STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
CASE TYPE: Civil Other

Court File No: 27-CV-15-3785
In re Syngenta Litigation Judge: Thomas M. Sipkins

This Document Relates to ALL ACTIONS

AFFIDAVIT OF LEWIS A. REMELE, JR. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SYNGENTA'S MOTION TO DISMISS

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Lewis A. Remele, Jr., being first duly sworn upon oath, deposes and says:

1. I am an attorney and shareholder in the law firm of Bassford Remele, A Professional Association, counsel in the above-captioned matter for Plaintiffs. I submit this Affidavit in support of Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss.

2. In order to assist the Court in disposing of Defendants' Motion, I have attached true and correct copies of all of the following:

A. Attached as **Exhibit A** is a copy of the Third-Party Complaint filed by the Defendants in the Federal MDL currently pending before Judge Lungstrum in the District of Kansas.

B. Attached as **Exhibit B** is a copy of *Castello v. Allianz Life Ins. Co. of N. Am.*, No. MC 03-20405, slip op. (Minn. Henn. Cnty. Sept. 5, 2005).

FURTHER AFFIANT SAYETH NAUGHT.

s/Lewis A. Remele, Jr.
Lewis A. Remele, Jr.

Subscribed and sworn to before me
this 1st day of December, 2015.

s/Mary P. Bordian
Notary Public
My Commission Expires 1/31/20

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR 162 CORN LITIGATION THIS DOCUMENT RELATES TO: ALL CASES CONFORMING TO THE PRODUCER PLAINTIFFS' AMENDED CLASS ACTION MASTER COMPLAINT ALL CASES CONFORMING TO THE MILO PRODUCER PLAINTIFFS' MASTER COMPLAINT	Master File No. 2:14-MD-02591-JWL-JPO MDL No. 2591
SYNGENTA AG, SYNGENTA CROP PROTECTION AG, SYNGENTA CORPORATION, SYNGENTA CROP PROTECTION, LLC, SYNGENTA BIOTECHNOLOGY, INC., AND SYNGENTA SEEDS, INC., *Defendants / Third-Party Plaintiffs,* v. CARGILL, INC., CARGILL INTERNATIONAL S.A., ARCHER DANIELS MIDLAND COMPANY, EXPRESS GRAIN TERMINAL LLC, AND RAIL TRANSFER, INC., *Third-Party Defendants.*	**SYNGENTA'S** **THIRD-PARTY COMPLAINT**

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Pursuant to Federal Rule of Civil Procedure 14(a), Defendants/Third-Party Plaintiffs Syngenta AG, Syngenta Crop Protection AG, Syngenta Corporation, Syngenta Crop Protection, LLC, Syngenta Biotechnology, Inc., and Syngenta Seeds, Inc. (collectively, "Syngenta") bring this third-party complaint for contribution and indemnity against Third-Party Defendants Cargill, Inc. and Cargill International S.A. (collectively, "Cargill"); Archer Daniels Midland Company ("ADM"); Express Grain Terminal LLC; and Rail Transfer, Inc.

INTRODUCTION

1. This case arises from an unprecedented attempt by Producer and Non-Producer Plaintiffs ("Plaintiffs") to assert that it was somehow a tort for Syngenta to sell a genetically modified ("GM") corn seed called Viptera in the United States *even though* Syngenta had already received all required approvals from three U.S. federal regulatory agencies. Once the MIR162 trait in Viptera received those approvals, any corn grown from Viptera seed became, by law, fungible U.S. "yellow corn" (as defined by the U.S. Department of Agriculture). According to Plaintiffs, however, Syngenta had a duty to restrict the commercialization of Viptera in the U.S. because Viptera had not yet been approved *by China* for import into its borders. Plaintiffs assert that, given the way corn is handled in the American system for growing and distributing commodity corn by parties *other than Syngenta—e.g.*, producers, grain elevators, shippers, and exporters—it is inevitable that once seed with a particular GM trait is sold, that GM trait will become dispersed throughout the commodity corn supply. Under Plaintiffs' theory, the dispersion of the MIR162 trait contained in Viptera made it impossible for any U.S. corn to be exported to China after China began rejecting U.S. shipments in November 2013.

2. Syngenta rejects Plaintiffs' theories, including the theory that Syngenta or any manufacturer of advanced biotechnology has a duty to restrict the commercialization of a safe, effective U.S.-approved technology in the U.S. simply because that technology has not been

approved in China. Syngenta believes that once a GM trait has been approved for sale by federal authorities in the U.S., it is entirely lawful to sell seed with that GM trait, and any producer, grain elevator, or exporter who wishes not to handle corn exhibiting that GM trait is responsible for devising its own system for segregating its corn accordingly. Syngenta especially rejects the theory that Syngenta has a duty to control the way *third parties*—like the non-producers themselves—handle harvested grain grown from Viptera seed so as to keep it segregated from the rest of the corn supply.

3. Nevertheless, the Court has held, at least at the pleading stage, that Plaintiffs have stated a tort claim against Syngenta that can survive a motion to dismiss under the theory that, due to the "inter-connected" relationships in the corn industry, Syngenta had a duty to control "the manner, timing, and scope of its commercialization of . . . Viptera" so as to ensure that the presence of Viptera in the corn supply would not cause economic harm to others in the corn industry. Mem. & Order, Dkt. 1016 at 10, 17, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-2591 (D. Kan. Sept. 11, 2015) ("MTD Order"). The Court's unprecedented ruling proceeds from the premise that the interconnected nature of the corn industry creates a duty for participants in the industry to operate their businesses for the "mutual economic benefit" of others, *id.* at 10, and a duty to restrict the spread of U.S.-approved GM traits solely because they have not been approved overseas. Syngenta respectfully disagrees with the Court's ruling on duty and will continue to challenge it as permitted under the applicable rules of procedure. The critical point here is that, *if* any such duty exists, the duty properly falls most squarely on the shoulders of the actors in the industry who actually accomplish the commingling that disperses a GM trait in the corn supply—namely, on the grain elevators, shippers, and exporters who commingle commodity corn together. It was their actions in indiscriminately commingling corn

from all sources—not Syngenta's action in merely selling fully approved seeds—that proximately caused the dispersion of Viptera throughout the corn supply. Syngenta therefore brings this Third-Party Complaint to ensure that, if there is any judgment imposing liability based on the presence of Viptera in the corn supply and the alleged consequent loss of the Chinese market, any liability is placed where it should be: on the grain elevators, transporters, and exporters who indiscriminately commingled corn and corn grain as they purchased, stored, transported, resold, and exported corn, including by intentionally delivering commingled corn including a mixture of Viptera and non-Viptera corn (and corn by-products) into export channels.

4. If anyone among the players in the "inter-connected" corn industry has a duty to segregate U.S.-approved corn based on the presence of GM traits so as to channel corn to different export markets based on which GM traits have been approved in certain countries, it is the Third-Party Defendant grain elevators, transporters, and exporters on whom the rest of the industry relies for responsibly gathering, storing, transporting and exporting U.S. corn. Third-Party Defendants, however, have made no attempt to segregate corn, including Viptera corn, based on the traits it contained and the countries where those traits had been approved. To the contrary, despite knowing that China had not yet approved Viptera for import and that the corn being delivered to them likely contained Viptera, the Third-Party Defendants took no steps to prevent Viptera corn (and corn by-products) from mixing with non-Viptera corn (and corn by-products) and entering export channels.

5. The Third-Party Defendants' actions were particularly exacerbated by the decision of two exporters—Cargill and ADM—who elected to ship U.S. corn that they knew or should have known contained Viptera to China even though they knew that Viptera had not yet been approved there for import. Cargill and ADM each knew or should have known that a

significant percentage of their U.S. corn shipments to China would test positive for Viptera and thus would not meet Chinese import requirements.

