STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
CASE TYPE: Civil Other

In re Syngenta Litigation

This Document Relates to ALL ACTIONS

Court File No: 27-CV-15-3785
Judge: Thomas M. Sipkins

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

This Court should deny Syngenta's Motion to Dismiss. A complaint need only contain a "short and plain statement" showing an entitlement to relief. Minn. R. Civ. P. 8.01; *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601 (Minn. 2014) ("This language from Rule 8.01 has remained the same since we adopted the rule in 1951.").

Remarkably, despite 166 pages of text, Syngenta's brief does not even mention the applicable pleading standard. Instead, Syngenta deluges the Court with citations to federal decisions (143 in total) for which different, more stringent pleading standards apply. Perhaps more remarkably, the majority of Syngenta's cited cases were decided either on summary judgment on a full evidentiary record (128 in total) or after a full merits trial (58 in total). Those cases, which obviously had very different procedural postures than this case, do not trump Judge Lungstrum's reasoned decision in the federal MDL in Kansas, which soundly rejected the same arguments Syngenta recycles here.[1]

In addition, Syngenta all but ignores *Walsh*. Syngenta buries that case deep in its principal brief and relegates it to a single citation (on page 119) without any discussion. But *Walsh* governs the outcome here because the Minnesota Supreme Court rejected the more stringent federal pleading standard established in *Iqbal* and *Twombly*. The Court held, as it has for decades, that Minnesota law permits "'pleading of events by way of a broad general statement which may express conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action.'" *Walsh*, 851 N.W.2d at 602 (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963)).

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[1] Granting Syngenta's motion would lead to an anomalous result where the plaintiffs in the Kansas MDL are permitted to proceed with fact discovery while Plaintiffs here (who have asserted, in many respects, identical claims) are not.

The Complaints here satisfy the pleading requirements of Rule 8.03, as interpreted by *Walsh*. In fact, they would satisfy any standard.

Syngenta is also wrong on the substantive law. As Judge Lungstrum concluded, Syngenta's principal argument—that Plaintiffs' claims are barred by the economic loss doctrine—is without merit. Syngenta's attempt to expand the ELD to apply to strangers to the contractual transactions between Syngenta and Viptera purchasers is a bridge too far and is simply untrue to the policy rationale behind the doctrine. Like Judge Lungstrum, this Court should resist Syngenta's invitation to broadly expand the ELD.

Syngenta's other arguments regarding legal duty, the importance of the China market, and Plaintiffs' alleged contributory fault just cast aside and ignore the allegations in the Complaints, which are deemed to be true at this stage. They also misstate the law in several important respects. As explained fully below, the Court should deny Syngenta's motion and allow this case to proceed to discovery.[2]

FACTS

Syngenta mischaracterizes Plaintiffs' claims by asserting that they somehow "hinge on the premise that GM crops must be segregated from those that are not." (Syn. Br. at 5.) This is a fiction of Syngenta's own making.

The Complaints do not allege that GM crops must be segregated from non-GM crops. Rather, the Complaints allege that commercialization of GM traits carries well-known risks, including "major trade disruptions and massive harm to both Producers and Non-Producers"

[2] Both the Class Complaint and Non-Class Complaint include common-law claims of nuisance and trespass. Given Judge Lungstrom's thorough analysis and Order in the federal MDL, which resolved similar common-law claims, Plaintiffs will voluntarily dismiss their claims for nuisance and trespass. In addition, the Class Plaintiffs will voluntarily dismiss their product-liability claims.

(NCC at 2; CC at 1),[3] and requires responsible practices, including approval from significant export markets (NCC ¶¶ 46, 73, 228; CC ¶¶ 34, 62, 217). Syngenta committed to stewardship when, *inter alia*, it represented to the USDA that channeling to "divert [Viptera] away from" unapproved export markets would take place in an effective manner, and affirmatively signed on to industry policies calling for a test to detect its GM trait. (NCC ¶¶ 62, 122, 132; CC ¶¶ 51, 111, 121.)

Because Syngenta's fact section is so contrary to the allegations pled, the Court should disregard it entirely.

I. Syngenta created the risk of harm to Plaintiffs.

Syngenta has publicly acknowledged that the commodity agricultural market is an integrated market where a seed manufacturer's decisions impact farmers, elevators, and exporters. (NCC ¶ 38 ("Our stakeholders are the people . . . affected by [our business]," referring specifically to "[g]rowers" and the "[i]ndustry"); CC ¶ 27 (same).) When a seed manufacturer like Syngenta commercializes a new GM trait without approval from major export markets, that decision imposes substantial risk on the integrated market, which is only exacerbated without responsible safeguards in place. (NCC at 2-3 & ¶ 38; CC at 2-3 & ¶¶ 15.)

In this case, Plaintiffs expressly allege that Syngenta commercialized Viptera with knowledge that "China would not approve MIR162 until sometime after that trait had entered export channels," creating a "huge risk that the U.S. corn industry could lose one of their large and growing export markets." (NCC at 3; CC at 2.) Nevertheless, during the 2012 and 2013 growing seasons, Syngenta expanded sales of Viptera, increasing the known risk of cross-

[3] Throughout this response brief, the First Amended Non-Class Complaint is denoted "NCC," and the First Amended Minnesota Class Action Master Complaint is denoted "CC."

pollination and commingling within the U.S. corn supply. (NCC ¶¶ 156, 199; CC ¶¶ 145, 188.)

Syngenta also:

- "actively misled Producers and Non-Producers" about the importance of the Chinese market and the imminence of Chinese approval in order to encourage sales and thus the spread of MIR162 (NCC at 4; CC at 3);

- misrepresented the measures it would take to prevent Viptera from contaminating other crops (NCC at 4; CC at 3);

- encouraged growers to take actions that increased the risk of cross-pollination (NCC ¶¶ 120, 126, 128 (encouraging growers to plant Viptera side-by-side with other corn and advising that they had no obligation to warn their neighbors); CC ¶¶ 109, 115, 117 (same));

- misrepresented to the USDA and to the public that deregulation would have no impact on the export market (NCC ¶¶ 60, 64; CC ¶¶ 49, 53);

- told the USDA and the public that its filings in China were in process when they were not (NCC ¶¶ 67, 70; CC ¶¶ 56, 59);

- told the USDA and the public that any risk of cross contamination was low because Syngenta would engage in a legitimate stewardship program, channeling MIR162 "away from export markets . . . where [MIR162] has not yet received regulatory approval for import" (NCC ¶ 62; CC ¶ 51);

- increased the presence of Viptera seed on U.S. land, which furthered "the widespread, pervasive contamination that has caused disruption of trade in U.S. corn with China" (NCC ¶ 129; CC ¶ 118);

- crafted a plan to mislead Producers and Non-Producers into believing that Chinese approval of MIR162 was forthcoming and continued its deception regarding the status of Chinese approval throughout 2012, further enhancing the risk of contamination (NCC ¶¶ 161-94; CC ¶¶ 150-83); and

- represented to Viptera growers on August 17, 2011, that Syngenta anticipated Chinese approval by March 2012; publicly represented in April 2012 that Chinese approval was expected in a matter of days; and disseminated a Bio-Safety Request Form and a Plant with Confidence Fact Sheet (NCC ¶¶ 167, 184, 190-93; CC ¶¶ 156, 173, 179-80).

In other words, "Syngenta did not simply fail to take precautions against foreseen and foreseeable harm. Syngenta acted affirmatively to create such harm." (NCC ¶ 239; CC ¶ 228.)

Absent effective stewardship and channeling, Viptera's entry into export channels was inevitable, as Syngenta knew. (NCC ¶¶ 235, 333; CC ¶¶ 224, 313.) That risk, and the resulting harm to Plaintiffs, was of Syngenta's making. (NCC ¶ 236; CAC ¶ 225.) Indeed, when one exporter attempted to exercise the purported "choice" that Syngenta wrongly relies on to put blame on Non-Producers for trying to keep MIR162 out of China, Syngenta sued it, and demanded that a federal court order the exporter to purchase Viptera. (NCC ¶¶ 147-50; CC ¶¶ 136-39). Syngenta also made misrepresentations to increase sales,[4] and decided not to implement a legitimate stewardship or channeling program, all for its own financial benefit. (NCC ¶¶ 106, 115, 124-25, 131, 136-37, 145-46; CC ¶¶ 95, 104, 113-14, 120, 125-26, 134-35.)

Syngenta could—and should—have waited to market Agrisure Viptera. Syngenta also could have withdrawn the seed from the integrated market before planting. (NCC ¶ 97; CC ¶ 86.) But it did not. Syngenta instead "sold even more Viptera for planting in 2012, further increasing th[e] risks." (NCC ¶ 156; CC ¶ 145.) Even after China closed its entire market to U.S. corn, Syngenta launched another GM strain of corn unapproved by China, Agrisure Duracade, for the 2014 crop year, not only prolonging but deepening the damage. (NCC at 4; CC at 3.)

II. The harm to Plaintiffs was foreseen by Syngenta.

Syngenta disputes that China was a key export market, ignoring its prior repeated acknowledgements that it is.[5] (NCC ¶¶ 74-75; CC ¶¶ 63-64.) Syngenta also says that China

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[4] Syngenta strategized about how to mislead growers to "get them comfortable that [Chinese] approval is close" and ensure continued purchases of Viptera seed. (NCC ¶ 161; CC ¶ 150.) "To encourage further sales and planting of Viptera, Syngenta, by at least August 2011, was representing to stakeholders . . . that [it] would obtain China's approval by March 2012." (NCC ¶ 167; CC ¶ 156.)

[5] A federal court determined that Syngenta should have recognized that Chinese imports of U.S. corn for the 2011 crop year "might well be very significant." (NCC ¶ 153; CC ¶ 142.)

lacked a "functioning regulatory system," and banned U.S. corn for economic reasons. But the Complaints, which are deemed to be true at this stage, allege otherwise. (NCC ¶¶ 60, 71; CC ¶¶ 49, 60.) Syngenta's unsupported suggestion that market-price damages are too "speculative" or that they were due to a "bumper corn crop" in 2013 are also inappropriate at this pleading stage, and in any event will be factually refuted by expert testimony.[6]

In April 2010, the USDA deregulated MIR162. (NCC ¶ 56; CC ¶ 45.) When Syngenta began selling Viptera "for the 2011 crop year," it "knew well that it would not have import approval from China."[7] (NCC ¶ 76; CC ¶ 65.) "The typical time period for import approval from China at that time was approximately 2-3 years." (NCC ¶ 77; CC ¶ 66.) The approval process can take longer if the application is "insufficient, incorrect, and/or incomplete," as Syngenta's was here. (NCC ¶ 170; CC ¶ 159.) Syngenta's request for cultivation approval, which is "more severely restricted," also delayed the process.[8] (NCC ¶¶ 175-76; CC ¶¶ 164-65.)

Syngenta commercialized Viptera for the 2011 growing season "despite the lack of regulatory approval from China, and despite [its own] knowledge that China was a key (and growing) export market for U.S. corn." (NCC ¶ 80; CC ¶ 69.) Syngenta knew the risk was

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[6] Syngenta hides behind the "U.S. regulatory framework" to defend its conduct. Nothing about the U.S. regulatory system justifies Syngenta's actions.

[7] In fact, Syngenta had only just sought regulatory approval in China. (NCC ¶ 70 ("Contrary to Syngenta's representations that its regulatory filings were "in process" in China, Syngenta first sought regulatory approval for MIR162 from China's Ministry of Agriculture three years later, in or around March 2010."); CC ¶ 59 (same).)

[8] Syngenta relies on materials far outside the Complaints to claim that Chinese authorities have deadlines to act on import applications and that failure to meet those deadlines evidences a non-functioning system. (Syn. Br. at 13.) But Plaintiffs allege that Syngenta knew that its application would not be approved in 270 days, and that delays were due to Syngenta's deficiencies. (NCC ¶¶ 78, 170; CC ¶¶ 67, 159.)

significant that MIR162 would be detectable in export channels before export approval. (NCC ¶¶ 113-14; CC ¶¶ 102-03.) "Syngenta clearly knew the risks of premature commercialization, and knew that without stringent containment and channeling procedures, MIR162 would contaminate the U.S. corn supply and move to export markets." (NCC ¶ 46; CC ¶ 35.) Syngenta also knew that meant "significant risk of trade disruption."[9] (NCC ¶ 114; CC ¶ 103.) The "importance of obtaining import approval from key markets was well known and recognized within the biotechnology industry and by Syngenta before [it] commercialized MIR162." (NCC ¶ 45; CC ¶ 34.)

Syngenta also knew that China was a major, growing export market. On multiple occasions before commercializing MIR162, Syngenta recognized China as a "key" import market for U.S. corn. (NCC ¶¶ 74-75; CC ¶ 63-64.) Industry groups warned Syngenta of China's importance. (NCC ¶¶ 82-89, 151; CC ¶¶ 71-78, 140.) By at least May 2010, Syngenta was "well aware . . . of the strong likelihood that China would be a significant import market by 2011." (NCC ¶ 82; CC ¶ 71.) In 2010, Syngenta itself recognized China as a "key" market to the National Grain and Feed Association. (NCC ¶ 75; CC ¶ 64.) Syngenta continued to recognize China's importance in early 2011, before the first planting of MIR162. (NCC ¶¶ 90-94, 101-105, 151, 153; CC ¶¶ 79-83, 90-94, 140, 142.) And Syngenta was explicitly warned about the importance of Chinese approval before commercialization and throughout 2011. (NCC ¶ 85; CC ¶ 74.) Even as China's importance increased, Syngenta refused to stop marketing Viptera. (NCC ¶¶ 87-90, 96; CC ¶¶ 76-79, 86.)

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[9] Syngenta's conduct in the face of similarly foreseeable risks continued in the 2014 crop year, when it "announced it would commercialize Duracade for the 2014 crop year . . . despite the continued lack of approval from China for MIR162." (NCC ¶ 212; CC ¶ 201.)

III. Syngenta was fully capable of implementing legitimate stewardship and channeling.

Syngenta contracts with growers who purchase its seed. (NCC ¶¶ 62-63, 132; CC ¶¶ 51-52, 121.) It could have required that "growers adhere to stringent practices that would have decreased the likelihood of contamination," but chose not to in order to avoid "drastically reduced sales." (NCC ¶ 125; CC ¶ 114; *see also* NCC ¶¶ 220, 222-23 (Syngenta represented when it launched Duracade that it would require growers to feed the corn to livestock or poultry or deliver it to those not exporting to China, but declined to require planting/harvesting protocols not because it could not have done so, but because it "did not want to"); CC ¶¶ 209, 211-12.).) Syngenta's contract contained a provision for channeling (without any reference to China), but gave no instruction on how to accomplish it. (NCC ¶¶ 138-41; CC ¶¶ 127-30.) And Syngenta "could have instituted channeling measures but did not." (NCC ¶ 238; CC ¶ 227.) As such, "[i]t was inevitable that Viptera corn would move into export channels, including China, and cause trade disruption, as Syngenta well knew." (NCC ¶ 235; CC ¶ 224.)

IV. Syngenta undertook stewardship obligations.

Syngenta knew the risks posed by premature commercialization and the importance of obtaining approval from key importing countries such as China. (NCC ¶¶ 27, 29-37, 45-46; CC ¶¶ 16, 18-26, 34-35.) Syngenta's experience in 2007 with MIR604 prior to approval in Japan and other export markets led to the Biotechnology Industry Organization's ("BIO") launch policy. (NCC ¶¶ 34-35; CC ¶¶ 23-24.) Syngenta adopted its own launch policy in 2007, incorporating BIO policies, including an assessment to identify key importing nations and secure approval prior to commercialization. (NCC ¶¶ 43, 46; CC ¶¶ 32, 35.) Syngenta also said it supports and will comply with stewardship standards of CropLife International and Excellence Through Stewardship. (NCC ¶ 44; CC ¶ 33.)

Syngenta not only agreed to these industry standards, but promulgated a corporate responsibility code identifying "Growers" and the "Industry" as "stakeholders" affected by Syngenta's decisions. (NCC ¶ 38; CC ¶ 27.) That code requires Syngenta to respond to feedback from stakeholders, implement high stewardship standards, prioritize issues important to stakeholders, and institute safeguards. (NCC ¶¶ 39-42; CC ¶¶ 28-31.) Consistent with these standards, "Syngenta committed to not commercializing new [GM] traits that had not been approved by key import markets." (NCC ¶ 46; CC ¶ 35.) Similarly, in its Deregulation Petition to the USDA, Syngenta represented that it instituted a "wide-ranging grower education campaign" to channel, which it said would be successful "based on prior experiences with the specialty maize market." (NCC ¶ 62; CC ¶ 51.) Despite these representations, Syngenta commercialized Viptera before Chinese approval without any legitimate stewardship. (NCC ¶ 134; CC ¶ 123.)

V. Syngenta embarked on a campaign of false statements in commercializing Viptera.

Syngenta engaged in an operation of misinformation regarding Chinese approval to sell Viptera. To commercialize, Syngenta needed the USDA to deregulate MIR162. (NCC ¶ 47; CC ¶ 36.) Deregulation petitions are publicly disseminated, and Syngenta's petition assured that Viptera would not disrupt the export market for U.S. corn. (NCC ¶ 60; CC ¶ 49.) It represented that: (1) there should be no effects on U.S. corn export markets; (2) applications for approval in export markets with functioning regulatory systems, including China, were in process; and (3) Syngenta would institute a stewardship program and wide-ranging grower education campaign to channel away from markets that had not approved MIR162. (NCC ¶¶ 58, 60-63; CC ¶¶ 47, 49-52.) Syngenta filed the petition with full knowledge that its statements and representations would be published and contained commercial content. (NCC ¶¶ 57, 69; CC ¶¶ 46, 58.)

After launch, Syngenta actively misrepresented that Chinese approval of MIR162 was forthcoming. (NCC ¶¶ 161, 181-94; CC ¶¶ 150, 170-83.) On August 17, 2011, in response to

increasing concern over the lack of Chinese approval and the prospect of grain handlers not purchasing corn grown from Viptera seed, Syngenta sent letters to growers and non-producers stating that Syngenta anticipated Chinese approval by March 2012. (NCC ¶ 167; CC ¶ 156.) Syngenta's CEO stated in April 2012 that approval was expected "in the matter of a couple of days."[10] (NCC ¶ 184; CC ¶ 173.) Syngenta instructed its employees to "verbally" tell potential customers that Syngenta anticipated approval soon. (NCC ¶ 183; CC ¶ 172.) But Syngenta knew these statements falsely represented reality. (NCC ¶¶ 169-73, 182-86; CC ¶¶ 158-62, 171-75.) Syngenta also published and disseminated a pointless Bio-Safety Certificate Request Form, deceptively indicating that Viptera corn could be exported to China, and a Plant with Confidence Fact Sheet deceptively downplaying China's importance to the market. (NCC ¶¶ 187-92; CC ¶¶ 176-81.)

Syngenta was "focused on its bottom line." (NCC ¶ 166; CC ¶ 155.) Contrary to its policies, "Syngenta launched a 'blame the grain trade' campaign," attempting to shift the entire burden of channeling to grain handlers. (NCC ¶ 165; CC ¶ 154.) Syngenta developed a "Top 10" list as part of a sales program designed to neutralize concerns about Chinese approval. (NCC ¶ 166; CC ¶ 155.) The program "provide[d] regular (and misleading) updates 'on progress and plans for China trait approval and to drive trait acceptance.'" (*Id.*) Thus, despite knowing the falsity of its feigned expectation that approval was forthcoming in March 2012, Syngenta decided that "[i]f we say March enough, there should be no issue." (NCC ¶ 168; CC ¶ 157.)

By trying to shift responsibility to non-producers, Syngenta ignores its commitment to manage the introduction of Viptera and its "ability to control the timing, size, and geographic

[10] Syngenta asks the Court to draw an inference that this statement cautions that Syngenta could not handicap the Chinese regulatory process. (Syn. Br. at 12.) Syngenta, as the moving party, is not entitled to this inference (or any other) on a motion to dismiss.

scope of its commercialization . . . , as well as the extent to which adequate containment measures [were] required." (NCC ¶ 238; CC ¶ 227.) Syngenta even re-characterizes the Complaints to support blaming Syngenta's customers for planting Viptera "in a way that permitted cross-pollination with neighboring fields." (Syn. Br. at 11.) But it was Syngenta that recognized the risk of MIR162 moving to export channels. And it was Syngenta that encouraged farmers to grow Viptera "side by side" with other corn, and to not warn their neighbors. (NCC ¶¶ 126-28; CC ¶¶ 115-17.)

Syngenta repeatedly resisted and abandoned its promised stewardship program. In July 2010, for example, Syngenta executives identified a need for a GM detection strategy. (NCC ¶ 123; CC ¶ 112.) That strategy would have been in accord with the BIO policy and Syngenta's internal policy, both requiring availability of a "reliable detection method or test." (NCC ¶¶ 121-22; CC ¶¶ 110-11.) Syngenta, however, utterly failed to execute.[11] (NCC ¶ 124; CC ¶ 113.)

VI. Plaintiffs suffered both physical and economic harm.

The pervasive contamination brought on by Syngenta's acts "caus[ed] physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land. (NCC ¶ 236; CC ¶ 225.) Syngenta's conduct also caused significant economic harm. (NCC ¶ 240; CC ¶ 229.) The corn industry began to suffer enormous consequences from Syngenta's actions around November 2013, when China began rejecting U.S. shipments testing positive for MIR162. (NCC ¶ 213; CC

[11] Syngenta also blames grain elevators and other non-producers by claiming they opted not to test for MIR162. (Syn. Br. at 12.) This both assumes that an adequate test was available, and that grain elevators were equipped to test and segregate corn for genetic traits—they were not. (NCC ¶ 111; CC ¶ 100.) Nor is there any allegation to support Syngenta's impermissible inference that the mythical "cost" decision by grain elevators was because "the Chinese market accounted for only about one-third of 1% of U.S. corn production when Viptera was launched in the U.S." (Syn. Br. at 12.)

¶ 202.) It took Syngenta another 13 months to obtain Chinese import approval. (NCC ¶ 233; CC ¶ 222.)

By then, Syngenta had already launched Duracade, not approved in China, thereby prolonging the harm. (*Id.*; *see also* NCC at 4; CC at 3.) China's subsequent approval of MIR162 is not likely to lessen the impact of Syngenta's conduct anytime soon. (*Id*.) Under basic laws of supply and demand, less demand means lower price. (NCC ¶¶ 284-89; CC ¶¶ 273-78.) As a result of Syngenta's actions, Plaintiffs have been harmed.[12] (NCC ¶¶ 241-99; CC ¶¶ 230-85). That harm likely will be long lasting (NCC ¶¶ 273, 283; CC ¶¶ 262, 272), in part because U.S. corn exports to China have not even begun to recover (NCC ¶¶ 269-74; CC ¶¶ 258-63).

ARGUMENT

I. Legal standard.

Syngenta moves to dismiss under Minn. R. Civ. P. 12.02(e). Such dismissals are generally disfavored. *Tollefson Dev., Inc. v. McCarthy*, 668 N.W.2d 701, 703 (Minn. App. 2003).

A motion under Minn. R. Civ. P. 12.02(e) "raises the single question of whether the complaint states a claim upon which relief can be granted." *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000) (citations omitted). In assessing such a motion, the Court accepts the facts alleged in the complaint as true, and makes all reasonable inferences in favor of the nonmoving party. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

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[12] Syngenta improperly claims that China began testing U.S. corn shipments in 2013 to get out of contracts at higher prices because a "bumper crop" had caused prices to drop. (Syn. Br. at 14.) Syngenta's unsupported arguments may not be considered on a motion to dismiss. Instead, Plaintiffs' allegations that China's rejection of U.S. corn was because of the MIR162 contamination and that the NGFA, for one, tied trade disruption with China's positive detections of MIR162, must be accepted as true for purposes of this motion. (NCC ¶¶ 213-14; CC ¶¶ 202-03.)

Significantly, in *Walsh*, the Minnesota Supreme Court rejected the application of the federal plausibility standard to State pleadings. 851 N.W.2d at 603 ("We now decline to engraft the plausibility standard from *Twombly* and *Iqbal* onto our traditional interpretation of Minn. R. Civ. P. 8.01"). Minnesota's notice-pleading standard was left untouched. That standard "'does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.'" *Id*. at 605 (quoting *Hansen v. Robert Half Int'l, Inc*., 813 N.W.2d 906, 917-18 (Minn. 2012)).

"A pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Franklin*, 265 Minn. at 395, 122 N.W.2d at 29; s*ee also First Nat'l Bank of Henning v. Olson*, 246 Minn. 27, 38, 74 N.W.2d 123, 129 (1955) ("[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."). Thus, "[a] claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d at 603.

II. Minnesota law applies.

There is no choice-of-law issue with respect to the Class Complaint, in which Plaintiffs and a class entirely within Minnesota have stated claims under Minnesota's consumer statutes. As for the Non-Class Complaint, Syngenta argues that the Court may not apply Minnesota law to the claims of non-resident Plaintiffs. But because the claims here involve false, fraudulent, or deceptive statements made from a defendant's principal place of business in Minnesota, Minnesota law—including its consumer-protection statutes—provides a basis for relief to the non-class plaintiffs, regardless of their location.

In this State, a choice between laws is required where "the choice of one forum's law over the other will determine the outcome of the case." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 93-94 (Minn. 2000). If there is such an outcome-determinative conflict and the law of either forum may be constitutionally applied, then Minnesota courts decide which state's law applies by weighing five factors: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Nodak*, 604 N.W.2d at 94; *see also Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 6 (Minn. App. 2003). Here, even assuming there is such an outcome-determinative conflict, the Court should apply Minnesota law to the claims of all Plaintiffs in the 22 states at issue in Syngenta's motion.

A. The Non-Class Complaint alleges facts and asserts claims warranting application of Minnesota law.

Plaintiffs' claims under Minn. Stat. §§ 325D.13 and 325F.69 pertain to false or misleading statements made in Minnesota by a Minnesota company. Such statements are actionable under Minnesota's consumer-protection laws.

Syngenta's principal place of business is in Minnetonka, Minnesota. (NCC ¶ 9.) Syngenta has stated that it "develops, produces, and sells, through dealers and distributors or directly to growers, a wide range of agricultural products," including Agrisure Viptera and Agrisure Duracade corn seeds. (*Id*.) Syngenta conducted field testing under permits issued by or notifications to, and made application for deregulation by, the USDA. (*Id.* ¶¶ 13, 50.)

Plaintiffs' allegations concerning the role of Syngenta in marketing Viptera warrant application of Minnesota law. (NCC ¶ 18.) Plaintiffs' fact allegations regarding Syngenta's role—drawn directly from Syngenta's representations in federal litigation about the nature of its own business—give rise to the reasonable inference that any false or misleading statements made

by Syngenta in connection with marketing Viptera were made by Syngenta through its principal place of business in Minnesota. (*See, e.g.*, *id*. ¶¶ 167-69, 182-89.)

Minnesota law is properly invoked by non-resident plaintiffs against a Minnesota defendant based on false, fraudulent, or deceptive statements originating in Minnesota. *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) ("As a Minnesota corporation, Allianz [cannot] claim surprise by the application of Minnesota law to conduct emanating from Minnesota, since Minnesota has a 'substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.'") (citation omitted); *Castello v. Allianz Life Ins. Co. of N. Am.*, No. MC 03-20405, slip op. at 2, 7 (Minn. Henn. Cnty. Sept. 5, 2005) (certifying nation-wide class in state-court action alleging violations of Minnesota consumer-protection statutes).

As courts have recognized, the Minnesota Prevention of Consumer Fraud Act "is intended to apply both to the conduct of foreign corporations that injures Minnesota residents and to the conduct of Minnesota companies that injures non-residents." *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309, 2004 U.S. Dist. LEXIS 7789, at *6 (D. Minn. Apr. 28, 2004) (re-affirming nationwide class based on Minnesota consumer-protection statutes).

