeds its authority. The effect of the emergency rule statute is to dispense with the 30 day notice requirement if there is an imminent peril to public health, safety or welfare; however the statute does not allow an agency to disregard the other requirements and limitations on the Plant Board's rulemaking authority.

66. The Plant Board's attempt to combine an emergency rule with a permanent rule is an illegal attempt to cure material defects in its notices for dicamba rule making discussed in Counts I and II above.

67. No emergency exists for the purposes of adopting the Final 2021 Dicamba Rule. There was no mention or discussion of an emergency as to the use of dicamba when the Plant Board heard the Hydrick Petition on March 3, 2021. Further, there was no mention of an emergency when the Plant Board adopted the Final 2021 Dicamba Rule on May 3, 2021, until near the end of the meeting as part of determining the final compromise motion to approve the Final 2021 Dicamba Rule and get it into effect.

68. The Plant Board's Emergency Declaration on its face shows it is merely an attempt to avoid procedures and timelines for regular rule making, to wit: "... the proposed permanent rule may not go into effect until well into or even after this year's growing season.... An emergency rule can

be in effect prior to the May 25 cutoff date.” See **Exhibit 2**, page 5.

69. The statement in the Emergency Declaration that dicamba is essential to the sustainability of row crop agriculture in Arkansas is not supported by the record and is contrary to information submitted by the University of Arkansas Division of Agriculture. See **Exhibit 12**.

70. The statement in the Emergency Declaration that there is extensive resistance to other weed control products is not supported by the record.

71. The Emergency Declaration totally disregards the increased risk of harm due to crop injury and damage to persons with crops susceptible to dicamba, whose risk is increased significantly by **extending the Cutoff Date** to June 30 and **reducing the buffers** from 1 mile to ½ mile for certified organic and commercial specialty crops and from ½ mile to ¼ mile for other susceptible crops.

72. The Final 2021 Dicamba Rule was not properly adopted as either an emergency rule or permanent rule, is a misuse of the emergency rule process and should be vacated.

COUNT V PLANT BOARD MEMBER’S CONFLICTS OF INTEREST

73. Paragraphs 1 through 72 above are incorporated herein by reference.

74. Ark. Code Ann. § 21-8-1001 provides that no member of a board or commission shall **participate in, vote on, influence, or attempt to influence** an official decision if the member has a pecuniary interest in the matter under consideration by the board.

75. Ark. Code Ann. § 25-15-213(2)(C) provides that any party may file an affidavit of personal bias or disqualification. This affidavit shall be ruled on by the agency and granted if timely, sufficient and filed in good faith.

76. An Affidavit was submitted to the Plant Board by Karen Seale, M.D. well before the meeting on May 3, 2021, alleging conflicts of interest of Plant Board member Brad Koen. See **Exhibit**

13.

77. Said Affidavit attested to grounds for Mr. Koen's conflicts as an area manager of BASF, a dicamba manufacturer, and included reported interviews with Mr. Koen about conflicts of interest. At the beginning of the public hearing on May 3, 2021, Mr. Koen deferred to the Plant Board to decide if he had a conflict of interest regarding dicamba matters. In a voice vote with audible nays, the Plant Board voted that Mr. Koen could participate in the dicamba matter, and he did.

78. Mr. Koen, as an area manager for BASF, which is a manufacturer of dicamba products, has a conflict of interest in violation of Arkansas law and should be declared to be ineligible to participate in, vote on, influence or attempt to influence any issue or proceeding before the Plant Board involving dicamba.

COUNT VI
VIOLATION OF ADMINISTRATIVE PROCEDURES ACT—FAILURE TO
PROVIDE STATEMENT OF REASONS FOR RULE

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

80. Ark. Code Ann. §25-15-204(a)(2)(D) provides that an interested person may request a statement of the reasons for and against adoption of a rule, and that the agency shall issue a concise statement of the principal reasons for and against the adoption of the rule.

81. Pursuant to said statute, Plaintiff Freedom To Farm Foundation, Inc. through its counsel by letter dated April 21, 2021, requested the Plant Board's explanations for the Proposed 2021 Dicamba Rule ("Freedom To Farm's Comment Letter and Request For Statement".) See **Exhibit 14**.

82. By e-mail dated April 30, 2021, Plant Board counsel Wade Hodge informed Plaintiff's counsel that the Plant Board would not respond to Plaintiff's Request for Statement until after the rule making was complete. As of the filing of this Complaint, Plaintiffs have not received any correspondence from the Plant Board that provides the statement required under Ark. Code Ann. § 25-

15-204(a)(2)(D).

**COUNT VII
DECLARATORY JUDGMENT**

83. Paragraphs 1 through 82 above are incorporated herein by reference.

84. Ark. Code Ann. § 25-15-207 provides for a cause of action against an administrative agency for declaratory judgment to determine the validity of a rule where a “rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property.”

85. Ark. Code Ann. § 25-15-202(9)(A) 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.”

86. Ark. Code Ann. §16-111-102 provides that “any person . . . whose rights, status or legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” The Final 2021 Dicamba Rule was adopted pursuant to the Arkansas Administrative Procedures Act and the Arkansas Pesticide Use and Application Act, and the Plaintiffs are entitled to a declaration of the validity of the Final 2021 Dicamba Rule under those statutes.

87. The Plant Board’s Final 2021 Dicamba Rule, which extends the applications of pesticides containing dicamba until June 30 and reduces dicamba buffer zones for susceptible crops, is a “rule” of the Plant Board that is arbitrary and capricious and otherwise invalid, which will cause injury to Plaintiffs’ businesses and property.

88. 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.

89. The Plant Board's continued arbitrary and capricious extension of the dicamba Cutoff Date and reducing dicamba buffer zones for susceptible crops creates lasting uncertainty regarding Plaintiffs' exposure to off target damage by dicamba and is injuring and will continue to injure Plaintiffs' businesses and property.

90. As set forth herein, the Plant Board's actions in adopting the Final 2021 Dicamba Rule are arbitrary and capricious, are ultra vires, are not supported by substantial evidence, violate the requirements of the Administrative Procedures Act, and should be declared invalid by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that the Court grant the following relief in Plaintiffs favor and against Defendants:

a. Entry of judgment against the Plant Board and its members in their official capacities and in favor of Plaintiffs for each count alleged in this Complaint;

b. Entry of a declaratory judgment that the Plant Board's Final 2021 Dicamba Rule, which extends the use of pesticides containing dicamba until June 30 of each year and reduces buffers, violates state law and is invalid and that the Plant Board and its members in their official capacities, therefore, lack authority to enforce it and must rescind it;

c. Entry of an injunction that immediately stays the Final 2021 Dicamba Rule and orders the Plant Board to adhere to and enforce its dicamba rules that were in effect immediately before the adoption of the Final 2021 Dicamba Rule; and,

d. All other relief the Court deems just or proper.

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Respectfully submitted,

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