6. In an effort to profit from record-high corn prices driven by corn shortages in 2011 and 2012, Cargill and ADM decided that it was in their economic interest to try to ship corn containing Viptera to China anyway. And they did so knowing that they did not have (and could not obtain) the biosafety certificate issued by Chinese regulatory authorities that was required by Chinese law to import corn containing Viptera. Although Cargill and ADM had successfully exported corn to China that likely contained Viptera in 2011 and 2012, in November 2013 they eventually lost their gamble: China began rejecting their shipments of U.S. corn for allegedly testing positive for Viptera. According to Plaintiffs' allegations, China eventually rejected all U.S. corn shipments.

7. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found to have any liability to Plaintiffs whatsoever, the Third-Party Defendants' actions—including the decisions by Cargill and ADM to ship corn containing Viptera to China in violation of Chinese import requirements—were the superseding and sole cause of any injuries sustained by Plaintiffs. At the very least, the Third-Party Defendants' negligence was a proximate cause of any injuries sustained by Plaintiffs, making the Third-Party Defendants jointly liable in contribution for their relative culpability.

8. Therefore, the Third-Party Defendants are or may be liable to Syngenta for all or part of the Plaintiffs' claims against Syngenta.

THE PARTIES

Defendants/Third-Party Plaintiffs

9. Third-Party Plaintiff Syngenta AG is a corporation organized under the laws of Switzerland with its principal place of business at Schwarzwaldallee 215, 4058 Basel-Stadt, Switzerland.

10. Third-Party Plaintiff Syngenta Crop Protection AG is a corporation organized under the laws of Switzerland with its principal place of business at Schwarzwaldallee 215, 4058 Basel-Stadt, Switzerland.

11. Third-Party Plaintiff Syngenta Corporation is a corporation organized under the laws of the State of Delaware with its principal place of business located at 3411 Silverside Road # 100, Wilmington, Delaware 19810-4812.

12. Third-Party Plaintiff Syngenta Crop Protection, LLC is a limited liability company organized under the laws of the State of Delaware with its principal place of business at 410 South Swing Road, Greensboro, North Carolina 27409-2012.

13. Third-Party Plaintiff Syngenta Biotechnology, Inc. was a corporation organized under the laws of the State of Delaware with its principal place of business located at P.O. Box 12257, 3054 East Cornwallis Road, Research Triangle Park, North Carolina 27709-2257.

14. Third-Party Plaintiff Syngenta Seeds, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business at 11055 Wayzata Boulevard, Minnetonka, Minnesota 55305-1526.

Third-Party Defendants

15. Third-Party Defendant Cargill, Inc. is a corporation organized under the laws of Delaware with its principal place of business in Minnetonka, Minnesota. Cargill, Inc. owns and operates a network of grain and crop-input facilities in the United States and purchases, stores,

and otherwise handles corn from U.S. farmers and grain handlers at facilities along the Mississippi, Illinois, and Ohio Rivers—including owning or operating storage warehouses in Alabama, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Wisconsin. Cargill, Inc. also owns or operates export elevators, including in Indiana, Louisiana, and Texas. On information and belief, Cargill sources corn from, stores, transports, or otherwise handles corn in or from farmers and other participants in the supply chain in all of the states in which Plaintiffs reside.

16. Third-Party Defendant Cargill International S.A. ("CISA," and collectively with Cargill, Inc., "Cargill") is a corporation organized under the laws of Switzerland with its principal place of business in Geneva, Switzerland. CISA is a wholly owned subsidiary of Cargill, Inc. that sells U.S. corn to overseas markets, manages much of Cargill's ocean-freight business, and contracts with both Cargill, Inc. and Chinese buyers for the sale and export of U.S. agricultural products, including corn, soybeans, and a corn by-product called Distiller's Dried Grain with Solubles ("DDGS"). On information and belief, CISA charters and operates vessels on the Mississippi River and conducts business with Cargill, Inc. at ports and export facilities in the United States such as Cargill, Inc.'s facilities in Louisiana, Indiana, and Texas.

17. Third-Party Defendant ADM is a corporation organized under the laws of Delaware with its principal place of business in Decatur, Illinois. ADM has an extensive network of grain elevators and grain handling and processing facilities (including country elevators, rail terminals, river terminals, corn plants, and port elevators) and transportation assets (including trucks, rail cars, barges, and ocean-going vessels) throughout the United States that it uses to buy, store, clean, process, and transport agricultural commodities, including corn. ADM

also owns or operates grain storage warehouses and elevators, including in Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin. ADM owns or operates export elevators, including in Ohio, Louisiana, and Texas. In addition, on information and belief, ADM sources corn from, stores, processes, transports, and otherwise handles corn in or from farmers and other participants in the supply chain in all of the states in which Plaintiffs reside.

18. Third-Party Defendant Express Grain Terminal LLC is a limited liability company organized under the laws of Mississippi with its principal place of business in Sidon, Mississippi.

19. Third-Party Defendant Rail Transfer, Inc. is a corporation organized under the laws of Minnesota with its principal place of business in St. Paul, Minnesota.

JURISDICTION AND VENUE

20. This Court has supplemental jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C. § 1367(a). The claims in this Third-Party Complaint are so related to and intertwined with the claims at issue in the remainder of the case, over which the Court has original jurisdiction under 28 U.S.C. § 1331, that they form part of the same "case or controversy" under Article III of the United States Constitution.

21. Because the claims asserted in this Third-Party Complaint are ancillary to the claims in the main cases filed by Plaintiffs against Syngenta, venue is also proper in this Court for pretrial proceedings and venue is proper in each of the courts in which Plaintiffs' cases were originally filed. *See, e.g., Love's Travel Stops & Country Stores, Inc. v. Oakview Const., Inc.*, No. CIV-10-235-D, 2010 WL 4811450, at *5 (W.D. Okla. Nov. 19, 2010) ("[T]he third party action is an ancillary proceeding that is incidental to the main action and thus requires no

independent basis of subject matter jurisdiction or venue."). By asserting that venue is proper for the purposes of pretrial proceedings with respect to this Third-Party Complaint, Syngenta does not waive its right to request that the cases filed against Syngenta be transferred back to the respective federal courts of origin for trial pursuant to 28 U.S.C. § 1407.

FACTUAL BACKGROUND

I. Syngenta Commercialized Viptera And Duracade Corn Seeds Consistent With All Requirements

A. Syngenta Developed Two Innovative GM Corn Seeds Called Viptera And Duracade

22. GM corn makes up approximately 92% of all corn planted in the United States.

23. Syngenta develops, manufactures, and sells GM seeds. Two of its recent advancements are corn seed traits called MIR162 and Event 5307.

24. Each trait protects corn crops from various insects and pests, thus increasing crop yields and reducing the need for pesticides.

25. Syngenta incorporated MIR162 into its Viptera corn seed, making corn resistant to above-ground pests like Lepidoptera (caterpillars).

26. Syngenta incorporated Event 5307 into its Duracade corn seed, which helps control pests like rootworm.

B. Viptera And Duracade Received All Required Approvals From Three Federal Agencies Before Being Sold In The United States

27. Before Syngenta began selling Viptera seed in the United States, Syngenta obtained the required approval of three federal agencies—the United States Department of Agriculture ("USDA"), Food and Drug Administration ("FDA"), and Environmental Protection Agency ("EPA").

28. The Environmental Protection Agency—which regulates the use, sale, and labeling of pesticides including those in GM traits—approved MIR162 in November 2008 and Event 5307 in July 2012.

29. In December 2008, the Food and Drug Administration ("FDA")—which oversees food and feed safety of GM plants—approved Syngenta's conclusion that food and feed derived from MIR162 are as safe and nutritious as food and feed derived from conventional corn. The FDA reached the same conclusion with respect to Event 5307 in January 2012.