This reasoning compels the conclusion that Minnesota's consumer statutes provide non-resident Plaintiffs a remedy for Syngenta's false, misleading, and deceptive practices. *Cf.* Restatement (Second) of Conflict of Laws § 145 (1971) ("[T]he place of injury does not play so important a role for choice-of-law purposes in the case of false advertising . . . as in the case of other kinds of torts. Instead the principal location of the defendant's conduct is the contact that

will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from false advertising . . . .").

B. Minnesota's choice-of-law factors favor Minnesota law.

The five choice-of-law factors also cut in favor of applying Minnesota's consumer-protection laws.

Predictability of results. Predictability of results has little bearing on a tort case. *See Reed v. Univ. of N. Dakota*, 543 N.W.2d 106, 108 (Minn. App. 1996). Here, Plaintiffs' claims sound principally in tort. Still, as in *Mooney*, applying Minnesota law is predictable. Plaintiffs would expect that fraudulent statements and misrepresentations made in Minnesota would be governed by Minnesota law. 244 F.R.D. at 536. Therefore, the first factor favors Minnesota law.

Maintenance of interstate order. The second factor primarily involves whether Minnesota has a sufficient connection to—and interest in—the facts and issues being litigated. *Id*. Syngenta is a Minnesota corporation, deeply related to the other Defendants, and made fraudulent statements and directed fraudulent activities from Minnesota. "Therefore, application of Minnesota law would not manifest disrespect for the sovereignty of any other state."[13] *Id*. This factor, too, favors Minnesota.

Simplification of the judicial task. For the same reasons explained in *Mooney*, this factor is either neutral (because this Court is capable of applying either Minnesota law or the substantive law of non-residents' states) or it favors Minnesota law (because that may be simpler for the Court to apply). *See, e.g., H Enters. Int'l v. Gen. Elec. Capital Corp.*, 833 F. Supp. 1405,

[13] Syngenta cites no authority that the second factor "favors applying the law of the state where each plaintiff operated its business and allegedly suffered financial harm." (Syn. Br. at 15.) Indeed, this *lex loci* rule was abandoned long ago. *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973).The second factor requires only that "the forum state [have] a substantial connection with the facts and issues involved." *Id.* at 417. For the reasons explained throughout this brief, Minnesota does.

1417 (D. Minn. 1993). Either way, this factor does not lend support to Syngenta's argument for home-state law.

Advancement of forum's governmental interest. Although both Minnesota and Plaintiffs' individual states may have various interests in having their laws applied here, the balance tips in favor of applying Minn. Stat. §§ 325D.13 and 325F.69. As the court explained in *Mooney*:

> By allowing "any person" to sue under [Minnesota's consumer-protection statutes], the Minnesota legislature has evinced a strong policy of providing redress for fraudulent business practices that occur within Minnesota's borders, regardless of where a consumer's injury occurs . . . . Although other states have an interest in applying their own laws, their interest is not so strong so as to prevent their citizens from benefitting from Minnesota's willingness to provide statutory and common law remedies for fraudulent conduct emanating from Minnesota.

244 F.R.D. at 536-37. Put simply, applying the home states' consumer laws—if, indeed, there are any[14]—would "reduce the protection afforded under Minnesota law" when Minnesota companies engage in false and deceptive conduct. *Medtronic, Inc. v. Adv. Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. App. 2001).[15] This factor favors Minnesota law.

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[14] There are no consumer-protection claims in this action for more than half of the 22 states at issue here. (*See* NCC at 81-83 (Alabama), 102-04 (Arkansas), 167-69 (Indiana), 170-71 (Iowa), 171-73 (Kansas), 173-75 (Kentucky), 175-76 (Louisiana), 195-97 (Michigan), 197-99 (Mississippi), 199-202 (Missouri), 248-50 (Ohio), and 250-52 (Oklahoma).).

[15] Syngenta's citation to *Montpetit v. Allina Health Sys., Inc.*, No. C2-00-571, 2000 Minn. App. LEXIS 1051 (Minn. App. Oct. 10, 2000), regarding the fourth factor is misleading. *Montpetit* did not state that Minnesota's interests are only satisfied when Minnesota residents recover losses. *Montpetit*'s holding was more limited: the district court was not wrong to conclude that, under the circumstances of that particular case, Wisconsin had the predominant governmental interest in distribution of a wrongful-death recovery where the parties claiming entitlement as beneficiaries all lived in Wisconsin. *Id.* at *3.

Better rule of law. Minnesota courts have tended not to use this factor, applying it primarily when the other four factors are not dispositive. *See Nodak*, 604 N.W.2d at 96; *Reed*, 543 N.W.2d at 109. Here the first four factors favor Minnesota law. Accordingly, the fifth factor is inapplicable.

In sum, then, the five choice-of-law factors favor Minnesota law. If there is any doubt, the Court could defer the choice-of-law analysis until discovery has been conducted, which would allow time to examine the extent of Syngenta's actions that emanated from or were connected to Minnesota. *See, e.g.*, *Reid v. Doe Run Res. Corp.*, 74 F. Supp. 3d 1015, 1024 (E.D. Mo. 2015) ("Many courts have concluded that a court is typically in a better position to decide a choice of law issue after the parties have developed the factual evidence through the process of discovery"); *Bonnell v. Cabo Azul Resort*, No. 2:08-CV-00910, 2010 U.S. Dist. LEXIS 89155, at *4 (D. Nev. Aug. 27, 2010) (finding that fact discovery regarding relationships between the various defendants was necessary to determine choice-of-law issues).

C. Minnesota's consumer laws may be constitutionally applied to the claims of all Plaintiffs, regardless of location.

Contrary to Syngenta's argument, no constitutional impediment exists to applying Minnesota law to the nonresidents' claims. "[F]or 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). "When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

Minnesota has significant contacts with Plaintiffs' claims. Syngenta has its principal place of business is in Minnesota. Further, Syngenta made its fraudulent statements and directed

its fellow-Defendant subsidiaries from Minnesota. *Mooney* and *Lutheran Brotherhood* found on similar facts that both the defendant and non-Minnesota class members would have expected Minnesota law to apply, and therefore constitutional requirements were satisfied. *Mooney*, 244 F.R.D. at 535; *Lutheran Bhd.*, 2004 U.S. Dist. LEXIS 7789, at *5-6; *cf. In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482, 486 (D. Minn. 2015) (court can "presume there are substantive conflicts between the laws of Plaintiffs' home states and Minnesota law and still constitutionally apply Minnesota law" because defendant's headquarters are in Minnesota); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 873 (Minn. App. 2003) (upholding district court's application of New Jersey law to nationwide consumer-fraud class action), *aff'd*, 675 N.W.2d 57 (Minn. 2004), *vacated and remanded on other grounds*, 544 U.S. 1012 (2005); *Castello*, No. MC 03-20405, slip op. at *2, 7 (certifying nationwide class alleging violations of Minnesota consumer-protection statutes).

D. Plaintiffs have alleged facts warranting application of Minnesota law to the common-law claims, regardless of each Plaintiff's residence.

The same conduct by Syngenta noted above supports applying Minnesota law to Plaintiffs' common-law claims as well. When analyzing choice-of-law questions that involve torts, the Minnesota Supreme Court has stressed that only the last two choice-influencing factors—advancement of the forum's governmental interests and application of the better rule of law—are relevant. *H Enter. Int'l. v. Gen'l Elec. Capital Corp.*, 833 F. Supp. 1405, 1416 (D. Minn. 1993) (citing *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408, 412 (1973)); *Cargill, Inc. v. Prod. Eng'g Co.*, 627 F. Supp. 1492, 1496 (D. Minn. 1986). As a matter of policy, "Minnesota places great value in compensating tort victims." *Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. App. 2004) (quoting *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 472 (Minn. 1994)).

Here, advancing the forum's governmental interests favors applying Minnesota law to judge tortious conduct emanating from Minnesota by a Minnesota corporation. The Court should apply Minnesota law to the common-law claims. As explained above, applying Minnesota common law to these claims also passes constitutional muster.[16]

III. The economic loss doctrine does not bar Plaintiffs' claims.

In seeking to invoke the economic loss doctrine ("ELD"), Syngenta asks this Court to dramatically expand the ELD beyond existing law in 22 states, and to depart from the ELD's underlying policies. Syngenta urges the Court to undertake this broad expansion by mischaracterizing the careful reasoning and analysis of Judge Lungstrum, who expressly rejected the *identical* arguments asserted here.

First, Syngenta ignores that the traditional ELD is limited in scope, and is subject to many exceptions. Courts disfavor the doctrine where its application would not further the underlying purposes for which the doctrine was created.

Second, Syngenta conflates application of the ELD with the stranger ELD ("SELD"), a separate doctrine that courts seldom apply and, when they do, they apply it only in a narrow category of cases. Syngenta acknowledges that it *must* rely on the SELD in this case, but then artfully blurs the lines between the two doctrines. Syngenta conflates these two distinct legal doctrines because the SELD is not recognized in many of the relevant states. Further, in the minority of jurisdictions where it has been recognized, the SELD is applied in extremely limited circumstances where the policies behind the doctrine are clearly served. There is no legitimate dispute that this case does *not* fall into one of the recognized SELD categories and, as discussed

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[16] Syngenta's argument that claims asserted under states in which no plaintiff resides must be dismissed (Syn. Br. at 16) is moot because a notice to conform has been filed on behalf of at least one plaintiff from all 22 states at issue in Syngenta's motion to dismiss.

at length by Judge Lungstrum in rejecting the SELD, expansion of the doctrine here is not warranted here.

Finally, Syngenta undertakes a broad attack on Judge Lungstrum's MDL Order by misconstruing that court's analysis and conclusion. In denying Syngenta's motion to dismiss, Judge Lungstrum undertook one of the most thorough analyses of the SELD that has been undertaken by any court in any state. In so doing, Judge Lungstrum declined Syngenta's invitation to drastically expand the SELD (the same invitation Syngenta makes here) after carefully considering the historical roots of the doctrine, the pertinent case law, and the facts alleged by plaintiffs in that federal case. The resulting 120-page Order is well-reasoned and relies on a number of compelling factors to hold that the SELD is inapplicable to the facts presented in that parallel case. Nothing in Syngenta's motion provides any valid reason for this Court to rule differently.

A. Syngenta misstates the ELD's narrow scope.

Syngenta argues that the ELD is a broad rule prohibiting *any* recovery of economic loss in tort. But even a cursory read of applicable case law shows that the ELD is a very limited doctrine that, even when applied, is riddled with exceptions, each of which is established to ensure that the doctrine is applied in a manner consistent with its underlying policies.

The ELD has been defined as a rule that "denies the purchaser of a defective product a tort action against the seller or manufacturer for purely economic losses sustained as a result of the product's failure." *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 885 (1997) (Scalia, J., dissenting). The doctrine developed in the product-liability context to prevent the deterioration of the line between warranty and tort law. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986). Similarly, courts have applied the ELD "to maintain a distinction between damage remedies for breach of contract and for tort." *Giles v. GMAC*, 494

F.3d 865, 873 (9th Cir. 2007). As the United States Supreme Court stated in its seminal *East River* decision, without the ELD, "contract law would drown in a sea of tort." 476 U.S. at 866.

Over the years, though, courts have limited the ELD by creating a number of well-recognized exceptions. *See People Express Airlines v. Consol. Rail Corp.*, 100 N.J. 246, 259 (N.J. 1985) (describing numerous exceptions to the ELD); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 56 (1st Cir. 1985) (same). Courts have consistently stated that the ELD should not be applied in categories of cases where the policy provisions underpinning the doctrine are not served by its application. *See, e.g.*, *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622, 624 (Kan. 2013) (holding that the ELD did not apply because "the doctrine's purposes would not be furthered by extending it to such claims"); *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003) ("[M]any courts have successfully translated the theory by recognizing and applying the underlying premise of the economic loss doctrine"). Taken together, the exceptions and policy limitations placed on the ELD have served to dramatically limit the doctrine's scope.

B. The SELD applies in limited circumstances not present here.

Syngenta does not seek to apply the ELD to Producer Plaintiffs' claims because that doctrine is plainly inapplicable. Rather, Syngenta's argument instead relies on a very narrow offshoot of the ELD, the SELD, which has been applied in a minority of states and in only a limited category of cases. Of the 22 states at issue in this motion, some have rejected the ELD altogether (*see, e.g.*, Arkansas); others have limited application of the ELD to non-stranger cases (*see e.g.*, Colorado, Minnesota, Michigan, and South Dakota); and others have applied the SELD, but only in extremely limited circumstances where the policy rationales behind the doctrine are served (*see, e.g.*, Iowa).

None of the relevant states have applied the SELD in the broad manner Syngenta advocates here. Thus, to apply the SELD, this Court would effectively have to expand the law of all 22 states. As stated in *Leonard v. Dorsey & Whitney LLP*, when predicting the law of another state, a court's "duty is to conscientiously ascertain and apply state law, not to formulate new law based on our own notions of what is the better rule." 553 F.3d 609, 612 (8th Cir. 2009).

Syngenta argues that the SELD is a broad rule barring recovery of economic damages in torts between strangers. (Syn. Br. at 25.) But the cases Syngenta cites reveal that the SELD has been applied primarily in three limited categories of cases: (1) lack-of-access/public nuisance; (2) chain-of-contract; and (3) injured employees. (*See* MDL Order at 23 (noting that in the seven states where the SELD has arguably been applied the vast majority of cases were lack-of-access/public nuisance cases).)

Lack-of-access cases typically involve situations where a negligent actor damages a piece of public infrastructure or a public resource. *See, e.g., Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 125 (Iowa 1984) (considering claims by restaurant owners and employees against a contractor who damaged a public bridge); *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020-21 (5th Cir. 1985) (considering claims by seafood restaurants, bait shops, marinas, and similar businesses against a ship that caused a chemical spill). In these cases, the public at large was denied access to the infrastructure or resource that was damaged. As Judge Lungstrum stated in his MDL Order, "[t]his is not a lack-of-access case in which any member of the public could potentially assert a claim for economic loss, leading to remote and indeterminate liability." (MDL Order at 23-24.) Thus, the limited exception does not apply.

The second category includes chain-of-contracts cases.[17] Syngenta repeatedly cites *Robins Dry Dock & Repair v. Flint*, which is a classic chain-of-contracts case. 275 U.S. 303 (1927). In *Robins*, plaintiff contracted with a ship owner to use the ship, and the ship owner in turn contracted with defendant to fix the ship. *Id*. Thus, while plaintiff and defendant were strangers because they did not contract with each another, and in fact, had no knowledge of one another, the Court reasoned that the parties had the ability to protect themselves *in contract* due to the chain of contractual obligations among the parties. *Id.*

Syngenta also relies heavily on another chain-of-contract case, *Aguilar v. RP MRP Wash. Harbour, LLC.*, 98 A.3d 979, 980 (D.C. 2014). In *Aguilar*, the plaintiffs had an employment relationship with shopping mall businesses and the shopping mall businesses, in turn, had a lessee-lessor relationship with the defendant. Therefore, although the plaintiff and defendant were not parties to a contract, they were only one step removed from each other in the "chain" of contracts. *Aguilar* carefully noted, however, that the SELD would not apply in chain-of-contracts cases where the parties have a "special relationship." *Id.* at 984. *Aguilar* analogized its application of the SELD to its treatment of claims for negligent infliction of emotional distress ("NIED"). The court reasoned that its rulings on NIED "balanced the need to hold negligent actors accountable while still maintaining limits on liability" by creating an exception based on "the nature of the defendant's undertaking to or relationship with plaintiff." *Id*. at 984. The Court stated that this approach was warranted (and applicable to SELD claims) because it "maintain[s] strong limits on liability while still allowing meritorious claims to proceed by examining the

[17] *See Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 504-05 (Iowa 2011), for examples of chain of contracts.

special relationship between the parties." *Id*. This reasoning is particularly instructive in this case, where plaintiffs and defendants are participants in a highly interconnected market.

Ultimately, chain-of-contracts cases are best viewed as a modification of the contract ELD, the primary purpose of which is to encourage parties to protect themselves in contract and to preserve the distinction between contract and tort law. *See Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.*, 272 F. Supp. 2d 482, 499 (E.D. Pa. 2003) ("an underlying reason for the economic loss doctrine is to encourage parties to negotiate liability provisions"). Syngenta tacitly acknowledges this when it argues that "the contractual strand of the ELD bars tort claims for economic losses arising where the parties are connected (directly or indirectly) by a contract." (Syn. Br. at 57.) Regardless of whether chain-of-contracts cases are contract ELD cases or SELD cases, this is not a chain-of-contracts case. Accordingly, *Robins* and *Aguilar* are inapposite.

Syngenta also cites to injured-employee cases, which claims brought by an employer against a third-party tortfeasor who has injured one of the plaintiff's employees. (Syn. Br. at 20 n.47.) For the most part, these cases are not ELD cases, and Syngenta cites them only in passing. Further, to the extent even a few of these cases do rely on the ELD, they are highly distinguishable.

What Syngenta fails to mention is that there is case law addressing whether the SELD should be extended to apply to negligence claims brought by farmers against GM seed companies. The majority of these cases hold that the SELD does not apply. (*See* MDL Order at 19-46) (holding that the ELD does not apply to producer plaintiffs' claims)); *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 842 (N.D. Ill. 2002) (refusing to apply the ELD); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 833 (Ark. 2011) (same); *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1017 (E.D. Mo. 2009) (same). Although these cases

considered the SELD in the context of negligence claims brought by farmers against GM seed manufacturers, with the exception of Judge Lungstrum's MDL Order, none of them provide a thorough analysis of the issues in this case. But Judge Lungstrum's MDL Order is directly on point.

Syngenta asks this Court to apply a common-law bar on recovery in circumstances where it has never been applied before, all while ignoring the persuasive decision made by Judge Lungstrum in rejecting identical arguments under virtually identical facts. In so arguing, Syngenta asks this Court to expand the common law in 22 different states. Further, it asks the court to do so for a doctrine that rests on tenuous grounds, in a situation where expansion does not serve the policies underlying the doctrine it seeks to expand. This Court should refuse Syngenta's invitation.

C. Applying the SELD would not serve the doctrine's underlying purposes.

There are two policy rationales underlying the ELD: (1) encouraging the use of contract to address economic loss; and (2) placing reasonable limits on liability. *See, e.g.*, *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866-75 (1986). Neither rationale would be served by extending the SELD in this case.

1. The contract-based policy rationale does not apply.

The policy of encouraging the use of contracts to manage risk is multifaceted. Many cases state that the ELD is designed "to maintain a distinction between damage remedies for breach of contract and for tort." *See, e.g.*, *Giles v. GMAC*, 494 F.3d 865, 873 (9th Cir. 2007). Other cases state that the policy is to "encourage parties to negotiate liability provisions." *See, e.g.*, *Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.*, 272 F. Supp. 2d 482, 499 (E.D. Pa. 2003). Still others state that the doctrine is intended "to encourage the party best situated to

assess the risk [of] economic loss . . . to assume, allocate, or insure against that risk." *See e.g. Daanen & Janssen v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998).

The contract-based policies that commonly underlie the ELD do not apply here. The Producer Plaintiffs did not have the opportunity to contract around their loss, either through insurance or by entering contracts with other grain market participants. Syngenta half-heartedly argues that "[p]roducers concerned about ensuring the exportability for their corn could have contracted for guarantees from grain elevators prohibiting commingling." (Syn. Br. at 35.) Setting aside whether these types of contracts were even possible, this argument ignores the realities of the modern corn market. Individual farmers do not have the market power to demand unique contracts with grain elevators.[18] Additionally, this argument is particularly unavailing given that Syngenta sued one of the country's largest grain buyers, Bunge, to *force* it to permit the commingling of non-Viptera corn with Viptera. *See Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F. Supp. 2d 953 (N.D. Iowa 2011). It cannot reasonably be disputed that Producer Plaintiffs did not have the opportunity to avoid loss through the use of contract.

Not only is the rationale underlying the ELD not served by applying the doctrine, those policies are actually furthered by declining to expand the doctrine to cover the claims asserted here. As argued by Syngenta, "[t]he 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.'" (Syn. Br. at 21 (*quoting Wiltz v. Bayer CropScience, Ltd. P'shp*, 645 F.3d 690, 697 (5th Cir. 2011)).) Here, *Syngenta* was the party in

[18] *Accord David v. Hett*, 270 P.3d 1102, 1103 (Kan. 2011) (holding that even where a plaintiff entered into a contract with the alleged tortfeasor, the ELD did not apply because of disparate bargaining positions that made the policy underlying the ELD inapplicable).

the best position, and arguably the only position, to avoid the loss, not the individual corn farmers.

Similarly, in discussing application of the ELD, the Restatement (Third) of Torts notes that "courts doubt that threats of such open-ended liability would usefully improve the incentives of parties to take precautions." Restatement (Third) of Torts § 7 cmt. b. That is not the case here. Holding Syngenta responsible for its actions would almost certainly dissuade other GM seed companies from taking similar actions for their own financial benefit.

2. The reasonable-limitations rationale is not served by applying the SELD.

The second policy underlying the SELD is avoiding the nearly endless flow of economic damages that could result from accidents. *See id.* This policy factor is best illustrated in lack-of-access cases, where an accident could cause open-ended and indiscriminate harm to the public at large. *See, e.g., In re Chi. Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997). Setting aside the fact that this case does not involve an accident—but rather a calculated decision by Syngenta to put farmers at risk for its own financial benefit—applying the SELD to Producer Plaintiffs' claims would not serve the policy of avoiding remote and indeterminate liability.

Syngenta relies almost exclusively on the policy of placing reasonable limits on liability to argue that the SELD precludes Producer Plaintiffs' claims. Syngenta analogizes to lack-of-access cases by stating "[c]onceptually, [Producer Plaintiff] 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." (Syn. Br. at 25.) The MDL Order distinguished lack-of-access cases by stating that this is not a case "in which any member of the public could potentially assert a claim for economic loss, leading to remote and indeterminate liability." (MDL Order at 24.) The MDL Court reasoned that "the scope of liability is not

completely open-ended, as plaintiffs represent discrete classes of growers and sellers, all in an inter-connected market." *Id*. The MDL Court was correct. This case does not involve the open-ended liability at issue in lack-of-access cases. The injuries suffered by Plaintiffs are not shared by the public at large. Rather, the damage was incurred by a discrete (albeit large) group of participants in the highly interconnected grain market.

Applying the ELD to avoid open-ended liability is not about the scope or amount of damages at issue, but rather the reasonableness of holding the tortfeasor responsible for those damages. The question of how to place proper limitations on tort liability is a fundamental question of law going back to some of this country's seminal cases. *See, e.g*., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). For this reason, cases purporting to analyze the ELD, as well as those cases cited as so-called "ELD cases", often sound in duty and proximate cause. *See, e.g*., *La. ex rel. Guste*, 752 F.2d at 1023 (noting that the ELD is "a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability"); *Daanen & Janssen*, 573 N.W.2d at 846 ("At the heart of the distinction drawn by the economic loss doctrine is the concept of duty.").

Duty and proximate cause are the traditional limits on liability in tort. The role of the ELD is to supply an additional limitation where appropriate. For example, the Restatement (Third) of Torts rationalizes the ELD by stating that "[i]n some cases recognition of such claims would also result in liabilities that are indeterminate and out of proportion to the culpability of the defendant." *Id.* § 7 cmt. b. By way of example, a seminal ELD case, *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965), discusses this concept in terms of the "nature of the responsibility" and analyzes what damages a tortfeasor can "appropriately be held liable [for]." *See also Long Motor Corp. v. SM&P Util. Res., Inc.*, No. 100,336, 2009 Kan. App. Unpub.

LEXIS 638, at *6 (Kan. App. 2009) (applying the ELD to prevent expansion of claims "beyond reason").

There is no danger of indeterminate damages—or damages "beyond reason"—in this case. As stated in the MDL Order, this case does not seek "liability that would be far out of proportion to the tortfeasor's culpability." (MDL Order at 24.) The Court reasoned that allowing producer Plaintiffs' claims would "not be disproportionate to Syngenta's specific wrongful conduct that caused the very injuries foreseen." *Id*. (citing *In re StarLink*, 212 F. Supp. 2d at 842). Moreover, this is not an accident case. Instead, Syngenta intentionally released Viptera into the market, fully aware of the damage that premature commercialization would cause and fully aware that Producers and Non-Producers alike would suffer the damage. Requiring Syngenta to take responsibility for the risks it knowingly created is not unreasonable, and the potential class of injured parties is not indefinite. Accordingly, the purpose of the SELD is not furthered by applying it in this case.

3. Special-relationship considerations do not warrant applying the SELD.

Syngenta asks this Court to apply the SELD in a novel context that has not been previously recognized by any of the relevant states, thereby demanding expansion of the doctrine. But this case shares more similarities with a category of cases that are *excepted* from the ELD than with those limited categories of cases in which the SELD has been applied, particularly as it relates to "special relationship" cases.

A special relationship between the parties precludes application of the ELD. *See Union Oil Co. v. Oppen*, 501 F.2d 558, 565 (9th Cir. 1974) (noting that "recovery for pure economic losses in negligence has been permitted in instances in which there exists 'some special relation between the parties.'") (citing Prosser, Law of Torts 952 (4th ed. 1971)); *Aikens v. Debow*, 541

S.E.2d 576, 589 (W. Va. 2000) (holding that the ELD applies absent some "other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor"); *Duffin v. Idaho Crop Improvement Ass'n*, 895 P.2d 1195, 1201 (Idaho 1995) (noting that the special relationship exception is not limited to professional or quasi-professional relationships).

The California Supreme Court—which first adopted the ELD has held that a Court should consider six factors in determining whether to apply the "special relationship" exception to the ELD:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979). Each of these factors militates against applying the SELD.

The "special relationship" exception exists to permit recovery where—like here—a duty of care exists and the defendant's breach of that duty causes economic loss. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, S.E.2d 85, 87 (S.C. 1995) (stating that the ELD does not prevent tort recovery where there is a "special relationship"). The reasoning in *Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.* elucidates the purpose of the "special relationship" exception. *Eaton* held that "[a] 'special relationship' exists where the relationship between the parties is such that it would be equitable to impose a duty to exercise due care to avoid purely economic loss." 272 F. Supp. 2d 482, 496 (E.D. Pa. 2003) (internal quotation omitted).

Here, Syngenta and Producer Plaintiffs are part of an interconnected market in which the parties rely on one another to act responsibly. This is underscored because Syngenta was urged by other participants in the interconnected market to take responsible actions with respect to the release and marketing of Viptera and cautioned about damages that would occur if it chose to proceed as it did. (NCC at 3-4.) Given this interconnected market, the policy rationales underpinning the "special relationship" exception are particularly applicable in this case and argue against application of the SELD.

D. Syngenta misreads the MDL Order.

Syngenta urges this Court to depart from the MDL Order based on the false premise that the MDL Court applied an incorrect rule of law. This argument is a red herring. According to Syngenta, Judge Lungstrum erred because he applied a "case-by-case approach" rather than a "bright line rule." (Syn. Br. at 23.) That assessment is faulty. Instead, Judge Lungstrum analyzed whether the ELD applied in the relevant states under analogous circumstances.

Courts routinely analyze whether the ELD should apply—including considering policy factors. *See, e.g.*, Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 Ariz. L. Rev. 897, 901-02 (2006) (noting that courts often refuse to apply the ELD "where the reasons for limiting liability [are] absent"); *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 679 N.E.2d 1197, 1200 (Ill. 1997) (considering "[t]he policy interest supporting the ability to comprehensively define a relationship" in deciding whether to apply the ELD); *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622, 624 (Kan. 2013) (holding that the ELD did not apply because "the doctrine's purposes would not be furthered by extending it to such claims"). Judge Lungstrum analyzed whether the ELD applied and correctly found that was inapplicable in this case. Therefore, Judge Lungstrum did not apply any ELD rule or exception, let alone an incorrect one. He simply decided that the doctrine did not apply.

