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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation This Document Relates To: ALL ACTIONS[†]	Case Type: Civil Other Honorable Thomas M. Sipkins File No.: 27-CV-15-3785 **SYNGENTA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED NON-CLASS AND FIRST AMENDED MINNESOTA CLASS ACTION MASTER COMPLAINTS FOR PRODUCERS AND NON-PRODUCERS**

[†] Pursuant to this Court's Scheduling Order No. 1, this Motion to Dismiss applies to all claims brought by Plaintiffs who reside in one of the 22 States currently at issue in the federal MDL, with proceedings in all other cases deferred.

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INTRODUCTION

Plaintiffs' lawsuit rests on the unprecedented theory that it was a *tort* for Syngenta to sell a U.S.-approved, genetically modified (GM) corn seed called Viptera in the U.S. simply because that biotechnology had not yet been approved for import into China. According to Plaintiffs, absent Chinese approval, the law imposed a duty on Syngenta either (i) to control the way *everyone else* handled corn grown with the new technology to keep it segregated or (ii) to prevent American farmers from having access to the technology *at all*. The claimed reason for this novel duty is not that the GM trait harmed corn in any *physical* way. There is no dispute that the U.S. government allowed corn grown from Viptera to be treated like any other yellow corn and thus that it could be harvested, processed, and consumed without any requirement to keep it separate. Instead, Plaintiffs claim only *economic* injury, asserting that because corn is typically treated as a fungible commodity crop, and because they and others mixed Viptera corn into the U.S. corn supply, China eventually decided to block all U.S. corn shipments (supposedly due to the presence of Viptera), so as to cause a drop in the price of all U.S. corn. In their view, Syngenta should be liable in tort for that entire extended chain of events, including actions taken by *others* entirely outside Syngenta's control. That theory should be recognized for what it is: an attempt to use tort law to allow Plaintiffs to avoid the costs of adapting their businesses to the advent of new technology and to turn a biotechnology manufacturer into an insurer paying out on a policy that Plaintiffs never bought to protect themselves from market drops in the price of corn.

At the heart of this case lies an inescapable fact: when the U.S. approves biotechnology before foreign countries (like China), players in the U.S. corn industry such as grain elevators and exporters face a choice. They can continue to treat all corn as fungible and mix all corn together, in which case they risk losing the ability to export to a market where a U.S.-approved technology has not yet gained approval. Or they can take steps to separate corn to preserve their

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ability to serve the special demands of particular export markets. The premise of Plaintiffs' case is that tort law eliminates the need for Plaintiffs to face that choice by requiring the manufacturers of new GM technology to hold others in the market harmless from costs that the advent of new technology might place on their current ways of doing business. In their view, tort law dictates that American manufacturers must either *suppress* innovative new technology until it is approved overseas, or else absorb the costs that others in the market incur when they fail to take steps to adapt to the new technology—all because it is supposedly a tort to market technology that others find disruptive for their way of doing business. Under that radical reasoning, a GM manufacturer could be liable in tort for selling a GM seed that increases crop yields and thus causes prices to drop, because of the economic harm to those in the industry who previously enjoyed higher prices. Plaintiffs' theory has no support in precedent and should be rejected as a matter of law.

There is no dispute that when Syngenta began selling Viptera in 2010, it had been found safe and was fully approved by the U.S. Government. It was also well known in the industry that China had not yet approved Viptera. As a result, some grain elevators—like Bunge—chose to change the way they did business to address the advent of this new technology. They decided it was important to preserve their ability to meet the standards of the Chinese export market, so they refused to accept Viptera corn at their grain elevators. Others, including the Non-Producer Plaintiffs here, took a different approach. They chose not to segregate corn grown from Viptera from other corn, treating all such corn for what, by law, it was: fungible U.S. "yellow corn." They mixed corn without distinction in their facilities. Corn producers similarly made no effort to require the grain elevators to whom they sold their corn to segregate it to ensure that it would be exportable to China. And in seeking to profit from record-high prices driven by corn shortages in 2011 and 2012, Non-Producers decided to ship corn containing Viptera to China

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knowing that Viptera had not yet been approved for import into China. That approach continued for two years, until China began turning away U.S. corn shipments in November 2013.

In addition to suffering from a host of individual defects, Plaintiffs' causes of action are broadly foreclosed by two fundamental principles.

First, Plaintiffs' claims are barred by the economic loss doctrine ("ELD"). Under settled law, purely economic losses are not recoverable in actions for unintentional torts. Indeed, until the Viptera litigation, the only American court to consider claims identical to those here based on the loss of a foreign market due to the spread of an approved GM trait *rejected* those claims by applying the ELD. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1093 (E.D. Mo. 2003).

Although the MDL court presiding over the federal Viptera litigation ("MDL Court") concluded that the ELD did not apply, that court did not acknowledge *Sample*, much less distinguish it. Instead, the MDL decision rests on the creation of a novel exception to the ELD based on a case-by-case assessment of policy factors to determine when the ELD should apply. With all respect, that approach misstates the law: the very reason for the ELD is to provide a bright-line rule barring recovery of economic losses absent physical injury. It forecloses precisely the case-by-case approach that the MDL Court adopted and which, if anything, resembles the *minority* approach to the ELD adopted by only three States and rejected by the Restatement and every other State to have considered it.

Second, Plaintiffs' suggestion that Syngenta had a duty to reorganize the entire industry framework for growing and distributing corn—by controlling the actions of growers, elevators, and exporters, *including Non-Producers themselves*—is literally unprecedented. The standard rule is that a party has no duty to control the conduct of another, and under that rule courts regularly reject the idea that manufacturers of safe, non-defective products have a duty to control third parties' handling of products after the point of sale. Imposing such a duty would also

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undermine the policy behind the U.S. regulatory framework under which, once approved by the USDA, the EPA, and the FDA, GM crops are treated the same as non-GM crops. No court has purported to create a parallel regulatory regime restricting which GM traits can and cannot be sold freely after federal approval, and this Court should not proceed down that uncharted path.

To the extent Plaintiffs claim that Syngenta had a duty not to sell Viptera *at all* until it had Chinese approval, that theory is even more far-fetched. State tort law does not require the suppression of new technology that current market participants find inconvenient, nor does it give foreign governments a veto over which new technologies—*already approved by the U.S. government*—can be sold in the United States.

The MDL Court's conclusion that Syngenta had a duty to operate its business "for the mutual benefit of all" in the industry so as to avoid economic disruptions for other market participants, MDL Order 10,[2] is similarly unprecedented. The MDL Court cited no prior case recognizing such a duty, and it is completely counter to the usual rule that, absent specifically defined economic torts, market participants are free to pursue their own advantage in the market, including by introducing disruptive new technologies.

Plaintiffs' repeated references to cases involving *unapproved* GM traits are irrelevant. Those cases involved GM traits that had been improperly released into the U.S. food supply *before they had been approved for human consumption.* Before the Viptera litigation, only two courts had addressed claims like the ones here—claims that the *lawful* sale of an *approved* GM seed harmed farmers or exporters by foreclosing their ability to serve an export market. Both courts rejected those claims as a matter of law. As noted above, *Sample* barred such claims under the ELD. In the second case, a Canadian court applied the same common-law principles

[2] "MDL Order" refers to Mem. & Order, Dkt. 1016, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-2591 (D. Kan. Sept. 11, 2015) (attached as Ex. C).

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applicable here and held as a matter of law that the plaintiffs could not show duty *and* that the claims were barred by the ELD as well. *See Hoffman v. Monsanto Canada (Hoffman I)*, 2005 SKQB 225, 2005 SK.C. LEXIS 330 (Can. Sask. Q.B. May 11, 2005) (attached as Ex. A), *aff'd*, *Hoffman v. Monsanto Canada* (*Hoffman II*), 2007 SKCA 47, 2007 SK.C. LEXIS 194 (Can. Sask. C.A. May 7, 2007) (attached as Ex. B).[3] Those decisions provide the proper approach for analyzing this case, and this Court should similarly dismiss Plaintiffs' claims.

BACKGROUND

Because Plaintiffs' complaints hinge on the premise that GM crops must be segregated from those that are not, a brief discussion of the regulatory backdrop is helpful.

A. Biotechnology And Genetically Modified Crops In The United States[4]

The United States Department of Agriculture ("USDA") defines genetic engineering as "a precise and predictable method used to introduce new traits into plants and animals by moving genetic elements from one or more organisms into another."[5] The government has recognized that the use of this biotechnology "has resulted in benefits to farmers, producers, and consumers" by "mak[ing] both insect pest control and weed management safer and easier while safeguarding crops against disease," including "allow[ing] for a significant reduction" in the use of pesticides.[6]

The benefits of biotechnology have prompted a dramatic increase in the use of GM seeds over the past two decades. For some crops, such as corn, this has translated into near-universal

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[3] Citations to exhibits refer to the exhibits attached to the November 9, 2015 Affidavit of D. Scott Aberson.

[4] The facts relevant to this motion come from the complaints, "[d]ocuments and oral statements referenced in the complaint," *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000), and matters of government and public record cited in the Argument section—all of which are subject to judicial notice, *see Mutua v. Deutsche Bank Nat. Trust Co.*, 2013 WL 6839723, at *1 (Minn. Ct. App. Dec. 30, 2013)—in addition to publicly available information provided solely for background and that is not necessary to the resolution of this motion.

[5] USDA, *Department of Agriculture's Consolidated Financial Statements for Fiscal Years 2010 and 2009*, 57 http://www.usda.gov/oig/webdocs/50401-70-FM.pdf.

[6] USDA, Biotechnology Frequently Asked Questions, http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml.

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usage across the U.S. Today, GM corn makes up 92% of all corn planted in the U.S.[7] The use of GM technology has also produced corresponding increases in crop yields.[8] As the USDA has explained, biotechnology can help "keep pace with demands for food while reducing production costs."[9] For these reasons, the U.S. Government long ago weighed the benefits of GM crops and adopted the policy of treating approved GM products the same as conventionally bred crops.[10]

Manufacturers of GM traits like the ones at issue here are statutorily restricted from launching GM traits until they have been fully vetted and approved by the USDA, the EPA, and the FDA—as the traits at issue here were.[11] Through its "complex method of evaluation"[12] and testing, the USDA may determine that the GM trait is safe and remove any statutory restrictions by "deregulating" the GM trait, either in whole or in part.

B. Syngenta's Development Of U.S.-Approved Viptera And Duracade Corn

Syngenta has developed, manufactured, and sold GM seeds for decades, and its advances include two corn seed traits called MIR162 and Event 5307. Each trait protects corn crops from insects and pests, thus increasing crop yields and reducing the need for pesticides. MIR162 was incorporated into Syngenta's Viptera corn seed, making it resistant to above-ground pests like

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[7] USDA, *Adoption of Genetically Engineered Crops in the U.S.* (2014), http://www.ers.usda.gov/amber-waves/2014-march/adoption-of-genetically-engineered-crops-by-us-farmers-has-increased-steadily-for-over-15-years.aspx#.VkDLy7erTGg.

[8] USDA, *Adoption of Genetically Engineered Crops by U.S. Farmers Has Increased Steadily for Over 15 Years* (Mar. 4, 2014), http://www.ers.usda.gov/amber-waves/2014-march/adoption-of-genetically-engineered-crops-by-us-farmers-has-increased-steadily-for-over-15-years.aspx#.VXfIevlVhBc.

[9] USDA, Biotechnology Frequently Asked Questions, http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml.

[10] *See, e.g.*, Blake A. Biles, *Agricultural Biotechnology: The U.S. Perspective*, 18 Nat. Resources & Env't 12, 43 (2003) ("According to the Coordinated Framework [issued by the Executive Office of the President in 1986], products created using genetic engineering are presumed to be as safe (concerning both public health and the environment) as their conventional counterparts unless evidence indicates otherwise.").

[11] 7 U.S.C. § 7711(a) ("[N]o person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit and is in accordance with such regulations as the [USDA] may issue . . ."). Under USDA regulations, genetically modified organisms are generally regulated as plant pests until approved. 7 C.F.R. § 340.1.

[12] USDA, *USDA's Biotechnology Deregulation Process* (June 28, 2011), http://blogs.usda.gov/2011/06/28/usda%E2%80%99s-biotechnology-deregulation-process/

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Lepidoptera (caterpillars). Several years after Viptera was launched, Syngenta developed Event 5307, which controls pests like rootworm and is found in a corn seed product called Duracade.

According to the complaints, Syngenta "field tested [Viptera and Duracade] under permits issued by or notifications to . . . the USDA." Non-Class Compl. ¶ 13; *see* Class Compl. ¶ 39. The complaints do not allege any unapproved releases of MIR162 during the field testing. Once sufficient laboratory and field testing established that Viptera was safe for humans, animals, and the environment alike, Syngenta petitioned the USDA in 2007 to deregulate MIR162. *See generally* Pet. for Determination of Nonregulated Status for Insect-Resistant MIR162 Maize, SYN-IR162-4 (Aug. 31, 2007) ("Deregulation Petition"), http://www.aphis.usda.gov/brs/aphisdocs/07_25301p.pdf.

Three years later, in 2010, the USDA approved MIR162 for deregulation without any restrictions on how it was to be sold, grown, or handled.[13] The USDA also concluded that MIR162 did not pose risks to humans, animals, or the environment.[14] The USDA rejected alternatives to full deregulation, including partial deregulation that would have restricted where Viptera could be planted.[15] By deregulating a GM trait like MIR162, the USDA "allow[s] it to be sold commercially." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1015 n.2 (E.D. Mo. 2009). As a result, the USDA's unrestricted approval made Viptera, just like every other U.S.-approved GM corn product, a lawful and integral part of the U.S. corn supply under the USDA's broad definition of "yellow corn."[16]

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[13] *See* USDA APHIS, *Syngenta Biotechnology, Inc.; Determination of Nonregulated Status for Corn Genetically Engineered for Insect Resistance*, 75 Fed. Reg. 20560 (Apr. 20, 2010).

[14] *See* USDA, *Nat'l Envt'l Policy Act Decision & Finding of No Significant Impact, MIR162 Maize*, 5 (April 12, 2010), http://www.aphis.usda.gov/brs/aphisdocs2/07_25301p_com.pdf.

[15] *Id.*

[16] *See* 7 C.F.R. § 810.402(c)(1) ("yellow corn" is "[c]orn that is yellow-kerneled and contains not more than 5.0 percent of corn of other colors," with "kernels of corn with a slight tinge of red [being] considered yellow corn").

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Syngenta petitioned the USDA for deregulation of Event 5307 in April 2011[17] after conducting USDA-authorized field tests. Non-Class Compl. ¶ 13; Class Compl. ¶ 198. As with the MIR162 field tests, the complaints do not allege any unapproved releases of Event 5307 during testing. In 2013, the USDA fully deregulated Event 5307 without any restrictions.[18]

MIR162 and Event 5307 not only received USDA approval, but also were approved by the EPA and the FDA. The EPA regulates the use, sale, and labeling of pesticides, including those in GM traits such as MIR162, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *See* 7 U.S.C. §§ 136a, 136w. Syngenta secured EPA approval of MIR162 in November 2008[19] and Event 5307 in July 2012.[20] The FDA, which oversees food and feed safety of GM plants,[21] was satisfied with Syngenta's conclusion that "food and feed derived from . . . MIR162 are as safe and nutritious as food and feed derived from conventional maize" (and likewise with respect to Event 5307).[22] Thus, by April 20, 2010, it is undisputed that Viptera had received all approvals required for it to be sold without restriction in the United States, and Duracade had received all required approvals for unrestricted sale by January 29, 2013. There is no dispute in this case about the safety or efficacy of Viptera and Duracade.

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[17] *See* Pet. for Determination of Nonregulated Status for Rootworm-Resistant Event 5307 Corn, Pet. No. 5307-USDA-1 (Apr. 22, 2011), http://www.aphis.usda.gov/brs/aphisdocs/10_33601p.pdf.

[18] USDA, *Determination of Nonregulated Status for Event 5307 Corn* (Jan. 29, 2013), http://www.aphis.usda.gov/brs/aphisdocs/10_33601p_det.pdf.

[19] EPA, *Notice of Pesticide Registration, MIR162 Maize* (Nov. 26, 2008), http://www3.epa.gov/pesticides/chem_search/ppls/067979-00014-20081126.pdf.

[20] EPA, *Notice of Pesticide Registration, 5307 Corn* (July 31, 2012), http://www3.epa.gov/pesticides/chem_search/ppls/067979-00022-20120731.pdf.

[21] *See* FDA, *FDA's Role in Regulating Safety of GE Foods* (May 14, 2013), http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm352067.htm.

[22] FDA, *Biotechnology Consultation Note to the File BNF No. 000113, Maize Event MIR162* (Dec. 1, 2008), http://www.fda.gov/Food/FoodScienceResearch/GEPlants/Submissions/ucm155598.htm; FDA, *Biotechnology Consultation Note to the File BNF No. 000128, Maize Event 5307* (Jan. 30, 2012), http://www.fda.gov/Food/FoodScienceResearch/GEPlants/Submissions/ucm304082.htm.

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C. Syngenta Commercializes Viptera Consistent With Industry Guidelines

1. The BIO Stewardship Policy

Given the increasingly globalized market for many commodity crops, one issue perennially raised by new GM technologies arises from the fact that a given GM trait typically will not secure approval from regulatory authorities in different countries all at the same time. Thus, a trait may be approved for commercialization in an exporting country before it has received approval for import in all other countries. Because of this issue of asynchronous approvals, various players in the biotechnology and grain industries have suggested "stewardship" guidelines for developers to consider in deciding when to commercialize a new product. One of the earliest was the Biotechnology Industry Organization ("BIO") "Product Launch Stewardship Policy," first approved on May 10, 2007.[23] The BIO Policy sets out recommendations for member companies but expressly refuses to create any binding obligations. *See* 2009 BIO Policy, Ex. D at 1 n.2 ("Under BIO's bylaws and applicable antitrust law, individual member companies ***are not bound*** by this Association policy or its annexes.") (emphasis added). The BIO Policy suggests that, before launching a new GM trait, member companies should assess which countries are "key import markets," which requires, among other things, assessing the volume of trade for the crop at issue. *Id.* at 4. The Policy does not define what makes a market "key" or stipulate any particular market-assessment metrics. The BIO Policy suggests that, before launching a new GM seed, manufacturers consider obtaining import approval from those "key export markets" that have "functioning regulatory systems"—defined as countries with "a track record of systematic authorizations with *consistent and predictable*

[23] BIO updated the BIO Policy on December 10, 2009—the only update prior to Syngenta's decision to launch Viptera, https://www.bio.org/sites/default/files/Product_Launch_Stewarship_12_10_09_0.pdf (attached as Ex. D and incorporated by reference at Non-Class Compl. ¶¶ 73, 116, 121, 144 and Class Compl. ¶¶ 25, 32, 35, 62).

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timelines and processes." *Id.* at 4 & n.6 (emphasis added).

The BIO Policy has never listed China as a key import country or a country from which approval should be secured prior to commercialization. In fact, the 2009 BIO Policy listed only the U.S., Canada, and Japan as "key markets," *see id.* at 4, and noted only that other countries might be considered later. *See id.* at 4 n.6.

2. Syngenta Commercializes Viptera Consistent With The BIO Policy

In late 2009, Syngenta decided to begin commercialization upon securing deregulation of MIR162 from the U.S. and import approval in the markets named by BIO. It is undisputed that, consistent with the BIO Policy, Syngenta obtained approval from the U.S., Canada, and Japan before Viptera was launched—the countries that BIO had identified at the time. Indeed, even before the first commercial planting began in 2011, many additional foreign countries, including Brazil, Korea, Taiwan, the Philippines, and Mexico, had approved Viptera for import as well.

China does not even permit an application for approval of a trait to be filed until the trait has been approved for human consumption in the exporting country.[24] Syngenta applied for import approval from China as soon as it was permitted to do so in March 2010. Non-Class Compl. ¶ 70; Class Compl. ¶ 59. At the time Syngenta launched Viptera in the United States in 2010, about one-third of 1% of annual U.S. corn production was exported to China.[25]

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[24] *See* USDA Foreign Agr. Serv., GAIN Report No. CH12046 (July 13, 2012) http://gain.fas.usda.gov/-Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Beijing_China%20%20Peoples%20Republic%20of_7-13-2012.pdf.

[25] Plaintiffs' repeated efforts to tout China's significance to the U.S. corn market are belied by the USDA's own statistics in the public record. For example, in 2010, there were 12,425,330,000 bushels of corn produced in the U.S. and 1,025,396 metric tons of that corn exported from the U.S. to China. *See* USDA Economic Research Service Feed Grains Database, http://www.ers.usda.gov/data-products/feed-grains-database/feed-grains-custom-query.aspx (attached as Exhibit F). Converting the latter data point to bushels (39.368 bushels per metric ton, *see* Ex. F, or approximately 40,367,790 bushels) and then dividing it by the total number of bushels produced in the U.S. shows that only 0.32% of the U.S. corn produced in 2010 was exported to China. *Cf. Kaiser v. Kaiser*, 186 N.W.2d 678, 684 n.4 (Minn. 1971) ("We do not doubt that judicial notice may be taken of both the fact of increase and the extent of increase in the cost of living by resort to consumer price indices published by the United States Bureau of Labor Statistics."); *see also, e.g., Victoria Cruises, Inc. v. Chiangjiang Cruise Overseas Travel Co.*, 630 F. Supp. 2d

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3. Competing "Stewardship" Guidelines From Other Trade Associations

Other industry associations have developed similar non-binding stewardship guidelines like the BIO Policy. The Excellence Through Stewardship ("ETS") "Guide for Product Launch Stewardship," *see* Non-Class Compl. ¶ 44; Class Compl. ¶ 33, leads with a disclaimer that the Guide is "solely an educational tool" and "does not define or create legal rights or obligations."[26] The ETS Guide simply provides "guidance" for companies to consider as they develop their own internal stewardship policies.[27] Likewise, CropLife International has established "Product Launch Stewardship" guidelines that, like the BIO Policy, recommend that CropLife International members should meet regulatory requirements in "key countries" with "functioning regulatory systems."[28] Neither the ETS nor the CropLife guidelines mention China.

D. Most Grain Elevators And Exporters Treat Viptera As Fungible Corn, Commingle It, And Ship It To China

With U.S. and other approvals in hand, Syngenta sold Viptera seeds to independent dealers and directly to growers in the United States for the 2011 growing season. Non-Class Compl. ¶ 80; Class Compl. ¶ 69. Plaintiffs allege that the farmers planting Viptera did so in a way that permitted cross-pollination with neighboring fields.

At the time, it was well known that China had not approved Viptera for import. As Plaintiffs point out, industry organizations, such as NGFA and NAEGA, were well aware of that fact at all relevant times. *See* Non-Class Compl. ¶¶ 85, 104-05; Class Compl. ¶¶ 93-94.

Based on the information available in the market, a few grain elevators and exporters,

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255, 263 n.3 (E.D.N.Y. 2008) ("The Court can take judicial notice of government statistics.").

[26] Excellence Through Stewardship, Guide for Product Launch Stewardship for Biotechnology-Derived Plant Products, 2 (July 2010), http://excellencethroughstewardship.org/wp-content/uploads/ETS-Stewardship-Guide-Final-Revised-12-13.pdf.

[27] *Id.* at 4.

[28] *See* CropLife International, Product Launch Stewardship, http://croplife.org/plant-biotechnology/stewardship-2/product-launch-stewardship/. Because the guidelines are undated, it is unclear what they recommended at the time Syngenta commercialized Viptera, if they even existed at that time.

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including Bunge, decided to protect what they viewed as their economic interests by refusing to accept Viptera corn. Bunge, in mid-2011, announced that it would not "accept Viptera corn because [it] exported corn to China." Non-Class Compl. ¶ 147; *see* Class Compl. ¶ 136.[29]

Unlike Bunge and Consolidated Grain and Barge, Non-Class Compl. ¶ 148; Class Compl. ¶ 137, many other grain elevators and exporters decided to accept and handle Viptera corn without distinction from non-Viptera corn. These grain elevators and exporters did not refuse Viptera corn (like Bunge and others) or ask for any contractual assurance from growers about the seed they had used. Nor did they decide to test for Viptera or to try to segregate Viptera to make sure that their corn complied with Chinese standards. And that made sense because as noted above, the Chinese market accounted for only about one-third of 1% of U.S. corn production when Viptera was launched in the U.S. *See supra* note 25.

During this time, Syngenta kept market analysts and its investors updated on the status of Chinese approval. For example, in April 2012, Syngenta hosted an earnings call for investors.[30] Plaintiffs seize on a statement from then-Syngenta AG CEO Michael Mack that, as to "outstanding approval for China" "we *expect* to have [it] quite frankly within the matter of a couple of days," and try to portray it as misleading.[31] But Mr. Mack cautioned listeners that "the regulatory authorities are not something that we can handicap definitively," and the entire call was preceded by the "usual cautionary statement" that the "presentation contains forward-

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[29] As Plaintiffs note, Syngenta Seeds sued Bunge and sought a preliminary injunction requiring Bunge to accept Viptera corn. *See* Non-Class Compl. ¶¶ 149-50; Class Compl. ¶¶ 138-39. The court refused that request and thus established the principle that Bunge—and all other grain elevator operators—remained free to protect their economic interests in exporting to China by refusing to accept Viptera corn. Bunge is not a plaintiff in this case.

[30] *See* Tr. of Q1 2012 Syngenta Earnings Call, http://www.syngenta.com/global/corporate/SiteCollectionDocuments/pdf/transcripts/q1-2012-transcript-syngenta.pdf (attached as Ex. E) (quoted in Non-Class Compl. ¶ 184 and Class Compl. ¶ 173).

[31] *Id.* (emphasis added).

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looking statements, which can be identified by terminology such as" the word "*expect.*"[32]

If anything, Mr. Mack's statement about the uncertainty of predicting the Chinese regulatory process was prescient. While Plaintiffs allege that China had a functioning regulatory system when Syngenta applied for import approval in 2010, *see* Non-Class Compl. ¶ 60; Class Compl. ¶ 49, as it turned out, it was anything but functional. Under Chinese law, the application for Viptera should have been addressed within 270 days.[33] By April 2012, it had been pending for more than 700 days. In December 2012, the U.S. Trade Representative acknowledged China's "apparent slow-down in issuing approvals" for biotechnology products.[34] Indeed, due in part to public backlash in China over GM products and outstanding trade disputes between the U.S. and China, the Ministry of Agriculture did not approve a single application for importing new GM crops from June 2013 until December 11, 2014 (when Viptera was approved).[35]

E. The Price Of Corn Drops And China Then Bans U.S. Corn

The complaints do not allege any rejections by China from the time Syngenta commercialized Viptera until late 2013. And as the 2013/2014 corn season approached, USDA analysts projected a "record" U.S. corn crop and significantly "[l]ower prices" as a result of "higher production, moderately higher use, and record global supplies"[36]—issues having nothing

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[32] *Id.* (emphasis added).

[33] USDA Foreign Agricultural Service GAIN Report Number 14032, 8 (Dec. 31, 2014), http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Beijing_China%20-%20Peoples%20Republic%20of_12-31-2014.pdf.

[34] U.S. Trade Rep., 2012 Rep. to Cong.ress on China's WTO Compliance, 89 (Dec. 2012), https://ustr.gov/sites-/default/files/uploads/2012%20Report%20to%20Congress%20-%20Dec%2021%20Final.pdf; *see also id.* at 88 (noting that "other U.S. concerns with China's biotechnology regulations and implementing rules remain").

[35] USDA Foreign Agricultural Service GAIN Report Number 14032, 8 (Dec. 31, 2014), http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Beijing_China%20-%20Peoples%20Republic%20of_12-31-2014.pdf.

[36] USDA, *Economic Research Service Feed Outlook, Record Feed Grain Production Projected for 2013/14*, 3 (May 14, 2013), http://usda.mannlib.cornell.edu/usda/ers/FDS/2010s/2013/FDS-05-14-2013.pdf.

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to do with Viptera. Corn futures reflected the same expectations.[37] That year's bumper crop was a record U.S. corn harvest (after several years of decreasing production) and the world's largest corn harvest in more than 50 years.[38] As predicted, U.S. corn prices dropped significantly in 2013, decreasing from $7.04 per bushel in February to $4.63 per bushel in October.[39]

It was not until late-November 2013, after that 34% price drop, that "China began rejecting shipments of U.S. corn that tested positive for the presence of MIR162." Non-Class Compl. ¶ 201; *see* Class Compl. ¶ 190. By rejecting this and other shipments, Beijing gave Chinese buyers a way out of millions of dollars of corn contracts that had been locked in at higher prices before the bumper crop. *See* Non-Class Compl. ¶ 205; Class Compl. ¶ 194.

Following China's actions, grain elevators and other exporters—the same ones that made no effort to turn away Viptera corn and no effort to protect themselves contractually in their agreements with Chinese buyers—sued Syngenta, later followed by farmers of non-Viptera corn.

China eventually approved Viptera for import in December 2014.[40]

CHOICE OF LAW

For purposes of the issues raised in this Motion to Dismiss, there are no conflicts in the tort laws applied by the relevant States, except where expressly noted. As a result, this Motion cites exemplar cases applying principles that apply across the relevant jurisdictions. *See, e.g.*, *Jepson v. Gen. Cas. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994) ("In analyzing the choice of law issue, the first consideration is whether the choice of one state's law over another's creates an

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[37] *See* Monthly Commodity Futures Price Chart—Corn (CBOT), http://futures.tradingcharts.com/prairielinks/CN/M.

[38] *See* Food and Agriculture Organization of the United Nations Statistics Division Data, http://faostat3.fao.org/browse/Q/QC/E.

[39] *See* USDA National Agricultural Statistics Service, *Quick Stats for Corn*, http://quickstats.nass.usda.gov/data/printable/84286845-EA4D-3EA6-A1C6-4D88693AE168.

[40] Non-Class Compl. ¶ 206; Class Compl. ¶ 195.

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actual conflict."). Out of an abundance of caution, however, Syngenta outlines the analysis that would apply in the event of a conflict. As the MDL Court recognized, each plaintiff's claim would be governed by the laws of that plaintiff's home state. *See* MDL Order 7.

Minnesota looks to five factors to determine which State's law applies: "(1) predictability of result; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law." *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004). First, Syngenta sold Viptera "in nearly every state," Non-Class Compl. ¶ 98, and would expect that its "business-related . . . activity" would be governed by the State where the activity occurred. *Schumacher*, 676 N.W.2d at 690. The second factor, which requires the Court to weigh each state's governmental interest, *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 95 (Minn. 2000), favors applying the law of the state where each plaintiff operated its business and allegedly suffered financial harm. The third factor "is not . . . significant" here because no single state's law is more difficult to apply than another's. *Jepson*, 513 N.W.2d at 472. Fourth, "Minnesota's interest in allowing recovery for persons injured within its boundaries" does not extend to the non-resident Plaintiffs. *Montpetit v. Allina Health Sys., Inc.*, No. C2-00-571, 2000 WL 1486581, at *3 (Minn. Ct. App. Oct. 10, 2000). Because the other factors favor each Plaintiff's home state, the Court need not consider the fifth factor. *See Schumacher*, 676 N.W.2d at 691-92.

The Non-Class Complaint's attempt to squeeze *all* Plaintiffs within the claims brought under Minnesota law, *see* Non-Class Compl. ¶¶ 300-60, violates the federal constitutional requirement that a "State must have a significant contact or significant aggregation of contacts" for that State's substantive law to apply. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *see Jepson*, 513 N.W.2d at 469-70. Non-Minnesota Plaintiffs base their claims on decisions and/or statements made outside Minnesota in conjunction with the "widespread"

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commercialization of Viptera that allegedly caused them economic harm outside Minnesota by lowering the price of the corn they grew and sold outside Minnesota. *See infra* X.A.1. The *only* contact Minnesota has with those claims is that *one* of the *six* defendants, Syngenta Seeds, Inc., has its principal place of business in Minnesota. *See* Non-Class Comp. ¶¶ 9-13. But the Non-Class Complaint makes clear that Syngenta AG, a *Swiss* entity, directed decisions about commercializing Viptera and that Syngenta Seeds, Inc. does "not function independently but under the Syngenta AG umbrella." *Id.* ¶ 18. As the MDL Court recognized in addressing parallel allegations, "the mere fact that one defendant resides in Minnesota does not provide significant contacts with the state with respect to claims by non-residents who had no contact with Minnesota." MDL Order 101. Thus, the Due Process and Full Faith and Credit Clauses preclude applying Minnesota law to non-residents' claims.

ARGUMENT

I. All Claims Asserted Under The Laws Of Any States Where No Plaintiff Resides Must Be Dismissed As A Matter Of Law.

The Non-Class Complaint purports to bring claims under the laws of all 22 States now at issue. As of this filing, however, no notices to conform have been filed, and the complaint itself names only plaintiffs from Minnesota. Non-Class Compl. ¶¶ 5-8. For claims under the law of any State other than Minnesota to survive, there must be a plaintiff from that State to assert those claims. Non-residents of a State lack standing to bring claims under the laws of that State. *See generally Snyder's Drug Store, Inc. v. Minn. State Bd. of Pharm.*, 221 N.W.2d 162, 165 (Minn. 1974) (adopting "'injury in fact' concept of standing"); *see, e.g.*, *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34, 49 (E.D.N.Y. 2014) ("Plaintiffs may only assert a state claim if a named plaintiff resides in, does business in, or has some other connection

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to that state").[41] In the event that timely Notices to Conform are not filed by plaintiffs from all 22 States, claims under the laws of any State lacking a plaintiff must be dismissed.

II. Plaintiffs' Claims Are Barred By The Economic Loss Doctrine.

Plaintiffs' unintentional tort claims[42] are foreclosed by the economic loss doctrine ("ELD"), which generally "bars recovery in negligence when the plaintiff has suffered only economic loss." *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011); *see also In re Chi. Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997) ("[S]olely economic losses are generally not recoverable in tort actions."). As the Restatement (Third) of Torts states the general rule, "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another." Restatement (Third) of Torts: Liab. for Econ. Harm § 1(a) (Tent. Draft No. 1 2012). That broad rule reflects the fact that the primary function of tort law is to establish duties to protect society from physical "harm to person or property" and that "the general duty of care to refrain from acts unreasonably threatening *physical harm* is not paralleled by any comparable duty when the harm threatened is merely *economic*." *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846, 847 (Wis. 1998) (emphases added).