30. In April 2010, the USDA concluded that MIR162 did not pose risks to humans, animals, or the environment, and approved MIR162 for deregulation without any restrictions on how it was to be sold, grown, or handled. In approving MIR162 for commercial sale, the USDA considered and rejected alternatives to full deregulation, including partial deregulation that would have imposed geographic restrictions on where seeds containing MIR162 could be planted.

31. By April 20, 2010, Viptera had thus received all approvals that were required for it to be sold and used without restriction in the United States.

32. Similarly, when Syngenta later developed Event 5307 for its Duracade corn product, Syngenta obtained the required approval of the USDA, FDA, and EPA before selling Duracade seed in the United States. In approving Event 5307 for commercial sale, the USDA considered and rejected alternatives to full deregulation, including partial deregulation that would have imposed geographic restrictions on where seeds containing Event 5307 could be planted and isolation distance requirements for Duracade.

33. After Duracade received all required approvals by January 2013, Syngenta began selling Duracade seeds in the United States.

34. Once MIR162 and Event 5307 received unrestricted federal approval, corn grown from Viptera and Duracade seeds automatically became lawful parts of the U.S. corn supply under the USDA's broad definition of "yellow corn"—which, by regulation, includes any deregulated "[c]orn that is yellow-kerneled and contains not more than 5.0 percent of corn of other colors" (with "yellow kernels of corn with a slight tinge of red [being] considered yellow corn"). 7 C.F.R. § 810.402(c)(1).

C. Syngenta Commercialized Viptera Consistent With Voluntary Industry Guidelines

35. In addition to adhering to U.S. regulatory requirements, Syngenta's decision to commercialize Viptera was consistent with the voluntary industry guidelines in existence at the time.

36. For example, the Biotechnology Industry Organization ("BIO") Product Launch Stewardship Policy sets out non-binding recommendations for its members. The December 10, 2009 BIO Policy ("2009 BIO Policy"), which was the version in effect at the time of Viptera's commercialization, suggested that, before launching a new GM trait, member companies should assess which countries are "key" export markets, which requires, among other things, assessing the volume of trade for the crop at issue and whether the country has a regulatory process that is science-based and free of political influence. The 2009 BIO Policy suggested that companies consider obtaining import approval from only those "key export markets" with "functioning regulatory systems" (defined as those with "a track record of systematic authorizations with consistent and predictable timelines and processes").

37. The 2009 BIO Policy specifically listed only the United States, Canada, and Japan as "key markets." Syngenta applied for and obtained approval from the United States, Canada, and Japan before Viptera was launched.

38. Syngenta also obtained approval for Viptera from additional foreign countries, including Brazil, Korea, Taiwan, the Philippines, Mexico, and Colombia.

39. The BIO Policy has never listed China as a key market for which import approval should be obtained before commercialization. In the years leading up to 2010 when Viptera was commercialized, China was a net exporter of corn. And when Viptera was launched in 2010 for sale in the United States, only about one-third of 1% of annual U.S. corn production was exported to China.

40. Syngenta applied for import approval from China in March 2010. Chinese laws mandate that applications must be decided within 270 days. Nevertheless, China never made a decision of approval or disapproval on Syngenta's application until December 2014, when China ultimately approved Viptera for import.

41. Market participants acknowledged that Syngenta's commercialization of Viptera was consistent with the industry's expectations and recommendations. For example, the National Corn Growers Association ("NCGA")—which represents the interests of all U.S. corn growers including the Producer Plaintiffs in this case—sent a letter to its members in the fall of 2011 stating that Syngenta did not violate any commercial stewardship policy by selling Viptera in the U.S. before receiving Chinese approval. To the contrary, NCGA recognized that Syngenta's "[c]ommercialization of Viptera was done in accordance with the U.S. regulatory approval system and met the policy requirements of NCGA and Biotechnology Industry Organization."

42. Syngenta also communicated with major U.S. grain handlers and exporters, including Third-Party Defendants Cargill and ADM, about whether or not they intended to accept corn grown from Viptera seed at their facilities. Cargill and ADM (among others)

informed Syngenta that they would accept corn grown from Viptera seeds, even though they knew that Viptera had not yet been approved for import by China.

II. The Role Of Grain Handlers And Exporters, Including Third-Party Defendants, In The Corn Growing, Distribution, And Export Chain

43. Syngenta sells corn seed. It does not grow corn for commercial sale, distribute corn, segregate corn, or export corn. Those activities are all carried out by other players in the market. After receiving all required regulatory approvals, Syngenta began selling Viptera seed in 2010 to independent dealers and directly to growers in the United States for the 2011 growing season.

44. Viptera growers grow corn from Viptera corn seed and later harvest that corn. Some of that corn is sold into the distribution chain, including to elevators, transporters, and exporters, who take corn into their facilities where it is stored or otherwise further moved down the distribution chain, including for sale to export markets.

45. Each elevator, transporter, and exporter, including the Third-Party Defendants, exercises discretion in determining whether and how to accept particular types of corn, including corn grown from Viptera corn seed, into its facilities. Each elevator, transporter, and exporter, including the Third-Party Defendants, also exercises discretion in determining how to dispose of the corn in its possession, including whether and how to sell the corn into export channels as opposed to selling it solely for domestic uses. For example, each Third-Party Defendant decided not to segregate corn grown from Viptera corn seed from other corn.

46. Syngenta respectfully disagrees with the Court's September 11, 2015 ruling that Plaintiffs have stated tort claims against Syngenta based on the theory that a manufacturer has a duty to ensure that a safe, effective, U.S.-approved GM corn trait is not dispersed in the U.S. corn supply in a way that might cause economic harm to others in the allegedly "interconnected"

corn industry. But if and to the extent that the nature of the allegedly "interconnected" corn industry creates a duty for market participants to operate their businesses in a manner that restricts the spread of U.S.-approved GM traits solely because they have not been approved overseas, that duty properly falls on the elevators, transporters, and exporters who actually commingle the corn. *If* anyone owes a duty to other market participants in the corn industry, then it is grain handlers and exporters, including the Third-Party Defendants, who owe a duty of reasonable care with respect to the acceptance, handling, and disposition of grain that they know or should have known is likely to enter export channels and that they know or should have known is likely to contain a GM trait that has not been approved for export to certain countries.

47. Cargill acknowledges other industry participants as its stakeholders. Cargill has publicly stated that its corporate "responsibility extends beyond [its] own operations to the suppliers, partners and other stakeholders in [its] supply chains" and that achieving a responsible supply chain "require[s] collaboration with all stakeholders across developed and emerging markets." As Cargill explained in its 2015 Annual Report, Cargill knows that its "customers and other partners expect [Cargill] to lead"—including in "supply chain management." With respect to the grain supply chain, Cargill states that it has "developed significant expertise in handling identity-preserved and differentiated products that sustain their distinctiveness in overseas markets." For example, to fulfill its "goal of helping farmers prosper and providing innovative solutions for [its] food customers," Cargill has managed the supply chain to segregate and channel a new GM soybean by working with a GM manufacturer, growers, and elevators "to better serve the total supply chain, from farmers to consumers, to create greater value for all."

48. Likewise, ADM has recognized that its stakeholders include other industry participants in the supply, distribution, and export chain. Because ADM recognizes that it

"occup[ies] a prominent position in the agricultural value chain that extends from the farm gate to the consumer's plate, [ADM] work[s] with [its] industry peers, trade associations, growers, governments, NGOs and operating communities to improve the quality and availability of crops in the global supply chain, and the lives of farmers and communities that grow these crops." ADM's Code of Conduct—which it touts as a "practical resource for colleagues, suppliers, and other business partners"—similarly acknowledges that ADM's "stakeholders" "include[e] [its] colleagues, customers and business partners, shareholders and communities" and that it is "important that [ADM] fulfill [its] commitments to these groups."