Syngenta also misconstrues Judge Lungstrum's decision by stating that it creates a "new 'inter-connected industry' exception." It did not. Rather, Judge Lungstrum rightly concluded that the SELD should not be expanded as far as Syngenta seeks. *See e.g.*, *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622, 626 (Kan. 2013) (framing the question of whether to apply the ELD to a particular tort claim as a question of whether to "extend the doctrine"). Judge Lungstrum merely cited the fact that the parties are part of an interconnected industry as one of the many reasons not to *extend* the SELD. Judge Lungstrum further reasoned that the SELD is inapplicable because the case already presents "a natural cutoff for liability" and does not require the ELD to artificially create one. (MDL Order at 14.)

The central part of MDL Order that Syngenta ignores is that the relevant states would not apply the SELD in this type of case given that the policies underlying the ELD would not be served. First, the Court correctly held that states that have not adopted the SELD doctrine would not adopt it in this case. (MDL Order at 23 (noting that "[a]lthough 22 states provide the governing law for plaintiff's negligence claims, only in seven has a court arguably applied the ELD in a stranger case").) Second, for those limited states that have applied the SELD in its traditional context, the Judge Lungstrum concluded that "those jurisdictions would [apply the doctrine] only in the right circumstances, in which the rationales for the doctrine would be furthered." (*Id*. (noting that the great majority of stranger ELD applications are lack-of-access or public nuisance cases).) Judge Lungstrum's well-reasoned order correctly concluded that the issues here do not support application of the SELD.

E. The relevant states would not apply the ELD here.

Minnesota

Syngenta tacitly recognizes that Minnesota's statutory ELD, Minn. Stat. § 604.101, does not bar the Producers' claims. (Syn. Br. at 38.) But relying on purported common-law ELD, Syngenta argues that the Producers' claims must be dismissed. Syngenta is wrong.

The Minnesota Legislature supplanted the judicially created ELD with Minn. Stat. § 604.101. The ELD "applies to claims only as stated in this section," Minn. Stat. § 604.101, subd. 5, which are confined to claims "by a buyer against a seller for harm caused by a defect in the goods sold or leased, or for a misrepresentation relating to the goods sold or leased."[19] Minn. Stat. § 604.101, subd. 2. From the plain language and the accompanying reporter's notes, it is clear that no common-law ELD survives in Minnesota. *See id.*, rep. note ("[T]he first sentence of Subdivision 5 means that: (1) the statute exhaustively states the economic loss doctrine, and (2) there is no residual common law economic loss doctrine.").

Syngenta ignores the plain language of the statute to argue that the common-law ELD still applies outside the sale-of-goods context. Syngenta's argument must be rejected for two reasons.

First, the Minnesota Court of Appeals rejected this very argument in a published decision. In *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535, 537-38 (Minn. App. 2014), farmers sued a manufacturer that sold and recommended fertilizer based on analyses of soil types and field histories. They alleged the fertilizer contained insufficient nitrogen, resulting in yield loss. The trial court correctly held that plaintiffs did not assert a product-defect claim barred by section 604.101, but also held that the negligence claim was barred by the common-law ELD. The

[19] The statute does not apply to statutory misrepresentation claims, and allows common law misrepresentation (of a seller) "made intentionally or recklessly." Minn. Stat. § 604.101, subd. 4.

appellate court reversed noting that section 604.101 "exhaustively states the [ELD]," and "there is no residual common law [ELD]." *Id.* (quoting Minn. Stat. § 604.101 reporter's notes; citing 27 *Minnesota Practice, Products Liability Law* § 13.15). "Because section 604.101 abrogates the common law and sets forth the full extent of the [ELD] as it applies to bar claims arising on or after August 1, 2000, the district court's holding as to the negligence claim was in error." *Id.* at 539.

In a footnote, Syngenta attempts to distinguish *Ptacek* as applicable only to the sale of goods. (Syn. Br. at 40 n.68.) Nothing in *Ptacek*, however, limits its application in this manner. Further, the decision in *Ptacek* is consistent with recent precedent from the federal district court in Minnesota. *See Smith v. Questar Capital Corp.*, No. 12-CV-2669, 2013 U.S. Dist. LEXIS 108703 (D. Minn. Aug. 2, 2013). In *Smith*, the plaintiff, a purported class representative, filed suit alleging violations of Minnesota's securities laws, common-law negligence, and common-law negligent misrepresentation. *Id.* at *4-5. Defendant filed a motion to dismiss, arguing that the negligence and negligent misrepresentation claims were barred by the ELD. The court denied the motion, reasoning that "[i]n Minnesota, the [ELD] is codified at Minn. Stat. §§ 604.10-101." Because the sale at issue concerned investment securities, "not tangible personal property," the court held they were "not 'goods' under Minn. Stat. §§ 604.10-101." Thus, the court held that the ELD did "not preclude [plaintiff's] negligence and negligent misrepresentation claims." *Id.* at *33. If Syngenta were correct, the court would have applied the common-law economic loss doctrine. It did not.

Second, Syngenta relies on extrinsic sources, but the cardinal rule of statutory interpretation is that, "[w]hen legislative intent is clear from the statute's plain and unambiguous language, we interpret the statute according to its plain meaning without resorting to other

principles of statutory interpretation." *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 755 (Minn. 2013) (declining "invitation to rely on extrinsic sources" to interpret statute because "the statute is not ambiguous"); *see also* Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Section 604.101 expressly provides that "[t]he economic loss doctrine applies to claims only as stated in this section." Minn. Stat. § 604.101. It also provides that it "applies to any claim . . . regardless of whether article 2 or article 2A of the Uniform Commercial Code under chapter 336 governed the sale or lease that caused the seller to be a seller and buyer to be a buyer[.]" *Id.*, subd. 2(2). Syngenta's interpretation would render the statute's express application to situations outside of "article 2 or article 2A of the Uniform Commercial Code" meaningless. *See* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions."). That is not to interpret the statute, but to rewrite it.

Based on the plain language of Minn. Stat. § 604.101, Judge Lungstrum "reject[ed] Syngenta's argument that a common-law ELD survives in Minnesota" and correctly held that "the Minnesota plaintiffs' claims are not barred by the ELD." (MDL Order at 26.) This Court should do the same.

Illinois

No Illinois state court has ever applied the SELD in the situation presented by this case and nothing supports the notion that Illinois courts would extend the doctrine where the policies

behind the doctrine are not served, and where Syngenta had an independent duty to act reasonably to avoid the very harm that occurred.[20]

Syngenta argues that because Illinois applied the SELD in *In re Chicago Flood Litigation*, 680 N.E.2d at 274-76, it must be applied here. Syngenta makes the misguided argument that because the SELD has been applied in one of the limited categories in which it served the policies underlying the doctrine, it must be applied to all claims. *Chicago Flood* is a lack-of-access case. Thus, it is uninstructive to the question faced by this Court, which is whether an Illinois court would apply the SELD here. The answer is no.

First, Illinois courts have expressly stated that "[i]n mapping the future course of the [ELD], this court should consider the policy behind it." *Congregation of the Passion v. Touche Ross & Co.*, 636 N.E.2d 503, 527 (Ill. 1994). The policies behind the ELD are not served by applying it here; therefore, the ELD should not be applied.

Second, Illinois courts have stated that "[t]he [ELD] does not bar recovery in tort for the breach of a duty that exists independently of a contract." *Id*. at 515; *2314 Lincoln Park West Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 352 (Ill. 1990) (recognizing that "[t]he principle common to those decisions [where the ELD is not applied] is that the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred"). Here, Syngenta had a duty to participants in an interconnected market not to take action that it knew would cause an undue risk of harm.

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[20] Syngenta cites *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088 (E.D. Mo. 2003). *Sample* is not an Illinois state case, does not cite Illinois law, and overstates the ELD without analysis. Conversely, Judge Lungstrum's Order provides a thorough analysis of the ELD under Illinois law and holds that it does not apply in this case.

The SELD has never been applied by an Illinois court in this context. Because applying it in this context would not serve the policies underlying the doctrine, and because Syngenta had a duty to prevent the precise harm that occurred, the SELD does not apply under Illinois law.

Iowa

Syngenta's analysis of Iowa law relating to the ELD exemplifies its attempt to expand the ELD far beyond the limited circumstances in which it has previously been applied, again arguing that because the SELD has been applied in *some* clearly identifiable circumstances, it *must* be applied in *all* circumstances.[21] Iowa law does not support this conclusion.

There is no dispute that Iowa has applied the SELD in limited circumstances, as Judge Lungstrum recognized in his analysis. (MDL Order at 38.) *See Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499 (Iowa 2011) (applying the SELD in a chain-of-contracts case where the application of tort law would "supplant a consensual network of contracts"); *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984) (applying the SELD in a lack-of-access case). But this is not a lack-of-access or chain-of-contracts case. And the rationales underpinning the SELD in those cases do not apply here.

Rather, the question before the Court is whether Iowa courts would *expand* the ELD to the facts presented here. Case law suggests Iowa courts would decline this invitation where—like

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[21] Syngenta cites *Anderson Plasterers v. Meinecke*, 543 N.W.2d 612, 613 (Iowa 1996) and *Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005), as examples of the application of the SELD in Iowa. These cases involved questions of whether an employer could recover economic damages based on an employee's injury caused by a third party. As noted in *Anderson Plasterers*, the rationale for precluding the employer's recovery of purely economic damages was two-fold: (1) the Restatement (Second) of Torts § 766(c) did not recognize a claim for "unintentional interference" with the performance of a contract or making the performance "more expensive or burdensome"; and (2) unlike under English common law, which recognized a claim for *per quod servitium amisit* and permitted a "master to recover for the loss of a servant's services," the modern employer-employee relationship no longer treats employees like property. These rationales are inapplicable in this case, and do not support applying the ELD here.

here—the policies underlying the ELD are inapplicable. *See Van Sickle Constr. Co. v. Wachovia Commer. Mortg., Inc.*, 783 N.W.2d 684 (Iowa 2010) (declining to expand the ELD to negligent misrepresentation claims after "a review of the purposes of the ELD and the situations in which it has been applied convinces [the court] that it provides no bar to the recovery of economic losses caused by a negligent misrepresentation"); *accord St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 351-52 (Iowa 2013) (recognizing and affirming previous decision to reject expanding the ELD to cases involving principal-agent relationships). The Iowa Supreme Court's analysis in *Van Sickle* relied on a nearly identical policy analysis approach as Judge Lungstrum in determining whether the purposes of the ELD were furthered by applying the doctrine in a new context. *Van Sickle*, 783 N.W.2d at 692. Judge Lungstrum's decision properly analyzed Iowa precedent and, like the Iowa Supreme Court, declined to expand the ELD where the purposes underlying the doctrine are inapplicable.

Louisiana

Louisiana does not apply the ELD, but rather engages in a case-by-case duty-risk analysis to determine whether the policies underlying the doctrine are implicated. *See Maw Enters., L.L.C. v. City of Marksville*, 149 So. 3d 210, 221 (La. 2014) (noting that the Louisiana Supreme Court "abandoned the per se rule excluding recovery [of economic losses] in favor of a case-by-case application of the duty-risk analysis"). Thus, any analysis of Louisiana law *must* consider the policies underpinning the ELD. As discussed in detail above, and as noted in Judge Lungstrum's Order declining to apply the SELD, the rationale supporting the doctrine is not furthered by applying it here. (MDL Order at 24.)

Applying the ELD here would be inconsistent with Louisiana law. In *England v. Fifth Louisiana Levee Dist.*, 167 So. 3d 1105, 1107 (La. App. 2015), for example, the court upheld the

plaintiffs' recovery of "economic damage only for the loss of use of their water" after they were required to stop using it for fear that the defendant had negligently contaminated it with herbicide. Saliently, *England* permitted recovery even though the plaintiffs water supply had not been contaminated—and thus there was no actual damage to property—after conducting its duty-risk analysis and finding a connection between the duty breached by the defendant and the purely economic damage suffered by plaintiffs. *Id.* at 1111. *England* directly demonstrates that a Louisiana court would not apply the ELD here.

Conversely, Syngenta cites *Wiltz v. Bayer CropScience, Ltd.*, 645 F.3d 690 (5th Cir. 2011), which is inapposite. *Wiltz* specifically noted that "although Bayer may have foreseen harm to the crawfish industry generally, *there is no indication that it should have foreseen harm to the plaintiffs specifically*." 645 F.3d at 702 n.16 (emphasis added). Plaintiffs here allege that Syngenta not only *could* foresee the harm it caused, but that the harm was "indeed foreseen" by Syngenta. (NCC ¶ 226.) Thus, neither the policies underlying the ELD nor Louisiana case law support application of the doctrine in this case.

Missouri

Syngenta insists that Missouri has adopted the SELD based on a case decided over 100 years ago, *Brink v. Wabash Ry. Co.*, 60 S.W. 1058 (Mo. 1901). (Syn. Br. at 45.) *Brink* relied on English common law and determined that parents could not maintain an action against the railroad for the negligent death of their son, which caused them to lose his financial support. *Id.* at 1059-60. The court carefully noted, however, that the outcome would be different had the railroad acted willfully. *Id.* at 1060.

Moreover, as the MDL Order observed, "much has changed in tort law since that case was decided," and thus *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1013 (E.D.

Mo. 1999), declined to follow *Brink*. (*See* MDL Order at 39.) *City of St. Louis* reasoned that "claims and issues" being considered differed substantially from those in *Brink*; the same is true here. Moreover, Missouri has repeatedly recognized exceptions in other cases. *Bus. Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 454 (Mo. App. 1984) (refusing to apply the ELD to a claim relating to architectural services);[22] *B.L. Jet Sales, Inc. v. Alton Packaging Corp.*, 724 S.W.2d 669, 673 (Mo. App. 1987) (concluding negligent misrepresentation cases are in a different category than cases in which the ELD has been applied). *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1016-17 (E.D. Mo. 2009), concluded that the SELD did not bar rice contamination claims, and noted "Missouri has traditionally allowed tort claims even where the only damages sought were economic."

Syngenta cites *Dannix Painting, LLC v. Sherwin-Williams Co.*, No. 4:12-CV-01640, 2012 U.S. Dist. LEXIS 170845 (E.D. Mo. Dec. 3, 2012), to argue that the SELD would apply in Missouri. (Syn. Br. at 45.) In doing so, Syngenta ignores the rationale of the ELD: preventing "tort law from 'altering the allocation of costs and risks negotiated by the parties.'" *Dannix*, 2012 U.S. Dist. LEXIS 170845, at *3-4 (citation omitted). Thus, as Judge Lungstrum concluded, there is no basis for predicting that Missouri courts would apply the SELD "without consideration of whether the purposes of the rule would be served." (MDL Order at 40.)

Ohio

Ohio courts have applied the SELD only in public-nuisance claims. *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, No. 87382, 2006 Ohio App. LEXIS 4958 (Sept. 28, 2006). This Court

[22] Syngenta attempts to distinguish *Graham* by analogizing it with a professional malpractice claim. (Syn. Br. at 45.) This analogy ignores the reasoning of the court: even where a contract exists, damages arising from a breach of duty are still recoverable. *Graham*, 891 S.W.2d at 454.

should not expand the SELD in Ohio where, as here, applying it would not serve the SELD's underlying policies and where there is an independent duty precluding the ELD.

Syngenta argues that applying the ELD in *River Corp. Group II v. Conrail, Inc.*, 549 F. Supp. 2d 981 (N.D. Ohio 2000), mandates applying it here because *Ashtabula* "squarely rejected the theory that the ELD does not bar tort claims that are independent of a contract claim." (Syn. Br. at 46.) Syngenta's reliance on *Ashtabula* is misleading and misplaced. *Ashtabula* is a public-nuisance case and the court's decision is limited to that context. Further, Syngenta misstates the holding. *Ashtabula* simply recognized that the plaintiff was "not alleging a tort independent of a breach of contract" without further discussion. Finally, the issue was not whether there was a tort claim without an accompanying contract claim, but that the defendant had no duty in tort.

The Ohio Supreme Court has held that the ELD does not apply where there is a "discrete, preexisting duty in tort." *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 835 N.E.2d 701, 705 (Ohio 2005); *Campbell v. Krupp*, 961 N.E.2d 205 (Ohio App. 2011); *see also* MDL Order at 41 ("Other courts in Ohio, however, have held that the ELD does not apply to a claim based on the breach of a non-contractual duty."). Plaintiffs have alleged that Syngenta had an independent tort duty.

Ohio courts have deemed it appropriate to consider the policies underlying the ELD in determining whether the doctrine should be applied. *Eysoldt v. Imaging*, 957 N.E.2d 780, 785 (Ohio App. 2011) (considering "the fundamental policy consideration underlying the economic loss rule" in deciding not to apply the doctrine). Because the SELD has never been applied under Ohio law in the context presented by this case, Syngenta had an independent duty in tort, and applying the SELD here would not serve the doctrine's underlying policies, the SELD does not apply under Ohio law.

Tennessee

Tennessee courts have applied the SELD only in lack-of-access cases. (MDL Order at 42 (citing *United Textile Workers, etc. v. Lear Siegler Seating Corp.*, 825 S.W.2d 83, 84 (Tenn. App. 1990); *Ladd Landing, LLC v. TVA*, 874 F. Supp. 2d 727, 728 (E.D. Tenn. 2012).) Syngenta relies solely on *Lear Siegler* and *Ladd Landing* to argue that the SELD should be expanded to apply in this case. This Court should reject Syngenta's argument for several reasons.

First, Tennessee Courts consider the policies underlying the ELD and SELD when determining if those doctrines apply. For instance, in *Lear Siegler*, the Court discussed the possibility for "limitless liability, or liability out of proportion to the defendants fault" and other "policy reasons" when deciding whether to apply the ELD. *Id*. at 85; *see also Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 492 (Tenn. 2009) (adopting an approach to ELD that "fairly balances the competing policy interests"). Tennessee courts are unlikely to expand the SELD in this case because the policies underlying the doctrine would not be served by its application.

Second, Tennessee Courts have indicated that the ELD should be limited to product-liability cases. As stated in *Ham v. Swift Transp. Co.*, "[t]he Tennessee Court of Appeals has since implicitly restricted the economic loss doctrine to claims involving products liability or the sale of goods, at least where the plaintiff can establish a sufficiently direct relationship between the defendant's negligent act and the plaintiff's economic loss." 694 F. Supp. 2d 915, 922 (W.D. Tenn. 2010). Since Tennessee courts have so limited the ELD, they are unlikely to expand the SELD into a new category of case in which the policies underlying the doctrine are not served.

Texas

Texas courts also consider the policies underlying the ELD in determining whether to apply the doctrine. *See LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014) (stating that "whether and how to apply the economic loss rule does not lend itself to easy answers or broad pronouncements. Rather, as we have already observed, the application of the [ELD] depends on an analysis of its rationales in a particular situation"). In *LAN/STV*, two policy rationales supported applying the ELD: (1) avoiding indeterminate and disproportionate liability; and (2) deference to contract law. *Id.* at 240-41. The court carefully confined its opining by noting that a "duty may exist when the rationales just stated for limiting recovery are 'weak or absent.'" *Id.* at 241. Neither of these policy rationales supports applying the ELD in this case. As Judge Lungstrum explained, his "consideration of the pertinent rationales in deciding whether to apply the ELD in this case [was] consistent with the approach mandated by the Texas Supreme Court." (MDL Order at 44.)

Further, the primary case law cited by Syngenta in its attempt to undermine Judge Lungstrum's order *supports* Plaintiffs' arguments against applying the ELD. For example, *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 799-800 (Tex. App. 2007), applied the ELD only because "although [plaintiff] may not have been in privity with [defendant], the economic losses claimed . . . were the subject matter of [plaintiff's] product supply agreement with [a third party], and the contract specifically addressed the issue of consequential damages." Thus, *Sterling* is a classic chain-of-contracts case applying the ELD to protect the bargained-for contract rights negotiated between parties in a series of linked contracts. *Sterling* is inapplicable here.

Wisconsin

Syngenta relies on *Midwest Knitting Mills, Inc. v. United States*, 950 F.2d 1295 (7th Cir. 1991), to argue that Wisconsin would unequivocally apply the SELD here. But in the 25 years after *Midwest*'s prediction that "Wisconsin would decline in all circumstances to allow a negligence suit for the recovery of only economic damages, even where there is no contractual relationship,"[23] Wisconsin courts have fulfilled that prediction. Instead, they have remained steadfast in applying the ELD only to product liability and contract claims. (MDL Order at 44-45.)

For example, *United Concrete & Construction, Inc. v. Red-D-Mix Concrete, Inc.*, 836 N.W.2d 807, 822 (Wis. 2013), affirmed that the ELD barred claims related to concrete work done pursuant to a contract because to hold otherwise "would prevent contractual rules from serving their legitimate function in governing commercial transactions." The court went on, however, to hold that claims unrelated to the concrete, *i.e.*, for landscaping, were not subject to the ELD because they were not governed by a contract. *Id.* at 823 n.19, *see also Ins. Co. of N. Am. v. Cease Elec. Co.*, 688 N.W.2d 462 (Wis. 2004) (refusing to extend the ELD to service contracts because "a recognition of tort actions in cases under the U.C.C. would upset the remedies contained in the U.C.C.; when the rationale is not applicable, *i.e.*, when the U.C.C. does not apply, there is no reason for the [ELD] to apply"); *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 724 N.W.2d 879, 884 (Wis. 2006) (concluding the ELD did not apply because claims were not predicated on contract); *Walker v. Ranger Ins. Co.*, 711 N.W.2d 683, 687 (Wis.

[23] *Custom Underground, Inc. v. Mi-Tech Servs., Inc.*, No. 10-CV-222-JPS, 2011 WL 5008343 (E.D. Wis. Oct. 20, 2011), accepted *Midwest Knitting*'s broad proclamation without any analysis of the Wisconsin opinions that subsequently refused to apply the ELD outside of the product liability or contractual context. (*See* MDL Order at 45 n.14.)

App. 2006) (declining to expand the ELD beyond product liability or contract cases because "[t]he ELD exists to compel parties bound by a contractual relationship to pursue damages via contract, not to prevent an injured party from bringing a potentially viable negligence claim when no contract exists").

Alabama

Alabama courts have not applied the ELD outside the context of product-liability cases. *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 673 (Ala. 1989); *see also Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84, 107 (Ala. 2004) (rejecting the ELD absent evidence that damage was caused by a "product" within the meaning of Alabama's product-liability statutes); *Wellcraft Marine, a Div. of Genmar Indus., Inc. v. Zarzour*, 577 So. 2d 414 (Ala. 1990) (applying the ELD to a defective-boat claim); *Tull Bros. v. Peerless Prods., Inc.*, 953 F. Supp. 2d 1245, 1256 (S.D. Ala. 2013) (holding that the ELD did not apply in an action by a subcontractor where there was no damage to the product itself, but rather only the cost to install a new one). Syngenta has not—and cannot—point to any authority to support its argument that the Alabama courts would so drastically expand the ELD to apply here.

Arkansas

Arkansas has completely rejected applying the ELD, even in the strict-liability context. *See Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 832 (Ark. 2011) (declining to "extend the doctrine to claims involving negligence" because of allegations of damage to property); *Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321, 324 (Ark. 1981) (rejecting application in the strict-liability context). The MDL Order concluded that "at least one federal court has declined to apply the ELD under Arkansas law in the stranger context." (MDL Order at 27 (citing *Carvin v. Ark. Power & Light Co.*, No. 90-6055, 1991 WL 54048, at *4-5 (W.D. Ark. Nov. 26, 1991),

which stated "[t]he question then is not whether the so-called economic loss rule applies but whether the plaintiffs have a right to recover losses for the kind of harm they sustained").) Syngenta attacks this as "flatly incorrect." (Syn. Br. at 53.) In so doing, Syngenta ignores that recovery was barred in *Carvin* because plaintiffs did not have a sufficient "property interest" to warrant recovery, not because the court applied the SELD. *Carvin*, 1991 WL 54048, at *5. Judge Lungstrum's analysis of Arkansas law was correct, and he properly declined to apply the SELD in a state that has not even adopted the ELD.

Colorado

Colorado law clearly precludes applying the ELD to any claim based on the breach of a duty that is independent of any contractual obligation. *See, e.g., S K Peightal Eng'rs, Ltd. v. Mid Valley Estate Sols. V, LLC*, 342 P.3d 868, 875 (Colo. 2015) ("If, however, the duty breached arises 'independently of any contract duties between the parties,' then a tort action premised on that breach remains viable."); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042 (Colo. 1983) (the ELD will not bar a tort claim against a homebuilder because it has an independent duty to act without negligence in constructing the home); *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313 (Colo. 1981) (holding that the contractual relationship gave rise to a common-law duty for defendant to perform its work with reasonable care and skill). Here, the duties alleged by Plaintiffs arise from common law, not contract, and are thus independent of any contractual duty owed by Syngenta. Thus, the SELD does not bar Plaintiffs' claims.

Indiana

As Judge Lungstrum noted, Indiana courts apply the ELD in a limited number of contexts. *See Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 736-37, 742 (Ind. 2010) (applying the ELD to preclude purely economic recovery in

a chain-of-contracts case); *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005) (applying the ELD to claims for failure of performance of products or services). In seeking to invoke the ELD, Syngenta relies on three decisions: *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 748 (Ind. 2010); *Charlier*, 929 N.E.2d at 739; and *Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 786 (Ind. App. 1990). (Syn. Br. at 54-55.) None of these cases support applying the ELD.

Morton affirmed that an employer could not recover solely economic losses resulting from an injury to an employee, reasoning that any such claim was "outmoded" and the "policy reasons for adopting it are dubious." 562 N.E. 2d at 786. The court cited the potential "multiplicity of actions" whereby an employee would sue the tortious actor for the injury incurred while the employer would file a parallel suit seeking damages for lost revenue and profits. *Id. Morton* provides no evidence to support application of the ELD in this case.

Charlier analyzed the context in which the ELD had previously applied, *i.e.*, product liability and contract claims. 292 N.E.2d at 741. *Charlier* then applied the ELD reasoning "there is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts." *Id.* Thus, *Charlier* was a chain-of-contracts case and is inapposite.

Finally, Syngenta cites *U.S. Bank* to argue that Indiana courts have "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.'"[24] (Syn. Br. at 54.) But *U.S. Bank* determined whether the ELD applied to claims of negligent misrepresentation by a title insurer, with the court *reversing* the trial court's dismissal of the plaintiffs tort claim and permitting the plaintiff to pursue the claim for solely economic damages. 929 N.E.2d at 749-50. Moreover, in so holding, the court favorably cited a prior decision that observed: "[A] defendant's exposure to tort liability is best framed in terms of what the defendant did. . . . To the extent that a plaintiff's interests have been invaded beyond mere failure to fulfill contractual obligations, a tort remedy should be available." *Id.* at 749 (quoting *Greg Allen Constr. Co., Inc. v. Estelle,* 798 N.E.2d 171, 173 (Ind. 2003)). Indiana case law does not support applying the ELD.