Two strands of the doctrine are relevant here. The "stranger" ELD applies between contractual strangers—like the Producers and Syngenta here.[43] The "contractual" strand of the doctrine generally applies to parties connected by a chain of contracts, particularly those in the chain of distribution for a product that is alleged to cause economic harm. As explained below, the Non-Producers' claims are covered by either the stranger rule or the contractual rule,

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[41] *See also Parks v. Dick's Sporting Goods, Inc.*, No. 05-CV-6590 (CJS), 2006 WL 170447, at *2 (W.D.N.Y. June 15, 2006) ("The Court finds that the [plaintiff] lacks standing to assert state-law claims arising under the laws of states other than New York, since he was never employed by defendant anywhere other than New York.").

[42] The ELD bars the Class and Non-Class Complaints' negligence claims, the Non-Class Complaint's nuisance claims, and the Class and Non-Class Complaints' strict-liability claims for products liability and failure to warn.

[43] To the extent Plaintiff Producers include farmers who *purchased* Viptera seed, which is unclear from the complaint, their claims are barred by the contractual ELD. *See infra* Part II.B.

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depending on how the claims are cast. To the extent Non-Producers complain that they were injured by the general presence of Viptera in the corn supply (not in the particular corn they handled), they are in the same position as Producers and their claims are barred by the stranger ELD. To the extent Non-Producers complain that the corn *they purchased* contained corn grown from Viptera, and that that caused their injury, they are in the classic position of purchasers of a product that has disappointed their commercial expectations and their unintentional tort claims are barred by the contractual ELD.

A. The Producers' Claims Are Barred By The Stranger ELD.

1. The Stranger ELD Is The Majority Rule.

The stranger rule is the historical core of the ELD. As the Iowa Supreme Court has explained, "[f]or well over a century it has been a settled feature of American and English tort law that in a variety of situations there is no recovery in negligence for pure economic loss," *Annett Holdings*, 801 N.W.2d at 503 (citation omitted)—a doctrine known as the stranger (or "relational") ELD. Under American law, the rule can be traced to *Anthony v. Slaid*, 52 Mass. 290 (1846), and the most-cited seminal decision is Justice Holmes' opinion in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). There, the charterer of a ship sued in negligence when a dry dock damaged the ship during repairs and thus delayed the ship's return to service. The plaintiff and the defendant had no contractual relationship because the ship's owner had contracted for the repairs. The Supreme Court held that because the charterer sought solely economic damage (for the loss of the use of the ship) and did not allege any physical injury to its own property, an action in negligence would not lie. *Id.* at 309-10;[44] *see also State of La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc) (noting that

[44] The Court made clear that its rationale was based on general principles under common law, not a special admiralty rule. *See Robins Dry Dock*, 275 U.S. at 309-10 (citing Georgia case for the rule).

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"[t]he principle that there could be no recovery for economic loss absent physical injury to a proprietary interest" was "well established when *Robins Dry Dock* was decided").

The stranger ELD is followed by the "majority of jurisdictions" in the U.S. *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982 (D.C. 2014); *see also Aikens v. Debow*, 541 S.E.2d 576, 583, 587 (W. Va. 2000) (American jurisdictions have followed *Robins Dry Dock* "almost without exception," collecting cases, and describing decisions that reject the stranger rule as a "minority view" that "represents a departure from a substantial collection of American and British cases").[45] Standard tort treatises universally describe it as the majority rule. *See, e.g.*, Dan B. Dobbs *et al.*, *The Law of Torts* § 647 (2d ed. 2011) ("Dobbs"); W. Keeton et al., *Prosser and Keeton on Law of Torts* § 129 (5th ed. 1984). As one treatise puts it, there is only "[a] little authority [that] has expressly rejected the stranger version of the [ELD]," and those cases "have garnered almost no lasting support outside their home states." Dobbs § 655;[46] *see also* Restatement (Third) of Torts: Liab. for Econ. Harm § 7 (Tent. Draft No. 2 2014) (Reporter's Note) (adopting the rule from *Robins Dry Dock* and explaining that "[c]ontrary positions have been taken only occasionally in the case law").

The stranger ELD applies in a variety of situations where the defendant's negligence has disrupted the plaintiff's ability to carry on business or caused economic loss and the plaintiff and defendant have no contractual connection. It applies where the defendant has, for example,

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[45] *See generally* Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. Rev. 823, 823-24 (2009) (explaining that, "from the start" the stranger ELD "has been a relatively fixed point in thinking about this issue in all its shapes and forms"); William Powers, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 Tex. Tech. L. Rev. 477, 482 (1992) (explaining that "cases between contractual strangers are the paradigm of the traditional 'economic loss' rule"); Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. Ill. L. Rev. 1573, 1578 (2008) ("The law governing this type of loss [between strangers] is also unambiguous. Starting with *Anthony v. Slaid*, and subject to few deviations, American courts have consistently denied recovery for relational economic losses. The leading authority is *Robins Dry Dock & Repair Co. v. Flint* . . . .").

[46] Only three States have rejected the stranger ELD: Alaska, California, and New Jersey. *See* Dobbs § 655 (citing *People Expr. Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985), *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356 (Alaska 1987), and *J'Aire Corp v. Gregory*, 598 P.2d 60 (Cal. 1979)).

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injured the plaintiff's employee[47] and where the defendant has damaged a common resource, such as a bridge or wharf, disrupting business for many potential plaintiffs.[48] Absent physical injury to their own property, claimants cannot sue in negligence for economic losses. The rule thus means that "claimants are barred from recovering lost profits or lost wages due to the negligent interruption of commerce caused by a third party." *Aguilar*, 98 A.3d at 982-83.

Multiple policies underpin the doctrine. As then-Judge Breyer has explained, one rationale is that, unlike physical injuries, economic effects from an event could extend almost infinitely and create unlimited liability. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985); *see also Annett*, 801 N.W.2d at 504 ("[E]conomic reverberations travel quickly and widely, resulting in potentially limitless liability."). As a result, financial harm that could "prove[] vast, cumulative and inherently unknowable in amount, could create incentives that are perverse," deterring worthwhile activity. *Barber Lines*, 764 F.2d at 55. In addition, the rule also reflects the view that, while tort law should protect against physical harm, economic losses (especially for commercial plaintiffs) are better addressed through the law of contract—including through the ability of a party to insure in advance against such losses or to secure contracts guaranteeing access to vital business inputs (here, for example, Producers could have contracted with grain elevators to address risks potentially posed by "commingling"). *Id.* at 54; *see also*

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[47] *See, e.g.*, *Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005) (defendant injured plaintiff's employee); *Anderson Plasterers v. Meinecke*, 543 N.W.2d 612, 613 (Iowa 1996) (same); *Annett Holdings*, 801 N.W.2d at 504 (explaining that *Anderson Plasterers* is a "stranger economic loss rule" case); *see also Conn. Mut. Life Ins. Co. v. N.Y. & N.H. R.R. Co.*, 25 Conn. 265 (1856) (denying recovery for economic loss where defendant had injured plaintiff's insured); Dobbs § 647 (collecting similar cases)

[48] *See, e.g.*, *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984) (damage and closure of bridge reduced access to plaintiffs' business); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 50-51 (1st Cir. 1985) (Breyer, J.) (negligent oil spill closed wharf to other shipping traffic); *Byrd v. English*, 43 S.E. 419 (Ga. 1903) (negligent severing of power line shut down printing business); *Weller & Co. v. Foot & Mouth Disease Research Inst.*, [1966] 1 Q.B. 569 (negligent release of virus from research institute caused closure of cattle markets, depriving auctioneers of ability to earn living) (attached as Ex. G); *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946) (damage closed factory so workers could not earn wages).

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Annett, 801 N.W.2d at 504 (the stranger ELD "encourages parties to enter into contracts"). The Restatement, for example, explains that the stranger ELD is "justified by several considerations," one of which is that "contractual lines of protection against economic loss"—including "first-party insurance"—are "considered preferable to judicial assignments of liability in tort." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b. The stranger ELD thus "encourages the party with the best information (that is, the party with knowledge of its own risk of loss) to decide whether to assume, allocate, avoid, or insure against its risk of loss." *Wiltz v. Bayer Cropscience, L.P.*, 645 F.3d 690, 697 (5th Cir. 2011) (emphasis added).

Multiple courts and the Restatement have explained that a central purpose of the stranger ELD is to provide a bright-line rule foreclosing the recovery of purely economic losses absent physical injury to the plaintiff or his property. The point of the doctrine is to eliminate the need for a case-by-case assessment of factors such as foreseeability to draw lines cutting off liability for economic losses or the need for a case-by-case policy assessment to decide when recovery for economic losses should be barred. Instead, the doctrine provides a clear rule: absent physical injury, there can be no recovery for purely economic losses. Thus, for example, in *Barber Lines* then-Judge Breyer explained that the rationales justifying the ELD "are highly general and abstract," 764 F.2d at 53, and that, even though they are "unlikely to apply with equal strength to every sort of 'financial harm' claim," nevertheless, "courts cannot weigh or apply them case by case," *id.* at 55. Case-by-case application of concepts like foreseeability to limit liability, for example, can be problematic because the economic ripple effects of a given event are, in many cases, foreseeable.[49] Using foreseeability to cut off liability would inevitably distort the concept

[49] *Barber Lines*, 764 F.2d at 54 (explaining that an oil spill "foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marina merchants, suppliers of those firms, the employees of marina businesses and suppliers, the suppliers' suppliers, and so forth").

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of foreseeability itself. *Id.* at 54. *Barber Lines* also made clear that the policies behind the ELD derive force based on *cumulative effects* across cases and that part of the purpose of the doctrine is to avoid distortions that would result if courts used case-specific line drawing "to separate the financially injured allowed to sue from the financially injured not allowed to sue." *Id.*

Similarly, in *M/V TESTBANK*, the Fifth Circuit explained that the ELD applies a bright-line rule barring recovery for economic losses absent physical injury and rejected calls for a "case-by-case approach," 752 F.2d at 1026, to applying the doctrine. It was the *dissent* in *M/V TESTBANK* that suggested that recovery for economic losses should be permitted but limited to cases where liability could be circumscribed to avoid the concern for "open ended" liability. *Id.* at 1046 (Wisdom, J., dissenting). The majority rejected such proposals for a fact-specific approach and held that the ELD should be applied as a "bright line rule." *Id.* at 1029. Echoing the concern from *Barber Lines*, the court explained that a case-specific analysis for determining who could recover economic losses would prove "arbitrary" and "much less the product[] of a determinable rule of law" than adhering to a bright line. *Id.* at 1028-29; *accord Am. Petrol. & Transp., Inc. v. N.Y.C.*, 737 F.3d 185, 196-97 (2d Cir. 2013) (where economic injury was "surely foreseeable" and limited in scope such that permitting recovery would *not* create "unbounded exposure . . . to a vast number of economic loss claims," the court nevertheless applied the rule barring recovery because any benefit from creating "an exception on the particular facts here is outweighed by the benefits of adhering to the general rule that denies recovery"); *Getty Refining & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 832-33 (3d Cir. 1985) (similarly rejecting a case-by-case approach).

The Restatement (Third) similarly explains that the rationales behind the ELD "prevail by their cumulative force," and even though "they do not apply equally to every claim," "most courts *reject such claims categorically*." Restatement (Third) of Torts: Liab. for Econ. Harm § 7

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cmt. b (emphasis added). In other words, courts reject claims for economic losses without a case-specific policy assessment. The majority rule is that "distinctions allowing some plaintiffs to recover but not others, based on a case-by-case inquiry into the policies at issue, cannot be made in a sufficiently principled manner." *Id.* The Restatement acknowledges that this rule imposes "hardship" on those whose claims "fall outside the policies that make the rule attractive," but concludes that a bright-line rule denying recovery has other benefits—"predictability, clarity, and economy of application for courts"—that "outweigh the benefits of occasionally providing relief." *Id.*

There are defined exceptions to the ELD. It does not bar claims for intentional torts, such as fraud, *see* Dobbs § 606, and most States hold that it does not bar malpractice claims against certain professionals. *See, e.g.*, *Annett*, 801 N.W.2d at 504; *see also Barber Lines*, 764 F.2d at 56 (listing exceptions). In addition, many States hold that the ELD does not apply to the tort of negligent misrepresentation, which allows recovery for economic loss where a professional or other expert service provider (*e.g.*, an accountant) has been negligent in providing information or a service that is intended to be relied upon by a known, limited group of third parties.[50]

2. The Stranger ELD Bars The Producers' Claims.

The Producers' claims are barred by the stranger ELD. The essence of their claim is that the distribution and exporting facilities for commodity corn were affected by the pervasive presence of Viptera, making it impossible to export U.S. corn to China. The only harm they claim is economic loss in the form of lower corn prices (followed by milo and soybean prices).[51]

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[50] *See generally First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 843 N.E.2d 327, 338-39 (Ill. 2006) (discussing negligent misrepresentation exception to ELD); *Van Sickle Constr. Co. v. Wachovia Comm. Mort., Inc.*, 783 N.W.2d 684, 690-91 (Iowa 2010) (same).

[51] *See, e.g.*, Non-Class Compl. ¶ 290 ("[A]ll U.S. corn Producers who priced their corn after November 2013 have received a lower price for their corn than they would have received if China's imports of U.S. corn had not effectively stopped.").

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Conceptually, those claims are indistinguishable from claims that access to some other shared resource used by multiple parties for their businesses (a bridge, a wharf, etc.) was disrupted by a negligent act. They seek exactly what is barred by the stranger ELD: "lost profits . . . due to the negligent interruption of commerce caused by a third-party." *Aguilar*, 98 A.3d at 982-83.

Until the Viptera litigation, only one American case addressed parallel claims alleging supposed "contamination" of a crop supply with a U.S.-approved GM trait, and that case held that the ELD barred farmers' tort claims. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088 (E.D. Mo. 2003). *Sample* involved GM corn and soybeans that, like Viptera, had been fully approved in the U.S. The plaintiffs abandoned allegations that their own particular crops had been damaged by cross-pollination or commingling because they recognized that such allegations would raise individual issues dooming a class. *See id.* at 1091. Instead, the plaintiffs proceeded on the theory—parallel to Plaintiffs' theory here—that "non-GM farmers lost revenue because the European community rejected Monsanto's genetically modified products and boycotted *all* American corn and soy as a result." *Id.* (emphasis added). Applying Illinois and Iowa law, the court held that "the economic loss doctrine preclude[d] recovery" because the farmers were not alleging "physical 'contamination' or injury to their property." *Id.* at 1093.

Because Plaintiffs here base their claims on the same theory of market-wide price effects from a foreign boycott (not physical injury to *their particular corn*), *see infra* Part II.A.3, the analysis from *Sample* equally applies here and the Producers' claims are barred by the ELD.

This case also aptly highlights some of the policies underlying the ELD. In particular, it shows how alleged economic effects can expand virtually without limit. If farmers could bring claims for economic losses based on an alleged drop in the price of corn, then anyone allegedly affected by a price drop for the largest commodity crop in the U.S.—such as landowners wanting

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to sell farm land[52] or farm equipment dealers[53]—could try to assert some "inter-connectivity" between their economic interests and the price of corn and turn Syngenta and other GM manufacturers "into insurers with seemingly unlimited tort liability." *Daanen & Janssen, Inc.*, 573 N.W.2d at 850. Indeed, this case has *already* spawned such claims by layers of plaintiffs other than corn farmers asserting ripple effects from the alleged drop in the price of corn. The plaintiffs include both growers of milo—who claim that the price of milo is pegged to the price of corn, *see* Non-Class Compl. ¶ 297—and growers of soybeans—who claim that corn is a substitute for soybeans and that lower corn prices thus increase the usage of corn and reduce demand for soybeans, *see id.* ¶¶ 298-99. Including soybean farmers as plaintiffs almost *doubles* the size of the potential pool of plaintiffs in this case, expanding it to more than 650,000 farmers.[54] As such claims show, the inherent problem with permitting *any* claims for purely economic loss is that "[t]he chain of events leading to economic losses is only limited by one's imagination," and as a result "permitting recovery for purely economic loss . . . could expand the potential pool of plaintiffs beyond reason." *Long Motor Corp. v. SM&P Util. Res., Inc.*, 214 P.3d 707, 2009 WL 2595932, at *2-3 (Kan. Ct. App. Aug. 21, 2009). It is precisely to avoid embroiling the courts in a morass of litigation bringing such claims (and to avoid the task of drawing lines determining which plaintiffs can recover pure economic losses and which cannot) that the law has applied a bright line rule for more than a hundred years barring *all* purely

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[52] *See, e.g.*, Corilyn Shropshire, *Falling Soybean, Corn Prices Hurt Farmland Values*, Chicago Tribune (Feb. 12, 2015), http://www.chicagotribune.com/business/breaking/ct-farmland-prices-0213-biz-20150212-story.html ("[F]armland values fell 3 percent in 2014, due in large part to the drop in soybean and corn prices[.]").

[53] *See, e.g.*, Abby Wendle, *Pain From The Grain: Corn Belt Towns Languish As Prices Drop*, NPR (Mar. 18, 2015), http://www.npr.org/sections/thesalt/2015/03/18/393841311/pain-from-the-grain-corn-belt-towns-languish-as-prices-drop ("When corn prices peaked, Hofreiter sold close to $11 million worth of shiny blue tractors in a single year. He says he doesn't expect to crack $3 million in 2015.").

[54] *See* 2007 USDA Census of Agriculture 2 http://www.nass.usda.gov/Statistics_by_State/Oklahoma/Publications/Media_Resources/Soybean_Factsheet.pdf (number of soybean farmers); USDA Background on Soybeans & Oil Crops, http://www.ers.usda.gov/topics/crops/soybeans-oil-crops/background.aspx (soybeans are second most planted crop).

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economic claims for unintentional torts as a matter of law. *See Barber Lines*, 764 F.2d at 54-56.

3. The Producers Cannot Avoid The ELD By Claiming Physical Injury To Their Own Property.

The Producers cannot sidestep the ELD by arguing that they have alleged physical injury to their own property. Any such argument fails for at least four reasons.

First, the complaint does not allege that each Producer had his particular corn, while it was his property, mixed with or cross-pollinated by Viptera corn. It merely alleges generally that there was a "pervasive contamination of the U.S. corn supply, including fields, grain elevators and other facilities of storage and transport, causing physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land." Non-Class Compl. ¶ 236. Vague assertions about generalized "contamination of the U.S. corn supply"—primarily in areas (such as "grain elevators and other facilities of storage and transport") that are involved only *after* the farmer has sold his corn—are not the same as an allegation that each Producer experienced cross pollination (or commingling) on his farm.[55] Indeed, Plaintiffs' allegations simply parrot word-for-word the allegations made in the Federal MDL.[56] And the MDL Court—which *rejected* the ELD on other grounds, *see infra* pp. 29-37—recognized that such vague allegations did not assert that every Plaintiff suffered physical injury to his property. *See* MDL Order 19-20.

Second, allegations of physical harm are irrelevant in any event because Plaintiffs' theory of injury does not depend on physical harm to *their* corn. Their theory is that the presence of Viptera in the U.S. corn supply and China's actions reduced the price for *all* U.S. corn—even

[55] Plaintiffs no doubt refrained from making such an allegation for good reason. They know that cross pollination or commingling did not happen on every Producer's farm, and they know that they cannot prove that it happened (much less prove it on a class-wide basis with common proof).

[56] *See* Producers' Am. Compl. ¶ 319, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-2591 (D. Kan. May 29, 2015) (alleging "pervasive contamination of the U.S. corn supply, including fields, grain elevators and other facilities of storage and transport, causing physical harm to plaintiffs' corn, harvested corn, equipment, storage facilities, and land.").

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corn that might be Viptera-free.[57] As the MDL Court recognized, allegations of physical harm provide an avenue for avoiding the ELD only where the economic loss results from the particular harm to property alleged. Where, as here, the alleged damages "are not derived from the physical harm alleged," physical harm provides no basis for evading the ELD. MDL Order 20.

Third, to the extent the Producers point to commingling of corn in grain elevators and storage facilities *after* they have sold their corn, they provide no allegations whatsoever establishing that they still had a property interest in the corn after it had been sold.

Fourth, even if the Producers had alleged that Viptera cross-pollinated or commingled with *their* corn, that would not qualify as *damage* to their property because Viptera was fully approved in the U.S. Viptera corn could be sold at the same price as all other fungible corn. Plaintiffs' only complaint is that they hypothetically could have secured a higher price if there had been no Viptera. That is the paradigm of pure economic loss, not physical injury.

As the court in *Sample* held in identical circumstances, there was "no evidence to demonstrate that the physical injury requirement would be met *even if* GM seeds were 'commingled' with non-GM seeds in a cooperative grain elevator" precisely because there was no allegation that commingling rendered the crop unfit for human consumption. 283 F. Supp. 2d at 1093 & n.2 (emphasis added). In the *Hoffman* case, a Canadian court considered similar allegations about "contamination" of canola with an approved GM trait and reached the same result. *See Hoffman I*, 2005 SK.C. LEXIS 330 (Ex. A), *aff'd*, *Hoffman II*, 2007 SK.C. LEXIS 194 (Ex. B). There, the plaintiffs claimed that GM canola had cross-pollinated with their non-GM crops, which they hoped to sell at a premium as organic crops and on the European market. The court held that, where a GM seed has been approved for human consumption, "the alleged

[57] *See* Non-Class Compl. ¶ 290 (asserting that "*all* U.S. corn Producers who priced their corn after November 2013 have received a lower price for their corn than they would have . . .") (emphasis added).

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damage is not of physical harm to the plaintiffs' crops, but arises from the alleged inability to meet the requirements of organic certifiers or of foreign markets for organic canola." *Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 72. The "harm" of receiving a different price for a commodity that is still fully saleable for human use was not sufficient to avoid the ELD.

Cases analyzing the ELD in the context of *unapproved* GM traits are irrelevant. As the court in *In re StarLink Corn Prods. Liab. Litig.* explained, crops are "damaged when they are pollinated" by corn with an unapproved trait (like StarLink) because it "render what would otherwise be a valuable food crop unfit for human consumption." 212 F. Supp. 2d 828, 841 (N.D. Ill. 2002). The court made clear, moreover, that such physical injury was the *sine qua non* for avoiding the ELD as it explained that "*[a]bsent a physical injury*, plaintiffs cannot recover for drops in market prices." *Id.* at 842 (emphasis added). The fact that rendering crops unfit for human consumption may constitute physical "harm" says nothing about the situation here, in which Viptera was fully approved and corn with the MIR162 trait is, by law, fungible U.S. Yellow Corn. In fact, *Sample* distinguished *StarLink* on exactly that basis. *See* 283 F. Supp. 2d at 1093 n.2.[58] Indeed, there is not a *single case* holding that an *approved* GM trait somehow "damages" a crop sufficiently to avoid the ELD. The only cases addressing the issue (*Sample* and *Hoffman*) say the opposite.

4. The MDL Order Misstates The Law On The Stranger ELD.

The MDL Court's ELD ruling does not reflect the majority rule.

a. The MDL Court Mistakenly Applied A Case-By-Case Policy Analysis To Permit Recovery Of Economic Losses.

First, the MDL Court disregarded settled law holding that the ELD is meant to provide a

[58] *Bayer Cropscience LP v. Schafer*, 385 S.W.3d 822, 833 (Ark. 2011), and *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1013, are distinguishable on the same basis because the GM Rice cases involved an unapproved trait.

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bright-line rule and does *not* depend on a case-by-case policy assessment. Instead, the court adopted a "case-specific approach," MDL Order 25, to assess whether "the rationales supporting the [doctrine] would necessarily be furthered by application" in a given case, *id.* at 24; *see also id.* at 24 n.10 (asserting that States would apply the ELD "only . . . when the doctrine's purposes would be served"). Thus, the MDL Order held that, because the plaintiffs constituted "discrete classes" all in an "inter-connected market" whose economic losses were "actually fores[een]," allowing their claims would not give rise to the primary concern animating the doctrine—"completely open-ended" liability. MDL Order 24. That approach is counter to the majority rule. As explained above, the majority rule is that "distinctions allowing some plaintiffs to recover but not others, based on a case-by-case inquiry into the policies at issue, cannot be made in a sufficiently principled manner." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b; *see also supra* pp. 21-23.

Indeed, the MDL Court's approach is functionally indistinguishable from the *minority* approach that rejects applying the ELD as a bright-line rule. Three minority jurisdictions reject the bright-line "physical harm rule" and instead apply a "more thorough consideration and searching analysis of *underlying policies* to determine whether a particular defendant may be liable for a plaintiff's economic losses." *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985) (emphasis added). Such jurisdictions rely on a case-by-case analysis to permit recovery in tort for economic losses where there is "[a]n identifiable class of plaintiffs" that is "particularly foreseeable." *Id.* at 116. But that is functionally the *same* analysis that the MDL Court applied. The federal court pointed to "inter-connected relationships and markets," MDL Order 23, to identify "discrete classes" of plaintiffs whose economic losses were "actually fores[een]," *id.* at 24, who may be allowed to recover. That focus on "inter-connected relationships" defining a "discrete" plaintiff group and "actually foreseen" harm is simply

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another way of expressing the same criteria used by courts applying the *minority* approach—namely, a focus on facts showing "[a]n identifiable class of plaintiffs" that is "particularly foreseeable in terms of the type of persons or entities comprising the class . . . as well as the type of economic expectations disrupted." *People Express*, 495 A.2d at 116. Thus, while it purported to be analyzing the ELD as it would be applied in twenty-two States, the MDL Court actually applied a *minority* analysis that has been overwhelmingly rejected.

Tellingly, moreover, the MDL Order does not cite a *single case* using a similar "case-specific approach" to apply the ELD. *StarLink* does not support that approach. *StarLink* held that the ELD did not apply because the plaintiffs had alleged *physical injury* from an *unapproved* GM trait that rendered their crops unfit for human consumption. 212 F. Supp. 2d at 841-43. *StarLink* does not suggest that a case-by-case policy analysis can provide an *independent* basis for avoiding the ELD where (as here) there was no physical injury. The *StarLink* court noted the "finite number of potential plaintiffs," *id.* at 842, only as additional support for a holding based on physical injury. The court made clear that physical injury was necessary for avoiding the ELD as it explained that "[a]bsent a physical injury, plaintiffs cannot recover for drops in market prices." *Id.* at 842. Indeed, the court reiterated a warning to plaintiffs that "proving *direct harm to their own property* is a *predicate* to any recovery." *Id.* at 843 (emphases added).

To the extent the MDL Order acknowledges settled law rejecting a case-by-case policy analysis, it dismisses the majority rule in a footnote with the observation that there are many exceptions to the ELD and that each existing exception must have been adopted in a first case. *See* MDL Order 23 n.10. The problem with that assertion is that the MDL Court's new exception is *different in kind* from existing ones. Existing exceptions apply to "broad categories of cases," *Barber Lines*, 764 F.2d at 56, typically defined by a type of legal claim (*e.g.*, intentional torts, negligent misrepresentation, malpractice claims against professionals). Here,

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by contrast, the criterion defining the new exception—"inter-connected relationships and markets," MDL Order 23—rests on a *factual* circumstance in which the interrelatedness of the industry supposedly (i) limits the number of potential plaintiffs to a "discrete" group (still numbering in the hundreds of thousands) and (ii) makes alleged economic losses particularly "foreseeable and foreseen." *Id.* at 24-25. The whole point of the majority rule set out in *Barber Lines*, *M/V TESTBANK*, and the Restatement (Third), however, is to foreclose exactly such case-specific assessments of whether the policies behind the doctrine apply in a particular case.

The MDL Court's focus on "inter-connectedness" also exposes exactly the problems with line-drawing that the majority bright-line rule seeks to avoid. Simply put, this new "inter-connected industry" exception supplies no clear principle marking an identifiable category of cases. The grain industry does not have greater "inter-connected relationships" than many others. In the maritime industry, for example, vessels operating in a confined waterway depend on one another for continued operations. It is readily foreseeable that one vessel's negligence will inevitably cause economic losses to others, and the scope of potential plaintiffs is, as here, limited to "discrete classes." MDL Order 24; *cf. M/V TESTBANK*, 752 F.2d at 1049 (Wisdom, J., dissenting) (noting the "great interdependence of the elements in the maritime industry"). The maritime industry thus seems to satisfy the test for the new exception. *But see, e.g.*, *Am. Petrol. & Transp.*, 737 F.3d at 196 (applying the ELD); *Barber Lines*, 764 F.2d at 55 (same). As that example suggests, the MDL Court's new test provides no clear limiting principle. Applying it would embroil courts in endless fact-based inquiries into whether industry A is more "inter-connected" than industry B, or whether party X is sufficiently "interrelated" with party Y, with no real legal rule to guide them. That exercise would present precisely the problem the Fifth Circuit predicted of producing "arbitrary" results that are not "the product of a determinable rule

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of law." *M/V TESTBANK*, 752 F.2d at 1029, 1030.[59]

In fact, the added claims of *soybean* farmers in this case highlight that problem. Beyond the deficiencies that doom the claims of corn farmers, adding more than 270,000 soybean farmers to the plaintiff pool (which would then include growers of the *first* and *second* largest crops in the U.S.)[60] destroys any concept of a "discrete" plaintiff class supporting an exception to the ELD as conceived by the MDL Court. At the same time, if this Court were to apply the MDL Court's novel analysis, the line distinguishing the "inter-connectedness" of corn and milo from the "inter-connectedness" of corn and soybeans (or corn and whatever other related market the next complaint raises) is not going to be based on a clear *legal* rule. Instead, it will be driven by exactly the exercise in *ad hoc*, fact-based line drawing necessary to limit liability that the Fifth Circuit and other courts have warned against and that has prompted them to adhere to a bright-line rule rejecting *all* recovery for economic losses.

b. The MDL Court Applied A Mistaken View Of The Policy Rationales Supporting The ELD.

Second, the MDL Order rested on an overly restrictive understanding of the policies behind the ELD. The MDL Order focused on preventing a risk of indeterminate or disproportionate liability and reasoned that this risk was primarily at issue in "access cases" or "public nuisance" cases in which "any member of the public could potentially assert a claim for economic loss," producing liability that is "completely open-ended." MDL Order 24. The court distinguished the Viptera lawsuits on the basis that they are not "access" cases and reasoned that, because they involve a supposedly more "discrete" tranche of plaintiffs—albeit one numbering

[59] *See also Pickett v. Consignment Enter. Co.*, No. C-77372, 1978 WL 216505, at *2 (Ohio Ct. App. Aug. 9, 1978) (applying ELD as bright-line rule, because "[i]f we wished to place limits on the recovery of economic interests, we would have to draw a line between remote and immediate third party losses, and between foreseeable and unforseeable [sic] risks to third parties, a task we decline to undertake, in the broad interest of justice").

[60] *See supra* note 54.

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in the hundreds of thousands—the policies behind the ELD were not implicated. *See id.* Every step in that analysis is contrary to precedent.

As an initial matter, nothing in the ELD limits its application to cases involving an indeterminate number of first-tier plaintiffs. *Robins Dry Dock* did not involve exposure to such a huge plaintiff group, or even to a "discrete" group of hundreds of thousands as in the Viptera cases. The first tranche of plaintiffs in *Robins Dry Dock* was limited to *one* charterer for losses related to *one* ship. *See* 275 U.S. at 308-09. Nevertheless, the ELD applied. As noted above, the doctrine similarly applies in various situations—such as where a defendant injures the plaintiff's employee—where there is only one initial plaintiff. *See supra* p. 20 & note 47.

Such cases show that the policies underpinning the doctrine are *not* limited to situations involving an indeterminate number of first-tier plaintiffs. Instead, the doctrine is based on the inherent unpredictability of permitting *any* recovery of pure economic losses because such losses spread outwards indefinitely to second- and third-tier plaintiffs. For example, a charterer as in *Robins Dry Dock* suffers economic losses because a damaged ship is unable to sail; as a result, a shipper also suffers losses because his cargo is delayed; as a result, a shopkeeper who expected a shipment of merchandise suffers losses, and so on. *See, e.g.*, *Barber Lines*, 764 F.2d at 54 (describing such ripple effects as rationale for the doctrine); *M/V TESTBANK*, 752 F.2d at 1028 (describing "wave upon wave of successive economic consequences"); Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b (describing ripple effect as the primary rationale for the ELD). By focusing solely on the size of the initial tranche of plaintiffs, and holding that the ELD should not apply where the court can identify a supposedly "discrete class" of first-tier plaintiffs, the MDL Court failed to consider the spreading ripple effect of economic losses.[61]

[61] To the extent the MDL Order suggests that the "inter-connectedness" of the corn industry provides a natural

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The MDL Court was also mistaken in describing access cases as cases in which "any member of the public could potentially assert a claim." MDL Order 24. *Barber Lines* was an access case involving blocked access to a pier. But the number of ships scheduled to dock at the pier (and thus the group of potential first-tier plaintiffs) was necessarily smaller than the more than 350,000 corn farmers who are potentially plaintiffs here—not to mention milo and soybean farmers. Similarly, "access" cases involving the closure of a factory or other workplace routinely involve much smaller groups of workers, but the ELD still applies. *See, e.g.*, *Aguilar*, 98 A.3d at 980 n.1; *United Textile Workers of Am. v. Lear Siegler Seating Corp.*, 825 S.W.2d 83, 84 (Tenn. Ct. App. 1990); *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946).[62]

As a result, the MDL Court's suggestion that there is a "discrete class" of plaintiffs here that is *more limited* and *more narrowly defined* than in the typical access case is demonstrably incorrect. In reality, the MDL Court reached the anomalous conclusion that there was no concern for expansive and indeterminate liability where the court was contemplating a first-tier plaintiff group *vastly larger* than in the typical access case where the ELD is applied. That approach cannot be reconciled with precedent. Indeed, if the MDL Court's analysis were consistently applied—if facts showing a "discrete class" of foreseeable plaintiffs numbering in the hundreds of thousands were sufficient to avoid the ELD—it would gut the doctrine and

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breaking point after the first tier plaintiffs to cut off liability for more remote economic effects, *cf.* MDL Order 14, that rationale still cannot reconcile the court's approach with the ELD. Courts could always solve the problem of spreading economic effects by pointing to a factual distinction that might justify cutting off liability at the first tier of plaintiffs. The point of the ELD, however, is to avoid the need for such fact-based line-drawing distinguishing between those who are permitted to recover economic losses and those who are not and to replace it with a bright-line rule based on physical injury. *See supra* Part II.A.4.a.