49. Grain handlers and exporters, including the Third-Party Defendants, are the parties that actually commingle corn grown from different sources, and are thus the parties best positioned to avoid the alleged economic harm to others in the corn industry from the presence of a GM trait in the U.S. corn supply. Grain handlers and exporters knew or should have known that commingling of commodity corn would result in the dispersion of a GM trait within the U.S. corn supply, and that shipping commingled commodity corn would risk sending corn grown from Viptera to China even though Viptera had not yet been approved by China for import into its borders.

50. When a trait is approved in the United States but not for import into a particular foreign market, grain handlers and exporters have numerous ways to minimize the risk of rejection in that foreign market. For example, grain handlers who wish to deliver corn into export channels can (1) choose to buy and export corn from sources that are free of the genetic trait; (2) negotiate warranties from sellers of corn that the corn was free of the genetic trait; (3) test inbound corn deliveries for the presence of the genetic trait and refuse to accept corn containing the trait; (4) test inbound corn deliveries for the presence of the genetic trait and

segregate corn so as to comply with the standards of the export markets to which their corn would be delivered; (5) test outbound corn deliveries, including shipments for export, for the presence of the genetic trait and channel corn containing the trait away from export channels to markets where the trait is unapproved (such as diverting corn containing the trait to elevators for domestic use or consumption); and/or (6) choose not to ship corn to foreign markets where the U.S.-approved trait is not approved.

51. The USDA has expressly announced that those who want to deal in corn free from U.S.-approved GM traits should bear the burden of implementing the necessary safeguards to enable them to do so. For example, on numerous occasions in considering whether to deregulate GM traits—including Syngenta's Event 5307—the USDA has responded to commenters' concerns that GM traits for commodity grain that have not been approved for import in some foreign markets should not be deregulated (and thus cleared for commercial sale) in the U.S. As the USDA explained, any obligation to avoid the risk of rejection in export markets falls on grain handlers and exporters rather than on manufacturers: "When international acceptance of a specific [genetic] event has not been attained, US elevators and grain buyers may either refuse to purchase the grain, or may require that it be diverted to elevators that are solely designated as sources for domestic grain sale."

52. Syngenta does not control how third-party grain handlers and exporters such as the Third-Party Defendants handle corn, corn grain, and corn by-products—including how they organize and operate their own facilities to test, channel, or segregate, and what they choose to do with the corn, corn grain, and corn by-products that they sell domestically or export.

53. Grain handlers and exporters such as the Third-Party Defendants generally have superior and sometimes exclusive knowledge about their own operations and their decisions

concerning how to dispose of corn in their possession. Syngenta cannot reasonably know (much less control) whether each and every grain handler and exporter in the United States plans, at any given time, to send any particular delivery of outbound corn, corn grain, or corn by-products into export channels or the details of its grain-handling operations.

III. Even Though China Had Not Yet Approved Viptera For Import, The Third-Party Defendants Accepted And Commingled Corn Containing Viptera Even Though They Knew Or Should Have Known That It Was Likely To Enter Export Channels To Markets Where Viptera Was Not Yet Approved

A. The Third-Party Defendants Knew Or Should Have Known That Viptera Was Likely To Be In The Corn They Handled And That The Trait Was Not Yet Approved For Import By China

54. It was well known within the corn industry that Viptera was sold in 2010 for commercial planting throughout the United States and that Duracade was sold in 2013 for commercial planting on limited acres in the United States.

55. At all relevant times, it was also well known in the corn industry that Viptera and Duracade had not yet been approved by China for import.

56. Industry organizations publicly acknowledged that Viptera and Duracade were being commercially sold but had not been approved for import by China. For example, the North American Export Grain Association ("NAEGA")—which represents members consisting of export companies and grain traders such as Cargill and ADM—and the National Grain and Feed Association ("NGFA")—a trade association that represents elevators such as Third-Party Defendant Express Grain, grain transporters such as Third-Party Defendant Rail Transfer, and export elevators such as those owned and operated by Cargill and ADM—released a joint statement in August 2011 publicly acknowledging that Viptera had not yet been approved by China. Third-Party Defendants Cargill and ADM are members of NAEGA, and Third-Party Defendants Express Grain, Cargill, and ADM are members of NGFA.

57. Numerous trade publications and news media also publicly and repeatedly discussed the fact that China had not yet approved Viptera or Duracade for import.

58. Cargill and ADM knew at all relevant times that Viptera had not yet been approved by China for import. Syngenta discussed the approval status of Viptera directly with Cargill and ADM on multiple occasions. For example, Syngenta warned Cargill that "some com[m]ingling [of Viptera and non-Viptera corn] will happen at harvest" in the fall of 2011.

B. The Third-Party Defendants Knew Or Should Have Known That The Corn They Handled Was Likely To End Up In Exports To Markets Where Viptera And Duracade Had Not Yet Been Approved

59. The Third-Party Defendants knew or should have known that commodity corn they commingled was likely to end up in export channels, including to countries like China where Viptera and Duracade had not yet been approved. Each of the Third-Party Defendants controls where it delivers the corn it handles, and each of the Third-Party Defendants delivers U.S. corn in ways that it knows or should know will allow the corn to end up in export channels.

60. Before China's rejection of U.S. corn, Cargill, Inc. was one of the largest exporters of U.S. corn destined for China, and CISA was one of the largest sellers of U.S. corn to China.

61. ADM sells the vast majority of corn and other grain products that arrive in its Louisiana facilities in the international export market.

62. Express Grain Terminal, which advertises its ability to "connect[] southern grain to global markets," stores and transports grain, including corn and milo, that is destined for export.

63. Rail Transfer provides loading and logistical services to exporters of corn by-products to Chinese importers. Rail Transfer transports containers of grain, including DDGS, by rail to the Pacific Northwest where they are then loaded on cargo ships bound for China.

C. The Third-Party Defendants Nonetheless Commingled Corn Grown From Viptera With Other Corn That Was Likely To Enter Export Channels

64. Despite knowing that Viptera was likely to be in corn delivered to each of the Third-Party Defendants and knowing that they would sell corn from their facilities into export channels, the Third-Party Defendants commingled commodity corn in their facilities, including corn containing the Viptera corn trait.

65. The Third-Party Defendants did not take reasonable steps to segregate or channel corn containing Viptera away from likely export channels. Instead, the Third-Party Defendants voluntarily purchased and handled corn that was likely to contain Viptera and commingled it with corn that was likely to be delivered into export channels.

66. Under the Court's analysis of duty in its Order of September 11, 2015, the Third-Party Defendants could and should have taken steps to segregate or channel corn containing Viptera including, but not limited to, testing inbound and outbound corn deliveries from growers and other distributors for the presence of Viptera, and segregating corn testing positive for that trait from corn that was would be shipped to export markets where Viptera had not yet been approved.

IV. Exporters, Including Cargill And ADM, Ship Corn Containing Viptera To China, Even Though They Knew China Had Not Approved Viptera For Import

A. Chinese Import Requirements For GM Agricultural Products

67. Once China approves a trait for import, the Chinese Ministry of Agriculture issues a biosafety certificate for that trait, which allows the trait to be imported.

68. Chinese law requires importers of a GM crop for production or as raw materials for processing to obtain the biosafety certificate for the GM crop before signing a contract for delivery to a Chinese purchaser.

69. Chinese law requires importers such as Cargill and ADM to submit the biosafety certificates for GM traits in their shipments to the Chinese Entry-Exit Inspection and Quarantine Department at the border along with the corresponding shipment.

70. If a shipment containing a GM trait arrives without the biosafety certificate, then Chinese law provides that the shipment can be rejected, seized, or destroyed.

71. As sophisticated international agribusinesses who regularly export crops to foreign markets including China, Cargill and ADM knew or should have known of the Chinese laws and regulations governing the import of agricultural products.

72. For example, Cargill has adopted a set of "Guiding Principles" recognizing its corporate duty to be a "responsible global citizen": "With [Cargill's] global reach comes the responsibility to understand and manage [its] impact." As Cargill recognizes, its responsibility includes "the responsibility to comply with all of the laws that apply to [its] businesses."