Kansas

Under Kansas law, the ELD has been applied in product-defect cases. *See Elite Profs., Inc. v. Carrier Corp.*, 827 P.2d 1195, 1197 (Kan. App. 1992). In *Rinehart v. Morton Buildings, Inc.*, 305 P.3d 622, 625-26 (Kan. 2013), the Kansas Supreme Court explicitly declined to expand the ELD to cover claims of negligent misrepresentation because "the duty at issue arises by operation of law and the doctrine's purposes are not furthered by its application under these circumstances." *Rinehart* acknowledged that the ELD is "still unfolding" under Kansas law, but declined to "extend the doctrine" where the rationales and policies underpinning the doctrine are not present. *Id.*; *see also Bryant Manor, LLC v. Bank of Am., N.A. (In re Manor, LLC)*, 434 B.R. 629, 636 (Bankr. D. Kan. 2010) (declining to expand the ELD where the plaintiff was not

[24] Syngenta has omitted a substantial portion of the quotation, which properly reads: "Moreover, consistent with our opinion in *Indianapolis-Marion County Public Library*, the existence or non-existence of a contract is not the dispositive factor for determining whether a tort action is allowable where special circumstances and overriding public policies have carved out exceptions for tort liability." The omitted portion of the quotation demonstrates that Indiana courts engage in a public-policy analysis to determine whether the policies underlying the ELD are served by its application.

"seeking to circumvent claims that could be brought under contract law by instead bringing tort claims"). Accordingly, in considering the expansion of the ELD from its traditional application under Kansas law—product defect cases—this Court *must* consider whether the policies underpinning the ELD support its application. As demonstrated above, and in the detailed analysis of the MDL Order, those policies do not support expansion of the doctrine to apply the ELD here.

Syngenta relies on *Long Motor Corp. v. SM & P Utility Res., Inc.*, 214 P.3d 707 (Kan. App. 2009) (unpublished), to argue that the SELD should be expanded in Kansas to preclude Plaintiffs' claims. (Syn. Br. at 55.) *Long Motor* affirmed the application of the ELD outside of the traditional product-liability context after a thorough policy and factual analysis. This case is distinguishable because *Long Motor* feared that permitting recovery would "expand the potential pool of plaintiffs beyond reason." *Id.* at *6. Here there is an identifiable group of claimants who participated in an interconnected market and whose injuries were actually foreseen by Syngenta. Further, *Long Motor* was cabined to the facts of that case, with the notation that the claim was dismissed "[d]ue to these public policy concerns, and based on the specific facts presented here." *Id*. Significantly, this Court should be hesitant to contradict Judge Lungstrum's conclusion that Kansas courts would not apply the ELD here. (MDL Order at 24.)

Kentucky

Under Kentucky law, the ELD has been limited to product-liability and sales cases. *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 738 (Ky. 2011), adopted the ELD, by recognizing that "economic losses, in essence, deprive the purchaser of the benefit of his bargain and that such losses are best addressed by the parties' contract and relevant provisions of Article 2 of the Uniform Commercial Code." Kentucky's federal courts have held

that where a "negligence claim does not arise from the sale of a defective product in a commercial transaction . . . under the controlling authority of Kentucky's highest court, the [ELD] does not apply." *NS Trans. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, No. 3:12-CV-00766 (JHM), 2015 WL 1020598, at *3 (W.D. Ky. Mar. 9, 2015). Both of these cases demonstrate that in Kentucky, the ELD is confined to product-liability and contract cases.

Finally, a concurring opinion in *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d 575, 589-90 (Ky. 2004), observed that *if* the economic loss doctrine *were* to be expanded, exceptions should be recognized for "special relationships" that "by their nature automatically trigger an independent duty of care" and instances where "a duty independent of any contractual obligations" exists, precluding application of the rule. *Id.* Thus, the *only* applicable analysis is firmly against applying the ELD in this case.

Michigan

Michigan law makes it abundantly clear that the ELD applies only where "there was a contract or commercial transaction that governed the plaintiff's economic expectations." *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.*, 656 N.W.2d 858, 866 (Mich. App. 2002). Here, there is no contract or commercial transaction that governed Plaintiffs' economic expectations. Nevertheless, Syngenta argues that this Court "should predict that the Michigan courts would apply the SELD in this 'mass tort' action." (Syn. Br. at 56.) As support, Syngenta cites to a single decision in which the defendants argued that there *should* be an exception to the ELD in "mass tort claims" and the Michigan Court of Appeals refused to even consider that argument. *Quest Diagnostics*, 656 N.W.2d at 866. This fact was explicitly noted by Judge Lungstrum in rejecting Syngenta's recycled argument. (MDL Order at 33.) There is no basis to predict that a Michigan court would apply the SELD here.

Mississippi

Syngenta contends that Mississippi has "not addressed, let alone rejected, the stranger ELD." (Syn. Br. at 56.) This argument loses the forest for the trees. The Mississippi Supreme Court has not adopted the ELD; thus, of course it has not expressly rejected the SELD.

Moreover, Syngenta ignores that the Mississippi Court of Appeals and federal courts have repeatedly observed that the ELD applies only in product-liability cases. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 387 (Miss. App. 1999); *Lyndon Prop. Ins. Co. v. Duke Levy & Assocs. LLC*, 475 F.3d 268, 274 (5th Cir. 2007) (refusing to apply the ELD to a contract case because no Mississippi case applies the ELD outside the realm of product liability); *BC's Heating & Air & Sheet Metal Works, Inc. v. Vermeer Mfg. Co.*, 2012 U.S. Dist. LEXIS 24420, at *26-27 (S.D. Miss. Feb. 27, 2012) (considering a motion to dismiss and refusing to apply the ELD where claims based on contract, tort, warranty, and product liability were pled because the ELD applies only to product liability cases, and barring Plaintiffs' claims would "effectively choose [the] theory of liability"); *Photo Arts Imaging Prof'ls, LLC v. Best Buy Co.*, 2011 U.S. Dist. LEXIS 135596, at *10-11 (S.D. Miss. Nov. 22, 2011) (denying motion for summary judgment based on the ELD because the ELD applies to only product liability cases and "Plaintiff's claims sound in both tort and contract, and the Court does not have sufficient evidence to sort out which rubric is a closer fit"); *Fed. Ins. Co. v. Gen. Elec. Co.*, 2009 U.S. Dist. LEXIS 112931, at *22 (S.D. Miss. Dec. 3, 2009) (noting that in Mississippi the ELD "has not been extended beyond product liability cases"); *Miss. Phosphates Corp. v. Furnace & Tube Serv., Inc.*, 2008 U.S. Dist. LEXIS 11294 (S.D. Miss. Feb. 1, 2008) (denying motion to dismiss because the ELD does not apply to non-product liability cases); *Brasscorp v. Highside Chems., Inc.*, 2007 U.S. Dist. LEXIS 41690 (S.D. Miss. June 7, 2007) (denying motion for summary

judgment because the ELD applies only to product liability cases). (S*ee also* MDL Order at 33-34. This is not a product-liability case. Therefore, in Mississippi, the ELD would not bar Plaintiffs' claims.

Nebraska

Nebraska has "expressly limited" the ELD to two contexts: product liability and situations where the alleged breach is based on a contractual duty, and no independent tort duty exists. *Lesiak v. Cent. Valley Ag Coop.*, 808 N.W.2d 67, 81-82 (Neb. 2012); *see also Thurston v. Nelson*, 2014 Neb. App. LEXIS 41, at *21 (Neb. App. Feb. 4, 2014); *E3 Biofuels-Mead, LLC v. Skinner Tank Co.*, 2014 U.S. Dist. LEXIS 12302, at *4 (D. Neb. Jan. 30, 2014) (the ELD does not bar tort theories if "there exists an independent tort duty alleged to be breached that is separate and distinct from the contractual duty"). Syngenta's urging that *Lesiak* does not support Nebraska's rejection of the SELD ignores the circumspect clarification of the ELD's "application and scope in Nebraska." *Id.* at 80-81 (observing that the ELD is a "judicially created doctrine" akin to the "ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie class *The Blob*," which might "consume much of tort law if left unchecked"). *Lesiak* concluded that the primary and most compelling rationale of the ELD "is to preserve the distinction between contract and tort theories in circumstances where both theories could apply." *Id.* at 81. Thus, as the MDL Order observed, *Lesiak* "would preclude application of the ELD in this case." (MDL Order at 35.)

North Carolina

North Carolina has not applied the ELD outside of product-liability cases and has observed that the ELD does not overturn 25 years of case law allowing tort claims for negligence based on breaches in the duty of care. (MDL Order at 35 (citing *Lord v. Customized Consulting*

Specialty, Inc., 643 S.E.2d 28, 32 (N.C. App. 27).) *See Hospira Inc. v. AlphaGary Corp.*, 671 S.E.2d 7, 14 (N.C. App. 2009) (the rationale behind the ELD is to "encourage[] contracting parties to allocate risks for economic loss themselves," and is therefore inapplicable where no privity exists); *Moore v. Coachmen Indus.*, 499 S.E.2d 772, 780 (N.C. App. 1998) ("[T]he rationale for the [ELD] is that the sale of goods is accomplished by contract and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies . . . . To give a party a remedy in tort . . . would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract."); *Ellis-Don Constr., Inc. v. HKS, Inc.*, 353 F. Supp. 2d 603, 606 (M.D. N.C. 2004) (rejecting defendant's argument that the ELD required granting a motion to dismiss and stating that the ELD "does not limit tort action that arise in the absence of a contract, nor is there any indication that the courts of North Carolina have expanded the [ELD] beyond its traditional role in products liability cases").

Thus, Syngenta's contention that there is no indication that "North Carolina would reject bright-line application of the stranger ELD" is unavailing and does not support its motion to dismiss. (Syn. Br. at 56.)

North Dakota and Oklahoma

Neither North Dakota nor Oklahoma have adopted the SELD. Rather, like many other states, both North Dakota and Oklahoma have limited the ELD to the product-liability context. *See Leno v. K & L Homes, Inc.*, 803 N.W.2d 543, 550 (N.D. 2011); *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 652 (Okla. 1990). There is no authority to indicate that North Dakota or Oklahoma would expand the ELD, let alone that they would do so when the policies underlying the doctrine do not support its application. When predicting the law of another state, the Court's "duty is to conscientiously ascertain and apply state law, not to

formulate new law based on our own notions of what is the better rule." *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009). Thus, this Court should decline to expand the law of these states by applying the ELD.

South Dakota

South Dakota courts have applied the ELD only in commercial transactions governed by the UCC, reasoning that in that context "the general rule is that economic losses are not recoverable under tort theories; rather, they are limited to the commercial theories found in the U.C.C." *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333-34 (S.D. 1994). The South Dakota Supreme Court has explicitly *rejected* expanding the ELD to cases outside the context of the UCC. *See Kriesers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413, 421-22 (S.D. 2014) (rejecting expansion of the ELD to apply to the provision of professional services).

Further, Syngenta mischaracterizes the Court's reasoning in *Kriesers*, arguing that the Court "looked to Illinois—a state that has unquestionably adopted the SELD" in defining the contours of the ELD. (Syn. Br. at 57.) Leaving aside that Illinois courts *would not* apply the SELD under the facts presented in this case, the South Dakota Supreme Court relied on Minnesota law, not the law of Illinois, in analyzing the application of the ELD. *See id.* at 421 ("In formulating our economic loss rule, we cited Minnesota law, which has declined to extend the [ELD] beyond commercial transactions."). Simply put, Syngenta cannot provide any case law supporting extension of the ELD.

F. The ELD does not bar Producer Plaintiffs' claims because they have adequately pled harm to property.

Judge Lungstrum relied on the federal plausibility standard to hold that Producer Plaintiffs did not adequately allege physical injury. (MDL Order at 20-21.) Plaintiffs here are not required to meet this higher standard. *Walsh*, 851 N.W.2d at 603, explicitly rejected application

of the federal plausibility standard to pleadings under Minnesota's Rules of Civil Procedure. *Id.* ("[W]e now decline to engraft the plausibility standard from *Twombly* and *Iqbal* onto our traditional interpretation of Minn. R. Civ. P. 8.01."). Minnesota's notice-pleading standard "does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Id.* at 605 (quoting *Hansen*, 813 N.W.2d at 917-18.)

As discussed, Producer Plaintiffs do not rely on allegations of physical damage to their corn to defeat Syngenta's ELD argument. But to the extent this Court considers it necessary, Producer Plaintiffs have adequately alleged physical damage precluding application of the SELD. *See e.g.*, *Ashtabula River Corp. Group II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 988 (N.D. Ohio 2008) ("Where 'plaintiff suffers both physical injury and economic loss, economic losses resulting from physical injury are recoverable.'") (citation omitted).

Plaintiffs allege that "Syngenta's acts and omissions have resulted in, and will continue to result in, the 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." (*See*, *e.g.*, NCC ¶ 236.) Producers and Non-Producers are participants in the U.S. corn market reliant on the corn supply that was contaminated and damaged by Syngenta's conduct. Plaintiffs also allege that "Plaintiffs' chattels/movables were impaired as to condition, quality, or value, and Plaintiffs were damaged." (*Id*. ¶ 309.) Therefore, Plaintiffs have made sufficient allegations of physical damage to place Syngenta on notice of the economic damages Plaintiffs intend to recover. Under Minnesota's notice-pleading standard, that is sufficient to survive a motion to dismiss.

G. The ELD does not bar Non-Producer Plaintiffs' claims.

Syngenta's argument with respect to Non-Producers contradicts the SELD argument it makes regarding Producers. Specifically, Syngenta argues that either (or both) the contractual ELD and the SELD apply based on whether Non-Producers allege damage to their own corn. But the question of whether any application of the ELD would fall under the stranger strand, or the traditional contract strand, does not hinge on injury to a proprietary interest, it hinges on the relationship between Plaintiffs and Syngenta. Here the Non-Producer Plaintiffs are *not* parties to a contract with Syngenta and Non-Producers did not buy any of Syngenta's products. As Syngenta readily acknowledges, "Syngenta sells corn seed. It does not grow corn for commercial sale, distribute corn, segregate corn or export corn."[25] (Third Party Compl. ¶ 43.) Therefore, the lack of a contractual relationship between Syngenta and Non-Producers dictates that if the ELD applies at all, it can only do so under the SELD, the only iteration that applies to strangers.

Further, Syngenta's attempt to shoehorn the Non-Producer Plaintiffs' claims into the contractual ELD is backwards. Syngenta argues that "[t]o 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 a contract." (Syn. Br. at 57.) Presumably, by arguing that the contract ELD applies "directly or indirectly," Syngenta is referring to the chain-of-contracts cases, stemming from *Robins*. But *Robins* precludes applying the ELD where Non-Producers plead damage to their own corn. "[T]he prevailing rule denie[s] a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which he had no proprietary interest." *La. ex rel. Guste*, 752 F.2d at 1022 (explaining the holding of *Robins*). Therefore, if

[25] On November 19, 2015, Syngenta filed a Third-Party Complaint in the Federal MDL asserting claims against Cargill and ADM. Citations to the "Third Party Compl." refer to that document.

Non-Producers' corn was damaged by Syngenta's premature commercialization, that fact would remove their claims from the ELD under *Robins*, rather than urging its application as Syngenta argues.

Regardless, Syngenta's argument is irrelevant. What matters is that neither the contractual ELD nor the SELD applies to Non-Producers' claims. As established above, there is no contract, or opportunity to contract, that would make the contractual ELD apply. The SELD cannot apply because Non-Producers' claims do not fall into one of the recognized categories of SELD cases. Syngenta argues that Non-Producers' "claims are identical to those of the Producers." (Syn. Br. at 57.) That argument is inaccurate, but it is true that the same policy factors precluding expansion of the SELD to Producers' claims also preclude expansion of the SELD to Non-Producers' claims.

Although it is clear that the contractual ELD does not bar Non-Producers' claims, Syngenta makes additional arguments for three of the relevant states. Those arguments are unpersuasive.

Minnesota

Minnesota's ELD does not bar claims by Non-Producers. As already explained, Minnesota's ELD is entirely statutory. Minn. Stat. § 604.101; Minn. Stat. § 604.101, subd. 5; *Ptacek*, 844 N.W.2d at 538-39. Other than common law misrepresentation claims, it applies to claims "for harm caused by a defect in the goods sold." Minn. Stat. § 604.101, subd. 2; *see also* Minn. Stat. § 604.101, subd. 3 (setting out when a buyer may bring a "product defect tort claim").[26]

[26] A buyer may bring a "product defect tort claim" if a "defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real

Contrary to Syngenta's arguments, section 604.101 does not apply to Non-Producers' claims because they did not purchase a "good" sold by Syngenta. As Syngenta readily acknowledges, "Syngenta sells corn seed. It does not grow corn for commercial sale, distribute corn, segregate corn or export corn." (Third Party Compl. ¶ 43.) Therefore, Judge Lungstrum correctly noted that the Non-Producers "bought corn, but [they] did not buy any product sold by Syngenta, which sold seeds, and Syngenta has not cited any authority to support a theory allowing for liability under this statute if the plaintiff did not buy the particular product sold by the defendant." (MDL Order at 47.)

In addition, section 604.101 is unavailing to Syngenta because neither Producers nor Non-Producer Plaintiffs have alleged a product defect. They do not allege that Viptera seed was defectively designed or manufactured, or that Syngenta's instructions or warnings on safe use were inadequate. They do not allege that Viptera seed was unfit for a particular purpose required by a particular buyer (Minn. Stat. § 336.2-315), was unmerchantable (Minn. Stat. § 336.2-314), or failed express warranties (Minn. Stat. § 336.2-313). In strikingly similar circumstances (the sale of fertilizer to farmers), *Ptacek* held that that the plaintiff "did not assert . . . a product-defect tort claim." 844 N.W.2d at 539; *see also* MDL Order at 47 ("In addition, plaintiffs have not alleged any sort of product defect, as Syngenta's seeds are not alleged to have failed to perform as intended. Therefore, the Court concludes that the claims by the Minnesota non-producer plaintiff are not barred by the ELD."); Minn. Stat. § 604.101, rep. note ("To come within the definition of 'product defect tort claim' a common law tort claim must seek recovery 'for damages caused by a defect in the goods.'").

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property," in which case the buyer may recover loss for, *e.g.*, "diminution in value of the other tangible personal property or real property" including costs of repair, replacement and restoration, and "business interruption losses." Minn. Stat. § 604.101, subd. 3(1)-(2).

Because the Non-Producer Plaintiffs did not purchase a "good" sold by Syngenta and have not alleged a "product defect tort claim," Syngenta's motion to dismiss must be denied.

Arkansas

Syngenta argues that this Court should apply the "contractual ELD" to bar Non-Producers' claims under Arkansas law. (Syn. Br. at 68.) Syngenta is wrong for at least two reasons. First, there are no allegations by Plaintiffs that Non-Producers contracted with Syngenta and, as Judge Lungstrum noted, there is no evidence to support that assertion because Non-Producers purchase corn, not corn seed. (MDL Order at 47.) Thus, the contractual ELD does not apply.

Second, Arkansas courts have not adopted the ELD in any form under any circumstance. See Blagg v. Fred Hunt *Co., Inc*., 612 S.W.2d 321, 324 (Ark. 1981) (rejecting application in the strict liability context); *see also Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 832 (Ark. 2011) (declining to "extend the doctrine to claims involving negligence" because of allegations of damage to property). As such, there is no Arkansas law to support applying the ELD to Non-Producers' claims in this case.

Louisiana

Syngenta argues that the Louisiana Products Liability Act ("LPLA"), La. Rev. Stat. § 9:2800.52, *et seq.*, bars any claims by Non-Producers under Louisiana law. (Syn. Br. at 68.) This argument overlooks two critical facts. First, the claims against Syngenta do not arise from damages that were "proximately caused by a characteristic of the product that renders the product unreasonably dangerous" and thus the LPLA does not apply. La. Rev. Stat. § 9:2800.54(A). Plaintiffs do not argue that Syngenta created a product that contained a characteristic that somehow rendered the Viptera or Duracade unreasonably dangerous. Rather,

Plaintiffs argue, and have pled, that Syngenta's conduct in commercializing its product was tortious and damaged Plaintiffs. Thus, neither the Producer nor Non-Producer claims are subject to the LPLA.

Second, Syngenta ignores a line of cases that reject the LPLA's exclusivity. These cases demonstrate that nothing in the LPLA precludes a plaintiff from bringing a non-LPLA claim against a manufacturer for damages caused by the manufacturer's wrongful conduct unrelated to the product's manufacture, design, warnings, or warranties. *See, e.g.*, *Triche v. McDonald's Corp.*, 164 So. 3d 253, 258 (La. App. 2014) ("[T]he LPLA does not eliminate a general negligence cause of action for damages caused by the negligent use or handling of the product."); *Lavergne v. Am. Pizza Co.*, 838 So. 2d 845, 848 (La. App. 2003) (rejecting argument that LPLA provided exclusive remedy for negligence claim derived from the negligent use of a product); *Crawford v. Dehl*, No. 08-0463, 2008 U.S. Dist. LEXIS 99133, at *8 (W.D. La. Jul. 21, 2008), *report and recommendation adopted*, 2008 U.S. Dist. LEXIS 68476 (W.D. La. Sept. 8, 2008) (rejecting LPLA exclusivity argument and permitting independent negligence claim reasoning that "[t]he exclusivity provision is better construed as barring only those claims against manufacturers in which the defendant's capacity as manufacturer is essential"); *accord In re Genetically Modified Rice Litig.*, No. 06-1811, 2011 WL 5024548, at *3-4 (E.D. Mo. Oct. 21, 2011) (allowing plaintiffs to pursue non-LPLA negligence claims under Louisiana law in GM contamination case).

H. The ELD does not apply to claims seeking damages related to soybeans.

Syngenta's premature release of Viptera caused damage to farmers by affecting the price of corn and soybeans.[27] (NCC ¶¶ 298-99.) Corn and soybeans are inherently connected commodities because corn and soybeans are used together as rotational crops and because they are feed ration substitutes. (*Id.* ¶ 298.)[28] Therefore, the damage incurred by Producer Plaintiffs' cannot be measured solely by the drop in corn prices, but instead must factor in the drop in soybean prices.

Despite the interconnected nature of these two crops, Syngenta's motion to dismiss implies that because Producer Plaintiffs were adversely affected by the drop in both corn and soybean prices, their claims are subject to the ELD. This argument fails.

As previously discussed, none of the relevant states have applied the SELD to negligence claims filed by farmers against a GM seed company, and there is no reason to extend the SELD in this case because its application would not serve the policies underlying the doctrine. The fact that farmers were harmed by the drop in corn and soybean prices does not change the policy analysis. First, the farmers still had no opportunity to contract around the losses they suffered.

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[27] The individual producers in these consolidated proceedings are all corn producers who are alleging that liability and damages both rest with the Syngenta entities. There are no named plaintiffs or individual plaintiff producers who grew only soybeans during the relevant time period, and no such claims are being pursued. The individual and named plaintiff producers grew both corn and soybeans. Plaintiffs do allege that Syngenta's actions with respect to the Chinese market caused them harm in their capacity as corn producers and, further, that because the corn and soybean markets are interrelated or otherwise inter-connected that their damages as corn producers were impacted in a manner consistent with how corn farmers who also grew milo were impacted. The extent and nature of the interrelationship or interconnectedness of the corn-farmer damages will be the subject of documentary evidence and expert testimony. Contrary to Syngenta's arguments, it would be inappropriate to decide the reasonable foreseeability or the nature and extent of the damages caused to corn farmers by Syngenta's conduct on a motion to dismiss, especially when all of the facts alleged in the Complaints must be accepted as true.

[28] Plaintiffs' Class Complaint makes no allegations regarding soybeans.

See Daanen & Janssen, 216 Wis. 2d at 403 (detailing contract rationale behind the ELD). Second, there is still no risk of the type of unlimited damages that exist in lack-of-access cases. *See e.g. La. ex rel. Guste*, 752 F.2d at 1021. Soybean related damages do not change Syngenta's culpability. Instead, the harm was foreseen, the damages are rationally limited to those suffered by farmers, Syngenta was in the best position to prevent the harm, and Producer Plaintiffs and Syngenta are part of an interconnected market.

Syngenta incorrectly compares soybean-related damages to the ripple effect of economic damages that exist in lack-of-access cases. (Syn. Br. at 50.) Syngenta has no basis to argue that the existence of damages related to the price of soybeans "almost doubles the size of the potential pool of plaintiffs," because corn farms and soybean farmers are principally the same group. More importantly, Syngenta confuses one of the ways in which Producer Plaintiffs were damaged with the multiple categories of claims that arise in lack-of-access cases. In lack-of-access cases, the risk is that almost any member of the public could have a valid claim for economic loss resulting from the inability to access a public resource or piece of public infrastructure. Syngenta claims that allowing Producer Plaintiffs to recover all of their damages, including soybean related damages, opens up the risk of such claims. "This is not a lack-of-access case, in which any member of the public could potentially assert a claim for economic loss, leading to remote or indeterminate liability that would be far out of proportion to the tortfeasors culpability . . . the scope of liability is not completely open-ended, as plaintiffs represent discrete classes of growers and sellers, all in an inter-connected market." (MDL Order at 24.) The fact that Producer Plaintiffs suffered multiple types of injury as a result of Syngenta's actions does not change that rationale.

IV. Syngenta owed a duty to Plaintiffs.

Plaintiffs allege that Syngenta owes a duty to exercise reasonable care in the "timing, scope and terms under which it commercialized MIR162." (*See, e.g.*, NCC ¶ 301; CC ¶ 328.) Syngenta knew the risks that existed if it chose to commercialize MIR162 absent approval by major export markets and adequate stewardship, and in fact, was explicitly warned that it would lead to devastating consequences. (NCC at 2-3, ¶¶ 18-26, 334; CC at 2-3, ¶¶ 29-37.) Syngenta's efforts to escape a legal duty fail based on established Minnesota law.

A. Syngenta's conduct created the foreseeable risk of harm to Plaintiffs.

Under Minnesota law, a party owes a duty of reasonable care where its "'conduct creates a foreseeable risk of injury to a foreseeable plaintiff.'" *Wenker ex rel. Wenker v. Xcel Energy, Inc.*, No. A14-0047, 2015 WL 1013553, at *2 (Minn. App. Mar. 9, 2015) (quoting *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014) and *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011)). "In other words, when a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others." *Domagala*, 805 N.W.2d at 26.

This principle is widely recognized outside of Minnesota. For example, the Restatement (Second) of Torts states that when performing "acts which affect[] the interests of another, there is a duty not to be negligent with respect to the doing of the act." Restatement (Second) of Torts Div. 2, Ch. 12, Topic 4, Scope Note; *see also* Dan B. Dobbs et al., The Law of Torts § 125 (2d ed. 2015) ("In the ordinary case . . . the defendant does owe a duty of care."); 57A Am. Jur. 2d Negligence § 88 ("[T]he law imposes upon every member of society the duty to refrain from conduct of a character likely to injure a person with whom he or she comes in contact and to use his or her own property in such manner as not to injure that of another."). Other jurisdictions at

issue here have likewise adopted the general duty to exercise reasonable care when the actor's conduct creates the risk of injury to another:[29]

- *Taylor v. Smith*, 892 So. 2d 887, 893 (Ala. 2004) ("'[E]very person owes every other person a duty imposed by law to be careful not to hurt him' . . . In a variety of circumstances, this Court has recognized a duty to foreseeable third parties, based on a general 'obligation imposed in tort to act reasonably.'");

- *Hill v. Wilson*, 224 S.W.2d 797, 800 (Ark. 1949) ("Actionable negligence itself is a relational concept. There is no such thing as 'negligence in the air.' Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of injury to others.");

- *Greenberg v. Perkins*, 845 P.2d 530, 537 (Colo. 1993) ("people owe a duty to use reasonable care with regard to their affirmative conduct" and "such a duty extends to all who may foreseeably be injured if that conduct is negligently carried out," rejecting application of the no-duty-to-control rule);

- *Karas v. Strevell*, 884 N.E.2d 122, 129 (Ill. 2008) ("[E]very person owes a duty of ordinary care to guard against injuries to others[.]");

- *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) ("An 'actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.'");

- *Greenburg v. Cure*, 2013 WL 1767792, at *5 (D. Kan. Apr. 24, 2013) (applying Kansas law and holding that "'[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm,' and it is only in exceptional cases that no such duty is present");

- *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 914 (Ky. 2013), as corrected (Nov. 25, 2013) ("'The concept of liability for negligence expresses a universal duty owed by all to all.' And 'every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.'");

- *Knox v. Calcasieu Parish Police Jury*, 900 So. 2d 1128, 1132 (La. App. 2005) ("every person has an 'almost universal' legal duty to conform his or her actions 'to the standard of conduct of a reasonable person in like circumstances.' "); *see also* La. Civ. Code Art. 2315 ("every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it");

- *Farwell v. Keaton*, 240 N.W.2d 217, 220 (Mich. 1976) ("Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.");

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[29] Internal citations and quotation marks in the bullet point parentheticals are omitted.