[62] The MDL Court's approach is not supported by *StarLink.* The *StarLink* court did suggest that "access" cases involve situations where "the tort's effects on plaintiffs are not qualitatively different from the effects on society at large" and thus such cases involve an "unbounded group of potential plaintiffs." *StarLink*, 212 F. Supp. 2d at 840. As the cases cited in text show, however, *StarLink*'s generalization is inaccurate. It was based on a mistaken focus on cases involving *bridges*. *See id.* In addition, as explained above, *StarLink* did not suggest that a more limited plaintiff group could, *in itself*, justify refusing to apply the ELD. Physical injury was the critical factor permitting recovery of economic losses in *StarLink. See id.* at 842; *see also supra* pp. 28-29.

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require reversing almost every seminal decision applying it. *Robins Dry Dock*, for example, involved a "discrete class[]" of plaintiffs (there was only one); the economic injuries were readily foreseeable (damaging the ship would foreseeably cause losses to those scheduled to use it); and thus the facts could have alleviated concern for "open-ended liability." MDL Order 24. Under the MDL Court's mistaken analysis, the ELD should not have applied.

The MDL Order also fails to consider additional policies behind the ELD, including encouraging the use of contracts to address economic risks. *See, e.g.*, *Barber Lines*, 764 F.2d at 55; *Wiltz*, 645 F.3d at 696. The Restatement, for example, explains that the stranger ELD is "justified by several considerations," one of which is that "contractual lines of protection against economic loss"—including "first-party insurance"—are "considered preferable to judicial assignments of liability in tort." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b. That rationale fully applies here. Producers concerned about ensuring exportability for their corn could have contracted for guarantees from grain elevators prohibiting commingling.

c. The MDL Order Does Not Acknowledge, Much Less Address, Directly Contrary Authority From Sample v. Monsanto.

Third, the MDL Court ignored the only American case on all fours with this case. *Sample v. Monsanto* involved exactly parallel claims that an approved GM trait had caused economic losses by triggering the loss of an overseas market, and the court held that such claims were barred by the ELD. *See supra* Part II.A.4.c. The MDL Order does not discuss or distinguish that precedent.[63] Syngenta respectfully submits that a decision contradicting the only American authority squarely on point—without even acknowledging that authority, much less providing a considered rationale to distinguish it—cannot be credited as persuasive precedent.

[63] The assertion that Syngenta had not cited any case in which a court considered and applied the ELD "despite the presence of inter-connected relationships and markets," MDL Order 23, is incorrect. *Sample* was such a case.

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d. The MDL Order Mistakenly Relies On West Virginia's "Hybrid" "Special Relationship" Exception From The ELD.

Fourth, the MDL Order erred by relying on *Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000), to hold that members of an "inter-connected" industry are in a "special relationship" that defeats the ELD. *See* MDL Order 23. The "special relationships" identified in *Aikens* all involved people with special expertise who provided information as part of their business and on which they intended others to rely. *See* 541 S.E.2d at 591 (discussing auditors, surveyors, termite inspectors, engineers, architects, and lawyers). In most States, parallel exceptions to the ELD are treated under the rubric of negligent misrepresentation and require meeting the elements for that tort, including that the defendant must provide the information as part of his business intending that a known group of persons will rely on it. *See supra* p. 23 & note 50; *see also* Restatement (Third) of Torts: Liab. for Econ. Harm §§ 5-6. To the extent *Aikens* adopted a broader principle, permitting a free-ranging use of "special relationships" as exceptions to the ELD, it is not the majority approach. To the contrary, *Aikens* itself described its "special relationship" test as a "hybrid." *Id.* at 590; *see also id.* at 590 (noting that "minority view" cases "reveal[] reasoning similar to ours"); *id.* at 592 (Starcher, J., concurring) (suggesting that *Aikens* took a "bold step forward" departing from majority rule). As a result, the "special relationship" exception in *Aikens* cannot properly be used to predict the law in twenty-two other States.

5. All States Would Bar The Producers' Claims Under The Stranger ELD.

Although the stranger ELD rule is the clear majority rule, some States have never had occasion to address it expressly. For example, the District of Columbia never considered it until just last year. When workers at retail establishments claimed that a defendant's negligence allowed the Potomac River to flood their workplaces (prompting closures that prevented them from earning wages), the D.C. Court of Appeals explained that the stranger ELD raised a

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question of "first impression" under D.C. law. *Aguilar*, 98 A.3d at 980. The court surveyed other state authorities, explained that the stranger rule was applied by a "majority of jurisdictions," and applied the rule to bar recovery. *Id.* at 982-85.

The question in this case is whether the twenty-two States at issue would apply the majority bright-line rule of the stranger ELD, or whether there is a basis in existing state law to predict that a State would *reject* the majority approach and permit recovery of pure economic loss. For the reasons below, there is no sound basis for predicting that *any* State at issue here would allow Plaintiffs' claims to proceed. Some States have applied the stranger rule in the past and there is no reason for concluding that they would not apply it here. Other States have not yet expressly addressed the stranger rule, but existing cases also provide no basis for holding that the State would *not* apply the majority rule when the issue arises. In particular, the mere fact that existing cases may address the ELD solely in the context of sales of goods provides no basis for concluding that a State would fail to follow the majority approach under the stranger ELD.

The MDL Order does not provide a persuasive rationale for a different result. Indeed, by predicting that *all* States would apply the ELD "only . . . when the doctrine's purposes would be served," MDL Order 24 n. 10, the MDL Court effectively predicted that *all* twenty-two States would *reject* the majority rule, which does not permit "case-by-case inquiry into the policies at issue." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b. There was no basis for such a prediction. In addition, the MDL Court assumed that if a State permitted *any* exceptions to the ELD, it would adopt the exception created by the MDL Court. As explained above, however, the MDL Court's new "inter-connected industry" exception is different in kind from existing exceptions, *see supra* pp. 31-32, and the mere fact that a State may recognize an exception for a *legal* category of claims—such as negligent misrepresentation—does not suggest that the State would follow the MDL Court's minority-approach case-by-case policy analysis.

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This Court should reject the MDL Court's erroneous analysis.

a. Nine States Have Expressly Adopted The Stranger ELD.

Minnesota. The Minnesota Supreme Court long ago applied the stranger ELD to hold that an employer cannot recover increased workers' compensation premiums that resulted after the defendant negligently killed an employee. *See N. States Contracting Co. v. Oakes*, 253 N.W. 371, 372 (Minn. 1934). The decision placed itself squarely in the line of stranger ELD decisions[64] and has been cited as an example of the rule.[65] More recently, a Minnesota court applied the stranger ELD to prevent an employer from recovering "lost profits" incurred as a result of the defendant's negligence injuring an employee. *Cariveau v. Golden Valley Motors, Inc.*, No. 27CV06-11202, 2006 WL 6252343 ¶ 27 (Minn. Dist. Ct. Nov. 28, 2006). The court expressly relied on two Iowa cases applying the stranger rule. *See id.* (citing *Anderson Plasterers*, 543 N.W.2d at 613-14; *Gosch*, 701 N.W.2d at 91).

For the sale of goods, Minnesota has codified the ELD by statute. *See* Minn. Stat. § 604.101. The statute applies only to claims by "a buyer against a seller" relating to "a defect in the goods sold or leased," *id.* subd. 2, and in that context the statute states that the ELD "applies to claims only as stated in this section," *id.* subd. 5. That statute is irrelevant to the Producers' claims, because they do not arise in the context of a sale of goods. Contrary to the MDL Order, there is no basis for reading § 604.101 to displace the common law ELD *outside* the sale-of-goods context addressed by the statute. *See* MDL Order 25-27. In Minnesota, "statutes in derogation of the common law are strictly construed," and courts "do not presume that the Legislature intends to abrogate or modify a common law rule except to the extent expressly

[64] *See N. States Contracting*, 253 N.W. at 372 (citing *Anthony*, 52 Mass. 290, and *Conn. Mut. Life Ins.*, 25 Conn. 265).

[65] *See, e.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558, 563 n.6 (9th Cir. 1974); David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 Ind. L.J. 593, 599 n.24 (1986).

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declared or clearly indicated in the statute." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012). For several reasons, nothing in the statute suggests that it eliminates the common law ELD outside the sale-of-goods context.

First, the statute was a legislative response to a specific decision from the Minnesota Supreme Court *in the context of a sale of goods* in which the court eliminated the distinction for injury to property "other than" the purchased goods. *See* 27 Minn. Practice: Prods. Liab. Law § 13.15 (2015 ed.) (describing *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990)).[66] The original statute was limited to addressing *sales of goods*. *See* Minn. Stat. § 604.10. When difficulties arose in interpreting that statute, the current statute was passed, again limited to *sales of goods*. *See* 27 Minn. Practice: Prods. Liab. Law § 13.15. Given the highly specific purpose for which the legislature acted, there is no basis for concluding that statutory language stating that "[t]he economic loss doctrine applies to claims only as stated in this section," Minn. Stat. § 604.101, subd. 5, was intended to sweep any more broadly than to the types of "claims" actually addressed in the statute—*i.e.*, claims relating to the sale of goods. Nothing in the history of the statute supports reading that language to wipe out the common-law ELD in myriad *other* contexts that were never even considered by the legislature. *Cf.* Minn. Stat. § 645.16 (statute should be construed by "considering" the "occasion and necessity for the law," the "circumstances under which it was enacted," and the "object to be attained").

Second, the official co-reporters of the statute published a definitive account of the statute explaining that its exclusive scope is more limited. They explained that, "*[w]here the statute does apply*, it occupies the field; there is no residual common law economic loss doctrine," and

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[66] *See also* Minn. Stat. § 604.101, Reporter's Note (similarly describing response to *Hapka*); Daniel S. Kleinberger, Linda J. Rusch & Alan I. Silver, *Building a New Foundation: Torts, Contracts, and the Economic Loss Doctrine*, Bench & Bar of Minn. (Sept. 2000), http://www2.mnbar.org/benchandbar/2000/sep00/econ-loss.htm (similarly describing legislative response to *Hapka*) (hereinafter "Kleinberger").

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that the statute "should preempt any common law rules *within its scope*."[67]

Third, courts have treated the exclusive scope of the statute consistent with that description. As noted above, a Minnesota court recently applied the stranger ELD to bar a claim for economic losses brought by an employer against a defendant who had injured an employee. *See Cariveau*, 2006 WL 6252343 ¶ 27. If section 604.101 actually eliminated *all* common law applications of the ELD, that decision would not have been possible. No Minnesota court, moreover, has ever held that the statute precludes application of the ELD *outside* the context of the sale of goods.[68] And the Eighth Circuit has expressly held that the predecessor statute to section 604.101, *see* Minn. Stat. § 604.10(a), did *not* preempt the common law ELD in contexts outside the sale of goods. *See AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 n.3 (8th Cir. 1998). As the Eighth Circuit explained, the statute "is limited to sales of goods" and there is "no indication that the statute was intended to replace or narrow the scope of the broader common law doctrine." *Id.*; *accord Praktika Design & Projectos Ltda. v. Marvin Lumber & Cedar Co.*, No. 06-cv-957, 2007 WL 1582710, at *3 (D. Minn. May 30, 2007). There is no basis for concluding that the successor statute, section 604.101, was intended to apply more broadly.

Illinois. Illinois applies the stranger ELD. *In re Chicago Flood Litigation* involved classic claims under the stranger rule. When a flood interrupted electrical service, numerous businesses brought claims for "lost revenues, sales, profits and good will," 680 N.E.2d at 268, all of which were held barred where they were not accompanied by physical injury to property, *see*

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[67] Kleinberger (under "Drafting Policies Underlying the New Statute") (http://www2.mnbar.org/benchandbar/2000/sep00/econ-loss.htm) (emphases added).

[68] *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535 (Minn. Ct. App. 2014), does not suggest any broader preemptive scope for the statute. That case involved a sale of goods. *See id.* at 536-37. The court held solely that, where the trial court had held that the plaintiff's negligence claim fell outside the "product defect" claims covered by the statute (a decision that was not appealed), the trial court could not rely on the common law ELD to bar the claim—the statutory rule was exclusive *in that sale-of-goods context*. *Id.* at 539. The decision is irrelevant to the Producers' claims, which do not arise in a sale-of-goods context.

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id. at 274-75. As explained above, moreover, *Sample v. Monsanto* squarely applied the Illinois ELD to bar claims identical to those in this case.

Contrary to the MDL Order, Illinois cases provide no support for applying a case-by-case policy assessment. In *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346 (Ill. 1990), the *only* exceptions to the ELD the court recognized were for intentional misrepresentation, negligent misrepresentation, intentional interference with contract, and intentional interference with prospective business advantage, *see id.* at 352. That list proves Syngenta's point: those well-established exceptions are all based on defined legal categories of claims, three of which fall outside the ELD because they are *intentional* torts. In noting that the common principle underlying such exceptions was "that the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred," *id.* at 352, the court was merely acknowledging that there are some types of torts (fraud, negligent misrepresentation) that are designed to protect against economic losses and to which the ELD simply does not apply. Nothing in *2314 Lincoln Park* supports a case-by-case policy assessment.

Similarly, in *Metro. Water Reclamation Dist. of Greater Chi. v. Terra Found. for Am. Art*, 13 N.E.3d 44 (Ill. App. Ct. 2014), the court reasoned that the type of tortious conduct before it—"*intentional* interference with an easement"—was "[s]imilar to the torts of *intentional* interference with a contract or with prospective business advantage" because it was an intentional tort and involved interference with property rights. *Id.* at 59-60 (noting that the case "originates in property law") (emphases added). In pointing out that the "damages suffered by the [plaintiff] were the very damages the [defendant] *sought to inflict upon it*," the court was indicating that, in contrast to *Chicago Flood*, the case at bar involved an *intentional* tort and that provided a basis for avoiding the ELD. *Id.* at 61 (emphasis added). Although the court did note that "the considerations behind the economic loss doctrine articulated in *Moorman* are not

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present here," *id.* at 61, that single, passing comment from an intermediate appellate court did not flip Illinois from a majority-rule State that applies the ELD as a bright-line rule to a *minority*-view State like New Jersey that applies a case-by-case policy analysis to determine whether economic losses can be recovered in tort.

Lastly, the MDL Order is incorrect in suggesting that Illinois courts would not apply the ELD in Viptera cases because they do not apply it where "the defendant had a duty to act reasonably to avoid the very harm that occurred" and "this Court has now recognized . . . just such a duty to avoid plaintiffs' financial losses." MDL Order 38. That reasoning is circular. The point of the ELD is that it *precludes* a duty to avoid economic harm. The MDL Court cannot point to its *own decision* recognizing a new duty to "avoid . . . financial losses" *in the case before it* as a reason for holding that the ELD does not apply *in the case before it*.

Iowa. Iowa has also adopted the stranger ELD. *See, e.g., Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984) (barring recovery of "purely economic or business losses sustained as a result of non-intentional harm to a public bridge, resulting in its closing"). Indeed, the Iowa Supreme Court has stated that it follows "the stranger economic loss rule." *Annett Holdings*, 801 N.W.2d at 503-04; *see also Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005) (business cannot recover against third party that injured an employee for "loss of income to [the] business as a result of the absence of [the] injured employee").

Contrary to the MDL Order, Iowa has not applied the stranger rule solely in access cases. That misstates the law. *See, e.g., Gosch*, 701 N.W.2d at 91 (defendant injured plaintiff's employee); *Anderson Plasterers v. Meinecke*, 543 N.W.2d 612, 613 (Iowa 1996) (same); *see also Annett*, 801 N.W.2d at 504 (explaining that *Anderson Plasterers* is a "stranger economic loss rule" case). In addition, nothing in *Annett* suggests that Iowa applies the ELD through a case-by-case policy analysis. *Cf.* MDL Order 38-39. *Annett* merely acknowledged that there were some

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categorical exceptions or "qualifications" to the rule (for example, exempting professional malpractice claims against attorneys and accountants from the ELD) and applied the rule upon determining that the case before it "does not fall under any of the recognized exceptions or qualifications to the [ELD]." 801 N.W.2d at 504. And *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684 (Iowa 2011), simply recognized that negligent misrepresentation claims provide an exception to the ELD because the tort "is, and always has been, an economic tort allowing for recovery of purely economic damages" and applying the doctrine to bar such claims "would essentially eliminate the tort." *Id.* at 693. Once again, nothing in that analysis endorses the fact-specific policy assessment adopted in the MDL Order.

Louisiana. Louisiana has "adopted a slightly modified version of the economic-loss rule," *Wiltz*, 645 F.3d at 697, in the stranger context. The rule is not a *per se* bar, but rather is applied as part of Louisiana's duty-risk analysis. *See Phillips v. G & H Seed Co.*, 86 So. 3d 773, 780 (La. Ct. App. 2012).

In *PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), the Louisiana Supreme Court faced a classic stranger economic loss scenario: a dredging company damaged a gas pipeline and a gas customer sued for losses resulting from the interruption in gas supply. *See id.* at 1060. The court barred recovery for those economic losses. Citing the standard rationale for the ELD, the Court explained that liability in tort for economic losses must be restricted to prevent creating "liability 'in an indeterminate amount for an indeterminate time to an indeterminate class.'" *Id.* at 1061 (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (Cardozo, J.)). "Because the list of possible victims and the extent of economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages." *Id.* at 1061-62. Restricting recovery in tort reflects the recognition that "a chain reaction occurs when economic harm is done and may produce an

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unending sequence of financial effects best dealt with by insurance, contract, or other business planning devices." *Great Sw. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 970 (La. 1990); *see also Wiltz*, 645 F.3d at 697-98 (noting that "the reasoning and result in *PPG* flow from the standard economic-loss rule," but the case "left the door open for case-by-case adjustments.").

Based on these considerations, the Louisiana Supreme Court has instructed that it is "*highly unlikely* that the moral, social and economic considerations" underpinning the duty/risk analysis would encompass the risk of pure "economic loss" suffered by parties whose property has not been injured. *PPG Indus.*, 447 So. 2d at 1061 (emphasis added). Applying that principle, courts have repeatedly held that the duty-risk analysis would produce precisely the same outcome as the stranger ELD. *See, e.g., id.* at 1061-62 (barring recovery where dredging company severed gas line causing economic loss to plaintiff); *Wiltz*, 645 F.3d at 699-702 (barring recovery where defendant's alleged negligence largely killed the crawfish crop, thus causing economic losses to buyers and processors of crawfish); *TS&C Invs. LLC v. Beusa Energy, Inc.*, 637 F. Supp. 2d 370 (W.D. La. 2009) (barring recovery where defendant's negligence closed an interstate highway, resulting in economic losses to plaintiffs).

The Fifth Circuit's decision in *Wiltz* is particularly instructive and rebuts the conclusion that Louisiana would permit recovery of economic losses in a case such as this. *Wiltz* involved claims by buyers and processors of crawfish who purchased crawfish from rice farmers and who claimed that the maker of an herbicide sold to the rice farmers had ruined the farmers' crawfish crop (thus hurting the plaintiffs' economic interests). In *Wiltz* there was certainly a "discrete" group of plaintiffs far smaller than the 350,000 or more corn farmers potentially at issue here, and there were similar "inter-connected relationships," yet the Fifth Circuit held that Louisiana

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law barred recovery.[69]

Missouri. The Supreme Court of Missouri adopted the stranger ELD long ago. *See Brink v. Wabash Ry. Co.*, 60 S.W. 1058, 1059-60 (Mo. 1901) (barring parents' claim asserting that railroad's negligence causing death of their son had injured them by preventing the son from keeping his contract to provide for their support).[70] Contrary to the MDL Order, the mere fact that a federal court addressing an action against tobacco manufacturers for restitution found a basis for distinguishing *Brink* based on intervening changes in wrongful death law does not undermine the relevance of the opinion here. *See* MDL Order 39 (citing *City of St. Louis v. Am. Tobacco Co., Inc.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999)). *Brink* shows that the Missouri courts adopted the principles behind the stranger ELD, and the decision has never been disapproved. Similarly, the mere fact that Missouri (like many States) has recognized exceptions to the ELD for actions for against architects akin to professional malpractice claims, *see Business Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 454 (Mo. Ct. App. 1994), and for negligent misrepresentation, *B.L. Jet Sales, Inc. v. Alton Packaging Corp.*, 724 S.W.2d 669, 673 (Mo. Ct. App. 1987), provides no basis for thinking that Missouri would not apply the ELD here. As another federal court has recognized, *B.L. Jet Sales* falls into one of the "rare exceptions to the economic loss doctrine" recognized in Missouri, and it does not warrant expanding Missouri law to create new ones. *Dannix Painting, LLC v. Sherwin-Williams Co.*, No. 4:12 CV 01640 CDP,

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[69] The decisions from *In re Genetically Modified Rice Litigation* are inapposite. They involved GM rice that had *not been approved for human consumption even in the U.S*. The duty to prevent release in those cases was founded entirely on federal laws and regulations, which were designed to "prevent harms arising from market disruptions" caused by the spread of *non-approved* crops. *In re Genetically Modified Rice Litig.*, No. 4:06-md-1811, 2011 WL 5024548, at *4 (E.D. Mo. Oct. 21, 2011); *see also In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1015, 1020 (E.D. Mo. 2009) (duties under federal law to "confine" the unapproved GM material). Those decisions are irrelevant here given that Viptera was fully approved in the U.S.

[70] The decision has been cited as an early application of the ELD. *See, e.g.*, *Union Oil Co.*, 501 F.2d at 563 n.4; *Stevenson*, 73 N.E.2d at 203; *cf. also* Dobbs § 647 (describing cases involving negligent injury of a person who had "contracted to provide [the plaintiff's] upkeep" as stranger economic loss cases).

2012 WL 6013217, at *2 (E.D. Mo. Dec. 3, 2012), *aff'd*, 732 F.3d 902 (8th Cir. 2013).

Ohio. Ohio applied the stranger ELD long ago to bar workers from recovering lost wages after the defendant negligently caused an explosion that closed a factory. *See Stevenson*, 73 N.E.2d at 203-04. More recently, Ohio courts applied the rule to bar claims against a defendant that negligently severed telephone cables "resulting in a loss of telephone, fax and some internet and cable services to thousands," *RWP, Inc. v. Fabrizi Trucking & Paving Co., Inc.*, No. 87382, 2006 WL 2777159, at *1 (Ohio Ct. App. Sept. 28, 2006), and to bar an environmental group's effort to recoup remediation costs from a railroad, *see Ashtabula River Corp. Grp. II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 987-88 (N.D. Ohio 2008).[71] *Ashtabula* squarely rejected the theory that the "[ELD] does not bar tort claims that are independent of a contract claim." *Id.* (citing *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005)).

Despite that straightforward precedent, the MDL Court concluded that the ELD does not apply in Ohio whenever a plaintiff asserts a tort claim independent of a contract. *See* MDL Order 41. That misstates Ohio law. The federal court pointed to broad dicta in *Campbell v. Krupp*, 961 N.E.2d 205 (Ohio Ct. App. 2011), which suggested that the ELD "does not apply—and the plaintiff who suffered only economic damages can proceed in tort—if the defendant breached a duty that did not arise solely from a contract." *Id.* at 211. But understanding that language requires looking at the *holding* of the case. The plaintiff in *Krupp* sued a title insurance company for negligence, claiming economic losses from a negligent title search. The court held that Ohio law had barred negligence claims against title abstractors (by parties other than those

[71] *See also City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 516 (N.D. Ohio 2009) (barring city's public nuisance claim against financial institutions for their use of subprime lending that allegedly caused "epidemic of foreclosures afflicting the City").

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in privity) for over 100 years and thus concluded that the plaintiff's negligence claim *failed* because "no cause of action outside of contract exists against a title abstracter for negligence." *Id.* at 213. Of course, the rule that no cause of action for negligence lies against title abstractors is nothing other than a particular application of—*the ELD*. Thus, when the court stated in dicta that a plaintiff could "proceed in tort" to recover economic losses "*if* the defendant breached a duty that did not arise from a contract," *id.* at 211 (emphasis added), the court was not remotely announcing a general rule that there *is* a duty in tort to avoid economic losses that would allow plaintiffs to bring negligence claims whenever they arise independently of a contract. To the contrary, to determine whether a duty in tort existed at all, the court still applied the ELD—and held that there was *no duty* in that case. *Id.* at 212-13. The holding in *Krupp* thus does nothing to upset the "general rule" under Ohio law that "there is no . . . duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 667-68 (Ohio 1995).[72]

The other cases cited by the MDL Court reflect the same principles. *Mulch Mfg., Inc. v. Advanced Polymer Sols., LLC*, 947 F. Supp. 2d 841 (S.D. Ohio 2013), involved claims for fraud, deceptive trade practices in violation of Ohio statute, and negligent misrepresentation, *see id.* at 855-56. The court reached the unremarkable conclusion that such claims came within exceptions to the ELD. The ELD does not apply to intentional torts (such as fraud and intentional

[72] As the discussion in *Krupp* shows, in suggesting that a plaintiff may recover economic losses in tort "*if* the defendant breached a duty that did not arise solely from a contract," *Krupp*, 961 N.E.2d at 211, the court was simply contemplating particular situations—particularly the tort of negligent misrepresentation—where there may be a duty in tort to avoid conduct causing economic losses to others. *See id.* (discussing the fact that, under *Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212 (Ohio 1982), the tort of negligent misrepresentation imposes a duty by law on certain parties to avoid economic losses).

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deception), and negligent misrepresentation is also a recognized exception to the doctrine.[73] *See id.* at 856 (noting that "various courts, applying Ohio law, have held that the [ELD] does not apply to the claims involved here"). As the court noted, the particular claims in the case rested on the assertion of duties that did not fall under the rubric of the ELD —namely, duties "not to engage in deceptive, misleading, and/or fraudulent practices." *Id.* at 857; *see also* Dobbs §§ 606 & n.1, 666. Nothing in that conclusion remotely undermines application of the stranger ELD to bar *negligence, nuisance,* or *strict liability* claims as in this case. *Dana Ltd. v. Aon Consulting, Inc.*, 984 F. Supp. 2d 755 (N.D. Ohio 2013), is further afield. The court there merely held that the only duties the plaintiff had identified all arose from a contract and applied the contractual ELD. *See id.* at 767. The case did not hold that a plaintiff may proceed in tort whenever its claims arise *outside* a contract; the court had no occasion to address that question.

At bottom, the MDL Order did not identify a *single* Ohio case—nor is there such a case—allowing a claim for *negligence, nuisance,* or *strict liability* for economic losses to proceed on the theory that the claim arises outside a contractual relationship.

Tennessee. Tennessee has adopted the stranger ELD. *See, e.g., Lear Siegler*, 825 S.W.2d at 85-87 (tracing the rule to *Robins Dry Dock*); *Ladd Landing, LLC v. TVA*, 874 F. Supp. 2d 727, 732 (E.D. Tenn. 2012). In *Lear Siegler*, the court barred workers' claims for wages lost when an industrial park was closed for a day due to the defendant's negligence in permitting a propane leak. 825 S.W.2d at 87. Tennessee cases discussing the ELD in the context of sales of goods and contract scenarios provide no basis for concluding that Tennessee would *restrict* the ELD to that context. As a federal court recently noted, there is a "difference between the [ELD]

[73] *See, e.g., Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Prods. Inc.*, No. 2:02-CV-1288, 2007 WL 894833, at *9 (S.D. Ohio Mar. 22, 2007) (collecting cases and concluding that "the Court does not believe that under Ohio law a negligent misrepresentation claim is barred by the [ELD]").

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in the context of a case involving contracts and a case in which no contract or privity between the parties is involved—the situation presented in *Lear Siegler* and in this case." *Ladd Landing*, 874 F. Supp. 2d at 732 (rejecting argument that ELD is limited to contracts and the sale of goods and relying on *Lear Siegler* to bar claims for pure economic loss resulting from dike failure).

As the MDL Court has pointed out, another federal court has suggested that, despite the holding in *Lear Siegler*, Tennessee would limit the ELD to the products liability context. *See Ham v. Swift Transp. Co., Inc.*, 694 F. Supp. 2d 915 (W.D. Tenn. 2010). But as *Ladd Landing* has explained, "*Ham* did not offer an explanation for why *Lear Siegler*'s application of the [ELD] to a tort situation was in error or limited to the facts of that case." *Ladd Landing*, 874 F. Supp. 2d at 731-33 (finding *Ham* unpersuasive and following *Lear Siegler* as the "controlling authority" from Tennessee courts). Indeed, the *Ham* court based its analysis on the patently mistaken assertion that the ELD "has its origins in the UCC." *Ham*, 694 F. Supp. 2d at 923. As explained above, that is demonstrably incorrect. The stranger ELD dates back to the nineteenth century. In addition, *Ham*'s holding—purportedly limiting Tennessee's ELD to UCC transactions—cannot be squared with other Tennessee cases applying the ELD outside the UCC context.[74] Lastly, as *Ladd Landing* pointed out, "because *Lear Siegler* is a published decision by the Tennessee Court of Appeals that has not been overruled or modified by a subsequent decision of the Tennessee Supreme Court, it is controlling authority." 874 F. Supp. 2d at 733. The reasoning in *Ham* for ignoring *Lear Siegler* is thus wholly unpersuasive.[75]

Texas. Texas has applied the ELD to contractual strangers. *See LAN/STV v. Martin K.*

[74] *See, e.g.*, *Rural Dev., LLC v. Tucker*, No. M2008-00172-COA-R3-CV, 2009 WL 112541, at *9 (Tenn. Ct. App. Jan. 14, 2009); *Amsouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540, at *4-5 (Tenn. Ct. App. Aug. 5, 2003).

[75] To the extent the federal court attempted to distinguish *Lear Siegler* and *Ladd Landing* as "lack-of-access" cases, MDL Order 43, as explained above, that distinction is meritless. *See supra* Part II.A.4.b.

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Eby Constr. Co., Inc., 435 S.W.3d 234, 250 (Tex. 2014). In contrast to most jurisdictions, however, in Texas the "application of the rule depends on an analysis of its rationales in a particular situation." *Id.* at 245-46. Contrary to the MDL Order, however, that does not mean that Texas courts would decline to apply the ELD in this case. *See* MDL Order 44. The Texas Supreme Court has expressly recognized that the "principal rationale[] for the rule" is that "[e]conomic losses *proliferate* more easily than losses of other kinds" and can result in "indeterminate and disproportionate liability." *LAN/STV*, 435 S.W.3d at 240 (emphasis added). "Those liabilities may in turn create an exaggerated pressure to avoid an activity altogether." *Id.* Those concerns fully apply here. As Syngenta has explained, Plaintiffs' theories would, in the first instance, expose Syngenta to claims by hundreds of thousands of corn farmers, not to mention the claims of Non-Producers ranging from grain elevators to exporters to anyone else downstream. And as the milo and soybean producers' claims show, the alleged economic ripple effects from Viptera could expand the potential plaintiff pool to sweep in hundreds of thousands more. The allegations in this case thus provide a classic stranger economic loss scenario, and there is no basis for concluding that Texas law would not apply the stranger rule in this case.

In re Genetically Modified Rice provides no persuasive authority for declining to apply the ELD in a case such as this. That decision predated *LAN/STV* and misread Texas law by holding that the stranger ELD applied only if "the plaintiff could have recovered for the same injury by a contract action against another." *In re Genetically Modified Rice Litig.*, No. 4:06-md-1811, 2011 WL 339168, at *3 n.2 (E.D. Mo. Feb. 1, 2011) (citing *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 793 (Tex. App. 2007)). *Sterling Chemicals* did not read the ELD so narrowly, *see* 259 S.W.3d at 799,[76] and other Texas cases (including those cited in *Sterling*

[76] In observing that the ELD was "particularly appropriate" where the plaintiff had a contract action against

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Chemicals) have applied the stranger ELD without any such restriction.[77]

Wisconsin. Federal courts have squarely held that Wisconsin applies the stranger ELD. In *Leadfree Enters., Inc. v. U.S. Steel Corp.*, 711 F.2d 805 (7th Cir. 1983), the Seventh Circuit held that Wisconsin law barred plaintiffs (users of a bridge) from recovering "for lost profits and other purely economic losses caused when [the] bridge was closed as a result of allegedly defective construction." *Id.* at 806. Subsequently, the Seventh Circuit explained that "there is now substantial evidence that Wisconsin would decline *in all circumstances* to allow a negligence suit for the recovery of only economic damages, even when there is no contractual relationship between the parties." *Midwest Knitting Mills, Inc. v. United States*, 950 F.2d 1295, 1300 (7th Cir. 1991) (emphasis added); *see also Custom Underground, Inc. v. Mi-Tech Servs., Inc.*, No. 10-CV-222-JPS, 2011 WL 5008343, at *4 (E.D. Wis. Oct. 20, 2011) (applying ELD to bar contractor's claim seeking to recover increased costs due to engineer's negligent plans where parties were contractual strangers). Federal courts have made clear that Wisconsin's ELD applies even in the absence of a contractual relationship and have refused to "conflat[e] the economic loss doctrine's applicability in cases where contractual privity exists between the parties with Wisconsin's principles regarding recovery of economic losses in tort where no contractual privity exists between the parties." *Custom Underground*, 2011 WL 5008343, at *3.

Wisconsin cases have not undermined the federal opinions and have not confined the ELD to "the context of contractual relationships." MDL Order 44-45. In products liability cases, the Wisconsin Supreme Court has taken a broad approach, holding that "contract notions

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another, *Sterling Chemicals* did not suggest that fact was determinative. *See* 259 S.W.3d at 799.