73. ADM's Code of Conduct also recognizes that—because it "ships products and services to countries all over the world"—its "international trading operations are subject to the laws and regulations of the countries in which [ADM] conduct[s] business." ADM therefore "must abide by all applicable laws and regulations regarding international trade."

B. Cargill Knowingly Exported Corn Containing Viptera To China Without Import Approval, And China Rejected Some Of Cargill's Shipments

74. Cargill informed Syngenta in July 2011 that shipping U.S. corn to China could result in the rejection of shipments because of the presence of GM traits that had not yet been approved by China for import into its borders.

75. Cargill also informed Syngenta that Cargill had unsuccessfully asked Chinese authorities to accept point-of-origin certification that a shipment was free of Viptera (rather than point-of-delivery testing at Chinese ports) or accept a low-level presence of Viptera in shipments

(rather than following a zero-tolerance law requiring the absence of any genetic trait that had not been approved by China).

76. Syngenta warned Cargill on multiple occasions that any vessels carrying U.S. corn would likely contain Viptera. Cargill itself informed Syngenta that Cargill was testing its corn shipments for the presence of Viptera and knew that approximately 50% of its shipments of U.S. corn to China in 2012 contained Viptera.

77. Cargill knew or should have known at all relevant times that China had not yet approved Viptera for import before December 2014. In addition to widespread public and industry knowledge of the point, Syngenta repeatedly informed Cargill that China had not yet approved Viptera for import. For example, in response to Cargill's inquiry about whether the inclusion of Viptera on a "Request Form For Biosafety Certificate" meant that China had approved Viptera for import and had issued a biosafety certificate that would allow corn containing Viptera to be imported, Syngenta informed Cargill in January 2013 that the biosafety certificate for Viptera "isn't available yet." Cargill thanked Syngenta for its "very clear" explanation. Likewise, in June 2013, Cargill asked Syngenta whether China had approved Viptera, and Syngenta informed Cargill that "no safety certificates" were available.

78. Despite Cargill's knowledge that its shipments were testing positive for the presence of Viptera and that China had not yet approved corn containing Viptera for import, Cargill entered contracts with Chinese buyers in mid-2012 for the sale of U.S. corn.

79. Cargill nonetheless doubled-down on its gamble by entering into more than 40 additional contracts with Chinese buyers from February through July 2013 for the delivery of more than 2 million metric tons of corn in the fall of 2013 and early 2014.

80. In September 2013—despite not having the biosafety certificate required to import Viptera into China and knowing that its shipments of U.S. corn to China contained Viptera—Cargill began loading shipments of U.S. corn for import into China.

81. In November 2013, China began rejecting shipments of U.S. corn—including several vessels operated by Cargill—purportedly because of the presence of Viptera.

82. As Syngenta learned through subsequent conversations with Cargill, Cargill was simply banking on China approving Viptera for import by early December 2013, and Cargill did not have a back-up plan in case that did not happen.

83. Cargill did not have to ship U.S. corn containing Viptera to China and could have channeled corn containing Viptera away from China. For example, Cargill operates feed lots and has other domestic outlets for corn. Cargill could have channeled U.S. corn containing Viptera for domestic consumption only, but chose not to do so. Similarly, Cargill could have sold U.S. corn containing Viptera to the many other overseas markets where Viptera was approved.

C. ADM Exported Corn To China That It Knew Or Should Have Known Contained Viptera, And China Rejected Some Of ADM's Shipments

84. Despite China's apparent rejection of U.S. corn shipments allegedly containing Viptera beginning in November 2013, ADM continued to treat China as an available destination for U.S. corn containing Viptera.

85. Like Cargill, ADM entered agreements with Chinese purchasers to deliver corn to China despite ADM's knowledge that Viptera had not been approved for import.

86. Like Cargill, ADM exported corn to China that it knew or should have known—given the availability and commercial feasibility of testing such as the testing performed by Cargill—that its corn shipments to China contained Viptera.

87. As a result, ADM's shipments of U.S. corn to China were subsequently seized or rejected because of the alleged presence of Viptera.

88. ADM also agreed to sell DDGS to COFCO, a Chinese grain company, in November 2014—one year after China began rejecting U.S. corn shipments containing Viptera, and prior to China's approval of Viptera in December 2014.

89. ADM tested its corn for the presence of Viptera after China began rejecting shipments of U.S. corn.

90. ADM's decision to promise corn to Chinese purchasers and attempt to export corn and corn by-products to China was, at a minimum, reckless under the premise of the Court's September 11, 2015 ruling.

V. Plaintiffs Sued Syngenta Based On China's Rejection Of U.S. Corn Supposedly Containing Viptera.

91. As a result of China's rejection of U.S. corn shipments supposedly containing Viptera—including shipments by Cargill and ADM—Plaintiffs have sued and continue to sue Syngenta in these cases and others, alleging that they suffered economic losses in the form of a decrease in the price of U.S. corn.

92. Syngenta has incurred substantial costs and fees in defending the litigation brought by Plaintiffs.

VI. The Third-Party Defendants Were Negligent And Thus Are Responsible For All Or Part Of Any Liability That Syngenta Owes To Plaintiffs

93. Syngenta denies that it is liable to Plaintiffs. *If* anyone is liable, however, it is the actors in the corn industry who commingle commodity corn together and export it to foreign markets—the Third-Party Defendants.

94. Syngenta denies that it owed Plaintiffs a duty not to sell its U.S.-approved corn seed to farmers in the United States. If there is any duty here, it is that the Third-Party

Defendants owed an independent duty of reasonable care to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained Viptera or Duracade and corn that they knew or should have known was likely to enter export channels.

95. The Third-Party Defendants breached their duty of reasonable care by, among other things, choosing to sell to China despite failing to segregate corn containing Viptera or Duracade from corn that the Third-Party Defendants then delivered into channels for export to China.

96. Cargill and ADM also breached their duty of reasonable care by, among other things, entering into contracts to deliver U.S. corn to Chinese purchasers and exporting corn to China, even though Cargill and ADM knew or should have known that their corn shipments to China contained Viptera, that China had not yet approved Viptera for import, that they did not have the required biosafety certificates to comply with Chinese import regulations, and that China could reject, seize, or destroy shipments containing Viptera.

97. Syngenta's actions were not the proximate cause of the injuries claimed by Plaintiffs, and Syngenta was not responsible in any manner for the injuries alleged by Plaintiffs. If anything, the Third-Party Defendants' negligence was the sole and superseding proximate cause of Plaintiffs' injuries. It was not foreseeable to Syngenta that the Third-Party Defendants would act negligently. Alternatively, if it is determined that Syngenta's actions were the proximate cause of the injuries claimed by Plaintiffs, the Third-Party Defendants' negligence was a direct, predominant, and/or concurrent proximate cause of Plaintiffs' injuries.

98. Syngenta denies that Plaintiffs suffered any injuries or that any injuries suffered by Plaintiffs were foreseeable. But if and to the extent that Syngenta is found liable to Plaintiffs, then any injuries suffered by Plaintiffs were foreseeable to and actually foreseen by the Third-Party Defendants.

CLAIMS FOR RELIEF

Count I — Indemnity (Negligence)
(Alabama)

99. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

100. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

101. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found liable, the Third-Party Defendants are liable for active negligence. By contrast, Plaintiffs allege, among other things, that Syngenta was passively negligent in failing to prevent the rest of the corn industry, including Third-Party Defendants, from commingling corn containing Viptera and exporting corn containing Viptera to China.

102. Syngenta denies that it is at fault for any injuries claimed by Plaintiffs. But if and to the extent that Syngenta is found to be at fault, the Third-Party Defendants are also at fault, and their negligence is the primary and efficient cause of any injuries claimed by Plaintiffs.

103. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count II — Equitable Indemnity (Negligence)
(Arkansas)

104. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

105. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

106. Syngenta denies that it has any special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

107. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

108. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China that they knew or should have known was likely to enter export channels to China.

109. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

110. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count III — Contribution (Negligence)
(Arkansas Uniform Contribution Among Tortfeasors Act, Ark. Code § 16-61-202)

111. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

112. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

113. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are joint tortfeasors because Syngenta and the Third-Party Defendants may have joint or several liability in tort for the same injury to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative culpability.

114. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta and to an allocation of fault as among all joint tortfeasors.

Count IV — Common-Law Indemnity (Negligence)
(Colorado)

115. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

116. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

117. Syngenta denies that it has any pre-existing legal or special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a pre-existing legal or special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a pre-existing legal or special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

118. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

119. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

120. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

121. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count V — Contribution (Negligence)
(Colorado Uniform Contribution Among Tortfeasors Act, Colo. Rev. Stat. § 13-50.5-101 *et seq.*)

122. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

123. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

124. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants have joint or several liability in tort for the same injury to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative degree of fault.

125. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of judgment entered against Syngenta.

Count VI — Contribution (Negligence)
(Illinois Joint Tortfeasor Contribution Act, 740 Ill. Comp. Stat. 100/0.01 *et seq.*)

126. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

127. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

128. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are subject to liability in tort arising out of the same injury to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative culpability.

129. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of all or part of any judgment entered against Syngenta.

Count VII — Common-Law Indemnity (Negligence)
(Iowa)

130. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

131. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

132. Syngenta denies that it has any special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

133. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

134. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

135. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

136. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count VIII — Contribution (Negligence)
(Iowa Code § 668.1 *et seq.*)

137. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

138. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its equitable share of the liability.

139. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are liable upon the same indivisible claim for the same injury or harm. As a result, the Third-Party Defendants are liable in proportion to their relative fault.

140. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count IX — Comparative Implied Indemnity (Negligence)
(Kansas)

141. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

142. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay the Third-Party Defendants' share of liability.

143. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

144. Syngenta is thus entitled to indemnification and/or contribution from the Third-Party Defendants for all or part of any judgment owed by Syngenta to Plaintiffs.

Count X — Contribution (Negligence)
(Kansas)

145. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

146. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay the Third-Party Defendants' share of liability.

147. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

148. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XI — Common-Law Indemnity (Negligence)
(Kentucky)

149. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

150. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

151. Syngenta denies that it is at fault for any injuries claimed by Plaintiffs. But to the extent that Syngenta is found to be at fault, the Third-Party Defendants are also at fault, and their fault is the primary and efficient cause of any injuries claimed by Plaintiffs. Syngenta and the Third-Party Defendants are thus not *in pari delicto*.

152. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

153. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XII — Contribution (Negligence)
(Kentucky Rev. Stat. § 412.030)

154. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

155. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its percentage of liability based on its assessed fault.

156. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are liable for concurrent negligence of substantially the same character which contributed to cause any losses suffered by Plaintiffs. As a result, the Third-Party Defendants are liable in proportion to their relative degrees of fault.

157. Contribution may be enforced against the Third-Party Defendants in this action because the alleged wrong is a mere act of negligence and involves no moral turpitude.

158. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XIII — Contribution (Negligence)
(Mich. Comp. Laws § 600.2925a *et seq.*)

159. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

160. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

161. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly or severally liable in tort for the same injury to a person or property. As a result, the Third-Party Defendants are liable in proportion to their relative degrees of fault.

162. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of all or part of any judgment entered against Syngenta.

Count XIV — Indemnity (Negligence)
(Minnesota)

163. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

164. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether or primarily the responsibility of the Third-Party Defendants.

165. Syngenta denies that it has any special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

166. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have

known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

167. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

168. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee. The Third-Party Defendants would thus have a primary or greater liability or duty which justly requires them to bear the whole of any liability as between Syngenta and the Third-Party Defendants.

169. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XV — Contribution (Negligence)
(Minn. Stat. § 604.01 *et seq.*)

170. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

171. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its proportional share of the common liability.

172. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants have common liability for Plaintiffs' injuries, and Plaintiffs could have brought an action against the Third-Party Defendants. As a result, the Third-Party Defendants are liable in proportion to their relative degrees of fault.

173. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XVI — Implied Indemnity (Negligence)
(Mississippi)

174. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

175. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

176. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found liable, the Third-Party Defendants are liable for active, primary, and positive negligence. By contrast, Plaintiffs allege, among other things, that Syngenta was passively, secondarily, and negatively negligent in failing to prevent the rest of the corn industry, including Third-Party Defendants, from commingling corn containing Viptera and exporting corn containing Viptera to China. As a result, any fault of Syngenta and the Third-Party Defendants is not equal in grade or character.

177. Syngenta denies that it is at fault for any injuries claimed by Plaintiffs. But to the extent that Syngenta is found to be at fault, the Third-Party Defendants are also at fault, and their negligence is the efficient cause of any injuries claimed by Plaintiffs.

178. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XVII — Equitable Indemnity (Negligence)
(Missouri)

179. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

180. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found liable, Syngenta will be forced to discharge an obligation to Plaintiffs that is identical to an obligation that is altogether the responsibility of the Third-Party Defendants.

181. Equity requires that the Third-Party Defendants discharge any liability that Syngenta owes to Plaintiffs because it would unjustly enrich the Third-Party Defendants if they do not reimburse Syngenta for discharging their liability.

182. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XVIII — Contribution (Negligence)
(Mo. Rev. Stat. § 537.060)

183. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

184. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its proportional share of the common liability.

185. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants have common liability for Plaintiffs' injuries, and therefore the Third-Party Defendants are originally liable to the plaintiff. As a result, the Third-Party Defendants are liable in proportion to their relative degrees of fault.

186. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XIX — Indemnification (Negligence)
(Nebraska)

187. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

188. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a common liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

189. To the extent that Syngenta is found liable to Plaintiffs, the Third-Party Defendants are liable for direct, active, and primary negligence. By contrast, Plaintiffs allege,

among other things, that Syngenta was merely passively and secondarily negligent in failing to prevent the rest of the corn industry, including Third-Party Defendants, from commingling corn containing Viptera and exporting corn containing Viptera to China.

190. Syngenta denies that it has any pre-existing legal or special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a pre-existing legal or special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a pre-existing legal or special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

191. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

192. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

193. It would unjustly enrich the Third-Party Defendants and would be inequitable to Syngenta to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

194. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XX — Contribution (Negligence)
(Neb. Rev. Stat. § 25-21, 185.10)

195. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

196. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found liable, then the Third-Party Defendants have a common liability to Plaintiffs, and Syngenta may be, but should not be, required to pay more than its fair share of the common liability. As a result, the Third-Party Defendants are liable in proportion to their relative degrees of fault.

197. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXI — Implied-In-Law Indemnity (Negligence)
(North Carolina)

198. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

199. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

200. Syngenta denies that it is liable to Plaintiffs. But if and to the extent that Syngenta is found liable, the Third-Party Defendants are liable for active negligence. By contrast, Plaintiffs allege, among other things, that Syngenta was passively negligent in failing to prevent the rest of the corn industry, including Third-Party Defendants, from commingling corn

containing Viptera and exporting corn containing Viptera to China. The Third-Party Defendants are primarily responsible, and therefore Syngenta and the Third-Party Defendants are not *in pari delicto*.

201. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XXII — Contribution (Negligence)
(North Carolina Uniform Contribution Among Tortfeasors Act, N.C. Gen. Stat. § 1B-1 *et seq.*)

202. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

203. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

204. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly or severally liable in tort for the same injury to a person or property. As a result, the Third-Party Defendants are liable for their pro rata share of the liability.

205. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXIII — Implied-In-Law Indemnity (Negligence)
(North Dakota)

206. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

207. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a liability that, as between itself and the Third-Party Defendants, is should have been discharged by the Third-Party Defendants.