- *Doe ex rel. Doe v. Wright Sec. Servs., Inc.*, 950 So. 2d 1076, 1079 (Miss. App. 2007) ("The general duty is to act as a reasonable prudent person would under the circumstances.");

- *Tharp v. Monsees*, 327 S.W.2d 889, 893 (Mo. banc 1959) ("'Every person has the duty to exercise ordinary care to so conduct himself as not to injure others, and is liable to one who is harmed by a breach of that duty.'");

- *Riggs v. Nickel*, 796 N.W.2d 181, 187 (Neb. 2011) ("[A]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.");

- *Pinnix v. Toomey*, 87 S.E.2d 893, 898 (N.C. 1955) (duty "arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another");

- *Hansen v. Scott*, 645 N.W.2d 223, 232 n.1 (N.D. 2002) ("'Every person has a duty to act reasonably to protect others from harm.'");

- *Akers v. Levitt*, 1992 WL 10288, at *1 (Ohio. App. Jan. 27, 1992) ("Every person has a duty to exercise that degree of care that a reasonably careful person would use under the same or similar circumstances.");

- *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 964 (Okla. 2007) ("[A] person owes a duty of care to another person whenever the circumstances place the one person in a position towards the other person such that an ordinary prudent person would recognize that if he or she did not act with ordinary care and skill in regard to the circumstances, he or she may cause danger of injury to the other person.");

- *Dodson v. S. Dakota Dep't of Human Servs.*, 703 N.W.2d 353, 355 (S.D. 2005) (every person has a duty of care "that a reasonable and prudent person would exercise in the same or similar circumstances");

- *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008) ("persons have a duty to others to refrain from engaging in affirmative acts that a reasonable person 'should recognize as involving an unreasonable risk of causing an invasion of an interest of another' or acts 'which involve[ ] an unreasonable risk of harm to another'");

- *Midwest Emp'rs Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770, 776 (Tex. App. 2009) ("Every person has a duty to exercise reasonable care to avoid a foreseeable risk of injury to others."); and

- *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575 (Wis. 2009) ("In the vast majority of cases . . . every person is subject to a duty to exercise ordinary care in all of his or her activities[.]").

Plaintiffs allege that Syngenta's affirmative acts—misfeasance[30]—are at the core of Plaintiffs' negligence claims. These acts include:

- Premature commercialization of Viptera and Duracade;
- Instituting a "careless and ineffective 'stewardship' program";
- The sale of Viptera and Duracade to thousands; and
- Distributing misleading and inadequate information regarding Viptera and Duracade and the timing of China's approval.

(*See, e.g.*, CC ¶ 331; NCC ¶ 302.) Plaintiffs further allege that "Syngenta clearly knew [of] the risks" that the above affirmative conduct would—and did—create for the U.S. corn market. (*See, e.g.*, CC at 2-3, ¶¶ 15-16, 35, 80-83, 101-03, 334; NCC at 2-3; ¶¶ 46, 93-94, 112-14.) These acts created a risk of (and caused) "physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land" as a result of the "pervasive contamination of the U.S. corn supply." (CC ¶ 225; NCC ¶ 236.)

These allegations are further supported by numerous other affirmative acts that Syngenta took to create the risk and harm to Plaintiffs: (1) Syngenta recognized Plaintiffs as stakeholders "affected by" its business (CC ¶ 226; NCC ¶ 237);[31] (2) Syngenta knew commercialization created a risk of losing the Chinese market (CC ¶ 102; NCC ¶ 113); (3) without Chinese approval, Syngenta gave away, planted, and sold Viptera seed and increased commercialization even as certainty of a Chinese ban intensified (*see, e.g.*, CC ¶¶ 184-89; NCC ¶¶ 115, 195-200);

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[30] "Misfeasance is 'active misconduct working positive injury to others'" while nonfeasance, or nonaction, is "'passive inaction or a failure to take steps to protect [others] from harm.'" *Domagala*, 805 N.W.2d at 22 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56 (5th ed.1984)).

[31] *See, e.g.*, *Doe v. WTMJ, Inc.*, 927 F. Supp. 1428, 1434 (D. Kan. 1996) (radio station had a duty of care because it "create[d] and foster[ed] a relationship with its listeners.").

(4) Syngenta purposefully decided not to institute responsible stewardship and channeling programs despite publicly acknowledging its obligation to do so (*see, e.g.*, CC ¶¶ 27-35, 108-36; NCC ¶¶ 38-46, 119-47); and (5) even after China's ban on MIR162, Syngenta introduced a new unapproved trait, enhancing and prolonging the risk and duration of injury (CC at 3-4; NCC at 3-4.) "Syngenta did not simply fail to take precautions against foreseen and foreseeable harm," but "acted affirmatively to create such harm." (CC ¶ 228; NCC ¶ 239.) As such, Syngenta owed a duty of care to Plaintiffs since its affirmative conduct contributed directly to the foreseeable harm suffered by Plaintiffs.[32] *See* MDL Order at 10 ("plaintiffs' particular injuries were not only foreseeable, they were actually foreseen by Syngenta, with the plaintiffs suffering the very harm expected . . . and thus plaintiffs' injury is sufficiently connected to Syngenta's conduct"); *see also Domagala*, 805 N.W.2d at 26.

Syngenta's argument that there is no duty to protect another from harm caused by a third party's conduct without a special defined relationship (Syn. Br. at 70-71) misses the mark. Syngenta asks the Court to apply Restatement (Second) of Torts § 315 and conclude that, absent a special relationship, there is "no duty so to control the conduct of a third person." Syngenta fails to address Plaintiffs' controlling and dispositive allegations—Syngenta's conduct, timing,

[32] Syngenta does not dispute that Plaintiffs sufficiently plead a breach of duty or that the harm was foreseeable. Instead, it attempts to argue that public policy is the critical factor in considering a duty. (Syn. Br. at 70.) This is untrue under Minnesota law, which considers the foreseeability of the harm as the threshold issue. *See e.g.*, *Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014) ("Once we identify the defendant's 'own conduct,' we then determine whether that conduct created a foreseeable risk of injury to a foreseeable plaintiff."). It is only when the harm is too remote that public policy dictates whether a legal duty exists. *Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 884 (Minn. App. 1993). Here, Plaintiffs were stakeholders (CC ¶ 226; NCC ¶ 237) and the harm suffered was the "very harm expected to occur" and known by Syngenta (MDL Order at 10).

scope, and manner of commercialization, is being challenged, not a third party's.[33] (*See, e.g.*, CC ¶ 331; NCC ¶ 302.) As discussed above, the "no-duty" rule turns on the distinction between "nonfeasance" and "misfeasance." *See Ariola v. City of Stillwater*, No. A14-0181, 2014 WL 5419809, at *7 (Minn. App. Oct. 27, 2014) ("[T]he duty to protect another from one's own conduct attaches only in the case of misfeasance, or "active misconduct working positive injury to others.") (internal quotations omitted); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1320 n.2 (Ohio 1997);[34] W. Page Keeton et al., Prosser and Keeton, On the Law of Torts § 56, at 373-74 (5th ed. 1984). As Minnesota Supreme Court explained, "when a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others."[35] *Domagala*, 805 N.W.2d at 26.

Syngenta did not fail to remove a preexisting risk, but committed "a new risk of harm to the plaintiff." *Satterfield*, 266 S.W.3d at 356 (quoting Prosser, *supra*, §56, at 373). That is misfeasance, for which liability extends to the foreseeable plaintiff suffering the foreseeable

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[33] Moreover, in light of Syngenta's premature commercialization, Plaintiffs pled that no third party could have prevented the harm absent adequate stewardship and channeling managed by Syngenta.

[34] The classic example is an ordinary bystander, even an expert swimmer with a rope, who has no duty to save a child from drowning. *Estates of Morgan*, 673 N.E.2d at 1319 n.2; Restatement (Second) of Torts § 314 Illustr. No. 4. Modern cases involve the duty of a mental health professional to act with regard to patients for the benefit of third parties. *Estates of Morgan*, 673 N.E.2d at 1328.

[35] *See* Dobbs, *supra*, § 414 ("The rule that one owes no duty to control others is a particular instance of the general rule that nonfeasance is not a tort unless there is a duty to act."); Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934) (Restatement draft founded on nonfeasance, where relationship of the parties imposes an "affirmative obligation").

injury.[36] *Domagala*, 805 N.W.2d at 26; Prosser, *supra*, § 56, at 375; *accord* Restatement (Second) of Torts, Div. 2, Ch. 12, Topic 4, Scope Note. Even Syngenta's cited cases recognize that misfeasance establishes a duty, even if a third party might alleviate the harm.[37] *See Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. App. 1981) (defendant who "jump-start[ed] an automobile for an obviously drunken driver" took "an affirmative act" creating a duty). Further, not one case cited by Syngenta excuses negligent commercialization by a corporation when there was far-reaching and foreseeable harm.[38] And the only Court to consider whether Syngenta

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[36] The no-duty-to-control rule "has no logical application" when a defendant affirmatively "creat[es] a risk of harm . . . through the instrumentality of another or otherwise." Dobbs, *supra*, § 414.

[37] Numerous cases in the relevant states hold that the no-duty-to-control rule does not apply where defendant's affirmative acts create or enhance the risk of harm. *See Simmons v. Homatas*, 925 N.E.2d 1089, 1100 (Ill. 2010) (club that "affirmatively assisted" intoxicated driver into car had duty to victims); *Bell v. Hutsell*, 955 N.E.2d 1099, 1109-10 (Ill. 2011) (discussing Simmons and distinguishing it from a "case of true nonfeasance" where the defendant "took no action"); *Calwell v. Hassan*, 925 P.2d 422, 431 (Kan. 1996) (identifying as a "basis for imposing a 'special relationship' duty under § 315 [of the Restatement where defendant's] "actions created a risk of harm to" the plaintiffs, but finding record inadequate); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1144 (Ohio 2002) (rejecting defendant's attempt to characterize duty as one of control over third persons, where plaintiffs alleged that they "engaged in affirmative acts (*i.e.*, creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms"); *Joyce v. M & M Gas Co.*, 672 P.2d 1172, 1174 (Okla. 1983) (where actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct," no-duty rule inapplicable); *Smith ex rel. Ross v. Lagow Const. & Developing Co.*, 642 N.W.2d 187, 192 (S.D. 2002) (landlords whose "own affirmative acts or omissions create a high risk of harm from crime owe a duty to exercise reasonable care to protect tenants from that increased risk"); *Robb*, 295 P.3d at 216 (no-duty rule does not apply when "the actor's own affirmative act creates a recognizable high degree of risk of harm"); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) ("One who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care."); *accord Ginapp v. City of Bellevue*, 809 N.W.2d 487, 492 (Neb. 2012) (identifying relationship between section 315 of the Restatement (Second) and section 37 of the Restatement (Third)).

[38] Syngenta's cases excusing misfeasance do so because the harm was unforeseeable. *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (game manufacturer had no reason to foresee

owed a duty under virtually identical facts as those before this Court concluded Syngenta did owe such a duty based on its own conduct. (MDL Order at 10-11 ("[T]he Court recognizes a duty here, based on Plaintiffs' allegations that Syngenta created an unreasonable risk of harm to plaintiffs by its conduct").)

Syngenta's attempt to skirt liability by arguing various policy considerations fails to address the relevant inquiry: whether Syngenta's conduct created a foreseeable risk of harm.[39] *Eischen v. Crystal Valley Coop.*, 835 N.W.2d 629, 634 (Minn. App. 2013); *see also* Prosser, *supra*, § 56 at 375 (when defendant has engaged in acts that have "begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him," the course of conduct is misfeasance). The allegations here are that "Syngenta did not simply fail to take precautions against foreseen and foreseeable harm," but it "acted affirmatively to create such harm." (CC ¶ 228; NCC ¶ 239.) And Syngenta's "failure" to implement stewardship and channeling programs was not an omission, but a decision. In choosing not to act as a steward, so as to bolster its gain, Syngenta created the risk of pervasive contamination. Syngenta has not and cannot argue a lack of foreseeability; therefore, existence of a duty is well founded.

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plaintiff's son was mentally ill and would commit suicide after playing the game); *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 670 (8th Cir. 2009) (criminal acts were an intervening cause between chemical manufacturer and city fighting methamphetamine crime). In contrast here, the harm was actually foreseen. (MDL Order at 10-11.)

[39] Syngenta offers one unpublished case for the rule that public policy is a major consideration in finding a legal duty under Minnesota law. (Syn. Br. at 70.) That case, however, offers no guidance. First, although the court states that public policy is a consideration, there is no mention of any guiding public policy in its analysis. Second, the court is considering whether a person has a duty to protect another from criminal activity in the landlord-tenant or hotel-guest situation. *Gutierrez v. Eckert Farm Supply, Inc.*, No. C5-02-1900, 2003 WL 21500161, at *4 (Minn. App. July 1, 2003).

Tacitly acknowledging the flaw in its duty argument, Syngenta makes straw-man arguments that Plaintiffs seek to impose a "novel duty" (and that the MDL Order imposed such a duty) and a duty "to refrain from selling Viptera *at all*." (Syn. Br. at 82, 89-90.) Plaintiffs do not assert, nor did the MDL Order impose, a novel duty on Syngenta. Instead, the duty invoked is one of "reasonable care" under the circumstances of this case. *See* Dobbs, *supra*, § 253 ("duty states a rule or standard of law rather than a conclusion about the defendant's breach of duty on the particular facts"). In Minnesota, it is well recognized that a defendant has a legal duty when its "'own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.'" *Wenker ex rel. Wenker*, 2015 WL 1013553, at *2 (quoting *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014)). Moreover, and contrary to Syngenta's contentions, Plaintiffs do not seek relief prohibiting GM seed developers from ever commercializing, or always waiting for approval from every foreign export market, "effectively transferring that decision to foreign sovereigns," as Syngenta argues. (Syn. Br. at 89-92.)

Courts have rejected similar efforts to recast duty in a manner that conflates its existence with breach.[40] In *Ludwikoski v. Kurotsu*, 840 F. Supp. 826 (D. Kan. 1993), the victim of an errant golf ball sued the golfer for negligence. Defendant moved to dismiss, arguing that Kansas law "does not impose upon a golfer a duty to hit a golf ball precisely." *Id.* at 827. The court rejected that argument: "Contrary to defendant's position, it is not necessary . . . to recognize a duty to

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[40] *See also Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158, 163 (Wis. 2002) ("[T]he primary question we ask is not whether the defendant has a duty to take (or refrain from) certain actions, but whether the defendant's actions (or lack thereof) were consistent with the general duty to exercise a reasonable degree of care under the circumstances."); *Hesse v. McClintic*, 176 P.3d 759, 763 (Colo. 2008) ("[T]here is no general requirement that a driver *always* pull over to the side of the road when confronted by animals on the road. However, simply because a driver need not pull over *every* time she is confronted by animals on the road does not mean that she *never* needs to pull over in such a situation.").

'hit a ball precisely' in order to find that plaintiff states a claim. The court need only find that the defendant had a duty to exercise ordinary care, or the care of a reasonable person under the circumstances." *Id.* at 827; *see also* Dobbs, *supra*, § 253 (discussing the "duty vs. breach confusion").

The same is true here. By collapsing duty and breach, Syngenta is trying to turn a jury question into a legal one. *See Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012) ("Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution."). Syngenta attempts to create new law and insists that the USDA's deregulation precludes a duty to refrain from selling Viptera. (Syn. Br. at 90.) But, that is not the duty owed. Instead, "nothing about USDA deregulation requires a developer like Syngenta to commercialize" or dictates the timing, scope, and manner of that commercialization. (CC ¶ 61; NCC ¶ 72.) Deregulation meant Viptera was no longer under USDA oversight at the time of commercialization. Syngenta's argument is like saying a driver's license confers a right to drive negligently. It does not.[41] And, of course, an activity need not be unlawful to be negligent.[42]

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[41] *See, e.g.*, *Smith v. Waggoners Trucking Corp.*, 69 So. 3d 773, 778 (Miss. App. 2011) ("[S]tatutory driving laws [do not] supplant the common-law duty of ordinary care," and that driver who had the statutory right-of-way "still owed a duty of reasonable care during the entire parking maneuver[.]").

[42] *Vancura v. Katris*, 939 N.E.2d 328, 344 (Ill. 2010), cited by Syngenta, acknowledges that "the mere existence of a statute . . . does not foreclose the possibility of a common law negligence action based on an extra-statutory duty of care." Every other relevant state agrees. *See Stewart v. Hewlett-Packard Co.*, 2012 WL 6043642, at *5 (N.D. Ala. Nov. 29, 2012); *Little Rock Land Co. v. Raper*, 433 S.W.2d 836, 842 (Ark. 1968); *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 79 (Colo. 1998), *as modified on denial of reh'g* (June 22, 1998); *N. Ind. Pub. Serv. Co. v. Sell*, 597 N.E.2d 329, 331-32 (Ind. App. 1992); *Schmitt v. Clayton Cnty.*, 284 N.W.2d 186, 190 (Iowa 1979); *Glynos v. Jagoda*, 819 P.2d 1202, 1210 (Kan. 1991); *Corley v. Gene Allen Air Servs., Inc.*, 425 So. 2d 781, 784 (La. App. 1982); *Burt v. Fumigation Serv. & Supply, Inc.*, 926 F. Supp. 624, 634 (W.D. Mich. 1996); *Blasing v. P. R. L. Hardenbergh Co.*, 226 N.W.2d 110, 115 (Minn. 1975); *Ill. Cent. R. Co. v. Brent*, 133 So. 3d 760, 772 (Miss. 2013); *Kersey v. Harbin*,

Finally, Syngenta seeks to avoid the universal rule that industry standards are relevant in determining whether Syngenta exercised reasonable care. (*See* Syn. Br. at 91-92.) The question here is not whether these standards created a duty (although they did under the voluntary undertaking doctrine, discussed below), but whether Syngenta's noncompliance is evidence of a breach, a point Syngenta concedes. (*Id.* at 91.)

B. Alternatively, Syngenta voluntarily undertook a duty.

It is well established that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323; *see also id.* § 324A (applying same principle to third parties). Minnesota has specifically adopted this section of the Restatement. *Glorvigen*, 816 N.W.2d at 587. Additionally, relevant state law further recognizes these principles.[43]

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591 S.W.2d 745, 750 (Mo. App. 1979); *Collingwood v. Gen. Elec. Real Estate Equities, Inc*., 376 S.E.2d 425, 428 (N.C. 1989); *Keyes v. Amundson*, 391 N.W.2d 602, 607 (N.D. 1986); *Nichols v. Coast Distrib. Sys.*, 621 N.E.2d 738, 740 (Ohio App. 1993); *Roadway Express v. Baty*, 114 P.2d 935, 937 (Okla. 1941); *Zacher v. Budd Co.*, 396 N.W.2d 122, 133 (S.D. 1986); *Chattanooga Rapid Transit Co. v. Walton*, 58 S.W. 737, 739 (Tenn. 1900); *Idar v. Cooper Tire & Rubber Co*., 2011 WL 2412613, at *6 (S.D. Tex. June 6, 2011); *Hoffmann v. Wis. Elec. Power Co.*, 664 N.W.2d 55, 62 (Wis. 2003).

[43] *Beasley v. MacDonald Eng'g Co.*, 249 So. 2d 844, 846-47 (Ala. 1971); *Capel v. Allstate Ins. Co.*, 77 S.W.3d 533, 543 (Ark. 2002); *Jefferson Cnty. Sch. Dist. R-1 v. Justus By & Through Justus*, 725 P.2d 767, 771 (Colo. 1986); *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769, 773 (Ill. 1964); *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1219-20 (Ind. App. 1983); *DeBurkarte v. Louvar*, 393 N.W.2d 131, 135 (Iowa 1986); *Sall v. T's, Inc.*, 136 P.3d 471, 477-78, 482 (Kan. 2006); *Louisville Cooperage Co. v. Lawrence*, 230 S.W.2d 103, 105 (Ky. 1950); *Dornak v. Lafayette Gen. Hosp.*, 399 So. 2d 168, 170 (La. 1981); *Schanz v. New Hampshire Ins. Co.*, 418

Syngenta voluntarily undertook a duty to exercise due care as it repeatedly and expressly acknowledged the integrated nature of the commodity market and adopted policies assuring stakeholders that it would engage in responsible commercialization consistent with industry policies. (*See* CC ¶¶ 27-35, 226.) These included stewardship, channeling, and a commitment not to commercialize new GM traits without approval by key import markets. (*See* CC at 2-3; ¶¶ 27-35, 61-88.) Syngenta does not dispute that Plaintiffs have adequately pled these facts; instead, it argues Plaintiffs cannot satisfy the elements of a voluntary undertaking as a matter of law. Syngenta's argument fails.

First, Syngenta notes that courts generally "limit[] liability for injury in a voluntary undertaking to 'physical harm.'" (Syn. Br. at 87.) Syngenta's own cases, however, recognize that "physical harm" includes property damage.[44] All Plaintiffs allege physical harm to their own property. (*See e.g.*, CC ¶¶ 96-104 (contamination of crops); NCC ¶¶ 107-15.)

N.W.2d 478, 481 (Mich. App. 1988); *Dr. Pepper Bottling Co. of Miss. v. Bruner*, 148 So. 2d 199, 201 (Miss. 1962); *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 433 (Mo. 1985); *Carroll v. Action Enter's, Inc.*, 292 N.W.2d 34, 36 (Neb. 1980); *Davidson v. Univ. of N. Carolina at Chapel Hill*, 543 S.E.2d 920, 929 (N.C. App. 2001); *Weiss v. Bellomy*, 278 N.W.2d 119, 121 (N.D. 1979); *Briere v. Lathrop Co.*, 258 N.E.2d 597, 602 (Ohio 1970); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 474 (Okla. 1987); *State Auto Ins. Cos v. B.N.C.*, 702 N.W.2d 379, 388 (S.D. 2005); *Biscan v. Brown*, 160 S.W.3d 462, 482-83 (Tenn. 2005); *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119 (Tex. 1976); *Am. Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 179 N.W.2d 864, 868 (Wis. 1970).

[44] *See Hatleberg v. Norwest Bank Wis.*, 700 N.W.2d 15, 23-24 (Wis. 2005) ("[P]hysical harm" encompasses damage to property in discussing tax liability arising out of improperly drafted trust documents); *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57, 63 (Minn. App. 1996) (tort "applied to property damage" in discussing a bad faith failure to settle within insurance policy limits); *Shaner v United States*, 976 F.2d 990, 994 (6th Cir. 1992) (finding no evidence of damage to persons "or their property" in litigation regarding cancellation of emergency loans); *Simms v. Jones*, 879 F. Supp. 2d 595 (N.D. Tex. 2012) (breach of contract action in which NFL failed to disclose that plaintiff's seating had obstructed view); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74 (Iowa 2001) (termination of employment); *Vancura v.*

Second, Syngenta's suggestion that the statements in its Deregulation Petition cannot be considered under the *Noerr-Pennington* doctrine is misconceived. (Syn. Br. at 88.) In *Pennington*, the Supreme Court noted that conduct, which may otherwise be protected, is admissible to establish such facts as the defendants' purpose, character, a continuing course of concerted conduct, and the effect of such conduct:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.[45]

United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 n.3 (1965) (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 45 (1911) (allowing evidence regarding defendants' "purpose, of their continuing conduct, and of its effect") and *FTC v. Cement Inst.*, 333 U.S. 683, 704 (1948) (permitting evidence to show a continuous course of concerted effort")); *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1139 (10th Cir. 2002) (no error in admitting prior statements to agency in course of rulemaking proceedings).

Plaintiffs do not premise liability exclusively on Syngenta's statements in the Deregulation Petition. Rather, they point to Syngenta's misrepresentations there,[46] along with the

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Katris, 939 N.E.2d at 347 (recognizing distinction between "physical" and "bodily" harm in discussing an improperly notarized mortgage loan).

[45] The one case cited by Syngenta does not alter this exception to the *Noerr-Pennington* doctrine. Instead, *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1573 (11th Cir. 1996), considered whether the motive or intent was a proper consideration in deciding whether to apply any exception.

[46] Syngenta's statements that its stewardship agreements would "include a term requiring growers to divert this product away from export markets (*i.e.*, channeling) where the grain has not yet received regulatory approval for import" (CC ¶ 121; NCC ¶ 132), for example, may be

lawsuit Syngenta waged against Bunge to enjoin channeling safeguards and all of the affirmative steps Syngenta took, to show the character and purpose of Syngenta's concerted, continuing efforts to get Viptera on the market and, once there, abandon undertakings to Plaintiffs' detriment.

Third, Syngenta misreads its own cases when it argues that "a voluntary undertaking creates a duty only if the promise induces detrimental reliance." (Syn. Br. at 88.) Detrimental reliance is only one potential element. If a defendant's failure to exercise reasonable care increases the risk of harm, for example, then reliance is not required. *See Glorvigen*, 816 N.W.2d at 587 (recognizing that Restatement (Second) of Torts § 323 attaches liability if failure to exercise reasonable care increases risk of harm or defendant detrimentally relied on the undertaking); Restatement (Second) of Torts §§ 323 & 324A; *Am. Mut. Liab. Ins. Co.*, 179 N.W.2d at 868 ("neither the [common law] nor the Restatement section make 'reliance' . . . a necessary element for recovery . . . reliance on the act is merely an alternative basis for liability."); *Nelson*, 199 N.E.2d at 779 ("Defendant's contention that the element of reliance is essential to its liability . . . either overlooks or misapprehends that defendant was charged with misfeasance[.]").

Some jurisdictions draw a distinction between misfeasance and nonfeasance; only the latter requires detrimental reliance.[47] *See Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 480 (Ind. App. 1993) ("Where nonfeasance is involved . . . liability may arise only where

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considered by this Court in considering the foreseeability that a stewardship program would help prevent the known risks. *Pennington*, 381 U.S. at 670; *Telecor*, 305 F.3d at 1139.

[47] *See also Kassis v. Perronne*, 209 So. 2d 444, 446 (Miss. 1968) (distinguishing between nonfeasance and misfeasance in holding that if a landlord "voluntarily repairs . . . he will be responsible for the want of due care in the execution of the work"); *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1221 (Ind. App. 1983) ("[R]eliance is not an issue in a case involving misfeasance").

the beneficiaries have actually relied on the performance."); *Chisolm v. Stephens*, 365 N.E.2d 80, 85 (Ill. 1977) ("The instant case involves non-feasance . . . rather than misfeasance[.]"). And as alleged, Syngenta committed misfeasance that not only increased the risk of harm, but actually harmed Plaintiffs and therefore a showing of detrimental reliance is not required. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) ("If the injury is foreseeable, the duty owed to the plaintiff is one of ordinary care.").

C. Foreseeability and public policy support finding a duty.

1. Syngenta's cases are inapposite.

Likening farmers who purchased and planted Viptera to "gun-wielding killers," *Young v. Bryco Arms*, 821 N.E.2d 1078, 1089-90 (Ill. 2004), Syngenta urges the Court to release it from liability as some courts have done for firearm manufacturers. Syngenta's argument is premised on its assertion that foreseeability alone is "not sufficient to create a duty." (Syn. Br. at 70.) But in at least five relevant states (Minnesota, Alabama, Arkansas, North Dakota, and Wisconsin), foreseeability is indeed the ultimate test. *See, e.g.*, *Eischen v. Crystal Valley Coop.*, 835 N.W.2d 629, 634 (Minn. App. 2013).[48] In virtually all other states, while duty may be refused on public policy grounds, foreseeability remains the most important consideration.[49] Syngenta does not contest foreseeability, so dismissal of these claims is wholly improper.