[77] *See, e.g., Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App. 2002); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 288-90 (Tex. App. 2000) (applying ELD to "contractual strangers" where there was no alternative for recovery in contract for excavating company's claims that gas company's negligent marking of its lines had caused economic losses in the form of "additional overhead and expenses" when excavating company struck the improperly marked lines).

of privity are irrelevant to the question whether" the ELD applies. *Daanen & Janssen*, 573 N.W.2d at 852. *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 724 N.W.2d 879 (Wis. 2006), is not to the contrary. The court there rejected the ELD on multiple grounds, including the square holding that the damages claimed were "non-economic." *Id.* at 888. The court also cited *Daanen* approvingly, *id.*, and cannot be read as *sub silentio* rejecting *Daanen*'s reasoning.

Schuetta v. Aurora Nat'l Life Assurance Co., No. 13-cv-007-JPS, 2013 WL 6199248, at *1 (E.D. Wis. Nov. 27, 2013), involved claims by the beneficiary of an annuity that the insurance company had negligently failed to inform him of his rights and is best understood as falling in the category of cases in which a defendant in the business of providing professional services or information for the benefit of a third party may be held liable for economic losses if it performs the service negligently. *See supra* pp. 24 & n.50; *cf. Ins. Co. of N. Am. v. Cease Elec., Inc.*, 688 N.W.2d 462, 471-72 (Wis. 2004) (holding that Wisconsin would not apply the ELD to claims arising under any contracts for services). To the extent the court there suggested that the ELD should not apply simply because the UCC did not govern the transaction and that ELD cases "most often deal with manufactured products that are under warranty," *Schuetta*, 2013 WL 6199248, at *5, that approach misstates the law and falls into precisely the error of "conflat[ing] the ELD's applicability in cases where contractual privity exists between the parties with Wisconsin's principles regarding recovery of economic losses in tort where no contractual privity exists between the parties." *Custom Underground*, 2011 WL 5008343, at *3.

The MDL Court was also mistaken in relying on *Walker v. Ranger Ins. Co.*, 711 N.W.2d 683, 687 (Wis. Ct. App. 2006), because that case involved *physical injury*. *See id.* (due to defendant's conduct "pipes burst and significant damage occurred as a result"). To the extent the court there suggested that the ELD should not apply because the plaintiffs had no contractual remedy, it plainly misunderstood the most basic parameters of the doctrine. The ELD did not bar

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recovery in that case because the plaintiffs had suffered physical damage to their property.

b. The Court Should Predict That States That Have Not Expressly Adopted The Stranger ELD Would Apply It Here.

Alabama. The Alabama Supreme Court has adopted the ELD in the products liability context, *see Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 674 (Ala. 1989), and nothing in that decision indicates Alabama would reject the majority approach here. The MDL Court cited *Public Building Authority of City of Huntsville v. St. Paul Fire and Marine Insurance Co.*, 80 So. 3d 171 (Ala. 2010), for the proposition that Alabama has limited the ELD to products liability. But *Public Building* merely held that the ELD does not apply in "a commercial-construction context" because Alabama has developed a context-specific six-factor test to determine whether "a duty in tort" exists in commercial-construction cases. *Id.* at 184-85.

Arkansas. The Arkansas Supreme Court has held that the ELD does not apply in strict products liability cases, *Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321, 324 (Ark. 1981), and has reserved the question whether to apply the doctrine to negligence cases, *see Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011). The MDL Order reached a contrary conclusion primarily by misstating Arkansas law. The Order rests on the assertion that the court in *Carvin v. Ark. Power & Light Co.*, Civ. Nos. 90-6055 & 90-6109, 1991 WL 540481, at *4 (W.D. Ark. Dec. 2, 1991), "declined to apply the ELD under Arkansas law in the stranger context." MDL Order 27. That is flatly incorrect. *Carvin* applied the stranger ELD as it held: "We do not believe that the Arkansas courts if faced with the issue would allow plaintiffs to recover from defendants for the purely economic losses stemming from the loss of the bridge." 1991 WL 540481, at *5. There is no reason to think that *Carvin* does not accurately reflect Arkansas law.

Colorado. The Colorado Supreme Court recently held that one strand of the ELD applying the doctrine where there are "interrelated contracts" does not apply to tort duties that

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arise independently of contract duties. *S K Peightal Eng'rs, LTD v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868, 872 (Colo. 2015). But the court made clear that it was addressing scenarios involving "a single contract" or "interrelated contracts" and specifically stated that its holding was "narrowly" tailored to "the specific facts of this case." *Id.* at 868, 877. The MDL Court erred in relying on that decision to hold that Colorado would reject the majority approach to the *stranger* ELD.[78]

Indiana. Indiana has made clear that the "existence or non-existence of a contract is not the dispositive factor for determining whether a tort action [for economic loss] is allowable," *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 748 (Ind. 2010), and has applied the ELD where parties had no contractual privity at all, *Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 739 (Ind. 2010). These decisions, which post-date the Indiana state-court decisions erroneously relied on by the MDL Court,[79] show that Indiana does not restrict the ELD to situations where the parties have a contract. In fact, the Indiana Court of Appeals has applied the stranger ELD in the classic scenario of defendant injuring an employee and disrupting plaintiff's business. *See Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 786 (Ind. Ct. App. 1990).

The MDL Court also erred by relying on a federal decision that erroneously cited *Charlier* for the proposition that Indiana has restricted the ELD to cases involving contracting

[78] The MDL Court also relied on *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000). *See* MDL Order 28-29. But *AZCO* was decided in the context of parties who were in contractual privity and said nothing about how the court would rule in a stranger scenario.

[79] The three state-court cases relied on by the MDL Court not only predate the Indiana Supreme Court's decisions, they also are readily distinguished from this case. Two of the cases involved property damage, which "clearly fall[s] outside the scope of the economic loss doctrine." *Hoffman v. WCC Equity Partners, LP*, 899 N.E.2d 756, at *2 (Ind. Ct. App. 2008) (unpublished decision); *see KB Home Ind. Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 300, 304-05 (Ind. Ct. App. 2010). In the third case, the appellate court found the ELD did not apply to a negligence *per se* claim because "it seeks recovery in negligence based upon [a] violation of state statutory and federal regulatory law." *American United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 705 (Ind. Ct. App. 2004).

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parties. *See Novak v. Ind. Family & Soc. Servs. Admin.*, No. 1:10-cv-0677-RLY-DML, 2011 WL 1224813, at *8 (S.D. Ind. Mar. 30, 2011). Contrary to *Novak*'s mischaracterization, the defendant in *Charlier* was an engineering subcontractor with whom the plaintiff had no contractual privity whatsoever. *Charlier*, 929 N.E.2d at 739.

Kansas. The MDL Court correctly recognized that the Kansas Supreme Court has held open the possibility that the ELD would apply in the stranger context, *see Rinehart v. Morton Buildings Inc.*, 305 P.3d 622, 632 (Kan. 2013), but erroneously found "no basis" to predict that Kansas courts would apply the doctrine in this case because "Kansas courts have never applied the stranger [ELD]." MDL Order 31. That analysis ignores the fact that the stranger ELD is the *majority* approach and should be applied in Kansas absent some indication that Kansas would *reject* the stranger ELD. Moreover, the Kansas Court of Appeals *has* applied the stranger ELD when an excavator negligently operated its equipment causing "economic harm due to an interruption in phone and internet service." *Long Motor Corp. v. SM & P Utility Res., Inc.*, 214 P.3d 707, at *3 (Kan. Ct. App. 2009) (unpublished).

Kentucky. The Kentucky Supreme Court adopted the ELD in the products liability context in *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011), and nothing in that decision restricts the doctrine to that context. The federal and lower-court decisions relied on by the MDL Court arose in the context of a contractual relationship and thus afforded no opportunity for those courts to address the stranger ELD. *See, e.g., Nami Res. Co., LLC v. Asher Land & Mineral, Ltd.*, Nos. 2012-CA-762-MR et al., 2015 WL 4776376, at *2 (Ky. Ct. App. Aug. 14, 2015) (non-final opinion). Accordingly, these cases are irrelevant to the question whether Kentucky would apply the stranger ELD here.

Michigan. Although Michigan courts have indicated that the ELD applies only where parties could have addressed their risks by contract, the Michigan Court of Appeals held open the

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possibility that claims for economic losses might be barred in "a mass tort claim with the potential for disproportionate economic exposure." *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.*, 656 N.W.2d 858, 866 (Mich. Ct. App. 2002). Plaintiffs have made this case a purported mass tort action, with more than 2,130 plaintiffs pursuing claims. Accordingly, this Court should predict that the Michigan courts would apply the stranger ELD in this "mass tort" action.

Mississippi. Mississippi courts have not addressed, let alone rejected, the stranger ELD. The cases relied on by the MDL Court considered the ELD in the context of contractual relations, *see, e.g.*, *Lyndon Prop. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 274 (5th Cir. 2007) (refusing to apply ELD to "a duty shaped by contract"), and consequently took no position on the rationales underpinning the stranger ELD.

Nebraska. The Nebraska Supreme Court has adopted the ELD in the products liability context, *see Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 332 N.W. 2d 39, 44 (Neb. 1983), and the MDL Court's reliance on *Lesiak v. Cent. Valley Ag. Co-op, Inc.*, 808 N.W.2d 67 (Neb. 2012), to limit the doctrine to that context is misplaced. In *Lesiak*, the court held only that the ELD did not apply because the plaintiffs had suffered *physical injury*—that is, "the damage allegedly caused by the breach was not purely economic loss," *id.* at 83. The court did not consider, even in dicta, stranger scenarios and thus *Lesiak* cannot be read as a rejection of the stranger ELD.

North Carolina. North Carolina courts have not addressed the stranger ELD. The MDL Court's conclusion was based on a decision that analyzed the ELD through the lens of products liability cases, and in that context held that lack of contractual privity precluded applying the rule. *See Lord v. Customized Consulting Specialty, Inc.*, 643 S.E.2d 28, 32 (N.C. Ct. App. 2007). *Lord* does not show that North Carolina would reject bright-line application of the stranger ELD.

North Dakota & Oklahoma. North Dakota and Oklahoma have adopted the ELD in the products liability context, *see Leno v. K & L Homes, Inc.*, 803 N.W.2d 543, 550 (N.D. 2011); *see*

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Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649, 652 (Okla. 1990), and have given no indication that they would not adopt majority approach in the stranger context.

South Dakota. The South Dakota Supreme Court has noted that it "is in agreement with the rationale behind the rule denying economic damages under tort theories and expressly recognize[d] it." *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333 (S.D. 1994). In defining the doctrine's contours, the court has looked to Illinois—a state that has unquestionably adopted the stranger ELD. *See Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413 (S.D. 2014) (citing *Collins v. Reynard*, 607 N.E.2d 1185 (Ill. 1992)).

B. Non-Producers' Claims Are Barred By The Stranger ELD Or The Contractual ELD.

The Non-Producers' claims are barred by one of the two strands of the ELD, depending on how the claims are cast. To the extent the Non-Producers assert that they were injured by the general presence of Viptera in the U.S. corn supply, their claims are identical to those of the Producers and are barred under the stranger rule for the reasons explained above. To the extent the Non-Producers assert that they were injured because the particular corn they purchased contained Viptera corn, the contractual strand of the ELD bars tort claims for economic losses arising where the parties are connected (directly or indirectly) by contract.[80]

In particular, the contractual ELD bars tort claims for economic losses arising from the assertion that goods do not have the value or the qualities the purchaser expected.[81] "A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects."

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[80] *See, e.g.*, *Annett Holdings*, 801 N.W.2d at 503; *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) ("[E]conomic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability."), *overruled on other grounds by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990).

[81] *See, e.g.*, *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 820 (Minn. 1984), *overruled on other grounds by Hapka*, 458 N.W.2d 683 (doctrine bars tort claims for "failure of the product to perform to the level expected by the buyer"); *accord City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333 (S.D. 1994).

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Anderson Elec., Inc. v. Ledbetter Erection Corp., 503 N.E.2d 246, 248 (Ill. 1987).

Like the stranger rule, the contractual ELD precludes the open-ended liability that would result if a manufacturer could be held liable for the spreading economic consequences of some failure of its product to meet expectations. *See, e.g.*, *Daanen & Janssen*, 573 N.W.2d at 849. It is also intended to preserve the distinct roles of tort and contract law. As noted above, tort law is concerned with duties to prevent physical harm. By contrast, claims that "a product has not met the customer's expectations" or "that the customer has received 'insufficient product value'" and suffered economic loss as a result are the concern of "express and implied warranties." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986). The contractual ELD thus reflects a determination that "principles of warranty law remain the appropriate vehicle to redress a purchaser's disappointed expectations when a defect renders a product inferior or unable adequately to perform its intended function." *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 450 (Ill. 1982) (citations omitted); *accord Delaval*, 476 U.S. at 867.

Restricting parties to their contract remedies prevents tort law from swallowing contract law and preserves the ability of parties to allocate risks through the terms of their transactions. The doctrine is thus intended to encourage parties to address economic risks by contract.[82]

Here, the Non-Producers' claims are barred by the contractual ELD. Their fundamental claim is that they purchased corn without regard to whether it was grown from Viptera, mixed the corn all together, and then were disappointed when the presence of Viptera in the corn supply (and China's embargo) allegedly lowered the price of corn. The Non-Producers themselves

[82] It encourages "the party with the best information (that is, the party with knowledge of its own risk of loss) to decide whether to assume, allocate, avoid, or insure against its risk of loss." *Wiltz*, 645 F.3d at 697; *see also Daanen & Janssen*, 573 N.W.2d at 850 ("[T]he economic loss doctrine is aimed at encouraging commercial parties ex ante to negotiate for warranty protection or to take other steps, such as purchasing insurance, to protect their purely economic interests.").

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characterize their alleged damages as "economic harm," Non-Class Compl. ¶ 240, and they complain solely of "losses from the drop in corn prices," "reduced volumes and reduced margins," Non-Class Compl. ¶ 292, and other similar economic damages, *see id.* ¶¶ 293-96. Such injuries are paradigmatic economic losses by a purchaser disappointed that the goods he purchased do not have the qualities and the economic value he had hoped for.[83]

The policies behind the doctrine also apply with particular force to the Non-Producers, because they could have protected against their losses through their contracts for purchasing corn—including by seeking warranties that the corn was Viptera free.[84] As noted, one purpose of the ELD is to "encourage" the "*commercial purchaser*[] to assume, allocate, or insure against [economic] risk." *Daanen & Janssen, Inc.*, 573 N.W.2d at 846 (emphasis added). Allowing recovery in tort and making Syngenta (and other manufacturers of GM seeds) the universal insurers for everyone else in the grain industry would give the Non-Producers the benefit of a protection they did not bargain (or pay) for when they were purchasing corn, eliminate incentives for them ever to rely on contracts to address these risks, and prevent the system of contracts between various players in the market from ever developing to address the economic risks at issue here. These are exactly the results the ELD is designed to avoid. The doctrine is premised on the view that "commercial entities [are] quite capable of bargaining for express warranties" and that the courts should not permit after-the-fact tort actions to remove the incentives to do so. *Lexington Ins. Co. v. W. Roofing Co., Inc.*, 316 F. Supp. 2d 1142, 1149 (D. Kan. 2004).

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[83] *See, e.g., Daanen & Janssen, Inc.*, 573 N.W.2d at 845 (ELD bars claims for "loss in value of the product itself" or "insufficient product value"); *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 387 (Miss. Ct. App. 1999) (ELD bars recovery for "controversies in which commercial purchases do not live up to the expectations of the consumer"); Minn. Stat. § 604.101, subd. 3 (Reporter's Note) (statute bars "recovery for damage to [or] diminution in the value of" the goods sold).

[84] *See, e.g., Daanen & Janssen*, 573 N.W. 2d at 850 ("Since Daanen was free to negotiate for warranty protection with [third parties], the policies underlying the [economic loss] doctrine applied with full force to its claims regardless of whether it was in privity with [Defendant].").

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Like the Producers, the Non-Producers also cannot sidestep the ELD by claiming physical injury to property. *See supra* Part II.A.3. The Non-Producers rely on the same generic assertions about "pervasive contamination of the U.S. corn supply," Non-Class Compl. ¶ 236, rather than any assertions about harm to *their* property. And their theory of injury is similarly decoupled from injury to *their* corn. They allege injury from a market-wide drop in the price of *all* U.S. corn, not injury to *their* corn in particular. The MDL Court held that the non-producers before it had not alleged physical injury, and the same logic applies to the Non-Producers here. *See* MDL Order 19-20. As explained above, moreover, the presence of Viptera in corn cannot count as physical injury in any event, because Viptera was fully approved in the U.S. Finally, the Non-Producers face an additional hurdle. In the purchase-of-goods context, physical injury suffices to avoid the ELD only where the purchased good damaged *other* property.[85] Where the only injury is to the good itself, the ELD applies. Here, corn—including corn containing the MIR162 trait—is the product the Non-Producers purchased. Their claim that the corn they purchased did not have the value it should have had does not involve damage to *other* property.

Nor can the Non-Producers claim injury to *other* property on the theory that they commingled MIR162 corn with other corn. Where one component or ingredient allegedly "injures" a product of which it is a part, that does not qualify as injury to "other property." *See, e.g.*, *Jorgensen*, 824 N.W.2d at 419; *W. Roofing*, 316 F. Supp. 2d at 1147-49; *Minneapolis Soc'y of Fine Arts*, 354 N.W.2d at 820.[86] Under this principle, courts have held, for example, that where fertilizer contaminated a crop of wheat with rye (thus preventing the farmer from selling

[85] *See, e.g.*, *Lexington Ins.*, 316 F. Supp. 2d at 1147; *Jorgensen Farms, Inc. v. Country Pride Coop., Inc.*, 824 N.W.2d 410, 419 (S.D. 2012); *State Farm*, 736 So. 2d at 387; Minn. Stat. § 604.101, subd. 3(1) (plaintiff can recover solely for damage to "*other* tangible personal property") (emphasis added).

[86] *See also, e.g.*, *Nw. Ark. Masonry, Inc. v. Summit Spec. Prods., Inc.*, 31 P.3d 982, 988 (Kan. Ct. App. 2001); *StarLink Corn*, 212 F. Supp. 2d at 841 ("[C]ourts have uniformly held that if a defective part of a product harms the rest of the product, that does not constitute 'other property.'").

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the crop at a higher price as certified seed), that did not constitute injury to "other property" because the fertilizer was merely a component part of the finished product—the crop of wheat. *Jorgensen*, 824 N.W.2d at 413, 418-19. Here, the Non-Producers combine corn from multiple sources to create their product: fungible corn. Mixing some corn with the MIR162 trait together with other corn cannot, as a matter of law, produce injury to "other property." *See, e.g.*, *Wasau Tile, Inc. v. Country Concrete Corp.*, 593 N.W.2d 445, 454 (Wis. 1999) (where manufacturer of pavers complained that "the pavers were damaged because one or more of their ingredients was of insufficient quality," there was no damage to "other property"); Dobbs § 449.[87]

The MDL Court offered two reasons for holding that the ELD did not bar non-producers' claims, but both rest upon incorrect statements of the law.[88]

First, the MDL Court held that the ELD did not apply because the non-producers had not purchased Syngenta's own product—Viptera *seed*—directly from Syngenta. Instead, they had purchased harvested corn grain from other intermediaries. *See* MDL Order 47. Contrary to the federal court's assumptions, however, the ELD applies even to remote purchasers who did not purchase directly from the defendant and applies where the defendant made only a component or ingredient incorporated into the product purchased by the plaintiff. It is well settled that, when a remote purchaser sues the manufacturer, the ELD applies just as it would if the plaintiff had purchased from the manufacturer directly. *See, e.g.*, *Daanen & Jansen*, 573 N.W.2d at 849.

[87] *See also Int'l Flavors & Fragrances, Inc. v. McCormick & Co., Inc.*, 575 F. Supp. 2d 654, 660-64 (D.N.J. 2008) (plaintiff that had purchased paprika infested with cigarette beetles from defendant could not show injury to "other property" where it had included the paprika in its barbeque sauce and the barbeque sauce was ruined); *Dixie-Portland Flour Mills, Inc. v. Nation Enters., Inc.*, 613 F. Supp. 985, 988-89 (N.D. Ill. 1985) (purchaser of flour contaminated with sand could not recover in tort despite the assertion that other ingredients were "harmed" and wasted when they were mixed with the flour; the "qualitative" defect in the flour "at core . . . merely injures a purchaser's expectations"); *see also StarLink*, 212 F. Supp. 2d at 841 (the "modern trend" is to hold that if "damage is of a type that the buyer could have foreseen resulting from the product failing to perform, it does not constitute harm to other property").

[88] The MDL Court discussed its rationales primarily in the context of Minnesota's statute codifying the ELD, and that statute is addressed more specifically below. *See infra* pp. 66-69.

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Any other rule would produce the anomalous result that those purchasing directly *could not* recover in tort for economic losses, but those who happened to purchase from intermediaries *could*. That is not the law. *See, e.g.*, *StarLink*, 212 F. Supp. 2d at 839-40 (if the ELD did not apply to a remote purchaser, "then manufacturers would become liable for economic expectations of secondary purchasers").[89]

Similarly, it is settled law that the ELD applies where a plaintiff sues the maker of a component or ingredient in a purchased product. The U.S. Supreme Court's seminal decision applying the contractual ELD involved exactly such a scenario—a charterer sued the manufacturer of the turbines in a vessel. *See Transam. Delaval, Inc.*, 476 U.S. at 860-61. Even though the charterer had not purchased the turbines (or anything else) from the defendant, the Supreme Court held that the ELD applied. *See id.* at 871-72. Likewise, in *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), the plaintiff farmer had purchased seed potatoes from a supplier, the seed potatoes had been treated with a sprout-suppressor, and the farmer sued the maker of the sprout-suppressor claiming that it had damaged the seed potatoes (preventing them from growing). The Third Circuit held the claim barred by the ELD because the sprout suppressor was simply a component of the product the farmer had purchased (seed potatoes), even though the farmer had not purchased any sprout suppressor himself.[90] The court explained that all the

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[89] *See also, e.g.*, *Nw. Ark. Masonry*, 31 P.3d at 988-89 (explaining that "consumers are not typically in privity of contract with the manufacturer when they purchase products from retailers or wholesalers," but that "[n]evertheless, the economic loss rule applies").

[90] This is the rule generally applied across jurisdictions. *See, e.g.*, *Hininger v. Case Corp.*, 23 F.3d 124, 127 (5th Cir. 1994) (under Texas law, consumer cannot recover economic losses in tort in action against a supplier of a component part in the product the consumer purchased); *accord Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987) (suit against designer of steering mechanism in ship) *Progressive Ins. Co. v. Monaco Coach Corp.*, No. 1:05-CV-37-DMR-JMR, 2006 WL 839520, at *3 (S.D. Miss. Mar. 29, 2006) (suit against maker of water heater in motor home); *Capital Motor Lines v. Detroit Diesel Corp.*, 799 F. Supp. 2d 11, 17 (D.D.C. 2011) (suit against maker of engine in a motor coach); *St. Paul Fire & Marine Ins. Co. v. Steeple Jac, Inc.*, 352 N.W.2d 107 (Minn. Ct. App. 1984) (suit against maker of defective gear box incorporated into window washing unit).

The Restatement (Third) applies the same approach. It explains that where Buyer purchases a house from Developer and later discovers that windows made by Manufacturer have leaked, damaging the house, the ELD bars

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plaintiff-farmer had lost was "the expected performance of the seed potatoes, no more and no less." *Id.* at 1052. The same rationale applies here.

Once again, any other rule would produce an anomalous gap in the doctrine. For example, if a purchaser bought pizza dough from A, and A had made the dough with flour from B that had sand in it, the MDL Court's approach would suggest that the ELD would not bar purchaser's tort claim against B (the remote component supplier) simply because the purchaser did not buy flour from B. But such a result cannot be squared with the settled rule that the ELD bars both (i) any tort claim by A (the maker of the dough) against B (the supplier of contaminated flour) because the flour was merely a component in A's final product (and thus did not injure "other" property)[91] and (ii) any tort claim by the ultimate purchaser against A, his direct counter-party. Nothing in the policies underpinning the doctrine suggests that a tort claim for economic losses should spring to life the minute the maker of a product with a deficient component sells the finished product to a third party. Or as many courts have put it, there is "no principled basis for affording the purchaser of a defective product greater relief against the manufacturer of a component part . . . than against the manufacturer of the assembled defective product." *Hilton-Davis*, 855 F.2d at 1051. To the contrary, the same policy rationales apply with full force, because barring tort claims will both limit indeterminate liability and encourage purchasers to protect themselves by contract (including warranties).[92] Nothing in the situation of a remote component supplier could justify "permitting a tort recovery that will allow a purchaser to reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising that chain." *Id.* at 1054. In short, the MDL

Buyer's tort claim against the Manufacturer. *See* Restatement (Third) of Torts: Liab. for Econ. Harm § 2 illust. 1.

[91] *See, e.g.*, *Dixie-Portland*, 613 F. Supp. at 988-89.

[92] In the pizza dough example, the ultimate purchaser would seek warranties from A (the maker of the dough), and A, in turn, would find it wise to protect its interests by seeking warranties from B (its flour supplier).

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Court's suggestion that the ELD would not apply unless the plaintiff had purchased the exact good produced and sold by Syngenta fundamentally misstates the law.[93]

Second, the MDL Court concluded that the ELD did not apply because the non-producers had not asserted that Viptera was "defective" and the ELD applies solely to product defect claims. MDL Order 47. That is also incorrect. Nothing in the purposes underlying the ELD limits it to tort claims asserting that a product meets a particular definition making it "defective." Instead, the fundamental point of the doctrine is that, *whenever* a plaintiff asserts a claim resting on the assertion that the product has disappointed the plaintiff's economic expectations, the plaintiff cannot proceed in negligence or strict liability and instead must look to the law of contract (and warranty) for relief. The doctrine has thus has been applied where, for example, the defendant simply sent the plaintiff the wrong product. *See, e.g.*, *Adcock v. S. Austin Marine, Inc*., No. 2:08-cv-263KS-MTP, 2009 WL 3633335, at *5 (S.D. Miss. Oct. 30, 2009). If the MDL Court's approach were applied, a plaintiff could evade the ELD by merely describing his alleged economic losses while studiously refraining from calling a product "defective."

1. All States At Issue Would Apply The Contractual ELD.

With minor variations, all States at issue apply the ELD in the context of the purchase of goods to bar recovery of economic losses in tort[94] and, for the reasons above, would apply it to

[93] The Non-Producers cannot avoid the rule described here on the theory that seeds used as an input in producing crops are somehow different from other component parts used as inputs in a final product. Cases applying the ELD in the agricultural context have repeatedly recognized that not only seeds but also even fertilizers are component parts that go into the finished product of a final crop. *See, e.g.*, *Jorgensen Farms*, 824 N.W.2d at 418-19 (applying ELD because fertilizer contaminated with rye was a component part of wheat crop for which fertilizer was used); *Everkrisp Vegetables, Inc. v. Tobiason Potato Co.*, 870 F. Supp. 2d 745, 750-52 (D.N.D. 2012) (applying ELD where seed potatoes infected with ring rot infected entire potato crop).

[94] *See, e.g.*, *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 674 (Ala. 1989); *S K Peightal Engineers, LTD v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 872 (Colo. 2015); *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 447-48 (Ill. 1982); *Indianapolis-Marion Cty. Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 739 (Ind. 2010); *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649, 651-52 (Iowa Ct. App. 1996); *Jordan v. Case Corp.*, 993 P.2d 650, 651-52 (Kan. Ct. App. 1999); *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 738-39 (Ky. 2011); *Neibarger v. Univ. Coops., Inc.*, 486 N.W.2d 612, 619-20

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bar the Non-Producers' claims here. Syngenta addresses here solely Minnesota law and those few States whose law requires some further comment.

Minnesota. As noted above, Minnesota has codified the ELD in the context of the sale of goods. *See* Minn. Stat. § 604.101. The statute provides that a "buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods . . . caused harm to the buyer's tangible personal property other than the goods." *Id.* subd. 3. The Non-Producers' claims fall under that provision and thus are barred.

The Non-Producers are "buyers" of corn, and Syngenta is properly classified as a "seller" under the statute because Syngenta sold an input (Viptera corn seed) that was used in creating at least some of the harvested corn purchased by the Non-Producers. The Non-Producers cannot escape the statute on the theory that they did not purchase goods *directly* from Syngenta. By its terms, the statute applies "regardless of whether the seller and the buyer were in privity regarding the sale . . . of the goods." Minn. Stat. § 604.101 subdiv. 2(1). And the Reporters' Note makes clear that the statute applies "where, in essence, both the claimant and the party claimed against are in the chain of distribution." *Id.* Reporters' Note. Syngenta is plainly in the chain of distribution for the MIR162 corn that the Non-Producers complain about here.

In addition, contrary to the rationale adopted by the MDL Court, *see* MDL Order 47, the Non-Producers also cannot evade the statute on the theory that Syngenta sold merely corn *seed* whereas the Non-Producers purchased a different "good"—the *harvested corn*. As noted above,

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(Mich. 1992); *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 386-88 (Miss. App. 1999); *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*, 870 S.W. 2d 832, 834-36 (Mo. Ct. App. 1993); *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 92 (Neb. 2011); *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772, 780 (N.C. Ct. App. 1998); *Leno v. K & L Homes, Inc.* 803 N.W.2d 543, 550 (N.D. 2011); *Corporex Develop. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704-05 (Ohio 2005); *Waggoner*, 808 P.2d at 653; *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333-34 (S.D. 1994); *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 173-74 (Tenn. Ct. App. 2001); *LAN/STV v. Martin K. Eby Constr. Co., Inc.*, 435 S.W.3d 234, 246-47 (Tex. 2014); *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 844-46 (Wis. 1998).

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see supra pp. 38-41, prior to the enactment of the statute, Minnesota common law recognized that the ELD applies to claims against the maker of a component part in a finished product. *See St. Paul Fire & Marine Ins. Co. v. Steeple Jac, Inc.*, 352 N.W.2d 107 (Minn. Ct. App. 1984) (suit against maker of gear box incorporated into window washing unit). The statute itself carries over this concept as it expressly defines the "goods" to which the statute applies to include tangible property "regardless of whether that property is incorporated into or becomes a component of some different property." Minn. Stat. § 604.101, subd. 1(c). The Reporters' Note, for example, explains that cinder blocks are a "good" sold by their maker even after a general contractor has incorporated the blocks into a different finished product—a building. *Id.* Reporters' Note, Example 1. Thus, the Non-Producers are "buyers" of any "good" that is "incorporated into" or that is a "component of" the corn they purchased, and that definition plainly includes Viptera seed. Nothing in the text or history of the statute suggests that the Legislature intended to make the statute narrower than the common law rule by eliminating the ELD whenever a purchaser of a final product sues a component manufacturer. As noted above, the Court should not presume that the Legislature intended "to abrogate or modify a common law rule except to the extent expressly declared" in the statute. *Staab*, 813 N.W.2d at 72.

The Non-Producers also cannot escape the statute on the theory that they are not bringing "product defect tort claims." *Cf.* MDL Order 46-47. The statute defines that term to mean "a common law claim for damages caused by a defect in the goods" and provides that "[a] defect in the goods includes a failure to adequately instruct or warn." Minn. Stat. § 604.101 subd. 1(e). Strict liability claims for failure to warn, *see, e.g.*, Non-Class Compl. Count VI, thus fall squarely within the statute. The statute also sweeps more broadly, as the Reporters' Note makes clear that it "encompasses all common law claims for product defects, such as negligence." Minn. Stat. § 604.101 subd. 1(e) Reporters' Note. In context, the statutory reference to product "defects" is

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best understood to encompass any characteristic that the plaintiff claims has resulted in deficient value of the product. One of the core purposes of the ELD is to protect the law of contract by restricting purchasers to contract remedies (including warranties) for complaints about disappointed expectations in goods. The purpose behind the doctrine thus has nothing to do with whether a claim in negligence meets a particular definition of a product "defect" developed by another body of law (such as products liability). What matters is whether the plaintiff is proceeding in tort for a claim that alleges only disappointed commercial expectations. Here, the crux of the Non-Producers' claim is that corn with the MIR162 trait has diminished *economic value* because it cannot be exported to China. That is a claim for disappointed commercial expectations that is at the heart of the ELD. If a plaintiff seeking to recover for that sort of alleged harm caused by a characteristic of a product could avoid section 604.101 simply by arguing that the characteristic is not a "defect," the statute could be evaded at will. Again, nothing in the text or history of the statute suggests that the Legislature intended to create such a gap in the coverage of the ELD. The "occasion and necessity for the law," the "circumstances under which it was enacted," the "object to be attained," and the "consequences" of Non-Producers' interpretation all suggest that the statute should be read to cover Non-Producers' claims. Minn. Stat. § 645.16(1), (2), (4), (6).[95]

In any event, the Non-Producers' claims also fit within a standard definition of a "product defect claim," because they essentially assert that corn with the MIR162 trait is not fit for its ordinarily intended purpose, which includes exporting it abroad. *Cf.* Minn. Stat. § 336.2-

[95] *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535 (Minn. Ct. App. 2014), is not to the contrary. As explained above, *see supra* note 68, in *Ptacek*, the trial court had held that the plaintiffs' negligence claim was not a "product defect" claim under the statute. That holding is not explained, it was not appealed, and it was not even addressed by the Court of Appeals. Instead, taking that ruling as a given, the court merely held that, where a claim fell outside the statute in the context of a sale of goods, there was no residual common law ELD to apply. *See Ptacek*, 844 N.W.2d at 539. That decision provides no guidance as to what qualifies as a "product defect tort claim" under the statute.