208. Syngenta denies that it is at fault for any injuries claimed by Plaintiffs. But if and to the extent that Syngenta is found to be at fault, the Third-Party Defendants are also at fault,

and there is great disparity in fault between the Third-Party Defendants, who are primarily responsible, and Syngenta.

209. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XXIV — Contribution (Negligence)
(North Dakota Cent. Code § 32-38-01 *et seq*.)

210. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

211. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

212. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly or severally liable in tort for the same injury to person or property. As a result, the Third-Party Defendants are liable for their pro rata share of the liability.

213. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXV — Contribution (Negligence)
(Ohio Rev. Code § 2315.25)

214. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

215. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its proportionate share of the common liability.

216. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly and severally liable in tort for the same injury or loss to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative degree of legal responsibility.

217. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXVI — Contribution (Negligence)
(Oklahoma Uniform Contribution Among Tortfeasors Act, 12 Okla. Stat. § 832)

218. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

219. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

220. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly or severally liable in tort for the same injury to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative degree of fault.

221. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXVII — Contribution (Negligence)
(South Dakota C.L. § 15-8-11 *et seq.*)

222. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

223. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its pro rata share of the common liability.

224. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are joint tortfeasors because they may be jointly or severally liable in tort for the same injury to person or property. As a result, the Third-Party Defendants are liable in proportion to their relative degree of fault.

225. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXVIII — Implied Indemnity (Negligence)
(Tennessee)

226. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

227. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be required to pay a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

228. Syngenta denies that it has any special relationship with Plaintiffs. But if and to the extent that it is determined that the nature and expectations of the corn industry create a special relationship between Syngenta and Plaintiffs, the Third-Party Defendants also have a special relationship with Syngenta, growers (including Plaintiffs) who rely on grain handlers and exporters to create and maintain the export market for U.S. corn, and other participants in the corn growing, distribution, and export chain.

229. Any such special relationship imposes an independent duty of care on the Third-Party Defendants to their stakeholders (including Syngenta, Plaintiffs, and other participants in the corn growing, distribution, and export chain) and to all other persons who foreseeably would have suffered any losses due to China's rejection of U.S. corn shipments containing Viptera, with respect to how the Third-Party Defendants handled corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

230. Any such duty carries with it an implied obligation on the part of the Third-Party Defendants to indemnify Syngenta for any losses resulting from the Third-Party Defendants' handling of corn that they knew or should have known contained corn with traits not approved in China and that they knew or should have known was likely to enter export channels to China.

231. Justice and fairness demand that the burden of paying for any liability owed to Plaintiffs be shifted to the Third-Party Defendants, whose fault or responsibility is qualitatively different from any fault Syngenta is determined to have. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

232. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XXIX — Contribution (Negligence)
(Texas Civ. Prac. & Rem. Code § 33.011 *et seq.*)

233. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

234. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay a larger proportion of damages than is required by its percentage of responsibility.

235. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are jointly and severally liable for any liability to Plaintiffs. As a result, the Third-Party Defendants are liable in proportion to their percentage of responsibility.

236. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

Count XXX — Equitable Indemnity (Negligence)
(Wisconsin)

237. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

238. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to discharge a liability that, as between itself and the Third-Party Defendants, is altogether the responsibility of the Third-Party Defendants.

239. It would be unjust and inequitable to hold Syngenta liable for the Third-Party Defendants' negligence, which Syngenta had no control over, did not participate in, and could not reasonably foresee.

240. Syngenta is thus entitled to indemnification from the Third-Party Defendants.

Count XXXI — Contribution (Negligence)
(Wisconsin)

241. Syngenta re-alleges and incorporates paragraphs 1-98 herein.

242. Syngenta denies that it is liable to Plaintiffs. But if Syngenta is found liable for any damages alleged by Plaintiffs, Syngenta may be, but should not be, required to pay more than its proportionate share of the liability.

243. To the extent that Syngenta is found liable to Plaintiffs, then the Third-Party Defendants are liable for the same injury. As a result, the Third-Party Defendants are liable for their proportionate share of any damages.

244. Syngenta is thus entitled to contribution from Third-Party Defendants for all or part of any judgment entered against Syngenta.

JURY DEMAND

Syngenta demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Syngenta respectfully asks for:

1. Entry of judgment in Syngenta's favor against the Third-Party Defendants;
2. An award of indemnity that awards Syngenta damages in an amount that fully negates any judgment for which Syngenta is determined to be liable (if any), plus pre-judgment and post-judgment interest; or, in the alternative, an award of contribution proportional to the Third-Party Defendants' fault for all or part of any judgment;

3. Reasonable attorneys' fees, costs, and expenses incurred in this litigation as allowed for the indemnity and other claims asserted by Syngenta; and

4. Such other relief as the Court may deem appropriate and just.

Dated: November 19, 2015

Respectfully submitted,

/s/ Thomas P. Schult

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CERTIFICATE OF SERVICE

I certify that on November 19, 2015, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system, which will accomplish service through the Notice of Electronic Filing for parties and attorneys who are Filing Users.

/s/ Thomas P. Schult
Thomas P. Schult

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED
05 SEP -2 AM 9:27
BY DEPUTY
HENN. CO. DISTRICT
CHIEF ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

ANN CASTELL, HELEN M. DeSMET, REGINA M. EISKER, VIVIAN D. WILBER, ARTHUR L. ROLAND, in his individual capacity and as representative of the estate of Barbara F. Matthews-Roland, JUGURTHA W. GLENN IV, in his capacity as representative of the estate of John K. Miller and as Trustee on behalf of the MILLER FAMILY TRUST, and IRENE M. ROVINSKI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA, a Minnesota corporation, And LIFEUSA INSURANCE COMPANY, a Minnesota corporation,

Defendants.

Case No.: MC 03-20405

ORDER AND MEMORANDUM

The above-entitled matter came before the undersigned Judge of District Court on July 15, 2005, on Plaintiffs motion for Class Certification. Charles N. Freiberg, Judith Z. Gold, and Gordon W. Resseisen of Heller Ehrman LLP, and Richard A. Lockridge and Robert K. Shelquist of Lockridge Grindal Nauen PLLP appeared on behalf of the plaintiffs. Lawrence J. Filed and Elizabeth Wiet Reutter, of Leonard, Street, Deinard, appeared on behalf of the defendants. The matter was submitted on written documents with oral arguments. Based upon all records and proceedings herein, together with the arguments of counsel:

IT IS HEREBY ORDERED:

1. That the proposed class is certified as the representatives of a class defined as follows:

   All persons who purchased Cash Bonus Annuities from defendants anytime between December 22, 1997 and the present.

2. The attorneys of record for the plaintiffs shall serve as counsel for the class.
3. The counsel for both parties shall consult with one another and contact this court to schedule a case management conference to determine an appropriate amount of time for creating the class notice for the court's approval, the schedule for mailing notice to class members, and the details of who shall pay for publication and postage.

I. Facts

Plaintiffs are purchasers of annuities from defendants. The annuities in question were called the Cash Bonus Annuity (CBA). The essence of plaintiffs' complaint is that the name and corresponding literature that was usually handled out during a sales presentation was and is misleading to the point that it violates Minnesota Consumer Protection Laws. The plaintiffs allege that they were led to believe that when they purchased the annuity that they would receive a cash bonus, often 10%, which they could begin to receive in equal monthly payments over the first year beginning just 30 days after they opened the account. The plaintiffs allege that instead of a bonus for those who opted to take the case bonus, they were in fact paid money out of their principal that they had just used to buy the annuity and the value of their annuity dropped dollar for dollar for each dollar they received as their "cash bonus."

The Defendants allege that it was clear that in order to receive the value of the cash bonus, annuity purchasers had to take payments after the first year and for at least ten years. The Plaintiffs dispute this, arguing that it was intentionally unclear to the point that it constitutes fraud.