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[48] *See also Bush v. Alabama Power Co.*, 457 So. 2d 350, 353 (Ala. 1984) ("ultimate test of a duty" is "foreseeability that harm may result if care is not exercised"); *Shannon v. Wilson*, 947 S.W.2d 349, 352 (Ark. 1997) (same); *Dinger ex rel. Dinger v. Strata Corp.*, 607 N.W.2d 886, 891 (N.D. 2000) ("The risk reasonably to be perceived defines the duty to be obeyed . . . within the range of apprehension."); *Janis v. Nash Finch Co.*, 780 N.W.2d 497, 502 (S.D. 2010) ("The risk reasonably to be perceived defines the duty to be obeyed."); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) ("duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person.").

[49] *See Perreira v. State*, 768 P.2d 1198, 1209 (Colo. 1989) (while not alone sufficient, foreseeability is "an important factor for consideration"); *Ward v. K Mart Corp.*, 554 N.E.2d

More than that, Plaintiffs allege that the harm was actually foreseen and the MDL Court agreed that at the pleadings stage it was foreseen harm. (MDL Order at 10; CC ¶ 228; NCC ¶ 239.) The Court therefore should begin from the premise that duty exists, asking whether circumstances warrant exception from normal tort principles. To be clear, Syngenta seeks immunity for itself and all GM seed manufacturers—a rule that would free the industry to act with impunity regardless of the risk of harm to others.

Syngenta relies on cases that consider misuse of a manufacturer's product.[50] (*See* Syn. Br. at 71 (using "misuse" to describe conduct justifying the no-duty rule); MDL Order at 12-13 ("[T]hose cases generally have involved the clear misuse of the product. Syngenta does not have a point in arguing that any results in harm to another could be described as "misuse . . . .").) Thus, while some courts are reluctant to hold firearm manufacturers liable for injuries or social

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223, 226 (Ill. 1990) (foreseeability "is one important concern"); *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 517 (Ind. 1994) (duty imposed "where a reasonably foreseeable victim is injured by reasonably foreseeable harm."); *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013) ("duty of care is intertwined with the foreseeability of harm"); *Shelton*, 413 S.W.3d at 908 ("foreseeability . . . is the most important factor in determining whether a duty exists"); *Bonds v. SAPA Extrusions, LLC*, 135 So. 3d 799, 802-03 (La. App. 2014) (error to find no duty where harm foreseeable); *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991) ("important component" of duty is that injury is "reasonably foreseeable"); *Lopez*, 26 S.W.3d at 156 ("foreseeability is paramount in determining whether a duty exists"); *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 695 S.E.2d 437, 440 (N.C. 2010) (duty extends to injury "reasonably foreseeable and avoidable through the exercise of due care"); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 693 N.E.2d 271, 274 (Ohio 1998) (duty "depends on the foreseeability of the injury"); *Wood v. Mercedes-Benz of Okla. City*, 336 P.3d 457, 459 (Okla. 2014) ("one of the most important considerations in establishing a duty is foreseeability"); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 365 (Tenn. 2009) (to determine duty, "courts must first establish that the risk is foreseeable"); *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) ("[F]oreseeability weighs heavily in favor of imposing a duty").

[50] Syngenta's attempt to sway this Court that because this case deals with a "safe, non-defective product," no legal duty should be imposed has no legal support. (Syn. Br. at 71-72.) Indeed, none of the cases cited by Syngenta show that is even a consideration in determining whether a duty exists.

costs associated with policing illegal firearm use, those holdings are premised on the fact that most people use the firearms lawfully and safely.[51] *See City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 899 (E.D. Pa. 2000) ("[M]ore than 99% of the gun maker's vendees transact their business lawfully" and distinguishing case where defendant "k[new] of illegal resales"). Additionally, as the MDL Court rightly determined, the cases relied on by Syngenta involved a user who was more culpable.[52] (MDL Order at 17.)

Finally, in other cases, the no-duty rule rested, in part, on a lack of foreseeability that the product would be misused.[53] *See Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. App. 2004) ("[C]ellular phone does not cause a driver to wreck a car . . . . Drivers frequently use cellular phones without causing accidents[.]"); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 394 (Ill. 1987) (drug manufacturers could not foresee that "drugs would be dispensed without warnings by physicians, . . . [and] patient would be discharged from the

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[51] Most of Syngenta's cases address laws of states not relevant here. *See Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (New York law); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194 (App. Div. 2003) (same); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 538 (3d Cir. 2001) (New Jersey law). Courts in relevant states have held to the contrary. *See, e.g., City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003) (plaintiff stated claim where gun manufacturers were alleged to have notice of illegal handgun sales and ability to control distribution).

[52] Syngenta argues this finding by the MDL Court was improper and also incorrect. This fails, however, as cell phones are not intended for use when driving. Indeed, it is not known to a cell phone manufacturer if any consumer would own a car or plan to use the phone while driving. In contrast, here Syngenta knew the exact purpose, use, and associated risks that existed by commercializing MIR162. And the end-users were not unknown but instead "participants in an inter-connected market." (MDL Order at 13.)

[53] The Nebraska case cited by Syngenta, *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256 (Iowa 1999), held on public policy grounds that a mental health professional owed no duty to the child of a patient who claimed that therapy caused estrangement between the patient and the child. In rejecting a duty to protect the child, the court relied on doctor-patient confidentiality as inconsistent with a duty to warn. *Id.* at 260-64. This case does not instruct the Court's decision here.

hospital, drink alcohol, drive a car, lose control of it, hit a tree, and injure the passenger"); *Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1119-20 (Colo. App. 1993) (finding no evidence that component supplier knew that final product was dangerous").

Unlike these cases, Syngenta foresaw the harm and Viptera seed was not misused. Indeed, it was used exactly as Syngenta intended. Moreover, misuse is no defense if the defendant knew of impending harm. *See City of Philadelphia*, 126 F. Supp. 2d at 901-02 (distinguishing cases on this ground). This Court should not abide Syngenta's request for judicial clemency, particularly at the motion-to-dismiss stage.

2. This is not an exceptional case warranting a no-duty determination.

As one of Syngenta's leading cases acknowledges, an analysis of public policy is required only "[i]n cases in which the existence of a duty is not previously established." *Williams*, 809 N.E.2d at 476. Such an analysis might be appropriate in cases attempting to hold firearm manufacturers liable for "gun-wielding killers," cold-medicine makers liable for meth-cooking criminals, or cell-phone makers liable for irresponsible drivers. But here, every American court has found that seed manufacturers owe a duty of care when their release of a GM trait results in harm to others, including the MDL considering the exact same wrongdoing alleged here.[54] (MDL Order at 17.) To paraphrase Judge Perry in the *Rice* litigation, Syngenta had a duty to introduce Viptera and Duracade "without negligence" and contamination of non-GM [corn] and a resulting disruption of the U.S. [corn] markets was "the known and foreseeable risks that [Syngenta] had a duty to prevent." *In re Genetically Modified Rice Litig.*, 2011 WL

[54] Syngenta attempts to distinguish *Rice* and *Starlink* because the USDA had not yet deregulated the traits at issue. But again, deregulation is not a license to commercialize negligently. In *Rice*, the court implicitly rejected this distinction when it held that plaintiffs could not pursue a negligence per se claim. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1022.

5024548, at *5-6 (E.D. Mo. Oct. 21, 2011) (granting plaintiffs' summary judgment on Bayer's intervening-cause defense); *accord In re StarLink*, 212 F. Supp. 2d at 843 (denying motion to dismiss founded on a purported lack of duty, holding that "Aventis had a duty to ensure that StarLink did not enter the human food supply, and their failure to do so caused plaintiffs' corn to be contaminated)"; *see also State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 218-19 (Ore. 1968) (manufacturer had duty to avoid foreseeable harm and complaint alleged that defendant "negligently reproduced and sold seed which caused plaintiffs to lose the expected profit from their crop"); *Nakanishi v. Foster*, 393 P.2d 635, 640 (Wash. 1964) (seed distributor had duty on ground that manufacturer or processor who offers goods on the market "must use reasonable care where there is a foreseeable risk of harm to the consumer").

Duty is not foreign in this area, and there is no need to impose a policy-based limitation. Indeed, under Minnesota law, no policy argument would support precluding a duty here as the connection between Syngenta's conduct and the harm is not remote.[55] *See e.g.*, *Glorvigen*, 816 N.W.2d at 582. This is true as it is Syngenta's conduct that created the risks and later caused the harm to Plaintiffs. There was no unknown factor or misuse of its product that ultimately caused the harm as alleged in the complaint. Thus, as "the consequence is direct and is the type of occurrence that was [] reasonably foreseeable [this Court should] hold as a matter of law a duty exists." *Hegna v. E.I. du Pont de Nemours & Co.*, 806 F. Supp. 822, 825 (D. Minn. 1992) on

[55] Relevant policy factors vary by state. Indiana, for example, considers three factors: relationship between the parties, foreseeability, and "public policy concerns." *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003) (declining balancing test of factors "[w]here a duty is already recognized"). Syngenta has not identified what factors are relevant in which states. Its motion should be denied for this reason alone and attempts to cure this deficiency in a reply brief should likewise be denied.

reconsideration, 825 F. Supp. 880 (D. Minn. 1993), *aff'd sub nom*, *Abrams v. E.I. Du Pont De Nemours & Co.*, 27 F.3d 571 (8th Cir. 1994).

Desperate, Syngenta turns to a Canadian court applying Canadian law. That case considered whether seed manufacturers owed a duty to organic growers when contamination from GM canola seed contaminated their organic crops, depriving them of the premium that organic produce commands.[56] *Hoffman v. Monsanto Canada*, 2007 SKCA 47, 2007 SK.C. LEXIS 194, at *8 (Can. Sask. C.A. May 7, 2007) ("*Hoffman II*"). As Syngenta is well aware, specialty markets are far different than commodity markets. Among other things, they are "closed loop" systems where specialty producers have incentive to isolate because they get a premium. (*See* CC ¶ 105; NCC ¶ 116.) Commodity markets are not a "closed-loop" system, and Plaintiffs do not allege they are seeking premium over commodity price. Here, it was not just those exporting to China who were harmed, but everyone whose corn was priced at the commodity market. Syngenta is the intermeddler in this non-specialty system by destroying (or at least diminishing) its own stakeholders' market (the commodity market)—something Syngenta represented would not happen.[57]

Importantly, the *Hoffman* plaintiffs did not allege that defendant knew of a European standard prohibiting use of GMs and GM derivatives in products labeled or advertised as

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[56] Also, plaintiffs in *Hoffman* did "not allege physical harm to themselves or their property." *Hoffman v. Monsanto Canada*, 2005 SK.C. LEXIS 330, at *59 (Can. Sask. Q.B. May 11, 2005) ("*Hoffman I*"). Neither did they allege they were "stakeholders" of the defendant. *Id.*

[57] Syngenta states that the MDL Court incorrectly distinguished *Hoffman.* First, the MDL Court correctly noted that it was non-binding authority with different facts. (MDL Order at 16.) Nevertheless, Syngenta asks this Court to give Canadian law precedential value. In doing so, Syngenta fails to address the fact that the MDL Court noted *Hoffman* did not include allegations that the defendant represented it would actively protect its stakeholders and that the duties at issue in the two cases differed. (*Id.*; MDL Order at 16-17.) This Court should, likewise, reject application of the *Hoffman* case.

organic. *Hoffman I*, at *59. In fact, the defendant could not have known of that standard because it did not exist when the trait was commercialized. *Hoffman II*, at *8-10. By contrast, Syngenta is alleged to have known that China was a key market and required its own approval of MIR162. (CC ¶¶ 35, 317; NCC ¶ 337.) The court also emphasized that "defendants are not alleged to have grown Roundup Ready and Liberty Link canola." *Hoffman II*, at *39. Here, Syngenta grew Viptera. Plaintiffs also allege (missing in *Hoffman*) "a close and direct relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiffs' legitimate interests." *Hoffman I*, at *61. Plaintiffs allege that Syngenta acknowledges them as stakeholders, and took affirmative, strategic steps that created, and increased, the very risk that befell them. *See id.* at *75 (distinguishing *Hoffman I* plaintiffs from other plaintiffs whose losses were "clearly foreseeable" and were in a class "vulnerable" to defendants' actions).

One axiom stands clear: "No better general statement can be made than that the courts will find a duty, where in general reasonable persons would recognize it and agree that it exists." Prosser, *supra*, § 53, at 359. Here, seed manufacturers have pledged to act "responsibly in introducing new genetically modified traits." (CC at 1; NCC at 2.) Syngenta acknowledges that this is reasonable, having obtained approval from export markets (except China) prior to commercializing Viptera. Syngenta's no-duty rule disregards what the industry—and Syngenta—recognizes as responsible practice against a known risk of harm. Now, Syngenta wants complete discretion to act with impunity. Rather than promoting responsible conduct, such immunity promotes a race to the bottom. Nothing would prevent manufacturers from introducing a new GM trait before any export market had approved it, a devastating proposition to the American agricultural industry, and wholly inappropriate for a motion to dismiss.

Moreover, the present system is working. In the last 15 years, there have been three other recorded lawsuits of this nature (*Rice*, *Wheat*, and *Starlink*). That hardly heralds a dysfunctional tort system in need of the radical protection demanded by Syngenta. The fact that some states have declined to pass legislation on this issue, proves, at most, that they believe the current tort system is adequately policing unreasonable commercialization of GM crops.[58] Good policy favors keeping the *status quo*, not upending it to allow GM developers impunity to alter their conduct to cause new, widespread harm. Thus, Syngenta's protests are empty since it offers nothing to demonstrate that the "magnitude of the burden" on seed manufacturers would, in fact, be "extraordinary" or that recognizing liability would create a flood of litigation. (Syn. Br. at 73.) *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011) (rejecting argument that proximate cause instruction would open the door to unlimited liability when defendant could "not identify even *one* trial in which the instruction generated an absurd or untoward award").

Plaintiffs are not asking Syngenta "to reorganize the entire industry framework for growing and distributing corn" (Syn. Br. at 3), but simply to act reasonably. By contrast, and having disregarded its own commitment to "work closely" with stakeholders and manage introduction in a responsible way (CC ¶¶ 28, 31; NCC ¶¶ 39, 42), Syngenta wants to force the burden onto non-producers at huge and unreasonable individual cost. As one court to have considered these issues, *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 820 F. Supp. 2d 953

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[58] *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("[P]etitioners' reliance on Congress' subsequent failure to enact proposed legislation . . . deserves only passing mention. This Court generally is reluctant to draw inferences from Congress' failure to act."); *Al-Salehi v. I.N.S.*, 47 F.3d 390, 394-95 (10th Cir. 1995) ("Mere nonadoption" of legislation "is not probative of congressional intent . . . since several equally tenable inferences [] may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.").

(N.D. Iowa 2011),[59] readily concluded, on a fulsome record that included fact and expert testimony, it was "not commercially reasonable or feasible for Bunge [an exporter] to make . . . modifications to its facilities" to ensure segregation of even a single GM trait "that would then service the Chinese market." *Id.* at 990. The cost to Bunge was "$6 million to $8 million *per facility*." *Id.* (further finding that it would cost "$4 million to $20 million" to "redirect[] a shipment of corn that China refused on delivery because of Viptera tainting"). "[N]o reasonable balance of equities would impose upon [non-producers] the prodigious additional expense of segregating Viptera corn (or segregating non-Viptera corn earmarked for Chinese export), where [they] did not create the situation in which Viptera corn has not been yet approved for import in China." *Id.* 990. The problem "arises entirely because Syngenta decided to commercialize Viptera corn knowing that it did not yet have Chinese and some other import approvals and would not have them for the 2011 crop year, and under circumstances in which Syngenta should have reasonably recognized that Chinese imports of United States corn for the 2011 crop year might well be very significant." *Id.* The court rejected Syngenta's request to shift the risk to Bunge. *Id.* at 988. Here, any such shift would be entirely premature at the motion-to-dismiss stage.

These findings are inapplicable to the "gun-wielding killer" cases Syngenta cites, where a fraction of customers misuse a product and the Court is asked to impose a duty on the manufacturer to prevent such misuse. In contrast, "public interest strongly favors allocating the risks of a decision to introduce a new transgenic grain into the commercial market on the company that decided to commercialize before obtaining all import approvals, not on the party

[59] Syngenta, who brought the lawsuit in *Bunge*, should be collaterally estopped from challenging these findings, an issue for resolution at a later date.

that is simply confronted with that decision and has reasonable countervailing business interests in not accepting the grain."[60] *Bunge*, 820 F. Supp. 2d at 992.

Moreover, beyond having a profit motive to commercialize before approval by major export markets, seed manufacturers are the only market participants with knowledge about the status of any export approval they have sought. Immunizing them from liability would make no sense given their ability to mislead the market about that approval, as Syngenta did here. (*See* CC ¶¶ 150-155, 176-180, 307.) Indeed, as internal communications reveal, Syngenta capitalized on farmers' lack of knowledge about the status of Chinese approval, celebrating that by the time growers learned of non-approval, it would be to their advantage as there would be a seed shortage. (CC ¶ 168; NCC ¶ 147.) A party with the ability to manipulate the flow of information should not be immunized from its negligence and push responsibility downstream.

Seed manufacturers are the only parties capable of shifting the cost of acting non-negligently to the users of those seeds. *See* Prosser, *supra*, § 98 at 692-93 ("Those . . . engaged in the manufacturing enterprise have the capacity to distribute the losses of the few among the many who purchase the products."). "This can be regarded as fairness and justice reason of policy." *Id.* at 693. Where the cost of negligence can be incorporated into the sale, the natural forces of an economic market disperse the harm caused by that seed to the beneficiaries of that seed.

And it is not outside Syngenta's control to exercise reasonable care. Manufacturers go to extensive lengths to control the use of GM seed when it serves their profit interests. *See Bowman*

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[60] It is hypocritical for Syngenta to argue that seed manufacturers have no duty because non-producers (like Bunge) can police segregation given that when Bunge attempted to do so, Syngenta sued because it interfered with Syngenta's ability to sell Viptera seed. (CC ¶ 136; NCC ¶ 147.) That action alone exposes Syngenta's thinly veiled motive in seeking a no-duty rule.

v. Monsanto Co., 133 S. Ct. 1761, 1764 (2013) (GM seed manufacturers do not allow growers to save any seed to preserve their patent monopoly profits). Plaintiffs are not seeking to make seed manufacturers "insurers" (Syn. Br. at 33), but to hold them accountable when their unreasonable conduct upsets the *status quo* and expose others to risks that would not exist but for their (monopoly) profiteering.

Finally, a decision not to extinguish Syngenta's duty has no implications beyond this case. By contrast, a no-duty rule would have wide implications, freeing manufacturers to create market-wide harms.

3. Public policy should not be adjudicated absent a factual record.

Alternatively, it would be premature to extinguish Syngenta's liability on an incomplete factual record because Syngenta relies on assertions and inferences that are nowhere in the Complaints and are, in fact, contradicted by the allegations. In the context of duty, disputed facts are submitted to the jury.[61] *Bjerke v. Johnson*, 742 N.W.2d 660, 667 n.4 (Minn. 2007) (although

[61] *Ex parte BASF Constr. Chemicals, LLC*, 153 So. 3d 793, 804 (Ala. 2013) ("Where the facts upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury") (internal citations and quotation marks omitted); *Heigle v. Miller*, 965 S.W.2d 116, 121 (Ark. 1998) (reversing summary judgment because "there was an issue of disputed facts" regarding duty to warn); *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 203-04 (Colo. 1992) ("Because of the evidentiary conflict, the district court's instruction on the duty owed . . . properly left the factual determination of [what the duty encompasses] . . . for the jury"); *DeVecchis v. City of Chicago*, 2013 WL 6002084, at *12 (Ill. App. 2013) ("where the duty depends on the existence of facts that are in dispute, the existence of the relevant facts presents a question for the jury to resolve" (internal quotations omitted)); *Nagel v. Northern Indiana Public Serv. Co.*, 26 N.E.3d 30, 44 (Ind. App 2015) ("whether a duty exists…may depend upon resolution of underlying facts by the trier of fact"); *Farwell*, 240 N.W.2d at 220 (disputed fact issues pertaining to duty "must be submitted to the jury, our traditional finders of fact, for ultimate resolution" (internal citations and quotation marks omitted)); *Mozingo by Thomas v. Pitt Cnty. Mem'l Hosp., Inc.*, 400 S.E.2d 747, 753 (N.C. App. 1991) ("when the facts are in dispute or when more than a single inference can be drawn from the evidence, the issue of whether a duty exists is a mixed question of law and fact. The issues of fact must first be resolved by the fact finder"); *Butz v. Werner*, 438 N.W.2d 509, 511 (N.D. 1989) ("if the existence of a duty depends upon factual determinations, their resolution is for the trier of fact"); *Peyer v. Ohio*

duty is generally a question of law, "this would not foreclose the possibility that there may be situations in which the facts necessary to establish a special relationship are in dispute and should be submitted to the jury."). The Court cannot simply accept Syngenta's contradictory assertions, such as when it claims that recognizing a duty would "run flatly counter to the policy determination that the USDA made in approving Viptera" (Syn. Br. at 33), while simultaneously arguing that the "USDA 'has no power to regulate the adverse economic effects that could follow [a GM trait's] deregulation'" (*id.* at 39). Moreover, the findings in *Syngenta Seeds, Inc*., 820 F. Supp. 2d at 966-67, which were made on a more complete record, counsel against adopting a no-duty argument, as Syngenta requests.

V. FIFRA does not preempt Plaintiffs' claims.

As Syngenta acknowledges, FIFRA governs warnings provided on labels and packaging of certain agricultural products. But the Supreme Court has held that only claims for fraud or failure to warn that would impose a labeling or packaging obligation broader than or inconsistent with that provided under FIFRA are preempted. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453-54 (2005). The Court further noted that FIFRA does not preempt common-law claims for negligence where a verdict in a plaintiff's favor would not impose any requirement on the manufacturer's labels. *Id.* at 444 (common law rules such as negligence do not "require[] that manufacturers label or package their products in any particular way").

Plaintiffs do not assert a direct failure to warn claim asserting that the label on the bags of Viptera seed were inaccurate. Indeed, Plaintiffs' claims are not tied to Viptera labels. What Syngenta refers to as a "failure to warn" claim is actually just a sub-bullet point in a laundry list

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Water Serv. Co., 720 N.E.2d 195, 201 (Ohio 1998) (sufficient evidence created fact issue on duty).

of ways Syngenta failed to act in a reasonable manner, which is not tied to any labeling. FIFRA has no application.

Nevertheless, to the extent the Complaints can be construed to include a claim that Syngenta failed to warn purchasers of its products, as the MDL Court found, Plaintiffs do not take issue with the MDL Court Order dismissing a claim for the sake of clarity that Plaintiffs never intended to plead in the first place. (MDL Order at 49.)

VI. Plaintiffs' have adequately pled their duty to warn claims.

Minnesota law places on manufactures a "duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use." *Gray v. Badger Min. Corp*., 676 N.W.2d 268, 274 (Minn.2004); *see also Gardner v. Brillion Iron Works, Inc.*, No. CIV. 11-3528 (JRT/LIB), 2014 WL 639960, at *9 (D. Minn. Feb. 19, 2014); *Frey v. Montgomery Ward & Co*., 258 N.W.2d 782, 788 (Minn. 1977). To prevail under Minnesota law, a plaintiff must show that "(1) the defendant[ ] had reason to know of the dangers of using the product; (2) the warnings fell short of those reasonably required, breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff's injuries." *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (citing *In re Levaquin Prods. Liab. Litig*., 700 F.3d 1161, 1166 (8th Cir. 2012)). To meet its obligation Syngenta was required to provide "adequate instructions for safe use" as well as to warn of the dangers of proper use of MIR162. *Id.* (quoting *Glorvigen v. Cirrus Design Corp*., 816 N.W.2d 572, 582 (Minn.2012)).

Under Minnesota notice pleading standards, Plaintiffs have met their pleading requirements. The Complaints allege that Syngenta knew of the dangers posed to the corn market by releasing MIR162; that Syngenta made no warnings of the dangers, and that failure caused Plaintiffs' damages. (CC ¶¶ 22, 65, 68, 83-87, 353-56; NCC ¶¶ 33, 76, 79, 354-57.) Nevertheless, Syngenta grasps at three arguments for why Plaintiffs' claims are barred:

(1) FIFRA preemption, (2) component-part doctrine, and (3) lack of a duty to Plaintiffs. Each of these arguments falls short.

First, Plaintiffs' claims are plainly not preempted by FIFRA for the reasons previously discussed.

Second, Syngenta misstates the scope and application of the component-parts exception. That exception applies where the defendant produces a part of the whole; here, the product in question is the end product. *See Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 281 (Minn. 2004) ("According to the Restatement (Third), a supplier of a raw material should not be held liable when its product is integrated as a component into a finished product if the component itself is not dangerous."). Here there is but a single use for corn seeds, to grow corn. (*See* CC ¶¶ 11, 13; NCC ¶¶ 9, 24.) An argument by Syngenta that corn could be used for either livestock feed or human consumption creates a false difference, because the corn is the same whatever its intended market.

To bolster this argument, Syngenta cites *TMJ Implants*, which states: "Plaintiffs have cited no case involving multi-use materials that were not inherently dangerous in which the raw material supplier defense was rejected." *In re TMJ Implants Products Liab. Litig.*, 872 F. Supp. 1019, 1028 (D. Minn. 1995); *aff'd sub nom, In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig.*, 97 F.3d 1050 (8th Cir. 1996). *TMJ Implants* involved "implants out of polytetrafluoroethylene (PTFE) powder and fiber, fluorinated ethylene propylene (FEP) film, and other raw materials." *Id.* at 1021. The parties at issue were DuPont, who manufactured the PTFE and FEP (collectively "Teflon"), and American Durafilm, who served as a middleman selling FEP to customers whose orders were below DuPont's minimum direct order requirements. *Id.* at 1022. The court held that there were myriad non-dangerous uses for Teflon, and that as a matter

of law DuPont and Durafilm could not be liable, because "[t]o impose liability upon [defendants] for the uses to which those products are put would force [defendants] to retain experts in a huge variety of areas in order to determine the possible risks associated with each potential use." *Id.* at 1025.

Syngenta's product is not multi-use, and it is not simply a part used in the construction of a larger product. The seed sold by Syngenta is put to a single use: growing a corn stalk. The purpose of the component-parts exception—to protect a manufacturer who produces a safe component from liability when used correctly in an otherwise dangerous product—is inapplicable because Syngenta seed was not an amalgamation of components from numerous manufactures. *See Thompson v. Hirano Tecseed Co.*, 456 F.3d 805, 810 (8th Cir. 2006). Viptera was a singular product, there were no other components and it was not sold to another manufacture to be combined with any other products prior to distribution; it was a single strain of corn seed produced by Syngenta. (CC ¶¶ 11, 13, 41-45; NCC ¶¶ 9, 24, 27, 52-56.)

Finally, Syngenta owed a duty to plaintiffs to warn them of the dangers of MIR162 entering the corn supply. "The duty to warn arises when a manufacturer knew or should have known about an alleged defect or danger, and should have reasonably foreseen that the defect or danger would cause injury." *Block v. Toyota Motor Corp.*, 5 F. Supp. 3d 1047, 1070 (D. Minn. 2014). Plaintiffs' Complaints make clear that Syngenta knew the risk premature commercialization posed. (*See, e.g.*, CC ¶¶ 35, 224; NCC ¶¶ 46, 235.)