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314(2)(c) ("merchantable," goods must be "fit for the ordinary purposes for which such goods are used"). Non-Producers' basic theory is that corn with a GM trait that has not been approved in key export markets is not fit to be treated as fungible U.S. corn. It does not matter that Non-Producers have not expressly couched their claim in terms of fitness of the corn for its ordinary purpose. Again, if labels chosen by a plaintiff controlled, section 604.101 could be evaded by artful pleading. Substance is what counts. And the substance of the Non-Producers' claim is that the corn they bought was deficient because it could not be exported to China.

Arkansas. As noted, *see supra* p. 53, Arkansas has rejected the ELD for strict liability claims involving the purchase of goods. For other claims, the Court should predict that the contractual ELD would apply.

Louisiana. Although Louisiana does not clearly apply the contractual ELD, all Non-Producers' claims in Louisiana (other than strict liability failure to warn) are barred by the Louisiana Products Liability Act ("LPLA"). The LPLA provides the exclusive means in Louisiana for seeking damages from a manufacturer for injuries allegedly caused by a characteristic or quality of a product. *See* La. R.S. 9:2800.52 (LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products").[96]

III. Syngenta Did Not Have A Duty To Control The Conduct Of Others To Segregate Viptera From The Corn Supply.

Plaintiffs' negligence claims fail because Syngenta owes no duty to control the way third parties handle a seed like Viptera with unrestricted U.S. approval simply because it has not been

[96] *See, e.g.*, *Jefferson v. Lead Indus.*, 106 F.3d 1245, 1251 (5th Cir. 1997) (applying LPLA to bar "allegations of negligence, fraud by misrepresentation, market share liability, breach of implied warranty of fitness and civil conspiracy" and collecting similar cases barring non-LPLA claims); *Bladen v. C.B. Fleet Holding Co.*, 487 F. Supp. 2d 759, 767 (W.D. La. 2007) ("The plain language and the unique legislative history of the LPLA demonstrate the legislature's intent to make the LPLA the sole vehicle for a suit against a 'manufacturer' [under Louisiana law]."). And as explained below, the Louisiana Non-Class Plaintiffs' failure-to-warn claim fails to state a claim under the LPLA as a matter of law. *See infra* Part VI.B.

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approved in China. Courts have uniformly declined to impose liability on a manufacturer for failure to control the way *others* use the manufacturer's safe, non-defective[97] product.

A. The Existence Of Duty Depends On Policy-Based Factors That Limit Liability Regardless Of Foreseeability As A Matter Of Law.

Plaintiffs' claims for negligence rest on the premise that Syngenta can be held liable for failing to control a chain of independent parties involved in growing and distributing corn to ensure that none of them would allow corn grown from Viptera seed to enter the U.S. corn supply. Plaintiffs cannot show that Syngenta had a duty to control the conduct of third parties including growers, grain elevator operators, and exporters who actually commingled Viptera corn into the corn supply. Duty ultimately depends on purely legal policy judgments defining how far liability should extend, and these are fundamentally questions of law for the Court. Courts have consistently rejected similar claims that manufacturers should be liable for controlling the way third parties handle their safe, non-defective products after the point of sale. This Court should similarly reject Plaintiffs' radical theory that Syngenta can be liable in tort for failing to reorganize the entire industry framework for growing, harvesting, shipping, and exporting corn. Plaintiffs' approach would essentially require Syngenta to establish a new system for what they now claim they wanted to do—grow and market a specialty product for export based on the laws of China rather than U.S. standards for fungible U.S. corn.

There is no support in existing law for imposing a duty on a manufacturer like Syngenta to reorganize the way third parties handle the manufacturer's safe, non-defective product. Duty is "an issue for the court to determine as a matter of law." *Larson v. Larson*, 373 N.W.2d 287,

[97] Although Plaintiffs' strict products liability claim alleges that Viptera and Duracade were defective, *see* Class Compl. ¶ 339, Plaintiffs' negligence claim does not depend on any allegation of a defect.

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289 (Minn. 1985).[98] Contrary to the impression Plaintiffs attempt to create, moreover, merely alleging that the commingling of Viptera in the corn supply and the consequences that might follow for the China market were "foreseeable" is not sufficient to create a duty. *See, e.g.*, *Leeper v. Asmus*, 440 S.W.3d 478, 489 n.5 (Mo. Ct. App. 2014) ("[F]oreseeability alone is not enough to establish a duty. . . . [T]here must also be some right or obligation to control the activity, which presents the danger."); *Hutchings v. Bauer*, 599 N.E.2d 934, 935 (Ill. 1992) ("[D]uty is not to be bottomed on the factor of foreseeability alone. Instead, we must balance the foreseeability of the harm against the burdens and consequences that would result from the recognition of a duty.").[99] As Minnesota courts have put it, "[p]ublic policy is a major consideration in identifying the legal-duty element of a negligence cause of action." *Gutierrez v. Eckert Farm Supply, Inc.*, No. C5-02-1900, 2003 WL 21500161, at *2 (Minn. Ct. App. July 1, 2003). It is the settled "general common law rule [] that no person has a duty to protect another from harm caused by a third party's conduct" absent certain well-defined special relationships with the third party or injured party. *Id.*; *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 398 (Ill. 1987); *see* Restatement (Second) of Torts § 315. And merely manufacturing and selling a product does *not* create any such special relationship.[100] As courts have observed in

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[98] *See also, e.g.*, *Marlar v. Daniel*, 247 S.W.3d 473, 476 (Ark. 2007); *Skinner v. State*, 149 So. 3d 342, 347 (La. Ct. App. 2014); *Gaytan v. Wal-Mart*, 853 N.W.2d 181, 192 (Neb. 2014); *Bajwa v. Metro. Life Ins. Co.*, 804 N.E.2d 519, 526 (Ill. 2004); *accord* Dobbs § 164 ("Judges rather than juries determine whether the defendant was under a duty of care at all and if so what standard of care applied.").

[99] *See also, e.g.*, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 784 N.W.2d 907, 916, 918 (Neb. 2010) ("Simply put, whether a duty exists is a *policy* decision . . . . We expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty."); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004) ("Simply because an action may have some degree of foreseeability does not make it sound public policy to impose a duty.").

[100] *See, e.g.*, *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 204-05 (Ark. 1995) (no duty on firearm manufacturer to control third parties by restricting its own distribution of firearms absent a special relationship); *Hamilton*, 750 N.E.2d at 1061 (rejecting claim for negligent distribution of firearms by applying rule that "[a] defendant generally has no duty to control the conduct of third persons" absent a special relationship); *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 266-67 (D.N.J. 2000) (rejecting similar claim for sale of firearms because "defendants have no duty to control the misconduct of third

rejecting theories that would require manufacturers to control the conduct of their products' purchasers, "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1119 (Ill. 2004).[101]

B. Applying These Factors, Courts Routinely Hold That Duty Cannot Be Established To Hold A Manufacturer Liable For Third Parties' Post-Sale Use Of Its Safe, Non-Defective Product.

Based on these principles, courts routinely reject efforts to hold manufacturers responsible for injuries resulting from third parties' post-sale use of safe, non-defective products.

For example, courts reject the theory that a cell-phone retailer can be liable for injuries caused by a buyer using a cell phone while driving. A retailer of a safe, non-defective product "cannot control what people do with the [product] after they purchase [it]," and thus "[i]mposing a duty on [a retailer] to prevent car accidents . . . would effectively require the companies to stop selling cellular phones entirely." *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478–79 (Ind. Ct. App. 2004).[102] Adopting a theory that sellers have "a legal duty to third parties to anticipate

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parties"); *Bloxham v. Glock, Inc.*, 53 P.3d 196, 199 (Ariz. Ct. App. 2002) (rejecting negligent commercialization claim against firearm manufacturer because "there is no duty to control the conduct of a third party"); *Gourdine v. Crews*, 955 A.2d 769, 783-84 (Md. Ct. App. 2008) (rejecting claim against pharmaceutical manufacturer for negligent sale because "there is no duty to control a third person's conduct"); *Blackton Bldg. Supply Co., Inc. v. Garesche*, 383 So. 2d 250, 251-52 (Fla. Dist. Ct. App. 1980) ("[Plaintiff] cites us to no authority which imposes on a retailer or distributor of a safe non-defective product the duty to oversee its use by a third party *over whose actions the distributor has no control*.") (emphasis added); *Ball v. SGB Constr. Servs., Inc.*, 820 S.W.2d 916, 917 (Tex. App. 1991) (rejecting claim against supplier for failure to provide safeguards because "there is no duty to control the conduct of third persons"); *see also, e.g., W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1157, 1159 (Colo. App. 2008) (non-actionable nonfeasance where security company "install[ed] and monitor[ed] [] a burglar alarm system" but "failed to notify the police").

[101] *See also, e.g., J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (existence of a duty depends on "three factors": "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations"); *Williams*, 809 N.E.2d at 476 ("Indiana courts analyze three factors in determining whether to impose a duty at common law: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.").

[102] *See, e.g., Durkee*, 765 F. Supp. 2d at 750–51 ("Existing precedent from the appellate courts of North Carolina support the legal conclusion that there is no duty to design or manufacture a product so as to anticipate that a user will misuse the product to harm another."); *Estate of Doyle v. Sprint/Nextel Corp.*, 248 P.3d 947, 951 (Okla. Civ. App. 2010) (no duty for telephone company to "protect [a motorist] from [a cell-phone purchaser's] negligent

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improper use of their products" would mean that "no product" that could cause harm by others' post-sale use "could be marketed"—allowing similar claims against sellers of "GPS devices and even car radios" to flood the courts and "turn[ing] products liability law on its head." *Durkee v. C..H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742, 749 (W.D.N.C. 2011).

Similarly, when municipalities tried to hold makers of cold medicine liable for damages resulting from third parties' use of the medicine in making methamphetamine, the Eighth Circuit dismissed all claims for lack of proximate cause, based on the same policy factors that limit duty. *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 649, 663 (8th Cir. 2009) (Arkansas law). Paralleling the arguments here, the plaintiffs argued that even though Sudafed and similar products were FDA-approved, the manufacturer should have "take[n] steps to restrict access to the products," by controlling the way retailers sold the medicine (*e.g.*, keeping it behind the pharmacy counter), and thus should have effectively "channeled" the product away from potential meth cooks. *Id.* at 669. The Eighth Circuit rejected the idea that the manufacturer could be held liable based on how others used the product—and that was true "*even if the manufacturers knew* that cooks purchased their products to use in manufacturing methamphetamine." *Id.* at 670 (emphasis added). The court emphasized that the manufacturer lacked "sufficient control over the retailers . . . [to] require [them] to implement the suggested measures." *Id.* at 671. Ultimately, given public policy concerns limiting "how far society is willing to extend liability"—the same public-policy concerns that inform the scope of duty—the court refused to impose liability on a manufacturer of an otherwise-lawful product based on the way third parties used that product.

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driving and/or warn of the potential dangers associated with using a cell phone while driving"); *see also, e.g.*, *City of Bloomington v. Westinghouse Elc. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (Indiana law) (chemical manufacturer could not be held liable for contamination caused by purchaser's dumping of chemicals because tort law does not impose liability on manufacturers of lawful, non-defective products for claims "arising from the use of their products subsequent to the point of sale").

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Id. To do so would open a "Pandora's box to [an] avalanche of actions that would follow" against all sorts of manufacturers for injuries caused by those using their products. *Id.*

Identical principles have also been applied by numerous courts to reject tort claims against gun manufacturers based on theories that the manufacturers should restrict firearms sales by independent retailers so as to limit injuries from the use of guns. These courts have applied the settled rule that a "defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001). A manufacturer usually has "no control over its retailers[,]" *Lorcin Eng'g, Inc.*, 900 S.W.2d at 204-05, and even where it does, the law does not create a "duty of care born of their purported ability to lessen the risks of illegal gun trafficking because they have the power to restrict marketing and product distribution." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003).[103]

Multiple policy factors all weighed heavily against finding a duty on the gun manufacturers, including the flood of litigation against other industries that could be expected if such a duty were created, *see, e.g., People ex rel. Spitzer*, 761 N.Y.S.2d at 196, and the magnitude of the liability—which would have the practical effect of imposing a policy decision by judicial decree shutting down the sale of an otherwise lawful product.[104]

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[103] The few cases that declined to reject claims against gun manufacturers as a matter of law involved allegations that the manufacturers knowingly facilitated illegal gun-trafficking or marketed defective or dangerous products. *See, e.g., City of Bos. v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000) (alleged "affirmative conduct" constituting "the creation of the illegal, secondary firearms market").

[104] *Cf., e.g., Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (Illinois law) ("Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns.").

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C. These Same Principles Limiting Duty Show That Plaintiffs Cannot Establish A Duty Of Care Here.

The same reasoning shows that Syngenta had no duty here.

First, it makes no sense to impose a duty on a GM seed manufacturer like Syngenta to control the conduct of all those who grow, harvest, process, store, ship, and export corn, because seed manufacturers simply do not control those third parties.[105] The usual approach under tort law is to place the duty "on the person in the best position to avoid the loss." *Turner v. Fehrs Neb. Tractor & Equip. Co.*, 609 N.W.2d 652, 658 (Neb. 2000).[106] Here, as in the pharmaceutical, cell-phone, and gun cases, the manufacturer (Syngenta) has no authority to control how third parties grow corn or handle harvested grain—especially county elevators, terminal elevators, and exporters. Plaintiffs have not even alleged that Syngenta has a contractual relationship with those actors. It is apparent on the face of the complaints that Syngenta has neither the authority nor the expertise to tell those parties how to reorganize their *own* facilities to enable segregation of different types of corn. Those third parties, including the Non-Producers themselves, are in the best position to devise and implement any such system.

Second, the theory that Syngenta had a duty to ensure that *everyone else* isolated Viptera is especially mistaken given that, once Viptera had been approved, it was permissible *by law* for Viptera to be present in U.S. corn because U.S. regulations make no distinction between non-GM corn and GM corn with approved traits. If some growers or handlers wanted to sell or export Viptera-free corn, that was a specialty product distinct from fungible U.S. corn. And the usual background rule is that a person who wants to conduct a specialized or especially sensitive

[105] To the extent Plaintiffs intend to suggest a duty to refrain from selling Viptera *at all* (which is within Syngenta's control), that theory is addressed below. *See infra* Part IV.

[106] *See also, e.g.*, *Abdo v. Trek Transp. Co., Inc.*, 582 N.E.2d 247, 252 (Ill. App. Ct. 1991) ("[W]hen a third party is in the best position to prevent a plaintiff's injury, there is no justification for imposing liability upon [the defendant]."); *Hamilton*, 750 N.E.2d at 1061 (same).

enterprise bears the burden of establishing protections enabling him to do so. *See generally* W. Prosser, The Law of Torts, § 87, at 579 (4th ed. 1971) ("The plaintiff cannot, by devoting his land to an unusually sensitive use, . . . make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless."); *see also, e.g., Belmar Drive-In Theatre Co. v. Ill. State Toll Hwy. Comm.*, 216 N.E.2d 788, 791 (Ill. 1966) ("[A] person cannot increase the liability of his neighbor by applying his own property to special and delicate uses."). For the same reason, the USDA has always taken the view for organic crops—another specialty product—that it is "the responsibility of organic operations" to protect their products' special identity by "manag[ing] the potential contact of organic products with other substances not approved for use in organic production systems."[107]

In fact, the USDA has expressly announced its view that parallel logic dictates that those who want to deal in corn free from approved GM traits should bear the burden of implementing the necessary safeguards to enable them to do so: "conventional growers, similar to organic growers who desire to minimize cross pollination from G[M] corn into their plantings, have the same basic options for avoiding pollination from other corn."[108] Indeed, in response to comments filed during numerous deregulation proceedings for GM traits (including Duracade), the USDA has repeatedly addressed concerns that a GM trait has not yet been approved in desired export markets by placing the onus on grain elevators and grain buyers, not GM manufacturers, to avoid the risk of rejection in export markets:

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[107] USDA, *Nat'l Envt'l Policy Act Decision & Finding Of No Significant Impact for Syngenta Seeds, Inc. Alpha-Amylase Maize Event 3272*, 39 (Comment 5), http://www.aphis.usda.gov/brs/aphisdocs/05_28001p_fonsi_rtc.pdf. ; *see also* USDA National Organic Program, Policy Memorandum From Miles McEvoy, Deputy Administrator, to stakeholders and interested parties re: Genetically Modified Organisms (Apr. 15, 2011), http://www.ams.usda.gov/sites/default/files/media/OrganicGMOPolicy.pdf (explaining that USDA "relies on *organic certifiers* and *producers*"—not GM manufacturers—"to determine preventative practices that most effectively avoid contact with GMOs on an organic operation").

[108] USDA, *Finding Of No Significant Impact for Syngenta Seeds, Inc. Alpha-Amylase Maize Event 3272*, at 41 (Comment 5), http://www.aphis.usda.gov/brs/aphisdocs/05_28001p_fonsi_rtc.pdf.

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> When international acceptance of a specific event has not been attained, ***US elevators and grain buyers*** may either refuse to purchase the grain, or may require that it be diverted to elevators that are solely designated as sources for domestic grain sale.[109]

The Non-Producers' claims are particularly specious since they assert that Syngenta had a duty to ensure that *they themselves* did not commingle Viptera and non-Viptera corn. The Non-Producers could have taken steps to keep Viptera corn out of their elevators, just as Bunge did. *See* Non-Class Compl. ¶ 147. They chose not to, and the law does not make it Syngenta's duty to protect their ability to export a specialized sub-segment of U.S. corn production.[110]

Third, recognizing an unprecedented duty for Syngenta to control the actions of others and imposing liability on Syngenta for those actions would ultimately force this Court to face the impossible task of apportioning responsibility for Plaintiffs' alleged injuries among Syngenta, growers who allegedly allowed cross-pollination, and the multiple elevators along the way who were actually responsible for "commingling" corn—including the Non-Producer Plaintiffs themselves. The Court would then also have to ensure that there was no duplicative recovery among Producer Plaintiffs and Non-Producer Plaintiffs for the same alleged drop in the price of

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[109] *E.g.*, USDA, *USDA's Response to Public Comments on Syngenta SYN-05307-1 Corn*, 24 (Comment 7), http://www.aphis.usda.gov/brs/aphisdocs/10_33601_rtc.pdf (emphasis added); USDA, *Nat'l Env'tl Policy Act Decision & Finding of No Significant Impact for Bayer CropScience LP Event FG72 Soybean*, 49 (Issue 16), http://www.aphis.usda.gov/brs/aphisdocs/09_32801p_fonsi.pdf; USDA, *Nat'l Env'tl Policy Act Decision & Finding of No Significant Impact for Stine Seed Farm, Inc. Event HCEM485*, 27 (Issue 8), http://www.aphis.usda.gov/brs/aphisdocs/09_06301p_fonsi.pdf. The decision in *Bunge* does not suggest anything to the contrary. *See Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F. Supp. 2d 953 (N.D. Iowa 2011). When the *Bunge* court stated that Syngenta "accepted the risk of commercializing Viptera," *id.* at 990, it was addressing an entirely different question (and in the context of a preliminary injunction)—merely explaining that Syngenta took the risk that some purchasers in the free market might decide that they did not want to buy corn with a GM trait like Viptera and they could lawfully refuse to accept Viptera corn. *See id.* (deciding whether Bunge "made a legitimate and reasonable business decision not to accept Viptera corn in order to service the Chinese import market"). The court did not face, and did not address, the entirely different question whether Syngenta had a duty in tort law to police the conduct of others so as to facilitate the ability of third party grain elevators to purchase and sell a specialized product like "Viptera-free" corn.

[110] Plaintiffs assert that Syngenta sought to stop channeling by bringing "a lawsuit against Bunge, a grain elevator operator," for "refus[ing] to accept Viptera corn." Non-Class Compl. ¶ 147; Class Compl. ¶ 136 (same). To the extent Plaintiffs base their claims on that lawsuit, such claims are barred by the First Amendment's Petition Clause. *See, e.g., BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525–26 (2002) (litigation is protected by the right to petition unless it is objectively and subjectively sham litigation).

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corn. The intractable problems courts would encounter in apportioning responsibility in that fashion are one of the reasons for the settled rule that a manufacturer is *not* liable for the conduct of third parties using the manufacturer's product.

Fourth, Plaintiffs' theory would impose extraordinary liability on GM seed manufacturers for alleged ripple effects in the market that have no logical stopping point. *Cf. City of Chi.*, 821 N.E.2d at 1126 (the "magnitude of the burden" placed on defendant is a relevant factor in assessing duty). Plaintiffs' theories would effectively transform GM manufacturers into insurers for their otherwise-lawful, non-defective products—a result flatly at odds with settled principles of tort law.[111] Indeed, according to Plaintiffs, Syngenta owes a duty not only to corn producers and corn non-producers, but also to producers of milo and soybeans because the prices of those crops are allegedly affected (in different ways) by the price of corn. The same allegations could be asserted by retailers of farm equipment,[112] or landowners leasing their land, or anyone else arguing that demand for their products or services is affected by the alleged drop in price for the largest commodity crop in the United States—precisely the open-ended liability that the MDL Court failed to foresee.

Fifth, imposing such liability would effectively put courts in the position of usurping policy determinations concerning which GM traits can and cannot be used in the U.S. As a

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[111] *See, e.g.*, *Martin*, 743 F.2d at 1204 (rejecting liability that "would virtually make [the manufacturers] the insurer for such products as explosives, hazardous chemicals, or dangerous drugs even though such products are not negligently made nor contain any defects"); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1213 (N.D. Tex. 1985) ("If this unconventional and unfounded theory is accepted, then—contrary to one of the basic principles of products liability—handgun manufacturers would become insurers for all injuries resulting from their products."); *Perkins v. F.I.E. Corp.*, 762 F.2d 1200, 1269 (5th Cir. 1985) (rejecting "[t]he argument that the manufacturer should become an insurer of all uses of those products, both legitimate and illegitimate, simply by virtue of having marketed them").

[112] *See, e.g.*, Abby Wendle, *Pain From The Grain: Corn Belt Towns Languish As Prices Drop*, NPR (Mar. 18, 2015), http://www.npr.org/sections/thesalt/2015/03/18/393841311/pain-from-the-grain-corn-belt-towns-languish-asprices-drop ("When corn prices peaked, Hofreiter sold close to $11 million worth of shiny blue tractors in a single year. He says he doesn't expect to crack $3 million in 2015.").

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practical matter, Plaintiffs' theory would shut down the marketing of any GM seed as long as there was a risk of litigation like this one. Halting the introduction of a seed like Viptera, however, would run flatly counter to the policy determination that the USDA made in approving Viptera and the general policy approach the U.S. Government has adopted of treating approved GM products exactly the same as conventional crops.[113]

Indeed, the extensive existing regulation of GM traits strongly counsels against thrusting courts into the role that Plaintiffs' theories would have them adopt. *See, e.g.*, *Young v. Bryco Arms*, 821 N.E.2d 1078, 1090 (Ill. 2004) (fact that sale of firearms is already "highly regulated by law" counsels against judicial creation of additional duties); *Ashley Cty., Ark.*, 552 F.3d at 669 (same for pharmaceuticals). Three federal agencies regulate GM crops, and Syngenta commercialized Viptera only after obtaining unrestricted domestic approval through extensive testing in "at least 119 field trials of MIR162 corn under at least 20 [government] permits" over eight years. Non-Class Compl. ¶ 52.

Plaintiffs' lawsuit is, in effect, an invitation for the courts to become super-regulators, grafting additional obligations onto GM traits without regard to the USDA's decisions by holding that, unless other countries have approved a particular trait, the entire system for growing and distributing corn in the U.S.—or for that matter, soybeans, wheat, or many other crops—should be reorganized to facilitate the desires of a market segment that wants to export to that foreign country. To paraphrase the conclusion of another court in a parallel context, "courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution, and sale of" GM seeds.

[113] *Cf. Martin*, 743 F.2d at 1204 (Illinois law) ("Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns.").

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People ex rel. Spitzer, 761 N.Y.S.2d at 199.

It would be particularly inappropriate for the courts to take on that role given the attention that Congress and state legislatures have given to proposals addressing exactly the subject of this lawsuit—liability of GM seed manufacturers based on the spread of their products. At least six Congresses have considered and failed to enact bills that would have made a "biotech company [] liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering." *See* App. A-1. Similarly, California eliminated part of a bill that would have made "the manufacturer of a genetically engineered plant . . . liable to any producer, grain, and seed cleaner, handler, or processor injured by the release of that plant into California." Assem. Bill 984, 2005 Leg., Reg. Sess. (Cal. 2005). Minnesota, New York, Nebraska, Massachusetts, Montana, North Dakota, Oregon, West Virginia, and Vermont have all considered and refused to enact similar bills.[114] That legislative activity not only confirms that Plaintiffs' theories are meritless (legislation would be unnecessary if the common law already imposed liability), but also underscores that the task of weighing the public policy implications of liability for GM seed manufacturers is best left to the political branches—all of which have refused to impose the sort of liability that Plaintiffs seek to impose here.

Sixth, and finally, the Court should reject Plaintiffs' proposed expansion of tort law because it would foist a flood of litigation on the courts of Minnesota and other States. As other courts have observed, once a claim is allowed to proceed in a case such as this, the same theories could be brought "against countless other types of commercial enterprises," raising claims about supposed harms from lawful, non-defective products "regardless of the distance between the

[114] A list of relevant bills introduced in state legislatures is appended in Appendix A.

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'causes' of the 'problems' and their alleged consequences." *People ex rel. Spitzer*, 761 N.Y.S.2d at 203; *Ashley Cty., Ark.*, 552 F.3d at 671-72.

D. The Only Court To Address Parallel Claims Against A Manufacturer Of Another Approved GM Seed Held That Duty Could Not Be Established As A Matter Of Law.

Before the Viptera litigation, only one common law court had addressed the theory that a seed manufacturer could be liable in tort for selling an *approved* GM seed that had not yet been approved abroad.[115] In *Hoffman*, Canadian courts applying the same common law principles that govern this case rejected the exact same claims that Plaintiffs raise here. *See Hoffman I*, 2005 SK.C. LEXIS 330; *Hoffman II*, 2007 SK.C. LEXIS 194. *Hoffman* involved Monsanto's GM canola seed that had been fully approved by the Canadian government for "unconfined release." *Hoffman II*, 2007 SK.C. LEXIS 194 ¶ 60. Alleging cross-pollination, non-GM canola farmers sued to recover (1) losses incurred by organic farmers, whose crops could no longer command a premium organic price, and (2) (in a claim exactly paralleling those asserted here) losses allegedly incurred by farmers due to "loss of the European market for all Canadian canola" because Monsanto launched the product in Canada before getting import approval from the EU. *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 21-22.

The Canadian court rejected the plaintiffs' trespass, nuisance, and negligence claims as a matter of law for lack of duty. It found "no existing judicial or legislative authority" imposing a duty on the manufacturer to prevent lawful GM canola seed from cross-pollinating with other crops by regulating farmers' growing practices. *Id.* ¶ 52. In so holding, the court assumed that cross-pollination was foreseeable, *see id.* ¶¶ 61, 63, but recognized that (as in the U.S.) duty was

[115] *Sample v. Monsanto* involved similar tort claims against a GM seed manufacturer for selling a U.S.-approved GM seed, but the court did not address the general duty analysis because it held that plaintiffs' claims were barred by the ELD. 283 F. Supp. 2d at 1093-94; *see also supra* Part II.A.4.c.

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not governed by foreseeability alone, *see id.* ¶¶ 66–67. As the court explained, there was no relationship giving rise to a duty of care between the GM manufacturer and the plaintiffs. *See id.* In addition, the court concluded that the mere sale of the GM canola seed could not be treated as the cause of plaintiffs' alleged harm, because the harm "required the intervention of neighbouring farmers who cultivated GM canola." *Id.* ¶ 114. Finding that proximate cause was lacking as a matter of law, the court cautioned that the "implications of holding a manufacturer . . . liable in *nuisance* for damage caused by the use of its product . . . by another would be very sweeping indeed." *Id.* ¶ 122 (emphasis added); *see also id.* ¶ 114 (explaining that plaintiffs' theory "would be equivalent to holding the manufacturers of pesticide responsible for the nuisance caused by the harmful drift of the pesticide" after a third party's use of it).

The two prior cases that Plaintiffs cite involving GM seeds, *see, e.g.*, Non-Class Compl. ¶¶ 30-32; Class Compl. ¶¶ 19-21, are irrelevant because both involved the release of *unapproved* traits in violation of governing regulations in factual contexts where the manufacturer still had control. In *StarLink*, the trait was not approved for human consumption, and the government conditioned the limited approval for cultivation by imposing on the manufacturer (Aventis) an "affirmative duty to enforce StarLink farmers' compliance with" restrictions, including segregation from other corn. *StarLink*, 212 F. Supp. 2d at 847. The court held that this duty gave Aventis "some measure of control over StarLink's use" and was a "critical factor" that "negate[d]" the usual "concerns [that] courts have expressed about holding manufacturers liable for post-sale nuisances." *Id.* The court thus reasoned that "[t]he *unique obligations* imposed by the limited registration arguably put Aventis in a position to control the nuisance." *Id.* (emphasis added). There are no similar facts here because Viptera enjoyed unrestricted U.S. approval.

In *Genetically Modified Rice*, the theory of the case was not that the GM manufacturer was responsible for the conduct of *others*; instead, the manufacturer itself (Bayer) had caused the

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improper release of the unapproved trait when conducting its own field trials. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1022. Bayer thus violated the USDA's GMO Regulations, which "unambiguously provide performance standards that do not allow adventitious presence of GM material outside the GM plants being tested" before approval is granted. *Id.* Again, there are no similar facts alleged here.

E. The MDL Court Erred In Holding That Syngenta Had A Duty.

The MDL Court is the *only* court that has ever held that a GM seed manufacturer has a duty in tort to restrict commercialization of an *approved* GM trait simply because the trait has not been approved in a foreign country. The MDL Court announced the unprecedented holding that Syngenta owes a duty to run its business "at least in part for the mutual benefit" of others in the corn industry by "exercis[ing] reasonable care in the manner, timing, and scope of . . . commercialization" so as to prevent solely economic harm to other industry participants who would prefer not to have their chosen methods of handling corn disrupted by the presence of a trait with limited exportability. MDL Order 10. That novel duty should not be recognized here.

First, the MDL Court started from the presumption of a "default duty rule" under which everyone owes a duty to avoid foreseeable harm to everyone else and it would be Syngenta's burden to establish an "exception" from that general rule. MDL Order 14. That is not the law. As the MDL Court itself recognized, the presumption of a duty to the whole world is an "alternative" approach adopted in the Restatement (Third) of Torts, which all but a few States have rejected.[116] *See, e.g.*, *Dolin v. SmithKline Beecham Corp.*, 62 F. Supp. 3d 705, 714 (N.D.

[116] *See, e.g.*, *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 574 (Wis. 2009) ("Wisconsin has long followed the minority view of duty set forth in the dissent of *Palsgraf v. Long Island Railroad*."). But even these few jurisdictions like Wisconsin assess policy factors in ultimately determining whether an actionable duty exists. *See, e.g.*, *Nichols v. Progressive N. Ins. Co.*, 746 N.W.2d 220, 225 (Wis. 2008) ("[E]ven if all the elements for a claim of negligence are proved, or liability for negligent conduct is assumed by the court, the court nonetheless may preclude liability based on public policy factors.").

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Ill. 2014) ("[T]here is no duty to the world at large.").

Second, the Restatement (Third)'s alternative approach that the MDL Court cited is expressly limited to a duty to avoid *physical harm*. *See* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 7(a) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of *physical harm.*").[117] The presumption of a duty is flatly inapplicable in these cases, which (as the MDL Court recognized) involve solely allegations of *economic* harm. *See* MDL Order 18-22. As explained above, *see supra* Part II, the ELD should bar Plaintiffs' claims entirely. But even if the Court disagrees on that point, the economic nature of the injury does not drop out of the duty analysis entirely. Evaluating duty involves weighing, *inter alia*, the injury at issue, the burden of placing a duty on the defendant compared to the utility of the defendant's conduct, and administrative difficulties that might arise in enforcing the duty.[118] The economic nature of the injury here has a bearing on all these issues.

Third, the grounds the MDL Court offered to distinguish the consistent line of cases holding that manufacturers do *not* have a duty to control the way third parties use their products is unpersuasive. The MDL Court asserted that in the cell-phone, pharmaceutical, and gun cases, the third parties' conduct was "more culpable" than the conduct here. MDL Order 13. But nothing in the legal analysis in those cases rested on culpability. And culpability does not even work as a factual distinction. Non-producers who commingled Viptera corn are at least as culpable as negligent drivers in the cell-phone cases. Like the cell-phone users, they used a product the way it was intended, but in circumstances where it happened (allegedly) to cause

[117] The Restatement (Third) makes clear that it does *not even address* claims, like those here, that involve solely economic harm. *See* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 6 cmt. f ("Liability for breaching the duty of reasonable care addressed in this Section applies *only in cases involving physical and emotional harm* . . . . Cases involving negligence that causes *only economic loss* (that is not property damage or derivative of personal injury) *are not addressed* in this Restatement . . . .") (emphases added).

[118] *See, e.g.*, *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (en banc); *see also* Dobbs § 255.

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injury. In fact, Plaintiffs' allegations suggest *knowing* violations of the law by Non-Producers that are *more* culpable than mere negligence. Plaintiffs allege that, knowing it was (allegedly) "*inevitable* that Viptera® corn would move into export channels, including China," Class Compl. ¶ 224; Non-Class Compl. ¶ 235, Non-Producers shipped corn containing Viptera to China anyway. That violated Chinese law, which requires importers to obtain a biosafety certificate before importing.[119] Such knowing—or at a minimum, reckless—violations of law are more culpable than distracted driving while using a cell phone.