II. Memorandum

1. Rule 23.01

Plaintiffs have brought this motion asking for class certification. Class actions are regulated in Minnesota under Rule 23 of the Minnesota Rules of Civil Procedure. 23.01 dictates that one or more members of a class may sue as representatives parties on behalf of all only if:

(a) the class is so numerous that joinder of all members is impracticable;
(b) there are questions of law or fact common to the class;
(c) the claims or defenses of the representative parties are typical of the claims of the class; and
(d) the representative parties will fairly and adequately protect the interests of the class.

Minn.R.Civ.Pro. 23.01.

Rule 23.02 requires that in addition to the requirements of 23.01, the court must find: (c) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent of the finding include: (1) the interest of members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims

in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

A. Numerosity

To determine whether a proposed class is numerous enough, the court must look at the impracticability of joinder. "In determining impracticability, courts generally consider a number of factors, including the size of the putative class, the size of the class member's individual suits, and the nature of the action itself." *Lewy 1990 Trust v. Investment Advisors, Inc.* 650 N.W.2d 445, 452 (Minn.App.2002). In this case, Plaintiffs estimate the potential class size in the thousands. "When the class is very large—numbering in the hundreds—joinder is almost always impracticable" *Id.* The Plaintiffs easily meet the numerousness requirement of 23.01.

The notion that a case could be to large or to difficult for class certification because a defendant had used multiple forms of advertising and different sales techniques is unpersuasive. Carried to its logical conclusion, such a ruling would encourage potential defendants to be as sloppy as possible in their sales and record keeping and then argue that the litigation would be unmanageable.

B. Questions of Law or Fact Common to the Class

This element is important and highly contested. "Commonality exists when the legal question linking the class member is substantially related to the resolution of the litigation." *In re Lutheran Brotherhood Variable Ins. Products Co. Sales Practices Lit.*, 201 F.R.D. 456, 459 (2001) (*Lutheran Brotherhood I*). Plaintiffs need not show though that all questions of law or fact are common to the class. *Id.* Defendants' core claim is that "[c]ommon questions of law and fact cannot predominate among all the

proposed class members in this case because the evidence proves that the CBA sales presentations, and thus, any alleged misrepresentations to policyholders, varied significantly." Def. Brief at 25. In a case of this size though, where Plaintiffs' counsel avers that the number of potential class members is near 70,000, it is impossible to expect that the sales presentations would all be exactly the same. Here, Plaintiffs allege it is the product itself described through various brochures all touting the same misrepresentation, that the purchasers get a cash bonus. In Lutheran Brotherhood, the Defendants argued that the sales presentations varied by Plaintiff so a class action was not appropriate. The Court found that argument lacking. "Even though Lutheran Brotherhood is correct that the exact alleged misrepresentation varies by Plaintiff, Plaintiffs do allege a uniform type of misrepresentation." *In re Lutheran Brotherhood Variable Ins. Products Co. Sales Practices Lit.*, 2004 WL 909741, 2 (D.Minn.Apr.28, 2004) (*Lutheran Brotherhood II*). The Court went on, "It would certainly be the rare case in which a widespread fraud of the sort alleged by Plaintiffs was founded on exactly the same misrepresentation." *Id.* This Court agrees that a common legal theory exists and certainly a general common factual scenario.

C. Typicality

"The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members" *Lewy 1990 Trust*, 650 N.W.2d at 453 and the "analysis is closely related to the commonality and adequacy inquiries of Rule 23(a)(2) and (4)." *Lutheran Brotherhood I*, 201 F.R.D. at 459. The named Plaintiffs in the case at hand all argue their claims are typical of the class because all were sold CBA's yet none were given cash bonuses. The

Lutheran Brotherhood I Court held that "the burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Id.* This Court finds that the proposed Plaintiff representatives' claims are in fact typical of the potential class.

D. Adequacy of Representation

23.01(d) requires that the party representatives will fairly and adequately protect the interests of the class. Class representatives in complex cases are not required to have a detailed level of firsthand knowledge but are required to have a basic understanding of the allegations that have been made, what law or laws the plaintiffs allege has been broken, and a willingness to confront his or her attorney when they take action with which the representative does not agree. *Lewy 1990 Trust*, 650 N.W.2d at 454. Other courts have found along these same lines. *See In re Select Comfort Corp. Sec. Litig.* 202 F.R.D. 598, 609 (D.Minn.2001).

2. Rule 23.02

23.02 explains that an action may be maintained as a class action if the requirements of 23.01 are met as well as one of three sub-sets of 23.02. "Under 23.02(c), a class action may be maintained if two basic conditions are met. First, common questions must predominate over individual issues, and second, the class action must be superior to other available methods for the fair and efficient adjudication of the controversy." *Lewy 1990 Trust*, 650 N.W.2d at 455.

A. Predominance

"No bright-line rules determine whether common questions predominate. Instead, a court must consider whether the generalized evidence will prove or disprove an element

on a simultaneous, class-wide basis that would not require examining each class member's individual position." *Id.* Courts look particularly close at the liability issue. "The predominance inquiry is directed toward the issue of liability." *Id.*

The defendants assert that reliance is an element that must be proven by each and every plaintiff and therefore class certification is not appropriate. The plaintiffs on the other hand, citing *Group Health I*, argue that the legislature eliminated, and the Minnesota courts have recognized, the common law requirement of proving reliance as an element in each and every plaintiff's case has been eliminated. "[T]he showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants' products." *Group Health Plan Inc.* 621 N.W.2d at 13.

The plaintiffs' claims are based on alleged violations of Minnesota consumer protection statutes, § 325D.09-16, 325D.43-48, 325F.68-70, and 325F.71. The common questions of law clearly predominate where the central legal question is did the defendants mislead the plaintiffs when they sold the cash bonus annuities that in fact did not pay cash bonuses. While it is understandable, much like the defendants in *Mitchell v. Chicago Title Ins. Co.*, 2003 WL 23786983 (Minn.Dist.Ct.2003), the defendants here are arguing the merits of the case too soon. "In its simplest sense, the court must herein determine if the proposed class members had a similar enough experience with Defendant; the fact finder in the end will be asked if the defendant's policy affecting these class members was unlawful." *Id.*

In re Lifeusa Holding Inc, 242 F.3d 136 (3rd Cir. 2001), was cited by Defendants as a case that was directly on point that compelled non-certification of the class. It is

very tempting to follow the legal reasoning of the Third Circuit and not certify this class. But after a careful reading of the Courts opinion, it becomes clear that the cases are distinguishable. In *In re Lifeusa*, the district court certified a class where the plaintiffs' claims were that the defendant's pre-sale techniques and literature were fraudulent and the basis for the suit. When the 3rd Circuit heard the defenses appeal though, the plaintiffs had changed the focus of their suit to alleged post-sale misrepresentations in quarterly statements issued to customers. The 3rd Circuit based its' decision to reverse the class certification on the plaintiffs evolving theory of the case and found that what the district court had based its decision to grant class certification was no longer a viable grounds upon which to base a class certification.

In this case, the Plaintiffs have alleged violations of Minnesota Consumer Fraud Statutes and have offered proof of these violations. Plaintiffs have not focused on the post-sale representations, instead arguing the pre-sale information and sales constitutes the basis for their action.

B. Superiority

"Factors to consider in a superiority analysis include, manageability, fairness, efficiency, and available alternatives." *Lewy 1990 Trust* 650 N.W.2d at 457 (citations omitted). When claims are relatively small and the number of potential claimants large, class action offers an efficient way to adjudicate the claims. *Id.*

There are nearly 70,000 potential claimants, many with claims that are relatively small. The plaintiffs point out that many are also relatively old and would not travel well. Although damage amounts will differ, the legal issue remains the same and damages

would be calculable fairly easily. A class action is superior to other methods of adjudication in the instant case.

BY THE COURT:

Date: September 1, 2005

Kevin S. Burke
Judge of District Court