Syngenta's argument regarding its lack of a duty to warn is primarily premised on the position of Plaintiffs in the market—that Plaintiffs were expected to know the risk. Syngenta bases this claim on its contention that Plaintiffs were experienced in the corn market and as such were knowledgeable about the dangers of MIR162 and the biological fact of cross-pollination.

(Syn. Br. at 98.) First, any such consideration is outside the scope of a motion to dismiss, which simply accepts the facts pled as true. Second, "[p]ast experience with a product . . . does not necessarily alert users to all of the dangers associated with the product." *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. App. 1985). Third, even if Plaintiffs knew about the possibility of cross-pollination, Plaintiffs cannot reasonably be expected to have full knowledge of the international regulatory market. Instead, Syngenta had a duty to disseminate truthful information about that process, and the dangers of selling an unapproved product prematurely. *See Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) ("the duty to warn assumes truthfulness and is concerned with how much of what is truthful must be disseminated").

Syngenta owed Plaintiffs a duty to warn them of the potential dangers, to provide "adequate instructions for safe use," and to warn of the dangers of proper use of MIR162. *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (quoting *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012)). Plaintiffs allege that Syngenta utterly failed in all three respects, and such allegations must be accepted as true at the motion-to-dismiss stage.

VII. Plaintiffs sufficiently allege claims for tortious interference.

Producers in Alabama, Arkansas, Indiana, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas allege claims for tortious interference. Syngenta argues that Plaintiffs' allegations lack (1) specific business relationships; (2) adequate injury; (3) intentional conduct by Syngenta; and (4) improper means used by Syngenta. (Syn Br. at 105.) These arguments were rejected in the MDL Order, and should likewise be rejected by this Court. (*See* MDL Order at 67-72.)

A. Plaintiffs adequately allege business relationships that Syngenta harmed.

Any requirements regarding specific third parties for tortious interference claims apply at the summary judgment or trial stage. Despite Syngenta's twisted presentation of the law—that naming specific third parties in a complaint is somehow required—no such mandate exists in any of the states at issue. For example, in *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 212 (Minn. 2014), the tortious-interference claim failed only after a trial during which no testimony or evidence was presented regarding a specific third party with whom plaintiff expected to do business but did not. Syngenta distorts *Gieseke*'s proof requirement into a pleading requirement.[62] This tortured construction ignores the court's holding: "We conclude that to prove [not successfully plead] the defendant tortiously interfered with plaintiff's prospective economic advantage, a plaintiff must specifically identify a third party with whom the plaintiff had a reasonable probability of a future relationship." *Id.* at 221; *see also id.* at 219 (specifying the elements a plaintiff must "prove," not plead, to succeed on a tortious interference claim); *id.* at 220 (analyzing whether plaintiff "present[ed] sufficient evidence" of a specific third party with whom he expected to do business, not whether he named a specific third party in his pleading); *id.* at 221 (explaining why plaintiffs must "demonstrate," not plead, the existence of specific third parties with whom they expect to do business).

[62] Syngenta also ignored the four-day trial in *Stonebridge Collection v. Carmichael*, 791 F.3d 811, 815, 819-20 (8th Cir. 2015) (holding the tortious interference failed due to lack of proof, not insufficient pleadings). Similarly, the tortious interference claim in *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 265 (Tex. App. 2006), failed after plaintiff failed to present any potential contracts at trial.

Syngenta also misconstrues the law of Alabama,[63] Arkansas,[64] Indiana,[65] South Dakota, and Tennessee,[66] which requires interference not with a specific third party, but merely with an identifiable class of third parties.[67] For example, in *Baptist Health v. Murphy*, 373 S.W.3d 269, 282 (Ark. 2010), doctors alleged that a hospital's privileging policies interfered

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[63] Alabama does not require naming a specific third party in a tortious interference claim to survive a motion to dismiss. Syngenta cites only one Alabama case to support this argument—*Walter Energy, Inc. v. Audley Capital Advisors, LLP*, No. 1131104, 2015 WL 731152 (Ala. Feb. 20, 2015). (Syn. Br. at 105 n.139.) *Walter Energy* simply concluded that a tortious interference claim requires interference by a stranger to the transaction, not that a specific third party must be named in the complaint.

[64] *Overturff v. Read*, 442 S.W.3d 862, 867-68 (Ark. App. 2014), cited by Syngenta, did not require naming a specific third party in a tortious interference claim to survive a motion to dismiss. Instead, summary judgment was affirmed when after over a year of discovery, no "sufficiently concrete" expectancy was identified to support the tortious interference claim. Likewise, in *Kidd v. Bass Hotels & Resorts, Inc.*, 136 F. Supp. 2d 965, 970 (E.D. Ark. 2000), the tortious interference claim was rejected on summary judgment due to "insufficient evidence."

[65] The only Indiana case cited by Syngenta listed the elements for tortious interference in a footnote, but did not even consider a tortious interference claim, let alone hold that a specific third party must be named in the complaint to survive a motion to dismiss. *See Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 n.21 (Ind. 2001).

[66] Syngenta cites *Golf Sci. Consultants, Inc. v. Cheng*, 2009 U.S. Dist. LEXIS 37721, at *10 (E.D. Tenn. May 4, 2009), to argue that specific third parties must be named in the complaint to survive a motion to dismiss. *Cheng* involved a summary judgment motion decided after two years of discovery during which the plaintiff failed to show "a prospective relationship with an identifiable class of third persons." *Id.* at *6, *26-27. Syngenta's reliance on *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 2004 Tenn. App. LEXIS 139, at *13 (Tenn. App. Feb. 27, 2004), is also improper. *Overnite* expressly did not consider tortious interference with prospective economic advantage, but instead considered interference with employees and security guards who had been hired for protection during a strike with picketing. *Id.*

[67] *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 15 (Ala. 2009) (ongoing business relationship sufficient); *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 215 S.W.3d 596, 604 (Ark. 2005) (upholding a complaint that did not name a specific third party with whom interference occurred, and further noting that "whether a valid business expectancy exist[s is] a question of fact for the jury to determine"); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002) (identifiable class of third persons sufficient).

with their business expectancy in ongoing relationships with patients. The hospital argued, like Syngenta, that the doctors failed to identify in the complaint "a specific contract" that was affected. *Id. Murphy* held that showing that the hospital disrupted the doctors' reasonable expectations for ongoing relationships was sufficient.[68] *Id.* at 283-84. Similarly, the South Dakota Supreme Court made clear, after a lengthy analysis, that:

> If we were to require that prospective third parties be identified by name we would render [tortious interference] for the most part, a nullity and, in all actuality, never allow a plaintiff to proceed with its claim beyond summary judgment especially if the business enterprise is dependent upon a large pool of clientele. The parties must only be identifiable—not identified as to provide an individual name for each.

Hayes v. N. Hills Gen. Hosp., 590 N.W.2d 243, 250 (S.D. 1999) (citation omitted).

Missouri,[69] North Dakota, Oklahoma,[70] and Texas[71] require pleading interference with a reasonably expected economic advantage, not with a specific third party. For example, Texas has

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[68] Syngenta's reliance on *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co. of Conway, Ark.*, 966 S.W.2d 894, 898 (Ark. 1998), is misplaced. Any requirement by *Country Corner* to identify a specific party was abolished by *Stewart Title*, 215 S.W.3d at 604, and *Murphy*, 373 S.W.3d at 283-84. *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 756 N.W.2d 399, 404 (S.D. 2008), is inapposite. The claim considered was for intentional interference with an existing contract by a corporate officer in the employment context. *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 552 (Ark. App. 2011), is unavailing because the plaintiff merely alleged damage to its reputation and a general desire to be able to do business within Arkansas.

[69] Syngenta cites only one Missouri case to argue that a specific third party must be pled in a tortious interference claim to survive a motion to dismiss: *Briner Elec. Co. v. Sachs Elec.*, 680 S.W.2d 737, 740 (Mo. App. 1984). *Briner* requires only "the existence of a valid business expectancy" and concludes that the jury verdict on the tortious interference claim was proper because plaintiff failed to prove an absence of justification. *Id.* at 740-41. Moreover, *Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555, 565 (Mo. App. 1999), makes clear that "a regular course of prior dealings suggests a valid business expectancy."

[70] Syngenta improperly cites *Tuffy's, Inc. v. City of Okla. City*, 212 P.3d 1158, 1165 (Okla. 2009), for the notion that specific third parties must be named in the complaint to withstand a

recognized that "[a]lthough plaintiffs do not specify the business relationships or actual or prospective contracts [at issue], such is not their burden to defeat a motion for summary judgment." *Winston v. Am. Med. Int'l*, 930 S.W.2d 945, 953 (Tex. App. 1996). *See also Bell v. May Dep't Stores Co.*, 6 S.W.3d 871, 876-88 (Mo. 1999) (holding plaintiff's expectation of obtaining credit was disrupted when a retailer reported false and negative information to credit agencies and that it was immaterial that plaintiff had not yet been denied credit by any particular company); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 717 (N.D. 2001) (requiring the existence of a valid business expectancy); *Gonzalez v. Sessom*, 137 P.3d 1245, 1249 (Okla. Civ. App. 2006) (same).

Moreover, assuming Syngenta's interpretation of the applicable law was correct, which it is not, Plaintiffs have sufficiently pled their claim for tortious interference. Indeed, the Introduction and Paragraphs 27-46, 59-62, 70, 73-106, 112-205, 213-40, 290-91, 310-18, 368-74, 494-500, 885-91, 1077-84, 1336-42, 1391-97, 1575-82, 1611-17, 1640-46 of the Non-Class Complaint provide the factual and legal basis for Plaintiffs' tortious interference claim. Specifically, Plaintiffs alleged that they had business relationships and a reasonable expectancy of continued relationships with purchasers of corn and that Syngenta induced or caused a disruption of that expectancy. (NCC ¶¶ 310-18, 368-74, 494-500, 885-91, 1077-84, 1336-42, 1391-97, 1575-82, 1611-17, 1640-46.) The MDL Order concluded that such allegations were sufficient to meet heightened federal pleading standards. (MDL Order at 68-69 ("Here plaintiffs

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motion to dismiss. *Tuffy's* held that a city had immunity against such a claim and did not analyze the sufficiency of the pleading. *Id.* at 1164-65.

[71] *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74 (Tex. 2000), is not informative. In *Prudential*, the court considered tortious interference with an existing contract and whether an agency relationship affected that claim. *Id.* at 78.

have alleged relationships and expectancies with an identifiable class of third parties, namely purchasers of corn from them. The Court concludes that such allegations are sufficient to state a claim for tortious interference that gives sufficient notice to Syngenta, particularly since the case involves a commodity that is sold in a defined market.").)

The information in Plaintiffs' Complaint provides "information sufficient to fairly notify [Syngenta] of the claim against it." *Walsh*, 851 N.W.2d at 605. The Minnesota Supreme Court has made clear that when Minnesota's "rules of civil procedure require more factual specificity—or 'particularity'—for a certain type of pleading, they say so clearly." *Id.* Nothing in the Minnesota Rules of Civil Procedure requires Plaintiffs to name specific third parties in their tortious interference claims, despite Syngenta's urging. Plaintiffs have sufficiently alleged their claims for tortious interference.

A. Plaintiffs adequately allege injury.

Syngenta contends that Plaintiffs have not pled that Syngenta induced or caused a breach or termination of Plaintiffs' economic expectancy. But this is not the law. The jurisdictions at issue allow for tortious interference if Syngenta (1) made a relationship with a third party more expensive or burdensome[72] or (2) interfered with an expected economic advantage.[73] Plaintiffs

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[72] *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 17 (Ala. 2009) (plaintiff "need not 'establish that but for' the interference it would have been awarded a contract"); *Columbus Med. Servs. Org., LLC v. Liberty Healthcare Corp.*, 911 N.E.2d 85, 92 (Ind. App. 2009) (tortious interference where defendant caused "detrimental consequences" to plaintiff); *Wilspec Techs., Inc. v. Duncan Holding Grp. Co.*, 204 P.3d 69, 73 (Okla. 2009) (claim only requires showing that interference made "plaintiff's performance more oppressive"); *Niemeyer v. U.S. Fid. & Guar. Co.*, 789 P.2d 1318, 1321 (Okla. 1990) (plaintiff stated a claim for tortious interference "with business" when liability insurer gave false information to plaintiff's carrier, resulting in a lower settlement offer); *Stebbins v. Edwards*, 224 P. 714, 714-16 (Okla. 1924) (plaintiff stated claim for tortious interference where defendants made false statements that caused a disruption in plaintiffs' sales).

allege that Syngenta's conduct prevented the export of U.S. corn to China, thereby decreasing sales and depressing prices, and therefore have sufficiently pled the requisite injury. (*See, e.g.*, NCC ¶¶ 316-17, 373, 499-500, 890, 1083, 1341, 1581, 1616, 1645.)

The cases relied on by Syngenta to suggest the contrary are uninformative. *See McNeill v. Sec. Benefit Life Ins. Co.*, 28 F.3d 891, 894 (8th Cir. 1994) (concluding on summary judgment that the claimed interference was indirect and could not support a tortious interference claim); *Wilkey v. Hull*, 366 Fed. App'x 634 (6th Cir. 2010) (applying Ohio law, which is not at issue); *Erickson's Flooring & Supply Co. v. Tembec, Inc.*, 2006 U.S. Dist. LEXIS 1459 (E.D. Mich. Jan. 18, 2006) (applying Michigan law, which is not at issue); *Schoedinger v. United Healthcare of Midwest, Inc.*, 2011 U.S. Dist. LEXIS 2937, at *19-21 (E.D. Mo. Jan. 12, 2011) (determining plaintiff's claim of tortious interference was actually a claim for breach of contract); *Reali, Giampetro & Scott v. Soc'y Nat'l Bank*, 729 N.E.2d 1259 (Ohio App. 1999) (applying Ohio law, which is not at issue); *Brown v. CVS Pharm., L.L.C.*, 982 F. Supp. 2d 793, 805 (M.D. Tenn. 2013) (affirming summary judgment because during plaintiff's deposition, "she was unable to state whether she had in fact lost a single dollar of income because of the defendants' alleged actions"); *Golf Sci. Consultants, Inc. v. Cheng*, 2009 U.S. Dist. LEXIS 37721, at *28-29 (E.D.

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[73] *Vowell v. Fairfield Bay Cmty. Club*, 58 S.W.3d 324, 329 (Ark. 2001) (holding that disruption of the plaintiff's expectancy in "a stream of dues" was sufficient to support tortious interference). Further, the Arkansas Model Jury Instruction on tortious interference provides that either "disruption or termination" of the expectancy will support liability. Ark. Model J. Instr. Civ. § 403 (2015). *See also Gieseke*, 844 N.W.2d at 219 (plaintiff must prove that defendant "interfered with plaintiff's reasonable expectation of economic advantage," not that a relationship must have terminated); *Kantel Commc'ns v. Casey*, 865 S.W.2d 685, 693 (Mo. App. 1993) ("A reasonable expectation of economic advantage . . . support[s] a claim for wrongful interference with a business expectancy"); *Carlson v. Roetzel & Andress*, 2008 U.S. Dist. LEXIS 27084, at *13 (D. N.D. Mar. 27, 2008) (holding "plaintiff must show he would have obtained the economic benefit in the absence of the interference"); *St. Onge Livestock Co. v. Curtis*, 650 N.W.2d 537 (S.D. 2002) (noting that the alleged injury of causing lost revenue is sufficient to withstand summary judgment).

Tenn. May 4, 2009) (affirming summary judgment decided after two years of discovery due to "insufficient evidence" regarding injury to plaintiff); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App. 2007) (affirming summary judgment because plaintiff failed to "prove" tortious interference and noting that potential contracts were delayed, not prevented).

Syngenta has utterly failed to show that Plaintiffs' alleged injury is insufficient to survive a motion to dismiss. Indeed, as the MDL Order concluded:

> To some extent, Syngenta's argument raises only a matter of semantics. If there is an expectation of a particular business—a sale at a certain price—and then the sale at that price becomes impossible, then there has been an unrealized expectation that could support a tortious interference claim—even if the plaintiff mitigates its losses by making a deal at a lower price. Syngenta has not explained why interference could not be the prevention of a sale at a particular price.

(MDL Order at 72.)

B. Plaintiffs sufficiently allege improper means or wrongful conduct.

Syngenta argues that Plaintiffs have failed to adequately allege interference with their business expectancies through "improper means," asserting that such means must be "independently tortious or unlawful." (Syn. Br. at 111.) In so doing, Syngenta attempts to place an additional burden on Plaintiffs, arguing that Plaintiffs must *allege* that Syngenta's conduct "amounted to other, specific torts," to state a claim for tortious interference.

The majority of cases cited by Syngenta to support this purported pleading standard involved decisions rendered on a full record, where a jury weighed the evidence to determine whether independently tortious or otherwise wrongful conduct had occurred.[74] Further, of the

[74] *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001) (reversing jury decision awarding damages for tortious interference with prospective advantage); *Trade'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 721 (N.D. 2001) (determining on request for certification from federal court that a claim for unlawful interference with business is a

ten states at issue, three require a multifactor test to determine whether defendant's conduct was "improper," not "independently tortious," thereby negating Syngenta's contention that such a universal pleading standard should apply. *See Baptist Health v. Murphy*, 373 S.W.3d 269, 281-82 (Ark. 2009) (requiring analysis of the factors in the Restatement (Second) of Torts[75] for "guidance about what is improper"); *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). Similarly, Tennessee has adopted a much more expansive definition of conduct that may constitute "improper interference." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 n.5 (Tenn. 2002) (noting that improper means is "dependent on the particular facts and circumstances of a given case"). In the MDL Order, Judge Lungstrum also properly concluded that the interference need only be "improper," pointing out the "fact-intensive" nature of the inquiry in many of the at-issue states, and that Syngenta failed to show that the interference alleged by Plaintiffs could not be deemed improper.[76] (MDL Order at 70.) Syngenta similarly fails here.

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recognized tort in North Dakota, but leaving it to the federal district court to "resolve the factual disputes and determine whether [defendant's] conduct provides a basis for tort liability"); *Community Title Co. v. Roosevelt Federal Sav. & Loan Ass'n*, 796 S.W.2d 369, 374 (Mo. 1990) (reversing grant of new trial and remanding for entry of judgment because plaintiffs failed, at trial, to establish the absence of justification for defendant's interferential conduct.)

[75] The factors are: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties. *See* Restatement (Second) of Torts § 767 (1979).

[76] This aligns with the policy goal of limiting tortious interference to improper conduct to encourage healthy competition among business. *See Gieseke ex rel. Diversified Water Diversion, Inc.*, 844 N.W.2d at 218 (noting that "[t]he heart of our national economic policy long has been faith in the value of competition"). That policy concern is not implicated here, however, where Plaintiffs' allegations are that Syngenta deliberately, and for its own gain, interfered with the entire U.S. corn market.

Moreover, even if allegations of independent tortious conduct were required to survive a motion to dismiss, Plaintiffs' Complaint contains such allegations. Plaintiffs allege that Syngenta engaged in independently actionable conduct in that it made material misrepresentations and/or omissions of fact, trespassed upon the property rights of Plaintiffs, and otherwise breached its duty of care to Plaintiffs, all of which caused Plaintiffs harm. (NCC ¶¶ 300-86, 484-504, 875-91, 1065-84, 1326-67, 1381-97, 1557-1659.) Thus, Plaintiffs have sufficiently pled their claims for tortious interference.

Syngenta also argues that Plaintiffs must demonstrate that Syngenta's improper conduct was directed towards the particular business expectancy in question. (*See* Syn. Br. at 111.) As the MDL Order aptly observed, Syngenta's support for this contention is a single case from Illinois. (MDL Order at 71.) The law of Illinois is not at issue here, and Syngenta provides no other authority for the implementation of such a standard of proof, much less pleading. Thus, this argument should be flatly rejected.

Finally, Syngenta argues that because it had regulatory approval to sell Viptera in the United States, its pursuit of profit renders any action it took "lawful" and therefore not improper. Again, as noted in the MDL Order, regulatory approval does not equate with lawfulness or otherwise immunize Syngenta from liability for its wrongful conduct. (MDL Order at 71.) Plaintiffs' overarching contention is that the methods Syngenta employed in introducing Viptera into the marketplace were unlawful. Syngenta's response—that selling an approved product "rubber stamps" any conduct associated with selling that product—is entirely circular.[77]

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[77] In support of its argument, Syngenta refers to two Iowa decisions (Iowa law is not at issue here) and an Alabama case, *Bridgeway Commc'ns, Inc. v. Trio Broad., Inc.*, 562 So. 2d 222 (Ala.

At the pleading stage, and under the standard articulated in *Walsh*, 851 N.W.2d at 605, Plaintiffs have sufficiently alleged improper means engaged in by Syngenta, and the tortious interference claims should not be dismissed.

C. Plaintiffs adequately allege intent.

Syngenta argues that Plaintiffs have failed to adequately allege that it acted with the requisite level of intent. (Syn. Br. at 112.) In the states at issue in this motion, intentional torts are routinely governed by the standard of the Restatement (Second) of Torts; *i.e.*, intent is present when the defendant either desired to bring about the harm suffered or knew that the harm was substantially certain to occur.[78] Plaintiffs repeatedly assert in the Complaint that Syngenta knew Plaintiffs had a reasonable expectancy of continued relationships with corn purchasers, and that by introducing Viptera into the interconnected marketplace, Syngenta intentionally caused a

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1990), in which summary judgment was granted because plaintiff failed to produce any evidence regarding defendant's improper conduct. (*See* Syn. Br. at 112, n.146.)

[78] Restatement (Second) of Torts § 8A; *see also Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 363 Ark. 530, 547 (2005) (noting that the "tort of interference with contractual relations is similar to other intentional torts 'in the sense that the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct'") (citation omitted); *Drake v. Dickey*, 2 N.E.3d 30, 39 (Ind. App. 2013) (finding that in the tortious interference context, "intent may be demonstrated by showing either that [defendant] specifically intended to interfere . . . or that it acted for another purpose but knew that the interference was certain or substantially certain to occur"); *Carnes v. St. Paul Union Stockyards Co.*, 205 N.W. 630, 632 (Minn. 1925) (finding malice non-essential in tortious interference context); *Bell v. May Dep't Stores Co.*, 6 S.W.3d 871, 879 (Mo. 1999) (finding that defendant had requisite intent to substantiate tortious interference claim "if it knew interference was certain or substantially certain to occur as a result of its actions, even if its express purpose was not to interfere"); *Peterson v. Zerr*, 477 N.W.2d 230, 234 (N.D. 1991) (asserting that the standard for intent in interference cases does not encompass only situations in which the defendant has "acted with this purpose or desire," but also when "the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action"); *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 577 (Okla. 2005) (applying the "substantially certain" standard in the context of tortious interference).

disruption[79] of that expectancy without justification or privilege. Judge Lungstrum concluded in the MDL Order that:

> [o]ne could reasonably infer from the facts alleged in the complaints that defendants knew that Viptera had not been approved in a key export market, that contamination of plaintiffs' corn would occur after commercialization of Viptera without certain safeguards, and thus that interference with plaintiffs' sales would be substantially certain to occur.

(MDL Order at 73.) There is no reason to reach a different conclusion here.

Syngenta's assertions regarding the relative scope of the Chinese market in the global market are of no legal moment. Especially at the pleading stage, it is irrelevant whether China accounted for one-third of one percent, five percent, or thirty-five percent of the corn market—other than for purposes of establishing damages at the proof stage of this litigation. If Syngenta was substantially certain that their conduct could have a negative effect on the corn market, the resultant relationships and expectancies producers had with corn purchasers, or both, and engaged in interferential conduct armed with that knowledge, then their actions were sufficiently intentional to substantiate a claim for tortious interference. At a minimum, Plaintiffs have made sufficient allegations regarding Syngenta's intent, and Plaintiffs' claims for tortious interference should not be dismissed.

VIII. Plaintiffs have adequately pled their consumer-protection claims.

A. Minnesota Statutes sections 325D.13, 325D.44, and 325F.69 apply.

Plaintiffs assert violations of Minnesota's Unfair Trade Practices Act (MUTPA), Minn. Stat. § 325D.13, and Minnesota's Consumer Fraud Act (MCFA), Minn. Stat. § 325F.69. Class Plaintiffs additionally assert a claim under Minnesota's Deceptive Trade Practices Act

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[79] Syngenta attempts to insert the purported requirement that interference is only cognizable when business expectancy is prevented. That assertion fails.

(MDTPA), Minn. Stat. § 325D.44. Minnesota has established a private remedy for violations of MUTPA and MCFA under its private attorneys-general statute. Minn. Stat. § 8.31. The MDTPA contains its own private enforcement mechanism. Minn. Stat. § 325D.45.

B. This Court may constitutionally hear Non-Class Plaintiffs' MUTPA and MCFA claims against Syngenta.

Syngenta argues that it is inappropriate for this Court to allow non-Minnesotans to assert Minnesota statutory claims. This position is incorrect for two reasons, and recent decisions bolster Plaintiffs' position that the MUTPA and MCFA should apply extraterritorially. First, recent decisions suggest a choice of law analysis is unnecessary. Second, Minnesota law has a policy of openness and access.

First, the conflict of law analysis is unnecessary. Syngenta claims that to determine whether this Court can apply the MUTPA and MCFA, it must determine if application of Minnesota law to non-Minnesotans is constitutionally permissible, as well as undergo a choice-of-law analysis. (Syn. Br. at 118-19.) Syngenta points to the MDL order, as the only court to address the issue of whether a non-Minnesotan may assert Minnesota statutory claims. (*Id.* at 119.) As Syngenta notes, the MDL Court held that the MUTPA and MCFA could not be applied extraterritorially. At the same time, however, a federal court in the District of Minnesota was considering the same issue. *In re Target Corp. Customer Data Sec. Breach Litig.*, citing pg. 18, 2015 WL 5432115. *In re Target* confronted statutory claims under Minn. Stat. § 325E.64. *Target* held: "To apply Minnesota law to a non-resident plaintiff's claims, the Constitution requires that Minnesota 'have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" 2015 WL 5432115, at *3 (quoting *Hague*, 449 U.S. at 312-13).

Target, however, unlike the MDL Court, did not see the need for choice-of-law analysis: "[T]he Court may presume there are substantive conflicts between the laws of Plaintiffs' home states and Minnesota law and still constitutionally apply Minnesota law." *Id.* This is not a novel legal theory. In *Mooney*, the Court stated plainly: "As a Minnesota corporation, Allianz can not [sic] claim surprise by the application of Minnesota law to conduct emanating from Minnesota, since Minnesota has a 'substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.'" 244 F.R.D. at 535 (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987)).

Minnesota plays a crucial role in the present litigation. One of the six Syngenta entities identified in the Non-Class Complaint, Syngenta Seeds, is headquartered in Minnesota. (NCC ¶ 9.) Among the products that Syngenta markets and sells are the Viptera and Duracade varieties of corn seed at issue in this litigation. (*Id.*) Minnesota was the site of field tests for Viptera. (NCC ¶ 52.) As such, application of Minnesota law to Syngenta is fair and constitutionally permissible.

Syngenta attempts to argue around the significant contacts it has with Minnesota, by arguing that it has significant contacts with other jurisdictions as well. (Syn. Br. at 120-21 (noting corporate activity in Delaware and North Carolina).) "However, the Due Process Clause and Full Faith and Credit Clause are satisfied as long as Minnesota has significant contacts with an out-of-state class member's claims." *Mooney*, 244 F.R.D. at 535. Additionally, the question of constitutionally permissible application is not zero sum; multiple jurisdictions may be able to exercise jurisdiction without offending the U.S. Constitution. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) ("[A] particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction's laws."). Moreover, the

expectations of the parties are a central feature of determining fairness and constitutionality. *Id.* at 822 ("When considering fairness in this context, an important element is the expectation of the parties."). Syngenta has chosen Minnesota as the corporate headquarters for its Seed business and used Minnesota farms and lands as sites of field tests; it would be fundamentally unfair to Plaintiffs to foreclose the application of Minnesota law to Syngenta under these facts, particularly at the motion-to-dismiss stage.[80] (NCC ¶¶ 9, 52.)