Fourth, the MDL Court's basis for distinguishing *Hoffman*—the only prior holding directly on point—is also unpersuasive. The MDL Court stated that *Hoffman* rested on Canadian law "that required a sufficiently proximal relationship between the parties," to find a duty. MDL Order 16. But that is no different from American law, which also looks at the relationship between the parties in assessing duty.[120] Moreover, the MDL Court based its entire rationale for finding a duty on the supposed "*relationship between the parties* in an inter-connected market," *id.* at 17 (emphasis added). It thus based a duty on exactly what the *Hoffman* court thought was *lacking* in an identical agricultural market where the spread of an approved GM trait supposedly caused economic harm. The MDL Court provided no rationale for distinguishing *Hoffman*'s diametrically opposed assessment of the significance of any "relationship" between players in

[119] *See* Class Compl. ¶ 177 ("In China, 'Bio-Safety Authorizations' are required for the issuance of shipment-specific 'Bio-Safety Certificates.'"); Chinese Ministry of Agriculture, Implementation Regulations on the Safety of Import of Agricultural Genetically Modified Organisms, arts. 18-19 (Jan. 5, 2002), http://bch.biodiv.org/database/attachedfile.aspx?id=561 (emphasis added); *id.* at art. 18 ("Those who import agricultural GMOs for production or as raw materials for processing *shall obtain the safety certificate of agricultural GMOs* issued by the ministry of agriculture *before signing the contract.*") (emphases added); State Council of the People's Republic of China, Regulations on the Safety Administration of Agricultural GMOs art. 34 (Jan. 8, 2011), http://apps.fas.usda.gov/gainfiles/200106/110681034.pdf ("[T]he introducers or foreign companies must submit the Safety Certificate from the Agricultural Administrative Department of the State Council and relevant approval documents to the Entry-Exit Inspection and Quarantine Department at the border."); *id.* at art. 38 ("[I]f goods arrive without the Safety Certificate . . . the goods will be rejected or destroyed.").

[120] *See generally* Dobbs § 255; *see, e.g.*, *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989); *DiBiasi v. Joe Wheeler Elec. Membership Corp.*, 988 So. 2d 454, 463 (Ala. 2008). Indeed, the MDL Court itself noted that the "relationship of the parties" is routinely considered as a factor relevant to duty. MDL Order 13.

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the grain industry at issue there.

The MDL Court thus created an unprecedented new economic tort—what might be termed "tortious commercialization of a product." Under the MDL Court's approach, wherever businesses operate in "an inter-connected market," MDL Order 13, a company can fall under a duty to run its business for the "mutual benefit," *id.* at 10, of others—that is, for the *economic benefit* of others in the industry. Under that duty, the company may be required to delay introducing new products, or to alter the *way* it introduces products, solely because innovations might undermine the *economic* interests of others. The essence of Plaintiffs' complaint is that they have an established way of doing business that involves treating corn as fungible. They do not want new biotechnology products (like GM traits) that have not been approved in overseas markets to be sold in the U.S., because such products force them to a choice: either spend money to alter their methods so that they can keep track of different types of corn, or risk foregoing an export market. Thus, they want to eliminate the threat that technological innovation poses to their business model. This lawsuit is their effort to force Syngenta (and other GM manufacturers) either not to sell seeds with GM traits or to shoulder the cost of creating a system for segregating different types of corn in order to hold Plaintiffs harmless from their own refusal to adapt to technological change in the market. Plaintiffs' radical theory would apply equally to hold a manufacturer liable in "negligence" for marketing a GM corn seed that increases crop yields and thus causes corn prices to drop because of increased supply.[121]

The MDL Court adopted Plaintiffs' vision of tort duties requiring some market players to protect others from the advent of innovative technologies, but that view is literally unprecedented

[121] *See* Robert Holly, *Growing Pains or Gains*, The News-Gazette (Oct. 11, 2015), http://www.news-gazette.com/news/business/2015-10-11/growing-pains-or-gains.html (describing Monsanto's GM seed that would increase the size of corn ears, with some economists cautioning that "increase in yield at the farm level could actually end up reducing producer income because the drop in price may be larger than the increasing quantity").

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in American jurisprudence. The ordinary presumption is that, apart from specific, strictly limited economic torts (fraud, tortious interference, negligent misrepresentation, etc.) or violations of statutory antitrust or unfair competition laws, businesses are free to pursue their own advantage in the marketplace—including by introducing disruptive new products that others may find inconvenient for their business plans—without regard for the effects their products might have on the economic positions of others.[122] As the Minnesota Supreme Court has explained, courts are "generally cautious and reluctant to impose a duty to protect between those conducting business with one another." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001). Tellingly, the MDL Court did not cite a *single* case finding a duty in tort to operate one's business for the economic benefit of others or to constrain the introduction of innovative products so as to avoid economic disruptions for others.

The MDL Court also failed to acknowledge the sweeping implications of its novel duty. The court's assertion that its new duty "does not involve the possibility of an endless stream of claims by strangers further and further removed from Syngenta's conduct," MDL Order 14, has already been proved wrong—by the claims of *soybean farmers in this case*. Non-Class Compl. ¶¶ 298-99. As noted above, the MDL Court's rationale provides no clear legal rule to distinguish the claims of milo farmers and soybean farmers, who similarly claim that the price of corn affects the price of their crop. *See supra* pp. 24-26, 32-33.

In addition, the MDL Court's novel duty is broad enough to apply—and to turn settled law upside down—in dozens of industries where businesses have "inter-connected relationships" in which they rely on one another for their products to succeed. For example, in the mobile

[122] Indeed, that is the view reflected in the USDA's determination that grain handlers and growers who do not grow GM corn—not GM seed manufacturers—are responsible for implementing measures to minimize the risk that corn grown from a GM seed is not exported to countries where the GM trait is not yet approved. *See supra* pp. 75-76.

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"ecosystem" where network operators, device manufacturers, app developers, social-media platforms, and other participants rely on one another of the interoperability of their products, the new duty would allow app developers to hold phone manufacturers liable in tort for changing their operating software and causing apps to cease functioning properly (until they adapted their products with new programming). Like Plaintiffs here, the app developers could complain that a phone manufacturer like Apple should have slowed down its rollout of the new operating system or done more to assist them so they could adapt to the new product. The very fact that the MDL Court's theory makes such a claim plausible shows how far it departs from existing law.

F. Plaintiffs' Allegations Do Not Show That Syngenta Voluntarily Undertook A Duty To Isolate Viptera.

Plaintiffs also cannot concoct a duty by claiming that Syngenta voluntarily undertook a duty. Any theory that a duty arose from (1) statements in Syngenta's Deregulation Petition concerning channeling or (2) public statements about Syngenta's role in "stewardship," *see* Class Compl. 3 & ¶¶ 27-35, 51, 305(a)-(b), fails as a matter of law.

First, it is settled that the law "limit[s] liability for the injury in a voluntary undertaking to 'physical harm.'" *Simms v. Jones*, 879 F. Supp. 2d 595, 604 (N.D. Tex. 2012); *see generally* Restatement (Second) of Torts § 323.[123] Plaintiffs allege only "economic harm" supposedly resulting from the loss of the Chinese corn market. *See, e.g.*, Class Compl. 3-4 & ¶ 229; Non-Class Compl. 3-4 & ¶ 240. As explained above, *see supra* Part II.A.3, Plaintiffs' vague assertions that their "corn crops" were "damaged," Non-Class Compl. ¶ 399, and that there was "physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land,"

[123] *See also, e.g.*, *Vancura v. Katris*, 939 N.E.2d 328, 347 & n.6 (Ill. 2010) (liability for a negligently performed voluntary "undertaking is explicit[ly] limit[ed] [] to situations in which the plaintiff has suffered 'physical' or 'bodily' harm," and thus does not extend to "economic damages"); *accord Hatleberg v. Norwest Bank Wis.*, 700 N.W.2d 15, 24 (Wis. 2005); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 82 (Iowa 2001); *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57, 63 (Minn. Ct. App. 1996); *Shaner v. United States*, 976 F.2d 990, 994 (6th Cir. 1992) (Ohio law).

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Class Compl. ¶ 225; Non-Class Compl. ¶ 236, are legal conclusions that must be disregarded and in any event do not allege physical harm as a matter of law. The MDL Court rightly held that indistinguishable allegations failed to assert physical harm. *See* MDL Order 18-22.

Second, Syngenta's statements in its Deregulation Petition are constitutionally protected under the Petition Clause and cannot be the basis for a duty resulting in liability. *See, e.g.*, *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1573 (11th Cir. 1996).[124]

Third, a voluntary undertaking creates a duty only if it "induce[s] detrimental reliance" that is reasonable. *Doe v. Hunter Oaks Apts., L.P.*, 105 So. 3d 422, 427 (Miss. Ct. App. 2013). *see also, e.g.*, *Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 480 (Ind. Ct. App. 1993) (same); *Chisolm v. Stephens*, 365 N.E.2d 80, 86 (Ill. App. Ct. 1977) (same). But Plaintiffs have not alleged that they detrimentally relied on any statement from Syngenta. They do not claim they would have done anything differently absent some statements from Syngenta. Nor *could* they allege detrimental reliance. To justify reliance, "plaintiff[s] must be unaware of the actual circumstances and not equally capable of determining such facts." *Chisolm*, 365 N.E.2d at 86. The complaints make clear that Plaintiffs knew that cross-pollination and commingling can occur (indeed, Plaintiffs claim it is "*inevitable*," Class Compl. ¶ 224 (emphasis added)), that China had not approved Viptera, and that Syngenta was not attempting to force isolation of Viptera corn. *See, e.g.*, Class Compl. ¶¶ 95, 97-100, 138. Thus, Syngenta's statements "did nothing to prevent plaintiff[s] from obtaining information . . . or from taking precautionary steps on [their] own behalf." *Chisolm*, 365 N.E.2d at 87. That forecloses a claim of reasonable reliance.

[124] To the extent there may be an exception for fraudulent statements in adjudicative proceedings, that exception applies only to statements that were "material, in the sense that they *actually altered the outcome of the proceeding*." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011) (emphasis added) (collecting cases). As a matter of law, Syngenta's alleged misrepresentations could not have been material to the USDA's decision to deregulate Viptera because the USDA "has no power to regulate the adverse economic effects that could follow [a GM trait's] deregulation." *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 841 (9th Cir. 2013).

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As the court in *Hoffman* explained in rejecting a parallel argument that Monsanto had undertaken a duty to channel its GM canola seed, "no duty of care arises from a gratuitous undertaking in the absence of some element of detrimental reliance." *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 84-88. The same analysis and result apply here.

IV. As A Matter Of Law, Syngenta Had No Duty To Refrain From Selling Viptera.

A. The Law Does Not Impose A Duty On Manufacturers To Refrain From Selling A Safe, Non-Defective Product Based On How Third Parties Might Use It After The Point Of Sale.

To the extent Plaintiffs claim that Syngenta had a duty to refrain from selling Viptera *at all*, that theory is also meritless. For many of the same reasons that courts refuse to impose a duty on manufacturers to control the post-sale use of a product by others, they also refuse to impose a duty to refrain from selling safe, non-defective products altogether. *See, e.g.*, *Ashley Cty., Ark.*, 552 F.3d at 673; *Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1120 (Colo. App. 1993) (Teflon manufacturer "had no duty to refrain from selling its [non-defective] product"); *People ex rel. Spitzer*, 761 N.Y.S.2d at 200 (rejecting "a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product").[125] Indeed, in circumstances exactly parallel to those here, Canadian courts in *Hoffman* held that the common law does not impose any duty on a GM manufacturer to refrain from selling a GM seed that is fully approved in the country where it is sold. *See Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 71.

A duty-not-to-sell rule would also thrust the judiciary even more clearly into the role of usurping policy decisions properly left to the political branches. A tort duty prohibiting the sale

[125] *See also, e.g.*, *Williams*, 809 N.E.2d at 478 (refusing to impose a duty on a cell-phone retailer for harm caused by distracted drivers because imposing such a duty "would be akin to making a car manufacturer stop selling otherwise safe cars because the car might be negligently used in such a way that it causes an accident"); *Stanford By and Through Stanford v. Wal-Mart Stores, Inc.*, 600 So. 2d 234, 240 (Ala. 1992) (no duty to refrain from selling a product that was not "inherently dangerous"); *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (Kentucky law) ("[W]e are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care.").

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of Viptera until it had been approved in China would directly conflict with the USDA's determination that Viptera *could* be sold in the U.S. without restriction. It would also give China a veto over which GM traits can and cannot appear in U.S. corn. Indeed, given that the U.S. is the world's largest corn exporter, Plaintiffs' position would give China the power to deny the biotechnology benefits of higher yields and lower prices not only to the United States, but also to much of the rest of the world. Given that China imported *only about one-third of 1%* of U.S. corn production when Viptera was launched, *see supra* note 25, Plaintiffs' theory would mean giving such a biotechnology veto to every country that imported a comparable percentage of any given crop. The common law of tort does not provide the courts with a mechanism for taking over the USDA's role in determining which biotechnology products can and cannot be sold in the U.S. and effectively transferring that decision to foreign sovereigns.

Plaintiffs' theory of duty would also embroil the judiciary in an ongoing flood of policy choices. Courts would have to decide for every significant export crop (1) how to define "key" markets that should be given a veto over the introduction of new biotechnology in the U.S.; (2) how to assess which governments have "functioning regulatory systems" such that they are worthy of being granted that veto power by American courts; and (3) whether changes in a country's circumstances have caused it to lose (or gain) status as a "key" market or a "functioning regulatory system." *Cf.* Nov. 27, 2012 BIO Policy at 4 n.5 ("Since regulatory systems continue to evolve and change globally, countries' systems may become functional or dysfunctional.").[126] Courts simply do not have the experience or expertise to construct and micromanage such a parallel regulatory system governing the introduction of biotechnology products. That is a role for the political branches. *See supra* Part III.C.

[126] https://www.bio.org/sites/default/files/Product-Launch-Stewardship-11272012.pdf.

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B. Alleged "Industry Standards" Did Not Impose A Legal Duty On Syngenta.

None of the supposed industry standards that Plaintiffs cite creates a legal duty on Syngenta to refrain from selling an approved GM seed simply because the trait has not been approved in a foreign country accounting for exports of about one-third of 1% of the relevant U.S. crop. *See supra* note 25. Plaintiffs point to the BIO Policy's guideline that GM products should not be launched without import approval from "key" export markets with "functioning regulatory systems," as well as advocacy statements by other private trade associations. *See* Class Compl. ¶¶ 25-26; Non-Class Compl. ¶¶ 36-37. Industry customs and standards, however, "may not be used to establish a duty in the first place"; instead, they are only "relevant evidence of the standard of care *after* the law has already recognized a duty of care." *Van Duyn v. Cook-Teague P'ship*, 694 N.E.2d 779, 782 (Ind. Ct. App. 1998) (emphasis added).[127]

The supposed industry standards that Plaintiffs invoke also show that it would make no sense to treat them as binding legal duties. The BIO Policy is an advocacy statement that expressly does not bind member companies and sets nothing more than "general policy statements and recommended processes." 2009 BIO Policy, Ex. D at 1 & n.2. Similarly, other supposed "standards" consist of self-serving statements from different sectors of the grain industry on what industry custom *should* be, conveniently asserting that someone *else* should bear the cost of addressing issues raised by asynchronous approvals in different markets.

Nor can Plaintiffs transform any supposed industry standard they cite into a legal duty not to sell Viptera by claiming that Syngenta *adopted* the standard. *Cf.* Class Compl. ¶ 46.

First, as explained above, the law limits liability for a voluntarily undertaken duty to

[127] *See also, e.g.*, *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996) ("[T]he evidence of industry custom would be relevant as to a standard of care, but did not establish a duty . . . ."); *Fla. Fuels, Inc. v. Citgo Petrol. Corp.*, 6 F.3d 330, 334 (5th Cir. 1993) ("Custom may help define the standard of care . . . , but custom alone cannot create a legal relationship between the parties.").

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physical harm, not the purely economic harm Plaintiffs allege here. *See supra* Part III.F.

Second, a gratuitous promise cannot create a legal duty absent detrimental reliance. *See supra* Part III.F (collecting cases). Plaintiffs make no allegations showing that they refrained from taking any actions because they were relying on a supposed promise from Syngenta.

Third, a voluntarily undertaken duty is "limited to the extent of the undertaking" and courts "apply a narrow construction" to it. *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178, 184 (Ill. App. Ct. 1999); *see also, e.g.*, *Doe*, 105 So. 3d at 428. A general statement adopting the BIO Policy in 2007 cannot be read as a promise to delay commercialization of Viptera simply because China had not approved it for import. The BIO Policy merely stated in general terms that commercialization should await approval in "key" markets without providing any definition of what makes a market "key." It also specified only the United States, Canada, and Japan—not China—as key export markets. *See* 2009 BIO Policy, Ex. D at 4. At the time Viptera was commercialized, moreover, it is a matter of public record that exports to China accounted for only about one-third of 1% of U.S. corn production. *See supra* note 25. Given the rule of strict construction that would apply to a voluntarily assumed duty, even if Syngenta had promised to abide by the vague standard in the BIO Policy, that could not reasonably be interpreted as a promise to refrain from selling Viptera absent approval from a market such as China.

V. FIFRA Preempts Plaintiffs' Failure-To-Warn Theory Of Liability.

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") expressly preempts Plaintiffs' strict liability failure to warn claims in their entirety as well as Plaintiffs' other claims to the extent they are based on an alleged failure "to adequately warn and instruct farmers on . . . the substantial risk that planting Viptera would lead to loss of the Chinese Market."[128] *See* 7

[128] Class Compl. ¶ 331; *see, e.g.*, *id.* ¶¶ 346-59; Non-Class Compl. ¶¶ 302, 348-60.

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U.S.C. § 136v(b) ("[A] State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."). FIFRA preempts any state rule—including a common law duty—that satisfies two conditions: (1) "it must be a requirement for labeling or packaging" that (2) "is in addition to or different from those required under [FIFRA]." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005). Plaintiffs' failure-to-warn theory would impose requirements that trigger both concerns.

First, failure-to-warn claims qualify as seeking to impose "'requirements for labeling or packaging,'" because they purport to "set a standard for a product's labeling." *Id.* at 446. *Second*, Plaintiffs seek to impose state-law requirements that labels must warn of potential economic loss due to trade disruptions, which is plainly "in addition to or different from" FIFRA's requirement that the label need only contain a warning "adequate to protect health and the environment." 7 U.S.C. § 136q(1)(G). Thus, as the MDL Court correctly held, Plaintiffs' theory that Syngenta failed to warn Viptera farmers is preempted because it "seeks to impose a labeling requirement not found among FIFRA's statutory requirements." MDL Order 49; *see Bates*, 544 U.S. at 452; *StarLink*, 212 F. Supp. 2d at 836 ("FIFRA therefore preempts any claims based on the inadequacy of StarLink's label or defendants' failure to warn StarLink farmers.").

VI. Plaintiffs' Strict-Liability Claims Fail As A Matter Of Law.

As noted above, Plaintiffs' strict-liability claims for products liability and failure to warn are both barred by the ELD. *See supra* Part II. In addition to that independent bar, the law also limits strict liability to defects that cause *physical* harm. *See generally* Restatement (Second) of Torts § 388 (limiting liability to "physical harm caused by the use of the chattel"); *see, e.g.*, *Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 996 (D. Minn. 2006) (Minnesota law "requires

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the 'unreasonably dangerous' condition of the product to cause some 'physical harm'").[129] Like their other claims, however, Plaintiffs' strict-liability claims allege only economic injury based on the theory that Viptera and Duracade were "defective" because Plaintiffs allegedly suffered market losses. *See supra* Part II.A.3. Plaintiffs do not and cannot allege that Viptera or Duracade corn seeds (or corn grown from them)—which were approved by the FDA, USDA, and EPA before sale, Class Compl. ¶¶ 36, 55-56—pose a threat of physical harm.

The strict-liability claims also suffer from further claim-specific defects.[130]

A. Minnesota Class Plaintiffs' Products-Liability Claim Does Not Allege Any Defect In The Condition Of Syngenta's Corn Seeds.

To state a products-liability claim, Minnesota Class Plaintiffs must show that (1) the product was in a defective condition unreasonably dangerous to the user, (2) the defect existed when the product left the manufacturer's control, and (3) causation. *Western Sur. & Cas. Co. v. Gen. Elec. Co.*, 433 N.W.2d 444, 447 (Minn. Ct. App. 1988). Plaintiffs fail to satisfy these requirements because they fail to allege any defect.

First, the Class Complaint does not even try to identify *any* defect in the condition of the Viptera and Duracade seeds that Syngenta sold—which alone requires dismissal. *See, e.g.*, *Russo*, 462 F. Supp. 2d at 996 (dismissing Minnesota products-liability claims based on lack of a defect as a matter of law). Products-liability claims are limited to three types of defects—defects in manufacturing, design, or warnings/instructions. *See generally* Dobbs § 452; Restatement

[129] *See also, e.g.*, *Mink v. Univ. of Chi.*, 460 F. Supp. 713, 719 (N.D. Ill. 1978) ("[O]ne of the essential elements in a claim for strict liability is physical injury to the plaintiff.").

[130] Both of Plaintiffs' strict-liability claims must be dismissed to the extent that they are based on the theory that Syngenta should have "withdrawn" Viptera and Duracade corn seed from the market. Class Compl. ¶¶ 86, 218-19; Non-Class Compl. ¶¶ 98-99, 229-30. The law has consistently refused to impose a common-law duty to recall on manufacturers. *See, e.g.*, *Hammes v. Yamaha Motor Corp. U.S.A., Inc.*, No. 03-6456, 2006 WL 1195907, at *11 (D. Minn. May 4, 2006) ("[N]o Minnesota case has imposed a duty upon manufacturers to institute a product recall or retrofit[,]" and "other courts have opined that Minnesota would refuse to impose a duty to recall a defective product because the overwhelming majority of jurisdictions have rejected such an obligation.").

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(Third) of Torts: Prods. Liab. § 2. Plaintiffs' only attempt to allege a defect is the assertion that "Viptera and Duracade was in a defective condition, unreasonably dangerous to users' property because it is nearly impossible to keep corn containing MIR162 from contaminating non-MIR162-containing corn." Class Compl. ¶ 339. That does not allege anything defective about the condition of the *seeds* Syngenta sold; instead, it focuses on cross-pollination and commingling of planted and grown corn long after the corn seeds have left Syngenta's hands.

That allegation does not assert any manufacturing defect because Minnesota Class Plaintiffs do not allege that any units of Viptera or Duracade seeds failed to meet Syngenta's intended design specifications. *See, e.g.*, *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1054 n.4 (8th Cir. 1996) (explaining that a "manufacturing defect exists only where an item is substandard when compared to other identical units off of the assembly line"). The ability of corn grown from Viptera and Duracade corn seeds to cross-pollinate and commingle with other corn is also not a design defect. Any design defect theory would amount to the unprecedented proposition that Syngenta was legally obligated to overcome biological fact by developing a corn seed that does not pollinate in the air and on contact. Indeed, the *StarLink* court rejected an identical attempt to treat the susceptibility of corn to cross-pollination and commingling as a defective design. *See StarLink*, 212 F. Supp. 2d at 837-38 (rejecting claim that StarLink corn seed is a "defective product" because "it will inevitably commingle and cross-pollinate" with other corn and explaining that "[t]his constitutes a failure to warn, not a design defect"). To the extent that Minnesota Class Plaintiffs' products-liability claim is based on defective warnings or instructions, that theory duplicates their claim for failure to warn and must be dismissed for the same reasons explained below. *See infra* Part VI.B.

Second, Syngenta is a component-parts manufacturer that cannot be held liable as a matter of law for harm resulting from the way growers used Viptera and Duracade seeds to grow

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corn or for harm resulting from the way non-producers commingled harvested corn. Under the raw-materials or component-parts doctrine, a manufacturer of a safe, non-defective component is not liable for harm resulting from the integration of the component into another product by other producers if the component manufacturer does not substantially participate in the integration. *See, e.g.*, *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d at 1056-57. And that is true *even if* the harm that may result from the integration is foreseeable or known to the component-part manufacturer. *See, e.g.*, *id.* at 1057 ("The alleged foreseeability of the risk of the finished product is irrelevant to determining the liability of the component part manufacturer . . . ."). Tort law thus generally does not impose duties on manufacturers of non-defective, safe components to refrain from marketing the component, even where the harm from integration is foreseeable. *See, e.g.*, *id.* ("[I]mposing such a duty would force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems."). Applying this principle, courts have held that raw materials for plants—including fertilizer and seeds like Viptera and Duracade—are component parts. *See, e.g.*, *Jorgensen Farms, Inc. v. Country Pride Coop., Inc.*, 824 N.W.2d 410, 419 (S.D. 2012) (fertilizer was a component part where it allegedly contaminated wheat crop with rye); *King v. Hilton-Davis*, 855 F.2d 1047, 1052-53 (3d Cir. 1988) (barring claim against sprout-suppressant manufacturer because suppressant was a chemical used in treating a potato crop and was thus a component part of that crop); *cf. People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 898 (Ill. 1953) (holding that the law treats commercially sold seeds as "ingredient[s]" of the crops raised by growers for sale).[131]

[131] As noted above, *see supra* note 93, some of these courts held that the ingredients of plants are component parts of the plant in the analogous context of analyzing the "other property" exception. There is no plausible basis for any different analysis under the component-part doctrine.

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Minnesota Class Plaintiffs expressly allege that Syngenta is nothing more than a component-parts manufacturer. They allege that Syngenta manufactured a safe component (Viptera corn seed) and that their economic injuries resulted from the way that component was integrated into another product (harvested corn and, subsequently, supplies of commingled, fungible corn) by later producers (who grew the corn and allowed cross-pollination), and non-producers (who commingled the corn). Under the law, the alleged foreseeability of commingling (which Plaintiffs say is "nearly impossible" to prevent, Class Compl. ¶ 339) does not give rise to a duty on Syngenta not to sell its non-defective, safe component.

Plaintiffs do not and cannot allege that their harm resulted from any flaw in Syngenta's seeds such that these component parts were themselves defective. Under Plaintiffs' allegations, if producers and non-producers had never integrated Viptera and Duracade corn seeds into commodity corn destined for export to a country where those genetic traits were not yet approved for import then Plaintiffs would not have suffered any harm. That is the point of the component parts doctrine. Where the source of the harm is the way the component part is integrated into another product (rather than an underlying defect in the component itself without regard to integration), the component-part manufacturer cannot be held liable. *In re TMJ Prods. Liab. Litig.*, 97 F.3d at 1056. Allowing Plaintiffs to hold Syngenta strictly liable would thus impermissibly "cast [Syngenta] in the role of insurer for any accident that may arise after [Viptera and Duracade corn seeds] leaves [its] hands." *Id.*

B. Syngenta Cannot Be Held Strictly Liable For Failure To Warn.

Plaintiffs allege that Syngenta owed them a duty to warn of "the danger of Viptera and Duracade" and a duty to Viptera and Duracade growers to "give adequate instructions as to the use of Viptera and Duracade." Class Compl. ¶ 355; Non-Class Compl. ¶ 356.

First, as explained above, the theory that Syngenta failed to warn Viptera and Duracade

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purchasers is preempted by FIFRA. *See supra* Part V.

Second, the component-part doctrine likewise bars Plaintiffs' failure-to-warn claims. *See, e.g.*, *In re TMJ Prods. Liab. Litig.*, 97 F.3d at 1058 ("A failure to warn claim brought against suppliers of multi-purpose components is precluded by the same raw material/component part supplier analysis that forecloses design defect claims."). The law does not require a component-part manufacturer like Syngenta to warn of the risks of an infinite number of circumstances in which Viptera and Duracade seed may integrated into growing crops, storage, commingling, sale, and export—particularly because the integrators (producers and non-producers) have superior knowledge about how they intend to use the seed (and harvested corn) and whether their uses are likely to cause harm. *See, e.g.*, *id.* at 1058-59 (rejecting failure-to-warn claim because allowing it "would be tantamount to charging a component part manufacturer with knowledge that is superior to that of the completed product manufacturer").

Third, as a matter of law, Syngenta did not owe any duty to warn of the obvious risks on which Plaintiffs base their claim. *See, e.g.*, *Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 884 (Minn. Ct. App. 1993) (rejecting failure-to-warn claim because risk was obvious as a matter of law). There is no duty to "warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users." Restatement (Third) of Torts: Prods. Liab. § 2 cmt. j; *see also, e.g.*, *Drager by Gutzman*, 495 N.W.2d at 884 ("[E]ven in the instance of an intended or reasonably foreseeable unintended use, a manufacturer has no duty to warn when the product user is aware of the risk."). Likewise, Syngenta owed no duty to warn corn producers, who are knowledgeable users expected to know about inherent parts of their own business including the biological fact of cross-pollination. *See, e.g.*, *DG&G, Inc. v. FlexSol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 824 (8th Cir. 2009); *Hines v. Remington Arms Co.*, 648 So. 2d 331, 337 (La. 1994). Similarly, Syngenta owed

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no duty to warn everyone in the industry of the risk of commingling or the risk that China might reject U.S. corn containing Viptera. Plaintiffs themselves assert that the entire industry was aware that Syngenta began commercially selling Viptera, that China had not yet approved that genetic trait for import, and that "[i]t was *inevitable* that Viptera corn would move into export channels, including China and cause trade disruption." Class Compl. ¶ 224; *id.* ¶¶ 22, 74, 93 (alleging that Syngenta was publicly warned of risks by others).

Under Plaintiffs' novel theory, however, Syngenta would be required to identify and warn not only all corn producers and non-producers, but also all milo producers and soybean producers. Plaintiffs' proposed duty to warn has no limiting principle and would apply to any business that allegedly lost revenue because demand for its services or products was affected by the alleged drop in corn prices. There is no basis in the law for creating a duty to warn that follows the never-ending ripple effects of those alleged economic injuries.

VII. Plaintiffs' Trespass-To-Chattels Claims Must Be Dismissed As A Matter Of Law.

Plaintiffs' Non-Class Complaint is insufficient to make out the elements of a claim for trespass to chattels. As relevant here, a trespass-to-chattels claim requires: (1) an action by the defendant that is (2) intentionally directed at plaintiff's chattels; (3) that the plaintiff had ownership or possession of the chattels; and (4) that the defendant's action physically intermeddled with the chattels—that is, that it damaged them by "impair[ing] [them] as to [their] condition, quality, or value." Restatement (Second) of Torts §§ 217, 218. This provision of the Restatement has been adopted in 21 of the 22 states under whose law Plaintiffs have asserted claims.[132] Plaintiffs fail to adequately plead all of these required elements.

[132] *See, e.g.*, *Holt v. Macy's Retail Holdings, Inc.*, 719 F. Supp. 2d 903, 914 (W.D. Tenn. 2010); *McLeodUSA Telecomms. Servs., Inc. v. Qwest Corp.*, 469 F. Supp. 2d 677, 703-04 (N.D. Iowa 2007); *MCI WorldCom Network Servs., Inc. v. W.M. Brode Co.*, 411 F. Supp. 2d 804, 810 (N.D. Ohio 2006); *Terrell v. Rowsey*, 647 N.E.2d 662, 666

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A. Plaintiffs Fail Adequately To Plead Acts *By Syngenta* Constituting Trespass.

Plaintiffs first fail adequately to allege any action *by Syngenta* that "intermeddled" with their chattels. Plaintiffs do not assert that Syngenta directed Viptera pollen onto Producers' farms or introduced Viptera corn into Non-Producers' grain elevators. To the contrary, Plaintiffs acknowledge that Syngenta's limited role is to sell seeds, primarily to dealers and distributors, who then sell them to farmers. *See* Non-Class Compl. ¶ 9. Plaintiffs' allegations about cross-pollination and commingling of corn that resulted in Viptera corn coming into contact with "the U.S. corn supply," *id.* ¶ 236, plainly describe the conduct of *others*. Thus, Plaintiffs describe pollen drift from farmers' fields, *see id.* ¶¶ 107-08, which presupposes that a farmer has planted Viptera close enough to a neighbor's crops for such drift to occur, *cf. id.* ¶ 127 (complaining that Syngenta did not require farmers to "take measures to prevent such cross-pollination in their own fields"). And as for commingling, Syngenta's conduct is even further removed. Plaintiffs affirmatively allege that corn "from hundreds of thousands of farms is then further commingled as it is gathered, stored and shipped through a system of local, regional and terminal grain elevators." *Id.* ¶ 111. Such local, regional, and terminal grain elevators accomplishing this commingling are, of course, none other than *the Non-Producers themselves*. *See id.* ¶¶ 7-8.

Thus, under Plaintiffs' own allegations, any cross-pollination or commingling that came about from the actions of neighboring farmers who planted Viptera and the actions of the Non-

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(Ind. Ct. App. 1995); *Poff v. Hayes*, 763 So. 2d 234, 238 (Ala. 2000); *Ark. La. Gas Co. v. Cent. Utils. Constructors, Inc.*, 643 S.W. 2d 566, 567 (Ark. 1982); *Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.*, 363 P.2d 175, 178 (Colo. 1961); *Ingram Trucking, Inc. v. Allen*, 372 S.W.3d 870, 872 (Ky. Ct. App. 2012); *Mackie v. Bollore S.A.*, No. 286461, 2010 WL 673295, at *4 (Mich. Ct. App. Feb. 25, 2010); *Mayo Clinic v. Elkin*, Civ. No. 09-322 (DSD/JJK), 2010 WL 760728, at *5 n.12 (D. Minn. Mar. 4, 2010); *McDowell v. Davis*, 235 S.E.2d 896, 900 (N.C. Ct. App. 1977), *abrogated on other grounds, Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85 (N.C. 1990); *Sagebrush Res., LLC v. Peterson*, 841 N.W.2d 705, 712-13 (N.D. 2014); *Woodis v. Okla. Gas & Elec. Co*, 704 P.2d 483, 485 (Okla. 1984); *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981); *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1229-33 (N.D. Ill. 2005); *ACI Worldwide Corp. v. MasterCard Techns., LLC*, No. 8:14-cv-31, 2014 WL 7409750, at *9-10 (D. Neb. Dec. 31, 2014). Because Louisiana does not recognize the common-law tort of trespass to chattels, Plaintiffs proceed under Louisiana's general "offense and quasi-offense" statute, La. Civ. Code art. 2315. *See* Non-Class Compl. Count 76, ¶¶ 999-1003.