Finally, in rejecting the application of Minnesota statutes, the MDL Order relied on *St. Jude*, and its criticism of two cases cited by the MDL Plaintiffs: *In re Lutheran Bhd. Variable Ins. Products Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 (D. Minn. 2001) and *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). *In re St. Jude* criticized these cases because they failed to conduct a search analysis of the constitutionality of applying Minnesota law to out-of-state plaintiffs, but indicated, that were such an analysis conducted it may well be proper to apply Minnesota law extraterritorially. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) ("Application of Minnesota law to all plaintiffs' claims ultimately may be proper."). Moreover, the MUTPA does not define person in terms of citizenship, and so there is no question that Plaintiffs can assert claims under these statutes, so long as the application of Minnesota law is constitutionally permissible. *See* Minn. Stat. § 325D.10 (defining person to "include[] any individual, firm, partnership, corporation or other organization, whether organized for profit or not")

Second, Minnesota courts have a policy of openness and access to residents and non-residents alike. Minnesota courts may express a reluctance to apply their statutes

[80] To the extent the Court believes a choice-of-law analysis is necessary, Plaintiffs have shown that Minnesota law should apply.

extraterritorially, as argued by Syngenta, however, they also are open to both residents and non-residents who file permissible claims. *Compare Olson v. Push, Inc.*, No. CIV. 14-1163 (ADM/JJK), 2014 WL 4097040, at *2 (D. Minn. Aug. 19, 2014) (noting presumption against extraterritorial application), *with Schwartz v. Consol. Freightways Corp. of Delaware*, 221 N.W.2d 665, 669 (Minn. 1974) ("Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts."). The language in the statutes at issue reinforces this openness, as the private attorneys-general statute empowers "any person injured by a violation of any of the laws" to bring an action.

C. Syngenta cannot escape liability by mislabeling Plaintiffs as merchants.

Syngenta argues that Minnesota law has a prohibition against 'merchants' asserting MUTPA and MCFA claims, however, this overstates the nature of the law in Minnesota—as the MDL also recognized. *See Securian Fin. Grp., Inc. v. Wells Fargo Bank, N.A.*, No. CIV. 11-2957 (DWF/HB), 2014 WL 6911100, at *6 (D. Minn. Dec. 8, 2014) ("Plaintiffs assert that the controlling Minnesota Supreme Court case on this issue, *Church of the Nativity of Our Lord v. Watpro*, 491 N.W.2d 1 (Minn. 1991), does not include any prohibition against "merchants" for consumer fraud claims. The Court agrees."); *Pugh v. Westreich*, No. A04-657, 2005 WL 14922, at *3 (Minn. App. Jan. 4, 2005) ("The MCFA is broadly construed to protect consumer rights.").

Given the lack of a strict prohibition, "courts focus their analysis on whether a party can be considered a sophisticated merchant in the specific skills or goods at issue, and only those parties that are in fact deemed to be sophisticated merchants in the specific skills or goods at issue have been precluded from asserting Minnesota consumer claims." *Securian*, 2014 WL 6911100, at *6. Further, "to be a sophisticated merchant, a party must have knowledge or skill particular to the practices involved in the transaction at issue." *Id.* (citing Minn. Stat. § 336.2-

104(1)). Syngenta relies on *Solvay Pharmaceutical, Inc. v. Global Pharmaceuticals*, which involved claims by one drug manufacturer against another. 298 F. Supp. 2d 880, 881-82 (D. Minn. 2004). Likewise, the other case relied on by Syngenta, *Pugh v. Westreich*, involved insurance companies all of which were "heavily involved in the practice of providing IMEs." No. A04-657, 2005 WL 14922, at *4 (Minn. App. Jan. 4, 2005).

Plaintiffs are not sophisticated parties as Minnesota law requires to invoke the merchant exception simply because they are in the corn industry. *See Ly v. Nystrom*, 615 N.W.2d 302, 310 (Minn. 2000) (holding Ly to be a consumer in purchase of restaurant even though he had worked in restaurant industry); *see also Regents of the Univ. of Minn. v. Chief Indus., Inc.*, 106 F.3d 1409, 1412 (8th Cir. 1997) ("To be sure, not all large, sophisticated purchasers are necessarily merchants in goods of the kind they buy.").

At the very least, any such finding would be improper at this stage in the litigation. As the MDL Court recognized, this argument is inappropriate at this stage of the litigation, and therefore the court denied Syngenta's motion to dismiss on this basis. (MDL Order at 97 (quoting *Securian*, 2014 WL 6911100, at *7 ("[A] fact question remained for trial concerning whether the plaintiffs were sophisticated merchants, even though they would 'undoubtedly have an uphill battle convincing a jury of their lack of sophistication.'")).)

D. Plaintiffs have sufficiently pled a public benefit.

Syngenta challenges Plaintiffs' MUTPA and MCFA allegations on the basis that they lack a public benefit, because Plaintiffs seek compensatory damages and attorneys' fees and China's approval of MIR162 moots any injunctive relief. (Syn. Br. at 123-24.) This, however, overstates the public-benefit requirement. *Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 11 F. Supp. 3d 933, 937-38 (D. Minn. 2014) ("[A] public benefit typically will be found when the plaintiff seeks relief primarily aimed at altering the defendant's conduct").

This action will, as Plaintiffs allege, serve a public benefit. (CC ¶ 325; NCC ¶ 343.) "Minnesota courts have not definitively delineated what factors are necessary to establish a public benefit. However, generally, courts examine the degree to which the defendants' alleged misrepresentations affected the public; the form of the alleged misrepresentation; the kind of relief sought; and whether the alleged misrepresentations are ongoing." *Select Comfort*, 11 F. Supp. 3d at 937-38. All Plaintiffs have pled specific benefits that would accrue to the public under this action. (CC ¶ 325; NCC ¶ 343.) Plaintiffs have made numerous allegations as to the breadth and effect Syngenta's behavior had on the U.S. Corn Market, the DDGS market, and the impact that these types of premature commercialization have on consumers. (*See, e.g.*, CC ¶¶ 230, 240-54, 269-80; NCC ¶¶ 241, 251-65, 280-91.) Plaintiffs have easily met their burden under Minnesota's pleading standards that a public benefit will be served.

Finally, this action is the very type of action contemplated by the drafters of Minnesota's private attorneys-general statute. "The Private AG Statute thus advances the legislature's intent to prevent fraudulent representations and deceptive practices with regard to consumer products by offering an incentive for defrauded consumers to bring claims in lieu of the attorney general." *Ly*, 615 N.W.2d at 311. In fact, Syngenta's behavior with subsequent product launches proves that intervention is necessary and will benefit the public. (CC ¶¶ 196-229; NCC ¶¶ 207-40.)

Minnesota

Class Plaintiffs have pled violations of the MDTPA. (CC ¶¶ 300-27.) Syngenta argues that because Class Plaintiffs have not made a specific injunctive request of this Court their claims are subject to dismissal. To prevail on a MDTPA claim, "[p]laintiffs must advance record evidence sufficient to support an inference of future harm to Plaintiffs." *Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1020 (D. Minn. 2003). The Class Complaint makes

numerous allegations about the behavior of Syngenta with respect to the commercialization of Viptera that allow this Court, under Minnesota's pleading standards, to draw an inference of future harm. (CC ¶¶ 196-221.) In the wake of the Viptera/MIR162 debacle, Syngenta engaged in similarly disruptive behavior by marketing Duracade, which contained both MIR162 (still unapproved in China) and a new unapproved trait, Event 5307. (CC ¶¶ 196-221.) To the extent the Court believes a specific prayer for injunctive relief is required, Plaintiffs should be granted leave to amend the complaint.

Illinois

Syngenta argues that Plaintiffs lack standing under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). This argument—pressed and failed in the Federal MDL—asserts that Plaintiffs have failed to show a "consumer nexus" that shows how Syngenta's actions involve consumer protection concerns, and how the requested relief would benefit consumers. (Syn. Br. at 125 (citing *Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012)).) The ICFA allows actions by non-consumers where it meets the consumer nexus test. (MDL Order at 105.) The consumer nexus test requires that:

> plaintiffs must plead and otherwise prove (1) that their actions were akin to a consumer's actions to establish a link between them and consumers; (2) how defendant's representations . . . concerned consumers other than themselves; (3) how defendant's particular breach . . . involved consumer protection concerns; and (4) how the requested relief would serve the interests of consumers.

Brody v. Finch Univ. of Health Scis./The Chicago Med. Sch., 698 N.E.2d 257, 269 (Ill. 1998). The consumer nexus test is required only when the plaintiff is a non-consumer and the action at issue does not "involve trade practices addressed to the market generally." (*See* MDL Order at 105-06 (citing *Banks One Milwaukee v. Sanchez*, 783 N.E.2d 217, 220 (Ill. App. 2003)).) The MDL Court rejected these very arguments and held that "growers that purchased Syngenta's

seeds were consumers of Syngenta's product under the ICFA . . . and Plaintiffs have alleged conduct addressed to Syngenta's purchasers." (MDL Order at 108.)

Syngenta argues that Plaintiffs are not consumers under the ambit of the ICFA because they are not end-users of corn. Syngenta argues that the ICFA allows only for "the ultimate buyer of the finished product" to bring claims. (Syn. Br. at 125 (citing *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004)).) As the MDL Order revealed, Syngenta has attempted to redefine the market at issue. Syngenta's argument requires the Court to analyze the corn market, rather than the corn seed market. (*See* MDL Order at 107 (citing *AGFA Corp. v. Wagner Printing Co.*, No. 02 C 2400, 2002 WL 1559663, at *2 (N.D. Ill. July 10, 2002)).) Relying on *Sluis v. Nudelman*, the MDL Court determined the applicable market was seeds, as "a seed becomes something different in producing a plant." (MDL Order at 107 (citing *Sluis v. Nudelman*, 34 N.E.2d 391 (Ill. 1941)).)

Syngenta argues that the MDL Court's reliance on *Sluis* is misplaced because a subsequent case came to a different conclusion. (Syn. Br. at 126 (citing *People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 897 (Ill. 1953)).) *Spiegel* was based on the same issue as *Sluis*: the taxability of the sale of seeds. *Spiegel* turns not on the question of whether seeds and produce are distinct, however, but on statutory interpretation. *Spiegel* noted that in the wake of *Sluis* the Illinois legislature passed a law to overturn the decision. *People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 898 (Ill. 1953). The Department of Finance then promulgated rules to distinguish between seeds sold for personal consumption (taxable) and seeds sold for commercial production (non-taxable). *Id.* The MDL Court relied on the fact that seeds become a crop, and *Spiegel* does not rely on abrogating that line of thought, rather it simply defers to the executive branch on rules that have been promulgated pursuant to statute. 115 N.E.2d at 898; *see Am. Oil Co. v.*

Mahin, 273 N.E.2d 818, 823 (Ill. 1971) (discussing *Siegel* and noting "[t]he statute did not especially exempt the seeds, but the Department had for more than ten years promulgated the rule"). In the end, *Spiegel* represents the Department of Finance's preference for not taxing seeds sold to farmers and vendors re-selling seeds.

Moreover, Syngenta reads *Spiegel* too broadly, as the very language at issue in *Spiegel*, demonstrates the distinction drawn by the MDL Court—that seeds produce something new:

> Sellers of seeds-When not liable for tax. Persons who sell seeds to purchasers who employ such seeds in raising vegetables, crops or other plants for sale are selling seeds to purchasers for purposes of resale and are not required to remit Retailer's Occupation Tax measured by their gross receipts from such sales.

115 N.E.2d at 896. Thus, the rule makers recognized that seeds turn into crops.[81]

Syngenta also argues that "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." (Syn. Br. at 125.) Syngenta offers no evidence to suggest that grocery store consumers were paying less for corn and corn food products due to the sharp price decline cause by Syngenta, nor would the Court be able to examine such evidence on a motion to dismiss.[82] Moreover, to make such a determination would require the court to *infer* that market prices on the Chicago Board of Trade

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[81] Syngenta's own materials, as alleged in the Complaints, indicate that it distinguishes between seed and what it becomes. (CC ¶ 127 (citing to the stewardship agreement that "grain produced from seed" should be appropriately channeled.").)

[82] While not relevant to present inquiry, and beyond the scope of the pleadings, in point of fact, it is likely that consumers of corn and corn based food (continued on next page) products have not seen any change in prices. *See* Randy Schnepf, *Farm-to-Food Price Dynamics* 21 (Congressional Research Service Sept. 27, 2013), *available at* https://www.fas.org/sgp/crs/misc/R40621.pdf ("The general perception (supported by considerable empirical evidence) is that retail food prices are "sticky"—that is, retail prices follow commodity prices upwards rapidly, but fall back only slowly and partially when commodity prices recede.").

were tied to the price grocery store consumers paid for corn and corn products. Any inferences drawn based on the facts pled should be drawn in favor, not against Plaintiffs. *Bahr*, 788 N.W.2d at 80. As discussed above, the consumers in question are the buyers of corn seed, who the Non-Class Complaint alleges were harmed by the actions of Syngenta. (NCC ¶¶ 236, 283, 292, 299.)

Nebraska

Syngenta's sole argument for dismissal of Plaintiffs' Nebraska Consumer Protection Act claims is that Nebraska exempts from its statutory scheme "actions or transactions otherwise permitted, prohibited, or regulated under laws administered by the Director of Insurance, the Public Service Commission, the Federal Energy Regulatory Commission, or any other regulatory body or officer acting under statutory authority of this state or the United States." Neb. Rev. Stat. § 59-1617. Syngenta reads the statute too broadly, it is not enough that the actor—Syngenta—is subject to regulation; the very act complained of must be as well. *See Hage v. Gen. Serv. Bureau*, 306 F. Supp. 2d 883, 890 (D. Neb. 2003) ("However, particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, the immunity arises if the conduct itself is also regulated."); *Wrede v. Exch. Bank of Gibbon*, 247 Neb. 907, 915, 531 N.W.2d 523, 529 (1995) ("The teaching of *Kuntzelman* is that while particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, immunity does arise if the conduct itself is also regulated.").

Thus the mere fact that Viptera is subject to USDA approval is not sufficient ground for immunity under the Nebraska Consumer Protection Act. Here the complained of actions, *inter alia*, releasing the seed prior to Chinese approval and failing to implement and effectively run a stewardship program address the manner in which Viptera was marketed and sold, are outside

the purview of any Nebraska state or Federal regulatory body. (*See* Syn. Br. at 9 (noting stewardship programs are not mandatory and are promoted by non-governmental industry groups).) As such, Syngenta is subject to the Nebraska Consumer Protection Act, and cannot claim immunity from it based on regulatory requirements not germane to the complained of action. The MDL Court likewise denied Syngenta's motions to dismiss on these grounds, noting that it could not "say as a matter of law that the specific manner in which Syngenta sold its products, as alleged here, was regulated by the agencies that authorized those products sale." (MDL Order at 110.)

North Carolina

Syngenta argues that Plaintiffs' claims under the North Carolina Unfair and Deceptive Trade Practices Act (NCUTPA), N.C. Gen. Stat. § 75-1.1, are barred because Syngenta and Plaintiffs are neither in competition nor in privity. This argument is unpersuasive, and for the same reasons the MDL Court rejected it, so too must this Court. (MDL Order at 111.) Syngenta relies on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, for the contention that the NCUTPA is limited in business to business cases to those where the two businesses are competitors or engaged in commercial dealings. 194 F.3d 505, 519-22 (4th Cir. 1999). The MDL Court noted that the cases *Food Lion* cites to draw those boundaries, are actually examples of cases where North Carolina courts expanded the reach of the NCUTPA, not restricted it. (MDL Order at 111, n.19.)

Syngenta argues this is a misreading of the law and cites to a recent case, once again, citing three ways a business may bring an NCUPTA claim. *Exclaim Mktg., LLC v. DirecTV, LLC*, No. 5:11-CV-684-FL, 2015 WL 5773586, at *5 (E.D.N.C. Sept. 30, 2015) (noting that claims are available where "1) the plaintiff-business is in the marketplace acting as a consumer

or is otherwise engaged in commercial dealing with defendant . . . [2]) the businesses are competitors, . . . or 3) the conduct giving rise to the cause of action has a negative effect on the consuming public" (citations omitted)). While *Exclaim* states that these are the only causes of action afforded to business to business transactions, it does not address the analysis of the MDL Court that these mechanisms were all, at the time the cases creating them were decided, expansions of the NCUTPA. Moreover, North Carolina law places the burden of proof on the party seeking exemption from NCUPTA. N.C. Gen. Stat. § 75-1.1.

Even if Syngenta's reading is correct that this is an exhaustive list of the manners in which Plaintiffs may bring a claim, Plaintiffs have met such definitions.[83] Plaintiffs have alleged that they were in the corn seed market place acting as consumers when they bought non-MIR162 seeds to grow corn, even if they did not directly engage Syngenta. (NCC ¶¶ 5-8.) North Carolina does not require that the two parties be in privity in order to maintain an action. *J.M. Westall & Co. v. Windswept View of Asheville, Inc.*, 387 S.E.2d 67, 69 (N.C. App. 1990). Additionally, it is clear that the third category applies, because Plaintiffs have alleged a widespread negative effect on the consuming public. (NCC ¶¶ 236, 283, 292, 299.)

Again, Syngenta argues, without providing any evidence, that the "ultimate buyers" of corn experienced lower prices, not higher, of corn, and as such there was no harm to consumers. As noted above, in the Illinois Consumer Protection section, such a determination would require the court to *infer* that market prices on the Chicago Board of Trade were tied to the price grocery store consumers paid for corn and corn products. Any such inference is not allowed under Minnesota law. *See, e.g., Bahr*, 788 N.W.2d at 80. Additionally, Syngenta does not articulate why Plaintiffs cannot bring this action as consumers in the corn seed market. *See* N.C. Gen. Stat.

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[83] Plaintiffs do not claim that they compete with Syngenta.

§ 75-16 (allowing "any person [who] shall be injured" by violations of the NCUTPA to bring actions).

Finally, Syngenta argues that Plaintiffs have failed to plead reliance, and as such the claim is fatally flawed. Under the NCUTPA an act falls under its purview, where the acts in question "offend public policy and that are immoral, unethical, or substantially injurious to consumers, as well as acts that possess the tendency or capacity to mislead." *Old S. Home Co. v. Keystone Realty Grp., Inc.*, 233 F. Supp. 2d 734, 736 (M.D. N.C. 2002). "To establish a prima facie claim for unfair trade practices under the NCUTPA, a plaintiff must establish: (1) that the defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that the plaintiff was injured thereby." *Id.*

The MDL Court relied on *Tucker v. Boulevard at Piper Glen LLC*, in dismissing Plaintiffs' North Carolina Unfair and Deceptive Trade Practices Act claims. (*See* MDL Order at 114-15 (citing 564 S.E.2d 248, 251 (N.C. App. 2002)).) *Tucker* held: "Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show 'actual reliance' on the alleged misrepresentation in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." *Id.* (quoting *Promenade v. Lechmere, Inc.*, 464 S.E.2d 47, 58 (N.C. App. 1995)). Plaintiffs' claims are based on more than misrepresentation. They include Syngenta's failure to administer an effective stewardship program, prematurely releasing Viptera, and failure to warn of potential risks. (NCC ¶ 1430.) These acts "offend public policy and [ ] are immoral, unethical, or substantially injurious to consumers." *Keystone*, 233 F. Supp. 2d at 736. To that end, under NCUTPA, Plaintiffs have adequately pled the requirements to state a claim.

North Dakota

Syngenta argues that Plaintiffs' North Dakota deceptive trade practices claim under N.D. Cent. Code § 51-15-02 should be dismissed because none of the alleged conduct was made in connection with the sale of MIR162. (Syn. Br. at 128-29.) Syngenta argues that because the complained of conduct was not made in connection with the sale of MIR163, it is beyond the reach of North Dakota's statutory scheme. This reads Plaintiffs' allegations too narrowly.

The misrepresentations that Plaintiffs allege were made in connection with the sale of MIR162. First, Plaintiffs allege that Syngenta used its website to make false and misleading statements. (NCC ¶ 38-44.) Second, Plaintiffs allege that Syngenta promulgated a "Plant with Confidence Fact Sheet" which was directed at encouraging farmers to plant Viptera. (NCC ¶ 190.) These are clearly marketing tools used to make sales of its product. *See DJ Coleman, Inc. v. Nufarm Americas, Inc*., 693 F. Supp. 2d 1055, 1077 (D. N.D. 2010) (finding that "The evidence clearly establishes that Nufarm advertised on its website that Assert® is safe for use on sunflowers in North Dakota" and those statements were found to be made in connection with the sale of Assert). Indeed the "Plant with Confidence" sheet cited in the complaint (NCC ¶ 190), is forward looking, encourages farmers to plant Viptera in order to increase yields, and is the very type of communication that falls under N.D. Cent. Code § 51-15-02.[84] (*See* MDL Order at 116 (denying dismissal of Plaintiffs' claims because the Fact Sheet "could plausibly be considered advertising intend to induce future sales of the same product").)

[84] "Given current commodity prices, it is critical that corn growers get the most out of their hybrids. Corn hybrids with the Agrisure Viptera trait offer in-seed defense against a collection of lepidopteran corn pests that costs U.S. corn growers 238 million bushels of corn and more than $1.65 billion in annual yield and grain quality losses." While the Fact Sheet is outside the pleadings, in Minnesota, a court is permitted to consider documents embraced by the complaint, which surely includes the Fact Sheet. *See, e.g., Ellis v. Hanson*, No. A11-101, 2011 WL 5829104, at *2 (Minn. App. Nov. 21, 2011).

Syngenta argues that the Fact Sheet is an update to growers who have already purchased Viptera. (Syn. Br. at 129 n.156.) As noted by the MDL Court, the document is plausibly directed at future sales, and indeed, under Minnesota pleading standards the Court must draw the reasonable inference that this is a communication made in connection with the sale or advertisement of Viptera. *See Walsh*, 851 N.W.2d at 603; *Bahr*, 788 N.W.2d at 80.

South Dakota

South Dakota's Deceptive trade Practices and Consumer Protection laws (SDCPA) make it illegal for "any person to (1) Knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled, deceived, or damaged thereby." S.D. Codified Laws § 37-24-6.

Syngenta, relying on *Nygaard v. Sioux Valley Hospitals & Health Systems*, argues that Plaintiffs' SDCPA claims must be dismissed because they fail to plead "reliance." (Syn. Br. at 129.) *Nygaard* does not require that a Plaintiff plead "reliance" but merely holds that "to state a claim under SDCL 37-24-31, [Plaintiffs] must have pleaded that their economic damages were proximately caused by one or more of the three alleged violations of the Act." 731 N.W.2d 184, 198 (S.D. 2007), *see also Rodriguez v. Siouxland Urology Assocs. P.C.*, No. CIV. 09-4051 (KES), 2013 WL 684243, at *5 (D. S.D. Feb. 22, 2013) ("Rodriguez must show that his damages "were proximately caused by" the alleged violations of the Consumer Protection Act." (quoting *Nygaard*)); *Rainbow Play Sys., Inc. v. Backyard Adventure, Inc.*, No. CIV.06-4166, 2009 WL 3150984, at *7 (D.S.D. Sept. 28, 2009) ("in a civil action a claim for damages pursuant to the South Dakota Deceptive Trade Practices Act [] specifically requires a causal connection between

the alleged deceptive practice and the damages suffered by a plaintiff"); *Sisney v. Best Inc*., 754 N.W.2d 804, 811 (S.D. 2008) ("Therefore, to state a claim under SDCL 37-24-31 and 37-24-6, Sisney must have pleaded that he was adversely affected as a *result of* a deceptive practice used by the Defendants in connection with their sale or advertising of the bread.").

Nygaard required a showing of reliance to prove causation: "In this case, Patients have only pleaded subjective characterizations of belief and legal conclusions of proximate cause that are untethered to any factual predicate that could constitute causation." *Nygaard*, 731 N.W.2d at 198. The present case is distinguishable in the breadth and depth of the allegations pled that show the statements made by Syngenta are directly tied to the damages suffered. (NCC ¶¶ 132, 161, 167, 188-92.) The Non-Class Complaint adequately alleges the causal mechanism between the false statements made and the harm done to the US market.

Texas

The Texas Deceptive Trade Practices-Consumer Protection Act (TDTPA), Tex. Bus. & Com. Code § 17.41, requires that Plaintiffs be consumers, that Syngenta acted in a manner that was false, deceptive or misleading, and that the act described caused the damage to the Texas Plaintiffs. *See Sparks v. Booth*, 232 S.W.3d 853, 864 (Tex. App. 2007) (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)). "To be a consumer, the plaintiff must have sought or acquired goods or services by purchase or lease, and those goods or services must form the basis of the complaint." *Ortiz v. Collins*, 203 S.W.3d 414, 424 (Tex. App. 2006).

Syngenta's primary argument for dismissal of the TDTPA claims is that the Non-Class Complaint fails to allege proper facts to establish that the Plaintiffs are 'consumers' under the TDTPA. Syngenta, mistakenly, claims that because the Non-Class Complaint does not allege

that Plaintiffs purchased Viptera these claims fail.[85] It is well established that Texas does not require that the plaintiff and defendant be in privity in order for the plaintiff to qualify as a consumer. *See, e.g.*, *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987); *Kennedy v. Sale*, 689 S.W.2d 890, 892-93 (Tex. 1985); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540-41 (Tex. 1981); *Sparks v. Booth*, 232 S.W.3d 853, 864-65 (Tex. App. 2007). Rather all that is required is that "the plaintiff must show the defendant's deceptive conduct occurred in connection with a consumer transaction." *Sparks*, 232 S.W.3d at 864-65 (citing *Ortiz*, 203 S.W.3d at 424). Plaintiffs have amply alleged that they are consumers under the TDTPA. Plaintiffs bought goods—corn seeds—and those goods form the basis of the complained of injurious actions of Syngenta.

Syngenta's second line of attack, similar to its arguments against other state consumer protection claims, is that Texas requires reliance in order to prevail. "To establish the producing cause element, the plaintiff must show the defendant's action was a substantial factor in bringing about the plaintiff's injury, without which the injury would not have occurred." *Sparks*, 232 S.W.3d at 865 (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 479 (Tex. 1995)). Again Plaintiffs' Complaint includes multiple factual allegations that Syngenta's unfair and misleading practices were false, misleading, and intended to reach Plaintiffs and other similarly situated farmers. (NCC ¶¶ 132, 161, 167, 188-92.); *see also In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 877 (S.D. Ohio 2012) (analyzing requirements of TDTPA); *Church &*

[85] While the Class Complaint defines its class to exclude farmers who grew Viptera (CC ¶ 286), the Non-Class Complaint does not include a prohibition on claims by producers who purchased and grew Viptera. To the extent that the Court finds Syngenta's strained reading of Texas case law persuasive, this claim should survive for those individual farmers who in fact purchased Viptera.

Dwight Co. v. Huey, 961 S.W.2d 560, 565 (Tex. App. 1997) (finding the causation requirement met where marketing efforts and materials formed basis of complaint).

CONCLUSION

The Court should deny Syngenta's motion to dismiss. The motion is based largely on cases decided at a different procedural stage, and is dependent on this Court expanding the economic-loss doctrine beyond its bounds. Judge Lungstrum correctly allowed the Kansas plaintiffs to proceed with fact discovery. This Court should, too.

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Respectfully submitted,

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