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Producers themselves (and other grain elevators and exporters like them) who commingled Viptera and non-Viptera corn. The most the complaint alleges is that Syngenta "knew or certainly should have known" that there was a "very high likelihood" that others might take these actions—an allegation insufficient to suggest any set of facts under which Syngenta itself accomplished any intermeddling. *Id.* ¶ 112. In other words, the complaint is deficient because, given the affirmative allegations about Syngenta's limited role and the intervening conduct of farmers, grain elevators, and others after Syngenta sold Viptera seed, the complaint does not leave open any possible set of facts that might be proved consistent with the pleadings that would put Syngenta in the role of accomplishing any intermeddling. *Cf. Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (describing pleading standard under Minnesota law).

That conclusion is buttressed by abundant precedent holding as a matter of law that a manufacturer cannot be liable in trespass based on the way others use its product post sale. The settled rule is that "[c]ourts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *City of Bloomington, Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989); *see also Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 664 (Alaska 2000) (seller of fuel not liable for trespass after purchaser leaked fuel into groundwater); *Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1582 (S.D. Ga. 1992) (seller not liable for trespass for contamination when buyer released chemicals).[133] As one court explained in rejecting a claim of trespass against the manufacturer of an herbicide that had drifted onto neighboring farm land when it was being applied, "there is no

[133] *See also Acosta Orellana v. CropLife Int'l.*, 711 F. Supp. 2d 81, 94 (D.D.C. 2010) (dismissing plaintiffs' trespass claim because "nowhere in the amended complaint do the plaintiffs allege, or even remotely suggest, that the CropLife Defendants ever personally sprayed" the fungicide at issue); *Dine v. W. Exterminating Co.*, CIV. A. No. 86-1875-OG, 1988 WL 25511, at *9 (D.D.C. Mar. 9, 1988) (pesticide vendor cannot be held liable in trespass based on later application of pesticide by others, because he did not "directly cause" an invasion of plaintiff's land).

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authority suggesting that a person who merely sells one item to another person is acting in concert with that person when that person eventually uses . . . the purchased item."[134]

Faced with parallel claims, the *Hoffman* court applied common-law principles to hold that trespass will not lie against a GM seed manufacturer based on claims of cross-pollination, because "much more than 'natural and inevitable forces' must intervene between merely marketing GM [seed] and its arrival on the plaintiffs' land." 2005 SK.C. LEXIS 330 ¶ 131.

More recently, the MDL Court applied precisely the rationale outlined above, holding that "plaintiffs may not state a claim for trespass" under the theory that a seller like Syngenta "knew that [its] product would end up interfering with property of non-purchasers" where "the seller *did not cause the interference itself*." MDL Order 54 (emphasis added). That ruling correctly stated the law and the same result should apply here.[135]

B. Plaintiffs Fail Adequately To Plead Intent.

Plaintiffs also fail to adequately plead intent. Plaintiffs cannot satisfy this requirement by simply repeating the conclusory assertion that Syngenta "knew . . . to a substantial certainty" that intermingling would result if it sold Viptera. Non-Class Compl. ¶ 308. Even if that were true, the Restatement's "substantial certainty" standard is expressly intended to convey the same level of intent that is required for other intentional torts—such as battery—and thus requires a state of mind beyond recklessness. *See* Restatement (Second) of Torts § 217 cmt. c; *id*. § 8A cmt. b & Illus. 2. Even the known possibility that selling Viptera might lead to farmers handling it in a way that allowed cross-pollination and grain elevators commingling it is simply not sufficient to

[134] *Ward v. Ne. Tex. Farmers Co-op. Elevator*, 909 S.W. 2d 143, 150-51 (Tex. App. 1995), *abrogated on other grounds by Envt'l Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).

[135] The same rule applies under Louisiana law. Plaintiffs rely on Louisiana's general "offense and quasi-offense" statute, La. Civ. Code art. 2315, but a tort under that provision similarly requires showing that the defendant itself *caused* the alleged harm. *See, e.g.*, *Addison v. Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

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hold Syngenta liable for an intentional tort. That is precisely why the Canadian court in *Hoffman I* held that assertions parallel to those made here could not state a claim for trespass. *See Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 130.

C. Plaintiffs Fail Adequately To Plead That *Their* Corn Suffered Intermeddling.

Plaintiffs' claims also fail because they do not adequately allege that there was any intermeddling with *their corn*—corn that they owned or possessed at the time. Plaintiffs mostly rely on vague allegations of Viptera intermixing with the "U.S. corn supply," Non-Class Compl. ¶ 236, which has nothing to do with their own property. Even in their specific counts, they fail to assert where and how any supposed intermeddling occurred that affected their own property. Instead, they allege only that the trespass occurred "through contamination in fields *and/or* in grain elevators *and* other modes of storage and transport." *E.g.*, Non-Class Compl. ¶ 369 (allegations of Alabama Plaintiffs) (emphases added). The complaint does not assert that any particular Producer (much less *every* Producer) experienced cross-pollination on his land or that any particular Non-Producer (much less *every* Non-Producer) experienced commingling of corn within its facilities. And to the extent Producers generally point to commingling in grain elevators *after* they had sold their corn, in that scenario the Producers no longer owned their corn and certainly lacked possession. They provide no rationale on which such commingling post-sale could be considered commingling with *their* property.[136]

The reason for the lack of any allegations asserting injury to their *own* property is that Plaintiffs' theory of damages has nothing to do with injury to Plaintiffs' own corn from Viptera.

[136] As the MDL Court noted, "one would normally expect growers to have given up their interest in the corn sent to elevators." MDL Order 55. That is fatal for Producers' trespass claims to the extent they are based on commingling *after* a Producer sold his crop to a grain elevator. *See generally* Restatement (Second) of Torts § 217; *see also, e.g.*, *Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.*, 504 F. Supp. 2d 260, 269 (N.D. Ohio 2007) ("To make a claim for trespass, one must have a possessory interest in the property in question.").

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As the MDL Court recognized, Plaintiffs rely on a damage-to-the-market theory. MDL Order 55. Their theory is not that their particular corn lost value due to contact with Viptera. Their theory is that *all* U.S. corn lost value due to the generalized presence of Viptera. *See* Non-Class Compl. ¶¶ 281-291. As a result, their complaint omits the critical assertions for pleading a claim of trespass—namely, allegations asserting intermeddling with their *own* property. As the MDL Court recognized, as a matter of law, trespass claims cannot survive where Plaintiffs have not even alleged that "*each* plaintiff suffered contamination of its own corn or other property." MDL Order 56 (emphasis added).[137] On that basis, the trespass claims should be dismissed.

D. Plaintiffs Fail Adequately To Plead That Their Property Was "Impaired" By Any Alleged Intermeddling.

Finally, Plaintiffs have not adequately alleged damage in the form of "impairment" to the "condition, quality, or value" of their property through alleged intermixing with Viptera.[138]

First, because Viptera was fully approved in the U.S., corn intermingled with Viptera corn cannot be said to be "damaged." By law, the USDA definition of yellow corn permitted the presence of Viptera, *see* 7 C.F.R. § 810.402(c), and Viptera corn was treated the same, could be sold the same, and brought the same price as all other U.S. fungible corn.

Second, and more important, Plaintiffs' theory of damage has nothing to do with their particular corn, milo, or soybeans having been mixed with Viptera. They do not claim that it was Viptera in their particular corn, milo, or soybeans that caused them to receive a lower price for their crop. Their complaint is that *all* U.S. corn—whether or not it specifically was mixed with

[137] The claims under Louisiana law fail for the same reason. To sustain a claim under La. Civ. Code art. 2315, a plaintiff must retain ownership of the "damaged" property. *See, e.g.*, *Forcum-James Co. v. Duke Transp. Co.*, 93 So. 2d 228, 230 (La. 1957) ("[S]ince we find that the [property] belonged to [a third party] it would seem to necessarily follow that plaintiff is without a right of action").

[138] Actual damage is a required element for trespass to chattels. *See* Restatement (Second) of Torts § 218 cmt. e ("The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel.").

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Viptera—suffered a market-wide price drop due to a Chinese boycott. *See* Non-Class Compl. ¶¶ 281-91. Because Plaintiffs' corn brought the same price whether or not it had Viptera in it, Plaintiffs simply cannot make out a claim that physical contact with Viptera somehow changed the "condition or quality" of their corn in a manner causing injury as required for a trespass claim. As the MDL Court recognized in addressing identical allegations, "because a producer or non-producer's corn [allegedly] lost value whether or not it experienc[ed] contamination, any trespass by means of contamination cannot have caused plaintiffs' market injury." MDL Order 57. That defect alone requires dismissing Plaintiffs' trespass claims.

VIII. Plaintiffs Fail to State A Claim For Tortious Interference.

Non-Class Plaintiffs fail adequately to allege multiple elements of their claim for tortious interference with prospective business relations. Specifically, the Plaintiffs fail: (1) to identify any specific business relationships that are the subject of the claim; (2) to allege the requisite injury: that third parties stopped doing business (or refused to do business) with Plaintiffs; (3) to provide any allegations suggesting that Syngenta *intentionally* caused third parties to stop doing business with Plaintiffs; and (4) to identify any *improper means* supposedly used by Syngenta.[139]

A. The Producers Fail Adequately To Allege Specific Prospective Business Relationships.

Plaintiffs' tortious interference claims fail at the outset because the complaint does not identify any "precise business expectancy" that is sufficiently concrete to warrant legal

[139] Non-Class Plaintiffs assert tortious interference claims under the laws of ten States: Alabama, Arkansas, Indiana, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas. Each State requires the four elements noted in text. *See e.g.*, *Walter Energy, Inc. v. Audley Capital Advisors LLP*, No. 1131104, 2015 WL 731152, at *5 (Ala. Feb. 20, 2015); *Overturff v. Read*, 442 S.W.3d 862, 867 (Ark. Ct. App. 2014); *Harris v. Gaylord Entm't Co.*, No M2013-00689-COA-R3-CV, 2013 WL 6762372, at *4 (Tenn. Ct. App. Dec. 19, 2013); *Tuffy's Inc. v. City of Okla. City*, 212 P.3d 1158, 1165 (Okla. 2009); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 n.21 (Ind. 2001); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 717 (N.D. 2001) (tortious interference with business); *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77-78 (Tex. 2000); *Anderson v. Regents of Univ. of Cal.*, 554 N.W.2d 509, 518-19 (Wis. Ct. App. 1996); *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 740 (Mo. Ct. App. 1984).

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protection. *Country Corner Food and Drug, Inc. v. First State Bank and Trust Co. of Conway, Ark.*, 966 S.W.2d 894, 898 (Ark. 1998). To make out a claim, Plaintiffs "must specifically identify a third party with whom [they had] a reasonable probability of a future economic relationship." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 221-22 (Minn. 2014); *see also Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 756 N.W.2d 399, 404 (S.D. 2008) (requiring plaintiff to demonstrate "an identifiable third party who wished to deal with the plaintiff"). A general assertion that the plaintiff has had customers in the past and expects to continue doing business is not sufficient. Merely projecting "future business with unidentified customers, without more, is insufficient as a matter of law," as is asserting a general expectation for the "level of business to continue in the future." *Gieseke*, 844 N.W.2d at 221-22; *see also e.g., Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 552 (Ark. Ct. App. 2011) (allegations that "are nothing more than a general desire to be able to contract" for business "do not show a specific relationship or expectancy").[140]

To the extent a plaintiff relies on the assertion that existing relationships will continue, moreover, the plaintiff must identify specific parties in those relationships,[141] and identify particular reasons for concluding that business with the same customers will continue. *See Stonebridge Collection v. Carmichael*, 791 F.3d 811, 820 (8th Cir. 2015) (claim failed where plaintiff failed to state "how many reorders a customer typically would place" or "whether its

[140] *See also Gieseke*, 844 N.W.2d at 221 ("[T]he majority of state courts that have considered the issue require the plaintiff to demonstrate the existence of a prospective economic advantage with at least one specific, identifiable third party with which the defendant interfered.") (collecting cases).

[141] *See, e.g., Gold Sci. Consultants, Inc. v. Cheng*, No. 3:07-CV-152, 2009 WL 1256664, at *10 (E.D. Tenn. May 4, 2009) ("Generalized references to third parties simply fail[] to meet the specificity need for this element."); *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 265 (Tex. App.--Corpus Christi 2006, pet. denied) (allegations that defendant "interfered with [plaintiff's] business relations with investors, advertiser, and others" was insufficient where plaintiff "[did] not identify any such contracts"); *Du Page Aviation Corp. v. Du Page Airport Auth.*, 229 Ill.App.3d 793, 171 Ill.Dec. 814, 594 N.E.2d 1334, 1340 (1992) (allegation of expectancy of future economic advantage through business relationships with "others" is insufficient).

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relationship with the reordering customers was long-term"); *Kidd v. Bass Hotels & Resorts, Inc.*, 136 F. Supp. 2d 965, 970 (E.D. Ark. 2000) ("[P]ast business relationships with former customers [are] not sufficiently certain, concrete and definite to establish a cognizable prospective relationship.") (internal quotation marks omitted); *see also* 1A Callmann on Unfair Competition, Trademarks, and Monopolies § 9:11 (4th ed.) ("Past business relationships with former customers are usually not sufficient to establish a cognizable prospective relationship.").

Plaintiffs' allegations fall woefully short of making out a claim on these standards. The sum total of Plaintiffs' allegations is that "Plaintiffs had business relationships and a reasonable expectancy of continued relationships with [unidentified] purchasers of corn." *E.g.* Non-Class Compl. ¶ 374. That is precisely the sort of "bald and conclusory assertion that [plaintiff] had . . . a business expectancy" that fails as a matter of law. *Hunt v. Riley*, 909 S.W.2d 329, 332 (Ark. 1995). Contrary to the MDL Court's suggestion, *see* MDL Order 68, it is not sufficient for a plaintiff merely to identify a class of third parties with whom it expects to do business. That amounts to no more than a "projection of future business with unidentified customers," which is "insufficient as a matter of law." *Gieseke*, 844 N.W. at 221-22. A complaint fails where "there are no specific third parties named in the complaint, only general categories of persons." *Overnite Transp. Co. v. Teamsters Local Union No. 480*, No. M2002-02116-COA-R3-CV, 2004 WL 383313, at *13 (Tenn. Ct. App. Feb. 27, 2004). Especially here, where the master complaint presents solely the claims of four individuals, it is hardly asking much for Plaintiffs to identify at least *one* party with whom they claim a business expectancy. Even if identifying a class of current customers were sufficient, moreover, Plaintiffs would still have to identify some basis for expecting the relationship with that group to continue, which they have wholly failed to do.[142]

[142] The Minnesota Non-Class Plaintiffs' allegations are different on this score. Minnesota Non-Class Plaintiffs

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B. Plaintiffs Fail To Allege The Requisite Injury: That A Third Party Ended Or Refused To Enter A Business Relationship.

Plaintiffs also fail to allege the requisite injury for tortious interference—namely, that the defendant "induc[ed] or caus[ed] a breach or termination of the relationship or expectancy." *McNeill v. Sec. Ben. Life Ins. Co.*, 28 F.3d 891, 893 (8th Cir. 1994) (applying Arkansas law). Where a plaintiff asserts interference with a *prospective* relationship, he must allege "that the defendant's actions *prevented the relationship from occurring.*" *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App. 2007) (emphasis in original); *accord Wilkey v. Hull*, 366 F. App'x 634, 638 (6th Cir. 2010) ("Absent some factual allegation that [defendant's actions] *ended or prevented a business relationship*," a plaintiff "does not state a claim.") (emphasis added). In other words, "[a] defendant faces potential liability for intentional interference with business relationships *only* when the interference causes a third person to *discontinue* a business relationship or to *refrain from entering* into a prospective business relationship." *Brown v. CVS Pharm., LLC*, 982 F. Supp. 2d 793, 805 (M.D. Tenn. 2013).[143] That rule is reflected in the black-letter of the Restatement, which explains that

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allege that their existing business relationships with elevators and exporters were "recorded by contracts, invoices, receipts and other documents *demonstrating a consistent course of sales*" and that Minnesota Non-Class Plaintiffs "reasonably expected to continue selling corn *to such customers*." Non-Class Compl. ¶¶ 313, 314 (emphases added). Non-Class Plaintiffs in other States make no similar allegations of repeat business or consistent course of sales. Even if the Minnesota Non-Class Plaintiffs' allegations were sufficient to survive they highlight the deficiency in the remaining plaintiffs' claims.

[143] This rule is consistently applied across jurisdictions. *See, e.g.*, *Schoedinger v. United Healthcare of Midwest, Inc.*, No. 4:07CV904SNLJ, 2011 WL 97735, at *7 (E.D. Mo. Jan 12, 2011) ("Failing to allege whether such actions caused any identified patient to *terminate* his/her business relationship with the plaintiffs is fatal to the plaintiffs' cause of action.") (emphasis added); *Gold Sci. Consultants, Inc.*, 2009 WL 1256664, at *11 (claim failed because "there is insufficient evidence that Defendants' alleged acts caused either Mr. Twigg or Mr. Winfield *to breach or break* their relationships with Plaintiff" and "Mr. Twigg and Mr. Winfield *did not choose to end their relationships* with Plaintiff") (emphases added); *Cent. Park Prods., Inc. v. Dorel Juvenile Grp., Inc.*, No. 07-5012, 2007 WL 1821308, at *2 (W.D. Ark. June 25, 2007) (dismissing claim because "[p]laintiff has not pled any breach or termination of its relationship or expectancy"); *Erickson's Flooring & Supply Co., Inc. v Tembec, Inc.*, No. 03-74214, 2006 WL 148759, at *8 (E.D. Mich. Jan. 18, 2006) (claim failed where there was no evidence that defendant "actually induced or caused a breach or termination of Plaintiff's business relationships or expectancies"), *aff'd*, 212 F. App'x 558, 566 (6th Cir. 2007); *Reali, Giampetro & Scott v. Soc'y Nat'l Bank*, 729 N.E.2d 1259, 1265 (Ohio Ct. App. 1999) (plaintiff must show that defendant "induce[d] or otherwise purposely cause[d] a third person *not to*

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liability for tortious interference with a prospective relationship arises only when the interference consists of "(a) inducing or otherwise causing a third person *not to enter into* or *continue* the prospective relation or (b) *preventing* the other from *acquiring* or *continuing* the prospective relation." Restatement (Second) of Torts § 766B (emphases added).

Here, Plaintiffs wholly fail to make the requisite assertion that Syngenta's conduct prevented an expectancy from being realized. Plaintiffs do not allege that buyers of corn stopped doing business with them or refused to deal with them. For the most part, they fail to describe any injury at all, relying instead on the bare, boilerplate assertion that Syngenta "induced or caused a disruption of that expectancy" without any further description. *E.g.* Non-Class Compl. ¶¶ 376, 516, 1166, 1451, 1514, 1762, 1796. The Minnesota Non-Class Plaintiffs, however, make clear that the only "interference" Plaintiffs allege is that Viptera in the corn supply supposedly left Plaintiffs "unable to sell corn at the *price* they reasonably expected to receive." *Id.* ¶ 318 (emphasis added). But it is black letter law that such a complaint about the *terms* of a contract that was realized is not sufficient to state a claim. As explained above, the plaintiff must allege that defendant prevented a business relationship from forming at all. "Merely claiming that [a] contract would have been more advantageous to [Plaintiff] in the absence of Defendants' interference—pleading, in other words, that a contract did not end up being as beneficial as the plaintiff had hoped—does not satisfy the requirement that a business relationship be *prevented.*" *U.S. Enercorp, Ltd. v. SDC Montana Bakken Expl., LLC*, 966 F. Supp. 2d 690, 704 (W.D. Tex. 2013) (emphasis in original).[144] The MDL Court's assertion that a plaintiff could state a claim

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enter into or continue a business relation with another") (emphases added).

[144] *See also Enercorp*, 966 F. Supp. 2d at 703 ("The Court is unaware of . . . any Texas case in which a contract was consummated but the plaintiff was nevertheless successful on a claim for tortious interference with a prospective business relationship."); *BCD LLC v BMW Mfg. Co.*, 360 F. App'x 428, 436 (4th Cir. 2010) ("A claim for prospective interference cannot stand where the plaintiff is able to consummate a contract with another party. . . . [I]t is irrelevant that a plaintiff could have realized a better deal 'but for' the actions of the defendant . . . .") (South

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by asserting "interference with the expectation of sales *at certain market prices*," MDL Order 72, fails to acknowledge this settled law. The MDL Court did not cite any case supporting its unprecedented conclusion.

Restricting tortious interference to situations in which a relationship has not been realized at all makes sense in light of the greater speculation required to divine the *terrms* parties would have set under hypothetical circumstances. Where an expectancy was not realized *at all*, a court needs to make only a relatively binary determination: the expectancy would have been realized absent the defendant's conduct or not. By contrast, if plaintiffs could state a claim based on the theory that the *terms* would have been better absent defendant's conduct, courts would have to adjudicate a vast new range of speculative assertions about the possible course of negotiations and the terms that "might have been." Plaintiffs' theory highlights that problem, because it would require speculating about what commodity prices for corn (*and* milo *and* soybeans) *would have been* under hypothetical facts. Turning tortious interference into a vehicle for having courts recalculate the market price of various goods any time a plaintiff asserts that someone took some wrongful action supposedly affecting prices would bring the tort a long way from its limited purpose of addressing intentional actions that prevent a plaintiff from securing a business relationship. This Court should not expand the law of Minnesota (and other States) by adopting such a novel extension of the law. *See, e.g.*, *State v. Anderson*, 603 N.W.2d 354, 357 (Minn. Ct. App. 1999) ("[T]he task of extending existing law falls to the supreme court or the legislature . . . ."); *cf. Texas Disposal Sys.*, 219 S.W.3d at 590 (refusing to "expand the doctrine of tortious interference . . . to make actionable conduct that results in *delaying the execution* of a

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Carolina law); Callman on Unfair Competition, Trademarks & Monopolies § 9:16 ("There is no liability where the plaintiff is able to consummate a contract with another party but could have realized a better deal but for the actions of the defendant; i.e. the plaintiff cannot recover on a theory that the agreement was less profitable to him than it would have been without defendant's interference.").

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contract," which made the contract less profitable) (emphasis in original).

C. The Producers Fail To Allege Improper Means.

Plaintiffs also fail adequately to allege that Syngenta accomplished the supposed interference through "improper means"—that is, through means that are "independently tortious or unlawful." *Gieseke*, 844 N.W.2d at 218.[145] "[I]ndependently tortious [] mean[s] conduct that would violate some other recognized tort duty." *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001). In connection with their tortious interference claims, Plaintiffs do not specifically allege that Syngenta's conduct amounted to other, specific torts, and for all the reasons explained above, their other efforts to cast Syngenta's conduct as tortious fail.

To the extent Plaintiffs point to supposed misrepresentations about "whether customers would accept Viptera," Non-Class Compl. ¶ 316, such misrepresentations cannot support a claim for tortious interference unless they were directed at preventing third parties from conducting business with Plaintiffs. *See, e.g.*, *Grund v. Donegan*, 700 N.E.2d 157, 161 (Ill. App. Ct. 1998) ("[P]laintiff must allege action by the defendant *directed towards the party with whom the plaintiff expects to do business*.") (emphasis added). But the Plaintiffs do not point to anything of the sort. Supposed misrepresentations to Plaintiffs themselves about what customers would accept or about the pace of Chinese approval, *see, e.g.*, Non-Class Compl. ¶ 182, are irrelevant, because the Plaintiffs do not and cannot allege that those statements were intended to prevent

[145] Courts in Texas, Minnesota, Missouri, North Dakota, and Oklahoma have explicitly required that the alleged interfering act be actionable under a recognized tort or independently wrongful. *See, e.g., Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219-20 (Minn. 2014); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 720 (N.D. 2001); *Community Title Co. v. Roosevelt Fed. Sav. and Loan Ass'n*, 796 S.W.2d 369, 373 (Mo. 1990) (en banc); *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 150 (Okla. 1998). Arkansas, Alabama and South Dakota look to a multifactor test to determine if a defendant's conduct was "improper." *See, e.g., Baptist Health v. Murphy*, 373 S.W. 3d 269, 281-82 (Ark. 2010); *Selle v. Tozser*, 786 N.W. 2d 748, 753 (S.D. 2010); *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 13 (Ala. 2009). Tennessee requires that "the plaintiff demonstrate that the defendant's predominant purpose was to injure the plaintiff" to show "improper" motive or means. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 n.5 (Tenn. 2002).

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counterparties from doing business with Plaintiffs, or that they logically could have that effect.

At bottom, Plaintiffs are trying to treat the lawful sale of a U.S.-approved product, in the U.S. as if it constituted "improper means," and to penalize Syngenta for lawfully pursuing its own economic interests in the marketplace. That is incorrect as a matter of law. The concept of "improper means" is restricted to preserve the ability of actors in a free market to pursue their own economic advantage—that is, to "ensure that fair competition is not chilled." *Gieseke*, 844 N.W.2d at 218.[146] Treating the lawful sale of an approved product as an "improper means" would turn the policy objectives of the law on their head and allow businesses to use tortious interference claims to impair the robust operation of free markets.

D. Plaintiffs Fail Adequately To Allege Intent.

Finally, Plaintiffs fail sufficiently to allege that Syngenta acted with the requisite intent. Even if intent in this context required only that Syngenta "knew to a substantial certainty" that interference with Plaintiffs' business expectancies would result from Syngenta's actions,[147] Plaintiffs have not satisfied that standard. As explained above, the only "interference" that suffices is preventing a business relationship from being realized at all. Plaintiffs do not (and cannot) allege that Syngenta *knew* that would happen; they do not even allege that it *did* happen. And to the extent Plaintiffs erroneously assert that the "interference" was merely causing lower corn prices, Plaintiffs cannot plausibly allege that Syngenta "knew to a substantial certainty" that introducing Viptera would have that effect. At the time Viptera was introduced, China

[146] *See also, e.g.*, *Berger v. Cas. Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996) ("A party does not improperly interfere with another's contract by exercising its own legal rights in protection of its own financial interests."); *Companio v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 466 (Iowa 1999) (bank's desire "to improve its own financial condition and improve the service to its client" cannot be "improper means"); *Bridgeway Commc'ns, Inc. v. Trio Broad., Inc. (WBLX Radio Station-93 FM)*, 562 So. 2d 222, 223 (Ala. 1990) (no improper means where "defendants were engaged in lawful competition to increase their own business").

[147] *See, e.g.*, *May v. Countrywide Home Loans, Inc.*, No. 4:07-cv-375-CDP, 2007 WL 1879781, at *4 (E.D. Mo. June 28, 2007).

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accounted for only one third of one percent of corn exports, *see supra* note 25, and Plaintiffs themselves allege that it was not until *two years* after Viptera had been introduced that China first rejected shipments of U.S. corn. Even under Plaintiffs' theory, the supposed effect of Viptera on the market price of corn depended on a highly contingent sequence of events that no one could have known to a "substantial certainty" in advance.

IX. Plaintiffs' Private-Nuisance Claims Must Be Dismissed As A Matter Of Law.

A claim for private nuisance requires that (1) the defendant control or substantially participate in carrying on an activity that (2) unreasonably interferes (3) with another's interest in the private use and enjoyment of his land. *See* Restatement (Second) of Torts § 821D; *see also, e.g., Lethu Inc. v. City of Hous.*, 23 S.W.3d 482, 489 (Tex. App. 2000); *Goforth v. Smith*, 991 S.W.2d 579, 587 (Ark. 1999).[148] Plaintiffs' complaint fails adequately to allege each element.

A. Plaintiffs Fail Adequately To Allege That Syngenta Controlled Or Substantially Participated In the Activity Constituting The Nuisance.

Plaintiffs have not adequately alleged even in a general fashion that Syngenta controlled or substantially participated in carrying on the activity that amounted to the alleged nuisance. It is well settled in similar situations that, because a "seller in a commercial transaction [like Syngenta] relinquishes ownership and control of its products when they are sold," it *cannot*, as a matter of law, be liable for post-sale nuisances allegedly caused by others' use of its products. *See, e.g., Cloverleaf Car Co. v. Philips Petrol. Corp.*, 540 N.W. 2d 297, 300-01 (Mich. Ct. App.

[148] The applicable principles of law are substantially the same in all relevant States, and each State has analyzed nuisance relying on the private nuisance definition in the Restatement (Second) of Torts. *See, e.g., Paulus v. Citicorp N. Amer., Inc.*, No. 12-cv-856, 2014 WL 4557603 (S.D. Ohio Sept. 12, 2014) (Ohio law); *Northern Nat. Gas Co. v. L.D. Drilling, Inc.* 697 F.3d 1259 (10th Cir. 2012) (Kansas law); *Kane v. Cameron Intern. Corp.*, 331 S.W.3d 145 (Tex. App. 2011); *Johnson v. Knox Cty. P'ship*, 728 N.W.2d 101 (Neb. 2007); *Collins v. Barker*, 668 N.W.2d 548 (S.D. 2003); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355 (Tenn. 2002); *Union Pacific R. Co. v. Reilly Indus., Inc.*, 4 F. Supp. 2d 860 (D. Minn. 1998) (Minnesota law); *Vogel v. Grant-Lafayette Elec. Co-op.*, 548 N.W.2d 829 (Wis. 1996); *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995); *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992); *Tipler v. McKenzie Tank Lines*, 547 So. 2d 438 (Ala. 1989); *Pendergrast v. Aiken*, 236 S.E.2d 787 (N.C. 1977).

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1995) ("Because Phillips had no control over what happened to the gasoline after it was delivered, it cannot incur liability as the supplier of the gasoline."); *L'Henri, Inc. v. Vulcan Materials Co.*, Civ. No. 2006-177, 2010 WL 924259, at *6 (D.V.I. Mar. 11, 2010) ("there is no support" for saying that a manufacturer "participated to a substantial extent in carrying on" a nuisance where it, "after the time of manufacture and sale, no longer had the power to abate the nuisance"); *City of Bloomington, Ind.*, 891 F.2d at 614 (dismissing nuisance claim because manufacturer did not "retain[] the right to control the [chemicals it sold] beyond the point of sale").[149] The general rule is that "the absence of a manufacturer's control over a product at the time [an alleged] nuisance is created generally is fatal to any . . . claim" based on post-sale uses of the manufacturer's product. *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002).

Plaintiffs cannot salvage their claim by arguing that Syngenta participated to a "substantial extent" in the activities giving rise to the nuisance. *See* Restatement (Second) of Torts § 834. Plaintiffs have not alleged that Syngenta either controlled or was substantially involved in the growing and distribution activity of either the farmers or grain elevators who accomplished the supposed cross-pollination and commingling of which Plaintiffs complain. To the contrary, the complaint affirmatively alleges that *others* carried out those activities. Plaintiffs allege, for example, that it is grain elevators like the Non-Producers themselves that commingled

[149] *See also, e.g.*, *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995) (dismissing nuisance claim alleging that chemical supplier was liable for spills that occurred after delivery because it "had no control over the off-loading of product by its carriers or [the plaintiff]"); *Jordan*, 805 F. Supp. at 1583 (rejecting tort claims, including nuisance, alleging that a chemical supplier was responsible for post-sale use of the chemicals that led to contamination); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (under North Dakota law, manufacturer not liable for nuisance arising from post-sale use of product because "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance"); *Appletree Square 1 Ltd. P'ship v. W.R. Grace & Co.*, 815 F. Supp. 1266, 1274 n.13 (D. Minn. 1993) (after defendant had sold fireproofing, "it no longer controlled the fireproofing and consequently a nuisance action cannot be maintained against it"); *Johnson Cty., Tenn. By & Through Bd. of Educ. v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A]s an elementary principle of tort law, a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality."), *order set aside in part on other grounds sub nom. Johnson Cty., Tenn. v. U.S. Gypsum Co.*, 664 F. Supp. 1127 (E.D. Tenn. 1985).

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Viptera corn with other corn. *See, e.g.*, Non-Class Compl. ¶ 111. The most that Plaintiffs allege is that Syngenta supposedly "knew" that there was a "very high likelihood" that cross-pollination and commingling would occur through the actions of others, *id.* ¶ 112, that Syngenta sold Viptera *without* a program in place giving it the ability to control the way others handled the product post-sale, *id.* ¶¶ 135-36, 143, 145, and that Syngenta brought a *failed* lawsuit against Bunge, *id.* ¶¶ 149-52—which actually confirmed that Syngenta could *not* control what grain elevators decided to do with respect to corn grown from Viptera.

The decision in *StarLink* also provides no support for nuisance claims here. The claim in that case survived because of unique circumstances that gave the manufacturer (Aventis) some control over the use of its product (StarLink corn) after the point of sale. *StarLink* recognized the "concerns [that] courts have expressed about holding manufacturers liable for post-sale nuisances." 212 F. Supp. 2d at 847. The "critical" difference "negat[ing]" those concerns was that StarLink had been given only restricted approval by the USDA. The "*unique obligations* imposed by the limited registration" of StarLink issued by the USDA imposed "an affirmative duty to enforce StarLink farmers' compliance with the Grower Agreements" and thus "arguably put Aventis in a position *to control the nuisance*." *Id.* (emphases added). Because there are no similar regulatory obligations here, *StarLink* is wholly inapposite.

In addressing identical private nuisance claims, the MDL Court correctly held that the "general rule" is that "a seller of a product is not liable for a private nuisance caused by the use of that product after it has left the seller's control," and dismissed the claims. MDL Order 59, 61. There is no basis for a different outcome here.

B. Plaintiffs Fail Adequately To Allege Interference With The Use And Enjoyment Of Their *Land.*

The nuisance claims are also fatally flawed because Plaintiffs have not adequately alleged

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that their injuries arise from an interference with the use and enjoyment of their *land*. Plaintiffs make general assertions about cross-pollination and commingling, but they do not allege those effects took place on every plaintiff's property, *see supra* Part II.A.3, nor do they present a theory of nuisance that depends on such an effect on every plaintiff's property. Instead, they rely on the theory that Syngenta created a nuisance "[b]y contaminating the U.S. corn supply." *E.g.*, Non-Class Compl. ¶ 382 (private nuisance for Alabama plaintiffs); *see also id.* ¶¶ 322, 522, 980, 1145, 1201, 1422, 1459, 1743, 1768, 1801, 2027. Plaintiffs' theory, in other words, is that they can claim a nuisance even if Viptera seed, Viptera pollen, and harvested Viptera corn never came anywhere near their properties. In their view, it is enough that Viptera affected the "corn supply," and that allegedly affected the price of all U.S. corn on the Chicago Board of Trade.

That is incorrect as a matter of law. Private nuisance unequivocally requires interference with the use and enjoyment of *Plaintiffs' land*. *See, e.g.*, *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 185, 192 (Minn. 2005) (beekeepers could not bring a nuisance claim for spraying of pesticide where beekeepers "do not own the land on which they place their hives" and thus "lack[] the requisite property interest" for a private-nuisance claim).[150] That requires allegations of some perceptible, tangible effects on the land. To permit a private nuisance claim to proceed based merely on assertions about the corn supply and a market drop in the price of corn would radically expand the tort, decoupling it from effects on *the land*. Courts routinely reject attempts to expand the tort in that fashion, recognizing that separating nuisance from its connection to the land in order to facilitate claims about manufactured products would result in

[150] *See also Hutchens v. MP Realty Grp.-Sheffield Square Apts.*, 654 N.E.2d 35, 38 (Ind. Ct. App. 1995) (private-nuisance liability requires a "proprietary interest in the land on which [the plaintiff's] injuries occur"); *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791 (Tex. App. 2009) (rejecting private-nuisance claim where plaintiff did not have a property interest in any of the houses affected by the alleged nuisance); *Culwell v. Abbott Const. Co., Inc.*, 506 P.2d 1191, 1196 (Kan. 1973) (rejecting private-nuisance allegations because "nowhere does it appear that [the plaintiff] was injured in relation to a right which he enjoyed by reason of his ownership of an interest in land").

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nuisance "becom[ing] a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 920-21 (8th Cir. 1993).[151] There is no basis for this Court to adopt such a radical expansion of the law.

The MDL Court correctly rejected a nuisance claim on identical allegations. As that court explained, there is no "authority indicating that a landowner may maintain a nuisance claim without any tangible effect on its property," and if such a claim were allowed "then any conduct causing fluctuation in a market for crops would give rise to a nuisance claim." MDL Order 65.

C. Plaintiffs Fail Adequately To Allege Unreasonable Interference.

Lastly, any alleged cross-pollination or commingling of Viptera corn and non-Viptera corn cannot be treated as an *unreasonable* interference with Plaintiffs' use of their land, given that Viptera had unrestricted federal approval to become part of the general corn supply and does nothing inherently harmful to yellow corn. Corn containing Viptera is still fungible yellow corn as defined by the USDA and is marketable at the same price as all other U.S. corn. As explained above, to the extent the Plaintiffs claim that they wanted to produce or transport "Viptera-free corn," they are opting to devote their land and facilities to producing a *specialty* product. But that does not enable them to treat the cultivation of corn meeting ordinary U.S. standards as a nuisance in violation of tort law. To the contrary, it is black letter law that the touchstone for determining what is an "unreasonable" interference depends on "normal uses" of land, and an alleged interference "is not a nuisance if it interferes only with especially sensitive . . . uses" of land. Dobbs § 399; Restatement (Second) of Torts § 821F cmt d & illus. 2. Growing, storing, or transporting exclusively corn that satisfies Chinese standards for international imports rather than

[151] *See also, e.g., Cavanagh v. Electrolux Home Prods.*, 904 F. Supp. 2d 426, 435 (E.D. Pa. 2012) ("Extending the private nuisance doctrine to encompass a products liability claim by a non-neighboring landowner is unsupported by Pennsylvania law or policy.").

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U.S. standards applicable in the U.S. constitutes a specially sensitive use of land and cannot support a claim of nuisance against neighboring farmers or anyone else.

The producers here are no different from the organic farmers in *Hoffman I*, in that they claim that they wanted to grow a crop with specialty characteristics, rather than fungible corn that met USDA standards. *Cf. Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 121. The *Hoffman* plaintiffs based their claims upon the loss of the entire European market for *all* Canadian canola, based on the allegation that the commoditized canola market had become tainted. *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 21-22. The *Hoffman* court recognized that a nuisance claim could not survive where it was not alleged that the GM trait at issue "is harmful per se or that it renders the . . . crops unfit for consumption or otherwise harmful." *Id*. ¶ 121. The same reasoning applies here.

X. Plaintiffs' Consumer Protection Claims Must Be Dismissed.

A. Minnesota Statutes §§ 325D.13, 325D.44, & 325F.69

Plaintiffs bring claims for a Minnesota class and individual claims for *all* Plaintiffs under Minnesota's Unfair Trade Practices Act ("MUTPA") and Prevention of Consumer Fraud Act ("MCFA"). Class Compl. ¶¶ 300-27; Non-Class Compl. ¶¶ 326-47. They also assert Minnesota class claims under the Minnesota Deceptive Trade Practices Act ("MDTPA"). Class Compl. ¶¶ 300-27. These claims all fail as a matter of law for the following reasons.

1. Plaintiffs' Allegations Cannot Support Applying MUTPA And MCFA To The Individual Claims Of Non-Minnesota Residents.

As a threshold matter, Plaintiffs have not adequately alleged any basis for applying MUTPA and MCFA extraterritorially to the individual claims of non-Minnesota residents.

For a state consumer protection statute to be applied to transactions and injuries *outside* the State, three hurdles must be crossed: (1) the statute must apply extraterritorially under state law; (2) the State must have sufficiently significant contacts with the plaintiffs and their

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transactions for applying its laws to comport with due process; and (3) ordinary choice-of-law rules must warrant applying the State's law. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005); *see also Cruz v. Lawson Software, Inc.*, Civ. No. 08-5900, 2010 WL 890038, at *7 (D. Minn. Jan. 5, 2010) ("*St. Jude* . . . provides that a Minnesota statute must both be subject to extraterritorial application ***and*** able to be applied under the constitutional analysis and choice of law test before it can be applied to a nationwide class.") (emphasis in original). As the MDL Court recognized, Plaintiffs cannot cross any of those hurdles. *See* MDL Order 103.

First, MUTPA and MCFA cannot apply extraterritorially as a matter of state law. The Minnesota Supreme Court has never applied them extraterritorially, *see St. Jude*, 425 F.3d at 1121, and Minnesota adheres to "the general rule which limits the operation of statutory law to the state of its enactment." *In re St. Paul & K.C. Grain Co.*, 94 N.W. 218, 225 (Minn. 1903); *see Olson v. Push, Inc.*, Civ. No. 14-1163, 2014 WL 4097040 ADM/JJK, at *2 (D. Minn. Aug. 19, 2014) ("Minnesota law does impose a presumption against the extra-territorial application of state law."). Applying that principle, the MDL Court (the only court that has addressed the issue) correctly ruled that MUTPA and MCFA do not apply extraterritorially. MDL Order 99.

Decisions applying these statutes to non-residents, *see Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531 (D. Minn. 2007), provide no precedent for extraterritorial application here. In *Mooney*, for example, the court conducted no analysis of extraterritorial application, and under the facts of that case extraterritorial application was not required. The sole defendant was a Minnesota corporation that had allegedly distributed fraudulent materials from Minnesota, and every putative class member had entered into a contract with the Minnesota defendant. This case is wholly different. Only one of six defendants is located in Minnesota, *see* Non-Class Compl. ¶ 9, and as explained below, Plaintiffs do not allege that the Minnesota entity (Syngenta Seeds) was the source of the allegedly deceptive practices. In fact, Plaintiffs do not allege any

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interactions with Syngenta Seeds at all. Their claims are based on statements that Syngenta Defendants made to *other* people *outside* Minnesota that supposedly encouraged sales of Viptera *outside* Minnesota that allegedly harmed Plaintiffs *outside* Minnesota. There is no precedent for applying Minnesota statutes in such a case. *Cf. Friedman v. Dollar Thrifty Auto. Grp.*, Civ. Act. No. 12-cv-02432-WYD-KMT, 2013 WL 5448078, at *6 (D. Colo. Sept. 27, 2013) (dismissing consumer protection claim because statute did not apply extraterritorially).

Second, Plaintiffs' allegations fail to establish any basis for allowing Minnesota law to apply to non-resident Plaintiffs consistent with the Due Process and Full Faith and Credit Clauses.[152] "For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *see also Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985). Such contacts were found in *Mooney* where the sole defendant was incorporated and headquartered in Minnesota, the allegedly fraudulent materials were "created and distributed . . . from Minnesota," and every putative class member had purchased an annuity from the Minnesota defendant and remitted payments to Minnesota. *Mooney*, 244 F.R.D. at 535. Given the importance in the due process analysis of the parties' expectations, the fact that every class member interacted directly with the Minnesota defendant was particularly significant in *Mooney*. *See id.*; *see also Shutts*, 472 U.S. at 822 ("When considering fairness . . . an important element is the expectation of the parties.").

None of those facts is present here. As noted, only one of six defendants is in Minnesota

[152] Both a constitutional analysis and a choice-of-law analysis are required because it is well settled that "[s]tate consumer-protection laws vary considerably, and courts must respect th[o]se differences rather than apply one state's law to sales in other states with different rules." *In re St. Jude*, 425 F.3d at 1120 (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002)).

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and Plaintiffs do not allege that it was the nerve center setting Syngenta's policies. Instead, they affirmatively allege that Syngenta AG, the Swiss parent, exercises an "unusually high degree of control" over *all* the subsidiaries, who "do not function independently but under the Syngenta AG umbrella." Non-Class Compl. ¶¶ 19, 21. While Syngenta's U.S. corn seed business is based in Minnesota, the Complaint itself alleges that it was the Swiss parent that directed decisions about commercializing Viptera. *Id.* ¶ 18. Those allegations, taken as true for purposes of this motion, establish that decisions relevant to Plaintiffs' claims did not emanate from Minnesota.

The supposedly deceptive statements on which Plaintiffs rely also confirm a lack of significant contacts with Minnesota. For example, Plaintiffs point to the statement of Syngenta AG CEO Michael Mack in an earnings call, but Mack participated in that call from *Switzerland* as CEO of a *Swiss* company.[153] Similarly, Plaintiffs complain of misleading statements in Syngenta's Deregulation Petition. But that was prepared and filed by Syngenta Biotechnology, Inc., a Delaware corporation with its principal place of business in North Carolina, and it was submitted to a government agency office in Maryland and made public on a government website.[154] Addressing parallel allegations, the MDL Court correctly concluded that they failed to allege any statements that were "made in or distributed from Minnesota." MDL Order 100.

Non-Minnesota Plaintiffs, moreover, had no contacts with Minnesota. They complain about statements primarily made outside Minnesota to others outside Minnesota, that supposedly encouraged farmers primarily outside Minnesota to buy more Viptera, which allegedly harmed Plaintiffs outside Minnesota when the price of corn dropped. Nothing in that chain of events could create an "expectation" that Minnesota law might apply to *all* non-residents' consumer

[153] *See* 2012 Q1 Trading Statement (Apr. 18, 2012) ("Basel, Switzerland"), http://www.syngenta.com/global/corporate/en/news-center/events-and-presentations/Pages/1stquarter2012.aspx.
[154] *See* Syngenta Biotechnology, Inc., Petition for Determination of Nonregulated Status for Insect-Resistant MIR162 Maize (Aug. 31, 2007), http://www.aphis.usda.gov/brs/aphisdocs/07_25301p.pdf.

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complaints against all six Syngenta Defendants. *Shutts*, 472 U.S. at 822.

Given Plaintiffs' failure to describe any significant aggregation of contacts with Minnesota, their "allegations are not enough to invoke Minnesota law" under the Due Process and Full Faith and Credit Clauses. *Murphy v. DirecTV, Inc.*, No. 2:01-cv-06465, 2011 WL 3325891, at *3-4 (C.D. Cal. Feb. 11, 2011).

Third, it follows *a fortiori* that Minnesota law also cannot be applied under Minnesota's own choice-of-law principles. *See Jepson v. Gen. Cas. Comp. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994) (preliminary step in a choice-of-law analysis is to "consider whether the law of both states can be constitutionally applied"). As explained above, *see supra* pp. 15-16, Minnesota's choice-of-law rules would not point to Minnesota law for non-residents' claims because the activities giving rise to their claims did not take place primarily in Minnesota, the alleged injuries did not occur in Minnesota, and each Plaintiff's home State will have a strong interest in applying its own laws to its residents' claims.[155] *See Jepson*, 513 N.W.2d at 470-71.

2. MUTPA And MCFA Do Not Apply Because The Direct Purchasers Of Syngenta's Goods Are Merchants.

Plaintiffs cannot assert claims under Minnesota's consumer protection laws because the direct purchasers of Syngenta's goods are *merchants*, not consumers. "[T]he Minnesota consumer protection statutes do not apply to a merchant." *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 920 (8th Cir. 2005).[156] Merchants are defined as "entities that deal in goods of the kind or otherwise by occupation hold themselves out as having knowledge or skill

[155] *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) ("[T]he state with the strongest interest in [consumer protection lawsuits] is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it.") (emphasis in original); *cf. Tyler v. Alltel Corp.*, 265 F.R.D. 415, 427 (E.D. Ark. 2010) ("States tend to be jealous of their right to protect their own citizens in consumer transactions.").

[156] *See also Securian Fin. Grp., Inc. v. Wells Fargo Bank N.A.*, Civ. No. 11-2957 (DWF/HB), 2014 WL 6911100, at *6 (D. Minn. Dec. 8, 2014) ("Courts examining MCFA and MUTPA claims have indeed distinguished between 'merchants' and consumers.").

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peculiar to the practices or goods involved," *Solvay Pharm., Inc. v. Global Pharm.*, 298 F. Supp. 2d 880, 887 (D. Minn. 2004), or entities who purchase a good "for the purpose of reselling it," *Ly v. Nystrom*, 615 N.W.2d 302, 310 (Minn. 2000). The relevant question is whether the direct purchaser of the defendant's products is a merchant in the context of the goods that were sold. *See Pugh v. Westreich*, No. A04-657, 2005 WL 14922, at *3 (Minn. Ct. App. Jan. 4, 2005).

Here, the direct purchasers of Syngenta's goods (corn seed) plainly qualify as merchants. Dealers and distributors, by definition, purchase seed to resell it and thus are merchants. *See Solvay*, 298 F. Supp. 2d at 887 ("wholesalers" and "distributors" are merchants "as they are entities that deal in goods of the kind"). Similarly, the growers to whom Syngenta sells directly are merchants because they "deal in goods of the kind" by purchasing the corn seed, growing the corn, and selling the corn to grain elevators and other buyers. Because the direct consumers of Syngenta's seeds qualify as merchants, it is black-letter Minnesota law that Plaintiffs' claims under the MUTPA and MCFA must be dismissed.[157] *See, e.g.*, *Pugh*, 2005 WL 14922, at *3.

3. MUTPA And MCFA Claims Fail For Lack Of Public Benefit.

Plaintiffs' MUTPA and MCFA claims also fail because they will not "benefit[] the public." *Ly*, 615 N.W.2d at 314 ("[T]he Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public."). A public benefit will be found only "when the plaintiff seeks relief primarily aimed at altering the defendant's conduct," *Buetow v. A.L.S. Enters., Inc.*, 888 F. Supp. 2d 956, 961 (D. Minn. 2012), which typically requires seeking injunctive relief and always requires the relief to be forward-looking. *See id.*

[157] The MDL Court declined to decide this question as a matter of law, *see* MDL Order 97, even though Minnesota courts have made similar merchant determinations on the pleadings, *see, e.g.*, *Pugh*, 2005 WL 14922, at *3. Such a decision is especially appropriate here because there can be little doubt that corn producers "deal in goods of the kind" when it comes to corn seed. *See Tisdell v. ValAdCo*, Nos. C0-01-2054 *et al.*, 2002 WL 31368336, at *10 (Minn. Ct. App. Oct. 16, 2002) ("operators of large commercial farms" are not consumers); *Huntting Elevator Co. v. Biwer*, No. C9-98-548, 1998 WL 747170, at *2 (Minn. Ct. App. Oct. 27, 1998) (corn "producer acted as a merchant in selling his grain products to the grain elevator").

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Plaintiffs fail that test because they seek solely "compensatory damages and attorneys' fees."[158] Class Compl. ¶ 326; Non-Class Compl. ¶ 347. That relief would benefit Plaintiffs, but not the public. *See Zutz v. Case Corp.*, No. Civ. 02-1776 (PAM/RLE), 2003 WL 22848943, at *4 (D. Minn. Nov. 21, 2003) ("Plaintiffs seek only compensatory damages. Where recovery is sought for the exclusive benefit of the plaintiff, there is no public benefit."). Nor can Plaintiffs claim this relief would put a stop to ongoing misrepresentations, because they have not alleged any ongoing misrepresentations. *Cf. Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 820 (Minn. Ct. App. 2001). The only misrepresentations Plaintiffs allege concern the timing of China's approval, *see, e.g.*, Class Compl. ¶ 305, and China has since approved MIR162. As the MDL Court correctly recognized, claims based on these alleged misrepresentations "would not serve a public benefit and are therefore subject to dismissal." MDL Order 95.

4. MDTPA Does Not Apply To Claims For Compensation For Past Harms.

Plaintiffs' MDPTA claim must be dismissed because MDPTA "provides only injunctive relief" "limited to those persons 'likely to be damaged by a deceptive trade practice.'" *Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn. Ct. App. 1999) (quoting Minn. Stat. § 325D.45, subd. 1). MDPTA claims fail where, as here, there is no claim that future deceptive acts will cause *future harm*. *See, e.g., Four D, Inc. v. Duthland Plastics Corp.*, No. 01-cv-2073, 2002 WL 570655, at *4 (D. Minn. Apr. 15, 2002); *Damon v. Groteboer*, 937 F. Supp. 2d 1048, 1070 (D. Minn. 2013) ("The [M]DTPA provides relief from future damage, not past damage."). Plaintiffs fail to state a claim because their MDPTA allegations all refer to past conduct and harm. *See, e.g.*, Class Compl. ¶ 304 (alleging misrepresentations "*were* likely to cause and/or *did* cause confusion and mistake") (emphases added); *id.* ¶¶ 305-07

[158] Although Plaintiffs suggest "injunctive . . . relief *may* be available," Class Compl. ¶ 327, they do not specify what conduct they want enjoined nor do they mention injunctive relief in their requests for relief, *see id.* at 85-86.

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(alleging Syngenta made false misrepresentations concerning China's approval of Viptera, which was granted in 2014); *id.* ¶ 321 (alleging Syngenta's actions "*caused* a likelihood of confusion") (emphasis added). Moreover, Plaintiffs merely assert that "injunctive . . . relief *may* be available" without indicating what the Court should enjoin, *see, e.g.*, *id.* ¶ 327 (emphasis added), and do not mention an injunction in their requests for relief, *see id.* at 85. Because Plaintiffs fail to articulate any actual forward-looking relief they seek, their MDTPA claim must be dismissed.

B. Illinois Consumer Fraud And Deceptive Business Practices Act

As "non-consumer[s]" of Syngenta's products, Plaintiffs lack standing under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") because they have not alleged a "consumer nexus." *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012). A "consumer nexus" requires showing, among other things, "how defendant's particular [action] involved consumer protection concerns; and . . . how the requested relief would serve the interests of consumers." *Id.* (citation omitted). Plaintiffs cannot meet either requirement.

The term "consumer" in the ICFA means "any person who purchases . . . merchandise not for resale," Ill. Comp. Stat. 505/1(e), meaning "the ultimate buyers of the finished product," *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004). A corn farmer who purchases Viptera seed is not a consumer "because his only use of the purchased product is as an input into the making of a product that he sells." *Id.* Grain elevators, exporters, and others along the distribution chain are also not consumers because they purchase corn "for resale in the ordinary course of [their] trade or business." Ill. Comp. Stat. 505/1(e). Thus, Plaintiffs' theory that Syngenta's conduct lowered the overall price of corn falls outside the scope of the ICFA because it means that "the ultimate buyers" (*i.e.*, consumers of corn) paid *less* for corn than they would have absent Syngenta's actions. *See Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 868 (7th Cir. 1999) (rejecting ICFA claim because "allow[ing] the seller to obtain damages

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. . . . when no consumer has been hurt is unlikely to advance the consumer interest").

Nor would Plaintiffs' requested relief serve consumers' interests. Plaintiffs seek damages on behalf of individual commercial corn growers and attorneys' fees. ¶¶ Non-Class Compl. ¶¶ 923-34. Because "none of these requests would benefit [consumers] in the least," Plaintiffs "do not have statutory standing to bring this claim." *Prescott v. Argen Corp.*, No. 13-cv-6147, 2014 WL 4638607, at *7 (N.D. Ill. Sept. 17, 2014).

The MDL Court erroneously held that corn farmers qualify as consumers of Syngenta's seeds. *See* MDL Order 107-08 (citing *Sluis v. Nudelman*, 34 N.E.2d 391 (Ill. 1941)). *Sluis* held that, under the tax statute at issue, seeds sold to farmers qualified as property transferred "for use or consumption and not for resale" because the farmer sold vegetables, not seeds. 34 N.E.2d at 392. But a more recent version of that tax statute clarified that when "property as an ingredient or constituent goes into and forms a part" of a product that is later sold, it qualifies as property transferred for resale. *People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 898 (Ill. 1953). Under this version of the law, which more closely parallels the ICFA test for consumers,[159] the Illinois courts held that seeds sold to farmers who then sell their crop ***do*** qualify as property transferred for resale and are *not* transferred "for use or consumption." *See id.* at 898.

C. Nebraska Consumer Protection Act

Plaintiffs have failed to plead a violation of the NCPA, which "expressly exempts certain activities of heavily regulated businesses." *Hage v. Gen. Serv. Bureau*, 306 F. Supp. 2d 883, 889-90 (D. Neb. 2003). The NCPA exemption requires that the "*actor* comes within the jurisdiction of some regulatory body" and that the act "was at least indirectly approved." *Wrede v. Exch. Bank of Gibbon*, 531 N.W.2d 523, 529-30 (Neb. 1995) (emphasis added). This

[159] Under the ICFA, "the business purchaser is not a consumer, because the only use of his purchased product is as an input into the making of a product that he sells." *Williams Elecs. Games*, 366 F.3d at 579.

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exception "is broader than federal preemption, and applies to all conduct regulated by federal agencies." *In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1104 (C.D. Cal. 2012).

Syngenta's GM seed traits come under the jurisdiction of several federal agencies, including the USDA. Non-Class Compl. ¶ 47. And as the Complaints make clear, "[t]he USDA approved Viptera for sale in 2010" and Duracade in 2013. Non-Class Compl. 2, 4; Class Compl. 1-3; *see In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1015 n.2 (USDA's deregulation of a GMO "allow[s] it to be sold commercially").[160] In addition, the USDA considered and rejected alternatives to full deregulation, including partial deregulation that would impose geographic restrictions on where the products could be planted and isolation distance requirements for Duracade.[161] Syngenta's conduct therefore falls within the NCPA's exemption.[162] *See ConAgra*, 908 F. Supp. 2d at 1104 (food mislabeling claim fell within NCPA exemption because FDA has regulatory authority over food labels).

D. North Carolina Unfair And Deceptive Trade Practices Act

Plaintiffs also fail to establish standing under NCUTPA. That statute "was enacted to protect consumers" and only "extend[s] to businesses in appropriate contexts." *Williams v. Charlotte Copy Data, Inc.*, 591 S.E.2d 598, at *2 (N.C. Ct. App. 2004). Namely, "one business is permitted to assert an [NCUTPA] claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other" or

[160] *See also* USDA, *Nat'l Envt'l Policy Act Decision and Finding of No Significant Impact, MIR162 Maize*, 5 (April 12, 2010) (recognizing that deregulation would allow commercialization), http://www.aphis.usda.gov/brs/aphisdocs2/07_25301p_com.pdf.

[161] *See* USDA, *Nat'l Envt'l Policy Act Decision and Finding of No Significant Impact, MIR162 Maize*, 5 (April 9, 2010), http://www.aphis.usda.gov/brs/aphisdocs2/07_25301p_com.pdf; USDA, *Final Environmental Assessment, Syngenta Company Petition for Determination of Nonregulated Status of SYN-05307-1 Rootworm Resistant Corn*, 40-41 (Jan. 2013), http://www.aphis.usda.gov/brs/aphisdocs/10_33601p_fea.pdf.

[162] The MDL Court did not consider the fact that the USDA not only approved Viptera and Duracade for sale, but also chose not to impose requirements on the manner of sale and growing, such as geographic restrictions or isolation distances. *See* MDL Order 110. This decision by the USDA suffices as the "indirect[] approv[al]" necessary for Syngenta's conduct to fit into the NCPA's exemption. *Wrede*, 531 N.W.2d at 530.

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the conduct giving rise to the cause of action has a negative effect on the consuming public. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999); *see Williams*, 2004 WL 193887, at *3; *Pleasant Valley Promenade v. Lechmere, Inc.*, 464 S.E.2d 47, 54 (N.C. Ct. App. 1995). The MDL Court mistakenly held that North Carolina law does not impose such restrictions. *See* MDL Order 111. But less than a month later, a federal court in North Carolina, drawing on multiple North Carolina decisions, reaffirmed exactly the restrictions Syngenta has explained: "When there is no business, competitive, or consumer relationship between two business entities a business tort only 'affects commerce' where the defendant's actions have a negative effect on the consuming public." *Exclaim Mktg., LLC v. DirecTV, LLC*, ___ F. Supp. 2d ___, 2015 WL 5773586, at *6 (E.D.N.C. Sept. 30, 2015).

Syngenta (a company that sells seed) does not compete with the Producers or Non-Producers, and Plaintiffs do not allege that they are engaged in commercial dealings with Syngenta. Moreover, Plaintiffs have not alleged that Syngenta's actions *harmed* the consuming public; instead, under their theory, Syngenta's actions produced lower corn prices for consumers. *See Exclaim Mktg.*, 2015 WL 5773586, at *7 (no harm to consuming public where defendant's actions "had a net positive effect on plaintiff's clients"). "The [NCUTPA], therefore, cannot be used here because there is no competitive or business relationship that can be policed for the benefit of the consuming public." *Food Lion*, 194 F.3d at 520.

Even if Plaintiffs had standing under the NCPA, their claims must be dismissed to the extent they are based on alleged misrepresentations because they do not allege reliance. *See Tucker v. Boulevard At Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002). The MDL Court dismissed claims under the NCUTPA on exactly this basis. *See* MDL Order 115.

E. North Dakota Unlawful Sales Or Advertising Practices Act

Plaintiffs have not stated a claim under North Dakota's Unlawful Sales Or Advertising

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Practices Act because that law is limited to "deceptive or fraudulent acts [made] 'in connection with the sale' of merchandise." *Benz Farm, LLP v. Cavendish Farms, Inc.*, 803 N.W.2d 818, 825 (N.D. 2011). None of the misrepresentations alleged here was made in connection with the sale of merchandise. The Deregulation Petition was submitted to a government agency three years before any Viptera sales. *See* Non-Class Compl. ¶¶ 55-56. Plaintiffs also erroneously rely on (1) statements made to investors (not consumers) in an earnings call, *id.* ¶ 184; (2) a biosafety certificate request form that Producers would have no reason to see (if ever) until *after* they had purchased Syngenta's product,[163] *id.* ¶ 188; and (3) a fact sheet targeted to Producers already "experiencing the advantages of Agrisure Viptera,"[164] *id.* ¶ 190. These statements cannot support a claim because they "were not made to [consumers], nor were they made 'in connection with the sale or advertisement of any merchandise.'" *Thimjon Farms P'ship v. First Int'l Bank & Trust*, 837 N.W.2d 327, 338 (N.D. 2013).[165]

F. South Dakota Consumer Protection Act

Plaintiffs' SDCPA claims must be dismissed because Plaintiffs have failed to plead reliance. *See Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 198 (S.D. 2007). Plaintiffs do not allege that they heard or received the alleged misrepresentations or that the alleged misrepresentations caused them to act. Without such allegations, the SDCPA claims fail as a matter of law. *See Nygaard*, 731 N.W.2d at 198; *Rainbow Play Sys., Inc. v. Backyard Adventure, Inc.*, 2009 WL 3150984, at *7 (D.S.D. Sept. 28, 2009).

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[163] The Bio-Safety Request Form's stated purpose is "to assist Recipient in obtaining required authorization for shipments containing [Syngenta's] Corn Product(s) into China," http://www3.syngenta.com/country/us/en/agriculture/Stewardship/Documents/Biosafety-Certificate-Request-Form.pdf.

[164] Plant with Confidence, http://www.syngenta-us.com/viptera_exports/images/Agrisure-Viptera-Fact-Sheet.pdf.

[165] With the exception of the fact sheet, the MDL Court correctly held that none of these statements was made in connection with the sale of merchandise for purposes of the North Dakota statute. *See* MDL Order 115-16. With respect to the fact sheet, the MDL Court erred. On its face, that document is nothing more than an update to growers who had *already purchased* Viptera to instill confidence "in your option for marketing and selling your grain." Plant with Confidence, http://www.syngenta-us.com/viptera_exports/images/Agrisure-Viptera-Fact-Sheet.pdf.

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G. Texas Deceptive Trade Practices Act

The Producer Plaintiffs lack standing for a TDTPA claim because they do not qualify as consumers. *See, e.g.*, *AdvoCare Int'l, LP v. Ford*, No. 05-10-00590-CV, 2013 WL 505210, at *2 (Tex. App. Feb. 5, 2013). A "consumer" must have "sought or acquired goods or services by purchase or lease" ***and*** "the goods or services purchased or leased must form the basis of the complaint." *Id.* (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981)). As Plaintiffs' allegations make clear, the Complaint is based on Syngenta's decision to commercialize Viptera, Non-Class Compl. 2-3, and the Producer Plaintiffs do not allege that they purchased that product.

Even if some Producer Plaintiffs had standing to bring a TDTPA claim, the TDTPA claims brought by all Plaintiffs must be dismissed because Plaintiffs failed to allege that they "relied on the misrepresentation to [their] detriment." *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 30 (Tex. App. 2004) (citing Tex. Bus. & Com. Code § 17.50(a)(1)). The Complaint does not allege that Plaintiffs received the misrepresentations, let alone relied on them. The claim thus fails as a matter of law. *See Bailey v. Smith*, No. 13-05-085-CV, 2006 WL 1360846, at *11 (Tex. App. May 18, 2006).

CONCLUSION

For the foregoing reasons, the First Amended Non-Class and First Amended Minnesota Class Action Master Complaints for Producers and Non-Producers should be dismissed with prejudice.

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Respectfully submitted,

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APPENDIX A:
FEDERAL AND STATE LEGISLATIVE PROPOSALS TO ADDRESS LIABILITY FOR GM CROPS

Jurisdiction	Year(s)	Legislation
Federal (U.S. Congress)	2002 2003 2005 2008 2010 2011	Genetically Engineered Organism Liability Act, H.R. 4816, 107th Cong. 2d (2002), H.R. 2919, 108th Cong. 1st (2003), H.R. 5271, 109th Cong. 2d (2005), H.R. 6637 § 203(a), 110th Cong. 2d (2008), H.R. 5579 § 203(a), 111 Cong. 2d (2010), H.R. 3555 § 203(a), 112th Cong. 1st (2011) (failed bills that would have made "biotech compan[ies] [] liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering")
California	2005	Assem. B. 984, 2005 Leg., Reg. Sess. (Cal. 2005) (eliminated bill provision that would have made "the manufacturer of a genetically engineered plant . . . liable to any producer, grain and seed cleaner, handler, or processor injured by the release of that plant into California")
Hawaii	2014	S.B. 2737 § 2, 27th Leg. Sess. (Haw. 2014) (bill that would have required GM manufacturer to provide certain minimum notice to purchasers of the "possible legal and environmental risks")
Massachusetts	2003	S.B. 1912 (Mass. 2003) (voted-down bill that would have held GMO manufacturers liable in tort for damages caused by use of their products)
	2001	S.B. 1789 (Mass. 2001) (similar)
Minnesota	2000	HF 3820, 81st Leg. (Minn. 2000) (failed bill to make manufacturers liable for "[a]ny transfer of genetic material from a growing crop of an agriculturally related GMO to a growing crop of nongenetically modified plant organisms, whether by cross pollination or other means" that results in "diminishe[d] value" of the crops)
Montana	2005	S.B. 218, 2005 Leg. Reg. Sess. (Mon. 2005) (failed proposal to make "manufacturer[s] liable for injury suffered by any party because of the release of genetically engineered wheat into Montana")

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Jurisdiction	Year(s)	Legislation
Nebraska	2000	L.B. 959 § 3, 96th Leg., 2d Reg. Sess. (Neb. 2000) (failed bill that would have established liability for "[t]he transfer of a genetically engineered trait from a genetically engineered growing crop, by cross pollination or other means, to a growing crop which is not genetically engineered")
New York	2013	Assem. Bill 6509 § 1, 236th Leg. Sess. (N.Y. 2013) (failed bill that would have made "[a] manufacturer of genetically engineered plants, planting stocks, or seeds . . . liable to any person for any damages . . . due to cross-contamination caused by the manufacturer's products," including "market price reductions incurred by farmers resulting from loss of crop exports, including foreign and domestic markets")
North Dakota	2005	S.B. 2235, 2005 Leg. Reg. Sess. (N.D. 2005) (voted-down bill "to establish liability related to the planting of genetically engineered wheat")
Oregon	2013	H.B. 2736 § 3, 77th Leg. Assem. (Or. 2013) (failed bill that would have made GM manufacturers liable in "private nuisance if the release causes the presence of the plant on property owned or occupied by a person who did not intend for the plant to be present on the property")
Vermont	2006	S. 18, 2006 Leg., Reg. Sess. (Vt. 2006) (vetoed bill that would have allowed farmers to sue GMO seed manufacturers for economic damage caused by cross-contamination)
West Virginia	2013	H.B. 2207, 81st Reg. Sess. (W. Va. 2013) (failed bill that would have made a "biotech company [] liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering")