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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

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

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

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INTRODUCTION

Plaintiffs fail to present any coherent rationale to rebut the central point that American law does not make it a *tort* to sell a safe, non-defective, U.S.-approved product simply because the agricultural technology in that product has not yet been approved in a foreign country like China. That is especially the case where Plaintiffs' only claim is that selling such technology in the U.S. may cause *economic* disruptions for those whose preferred business model avoids the cost of trying to distinguish crops (here, corn) gathered from different sources based on the presence of the new technology and instead indiscriminately mixes crops from all sources together for export. Plaintiffs still fail to cite a *single* case establishing that purely economic disruptions caused by the introduction of new technology are somehow a subject of *tort* law, as opposed to being a matter left to free markets and market participants to address by contract.

First, Plaintiffs provide no plausible theory for evading the economic loss doctrine ("ELD"). Producers' assertions that the contractual ELD is the "traditional ELD," Opp. 20, and that the stranger ELD is a "minority" view," *id.* at 22, that applies only "in a narrow category of cases," *id.* at 20, are incorrect. The stranger ELD is the historical core of the doctrine and it establishes a "general rule" that "there is no . . . duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 667-68 (Ohio 1995). The ELD is designed to foreclose indeterminate liability that could otherwise arise from the ever-expanding economic ripple effects flowing from a given incident. Plaintiffs' complaint highlights the exact problem the ELD is designed to address as their claims have already expanded the universe of plaintiffs in the Viptera litigation from a group that allegedly includes hundreds of thousands of corn farmers to now include hundreds of thousands of *soybean and milo farmers* as well—all on the theory that they suffered economic loss because

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the price of corn affects the price of their entirely different crops. Plaintiffs' approach has no limiting principle: it would allow *anyone* who could claim some economic effect from an alleged drop in the price of the largest commodity crop in the U.S. (including dealers in farm equipment, for example) to sue Syngenta. The ELD forecloses precisely such infinitely expanding liability.

Producer Plaintiffs cannot avoid the ELD by arguing physical harm and pointing to vague allegations concerning the dispersion of Viptera in the "corn supply." First Am. Non-Class Compl. ("NCC") ¶ 236. Even the federal MDL Court recognized that the *same allegations* failed to allege physical injury and provided no route around the ELD. MDL Order 19-21. The MDL Court avoided the ELD solely through a "case-specific approach," *id.* at 25, purportedly assessing whether the rationales for the doctrine applied on the facts of the case. But as Syngenta has shown, that approach—failing to apply the ELD as a bright-line rule—erroneously adopted a *minority* analysis. Far from rebutting Syngenta's showing, Plaintiffs defend the MDL Order by citing *yet more minority cases*—thus confirming that the MDL Court applied a minority, case-by-case approach that has been rejected by a majority of jurisdictions. This Court should not make the same error.

As for the Non-Producers, they are fundamentally purchasers who bought corn without distinction as to whether it contained Viptera, and their claims are barred by the contractual ELD. Non-Producers complain of supposed injury solely in the form of diminution in value of the very goods they purchased—a complaint that does not sound in tort, but instead should have been addressed in the contracts through which they bought corn.

Second, although Plaintiffs try to obscure the duty they are asking the Court to impose, they ultimately make clear that they believe Syngenta "should have . . . waited to market Agrisure Viptera®" at all until after Chinese approval, Opp. 5; NCC ¶ 97, and that even then Syngenta was obligated to control the way *everyone else* handled corn by implementing

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"stewardship and channeling programs." Opp. 69 n.33; *see also* NCC ¶ 106. Plaintiffs resist acknowledging those demands because doing so exposes the utter lack of legal support for their theories. Plaintiffs want to use tort law to block any innovation that jeopardizes their preferred way of doing business, in which they have no need to incur the costs involved in segregating different types of corn for different markets. *See* Mot. 85-86. In their words, they want to impose tort liability on anyone who "upsets the *status quo* and expose[s] others to [economic] risks that would not [otherwise] exist." Opp. 88. Indeed, Plaintiffs do not deny that their unprecedented theory would make it a tort to introduce a GM seed that doubled crop yields but led to lower prices for growers as a result. Plaintiffs avoid expressly defending the MDL Court's radical invention of a duty in tort to operate one's business for the "mutual benefit" of others in an "inter-connected" industry, MDL Order 10, but that is exactly the theory at the heart of their claims. Tort law, however, does not enshrine the economic *status quo* into law and protect current market players from the need to adapt in response to technological innovation simply because they find it inconvenient to their current way of doing business.

Tellingly, Plaintiffs offer no response to distinguish the only two cases that, prior to the Viptera litigation, addressed claims exactly like the claims here—claims of economic harms arising from the alleged loss of an export market due to sales of an *approved* GM trait. In the only American case, the court rejected plaintiffs' claims because they were flatly barred under the ELD. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1093 (E.D. Mo. 2003). Like the federal MDL Court, Plaintiffs ignore *Sample* and provide no basis for distinguishing its holding. In the other case, a Canadian court dismissed claims identical to those presented here for lack of duty, lack of proximate cause, *and* under the ELD. *See Hoffman v. Monsanto Canada*, 2005 SKQB 225, 2005 SK.C. LEXIS 330 (Can. Sask. Q.B. May 11, 2005). Plaintiffs provide no reason for this Court not to follow the persuasive precedent provided by those two cases.

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CHOICE OF LAW

The federal MDL Court held that Minnesota had *so few* contacts with the claims of non-Minnesotans that applying Minnesota law to their claims would violate the Due Process Clause and that no State's choice-of-law rules would point to Minnesota law. MDL Order 101-03. Despite alleging nearly "identical claims," Opp. 1 n.1, Plaintiffs argue that Minnesota has *so many* contacts with non-residents' claims that using Minnesota law is not only constitutionally permissible but also *required* under Minnesota's choice-of-law rules. That is not correct.

Plaintiffs' erroneous choice-of-law analysis rests on the mistaken premise that alleged "false or misleading statements made by Syngenta in connection with marketing Viptera were made by Syngenta through its principal place of business in Minnesota." Opp. 14-15; *see also id.* at 16 ("Plaintiffs would expect that fraudulent statements and misrepresentations made in Minnesota would be governed by Minnesota law."). That assertion ignores the fact that only *one* of the *six* defendants (Syngenta Seeds) has its principal place of business in Minnesota, and Plaintiffs do not actually allege that Syngenta Seeds made the alleged misrepresentations. *See* NCC ¶ 9-13. For example, Plaintiffs point to a statement made by Michael Mack in an earnings call, *see* Opp. 15 (citing NCC ¶¶ 182-89), but the transcript cited in the complaint makes clear that Mack made the statement *in Switzerland* as the CEO of a *Swiss* company, *see* NCC ¶ 184.[2] As the federal MDL Court recognized in addressing parallel allegations, Plaintiffs have failed to allege that any of the relevant statements were "made in or distributed from Minnesota." MDL Order 100. Rather than point to allegations showing a connection to Minnesota, Plaintiffs ask this Court to supply an "*inference* that any false or misleading statements" were made by Syngenta Seeds—the sole Minnesota defendant. Opp. 14-15 (emphasis added). The complaint,

[2] Plaintiffs also complain of misleading statements in Syngenta's Deregulation Petition, but it is undisputed that document was prepared and filed by Syngenta Biotechnology, Inc., a Delaware corporation with its principal place of business in North Carolina, and submitted to a government agency office in Maryland. *See* Mot. 121 & n.154.

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however, cannot support such an inference given that it affirmatively alleges that the statements were made by *others outside* Minnesota. Moreover, any suggestion that Syngenta Seeds is somehow the source for all statements made by other entities is flatly inconsistent with Plaintiffs' allegation that Syngenta AG, the Swiss parent entity, directed decisions about commercializing Viptera and that Syngenta Seeds, Inc. does "not function independently but under the Syngenta AG umbrella." NCC ¶ 19; *see also* MDL Order 100 (rejecting similar inference).

The relevant choice-of-law factors point to the law of each non-resident's home state.[3] First, "predictability of result[s]" points to each home state because companies expect the law of the state where they conduct their activities to apply. *Schumacher*, 676 N.W.2d at 690. None of the Defendants (especially the five non-Minnesota Defendants) would have expected Minnesota law to govern claims brought by non-Minnesotans concerning sales outside Minnesota.

Second, "maintenance of interstate order weighs in favor of the state that has the most significant contacts with the facts." *Schmelzle v. ALZA Corp.*, 561 F. Supp. 2d 1046, 1049 (D. Minn. 2008). Minnesota's only contact with nonresidents' claims is the one Minnesota defendant. Each home state, in contrast, has the contacts that Viptera was sold there, and that the plaintiff resides there; planted, harvested, and sold corn there; and suffered any injury there.

Third, "[t]he advancement of the forum's governmental interest factor generally weighs in favor of application of the state law in which the plaintiff lives and in which the injury occurred." *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 207 (D. Minn. 2003). Each nonresident plaintiff suffered any injury in his or her home State. Plaintiffs cite Minnesota's general interest in compensating tort victims, but that interest "is lessened where the injury occurred in another state" and "the injured party is not a Minnesota resident." *Schmelzle*, 561 F. Supp. 2d at 1050;

[3] The parties agree that only three of the five factors enumerated in *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004), are relevant here: (1) predictability of results, (2) maintenance of interstate order, and (3) advancement of the forum's governmental interest. *See* Opp. 16-17; Mot. 15.

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accord Montpetit v. Allina Health Sys., Inc., No. C2-00-571, 2000 WL 1486581, at *3 (Minn. Ct. App. Oct. 10, 2000).

In addition, entirely apart from choice-of-law analysis, given that Minnesota lacks a "significant contact or significant aggregation of contacts" with non-residents' claims, Minnesota law cannot "be selected in a constitutionally permissible manner." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *see also* MDL Order 100-01.

ARGUMENT

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

A. The Stranger ELD Is The Historical Core Of The Doctrine, It Is The Majority Rule, And It Provides A Generally Applicable Rule Absent An Established Exception.

Plaintiffs' effort to cast the stranger ELD as if it were a narrow, seldom-used, minority rule transparently misstates the law. According to Plaintiffs, the contractual ELD is the "traditional ELD," Opp. 20, the stranger ELD is a "minority" view that is a "very narrow offshoot" of the doctrine, *id.* at 22, and the stranger rule applies only "in a narrow category of cases" involving a limited set of "recognized SELD categories," *id.* at 20. Plaintiffs ultimately assert that Syngenta seeks to apply the ELD "in circumstances where it has never been applied before." *Id.* at 26. Every assertion in that litany is wrong.

First, the suggestion that the *contractual* ELD is the "traditional ELD" is patently incorrect. The stranger ELD, as applied by the Supreme Court in 1927 in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), is the traditional core of the ELD. The rule dates back to *Anthony v. Slaid*, 52 Mass. 290 (1846). *See also* Restatement (Third) of Torts: Liab. for Econ. Harm § 7 Reporter's Note a (stranger rule as applied in *Robins Dry Dock* "appeared in many earlier cases," citing *Anthony v. Slaid*); *State of La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc) (noting that "[t]he principle that there could be no recovery

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for economic loss absent physical injury to a proprietary interest" was "well established when *Robins Dry Dock* was decided"). Plaintiffs' effort to make it appear as if the ELD were first developed in the contractual or products-liability context simply misstates history.

Second, abundant authority makes clear that the stranger ELD is the majority rule. As one treatise puts it, there is only "[a] little authority [that] has expressly rejected the stranger version of the [ELD]," and those cases "have garnered almost no lasting support outside their home states." Dan B. Dobbs *et al.*, *The Law of Torts* ("Dobbs") § 655 (2d ed.);[4] *see also* Restatement (Third) of Torts: Liab. for Econ. Harm § 7 (Tent. Draft No. 2 2014) Rept.'s Note a (explaining that "[c]ontrary positions have been taken only occasionally in the case law").[5] Plaintiffs provide no authority treating the stranger ELD as a minority approach. Even the MDL Court (which declined to apply the ELD on other grounds) rejected as "unconvincing" the assertion "that the SELD represents a minority rule" and noted that the Restatement (Third) "adopts the SELD as a general provision." MDL Order 22.

Third, it is not true that the stranger ELD applies only to particular "narrow categor[ies] of cases" or "recognized SELD categories." Opp. 20. Instead, it provides a *general rule* precluding liability for pure economic losses for unintentional torts, and that rule can be avoided only when a case fits within a recognized *exception*. Dobbs explains that, "[i]n the absence of an exception or a particular tort duty, *liability is generally not imposed upon strangers*—those not in privity or near-privity—for negligent infliction of pure economic harm." Dobbs § 611 at 471

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

[5] *See also* Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. Ill. L. Rev. 1573, 1578 (2008) ("The law governing this type of loss [between strangers] is also unambiguous. Starting with *Anthony v. Slaid*, and subject to few deviations, American courts have consistently denied recovery for relational economic losses. The leading authority is *Robins Dry Dock & Repair Co. v. Flint* . . . ."). The term "relational economic loss" is used in Commonwealth countries to describe stranger economic loss cases. *See, e.g.*, Restatement (Third) § 7 Reporter's Note a (explaining that the "types of recovery prohibited by this Section are described in some other countries as 'relational economic loss'").

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(emphasis added). Similarly, under the heading "*General rule*," Dobbs explains that "[a] stranger who negligently but not intentionally causes physical harm to one person or his property with resulting economic harm to another person, is not liable for that economic harm." *Id.* § 647 at 584; *see also id.* § 646 at 582-83 ("The general economic loss rule for strangers . . . is that defendants ordinarily owe no duty to use care to protect strangers against stand-alone economic loss."). Numerous courts have also explained that the ELD provides a "general rule" that "there is no . . . duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 667-68 (Ohio 1995).[6]

Plaintiffs' theory that the stranger ELD applies solely to limited categories of cases has things backwards. The point of the economic loss *rule* is to establish a presumptive principle governing *all* cases in the absence of an exception and thereby to eliminate the need for case-by-case weighing of other factors (such as foreseeability) to determine whether economic losses may be recovered. *See* Mot. 21-23. The cases Plaintiffs have identified simply demonstrate the breadth of scenarios in which the rule provided by the stranger ELD has been applied. And the suggestion that cases involving injuries to employees actually "are not ELD cases" is specious. Opp. 25. It is universally recognized that such cases apply the principle now known as the ELD. *See, e.g.*, Restatement (Third) of Torts: Liab. for Econ. Harm § 7, Reporter's Note a (citing *Conn. Mut. Life Ins. Co. v. N.Y. & N.H. Ry. Co.*, 25 Conn. 265 (1856)); Dobbs § 647 at 584-85.[7]

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[6] *See also Corporex Devel. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005) (ELD provides "[t]he well-established *general rule* . . . that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable") (emphasis added) (quotation marks and citation omitted); *Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722,730 (Ind. 2010) (ELD "operates as a general rule to preclude recovery in tort for economic loss"); *Van Sickle*, 783 N.W.2d at 692 ("The economic loss doctrine has been characterized as '*a generally recognized principle of law* that plaintiffs cannot recover in tort when they have suffered only economic harm.") (emphasis added).

[7] The suggestion that *Robins Dry Dock* is best understood as a case involving a "chain-of-contracts" and the

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Finally, contrary to Plaintiffs' assertion, the ELD has been applied in *exactly* the circumstances presented in this case. Prior to the Viptera MDL, only one American court had addressed the ELD in parallel circumstances involving the claimed loss of overseas markets due to the spread of an *approved* GM trait. The court *applied* the ELD under Illinois and Iowa law and held that growers' tort claims were barred. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1092-93 (E.D. Mo. 2003). Plaintiffs make the same error as the MDL Order as they fail even to *acknowledge* the decision in *Sample*, much less provide any basis for distinguishing it.[8]

The cases Plaintiffs cite are irrelevant. They all involved *unapproved* GM traits. *See* Opp. 25. Those decisions refused to apply the ELD because the plaintiffs claimed *physical injury* through contamination with an *unapproved* trait that made their crops unsalable. For example, the court in *StarLink* explained that crops are "damaged when they are pollinated" by corn with an unapproved trait (like StarLink) because it "renders what would otherwise be a valuable food crop unfit for human consumption." *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 841 (N.D. Ill. 2002). The court made clear that such physical injury was essential for avoiding the ELD as it warned that, "*[a]bsent a physical injury*, plaintiffs cannot recover for drops in market prices." *Id.* at 842 (emphasis added). Similarly, in *Bayer CropScience*, the court explained that the ELD did not apply because there was evidence of

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contractual ELD is also incorrect. Opp. 24. Nothing in the rationale in *Robins Dry Dock* depended on the existence of an indirect contractual link between the plaintiff (a time charterer) and the dry dock. *See* 275 U.S. at 307. At most, the fact that the plaintiff had a contract with the ship owner and the ship owner, in turn, had a contract with the dry dock shows that the stranger ELD and contractual ELD do not exist in hermetically sealed compartments. They are both reflections of similar elementary principles. In any event, there is a similar chain of contracts connecting the parties here. Producers have contracts with grain elevators to whom they sell their harvested corn. The grain elevators, in turn, have contracts with *other* producers, some of whom have contracts with Syngenta, from whom they have purchased seed. If Producers had wanted to ensure their corn could be exported to China, they could have sought contractual guarantees that it would not be commingled. Grain elevators, similarly, could have insisted on guarantees that the corn they were purchasing was fit for export, and growers could have insisted on guarantees that the seeds they purchased were approved for export. Such terms flowing up and down the chain of contracts could have addressed all parties' interests here.

[8] Plaintiffs eventually acknowledge *Sample* solely in a footnote in the midst of their discussion of Illinois law and provide no rationale for distinguishing it. Opp. 37 n.20.

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"physical harm to the rice farmers' lands [and] crops" due to "contamination" with the *unapproved* GM trait. *Bayer CropScience L.P. v. Schafer*, 385 S.W.3d 822, 832-33 (Ark. 2011); *see also In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1016 (E.D. Mo. 2009) (ELD did not apply "[b]ecause [plaintiffs] allege damage to other property" through contamination with *unapproved* GM traits). No comparable physical injury is alleged here, both because Viptera was approved and because Plaintiffs do not allege that they each suffered intermingling of their particular crops with Viptera corn. *See* Mot. 26-28; *infra* Part I.C.

B. Case-Specific Assessment Of The Policies Underpinning The ELD Does Not Provide A Basis For Evading Application Of The ELD.

The MDL Court erroneously decided that the ELD did not apply by engaging in a "case-specific analysis," MDL Order 25, of the policies behind the ELD to determine whether it should apply in the particular circumstances of this case. In defending the same mistaken approach, Plaintiffs offer no response to address the errors Syngenta identified in the MDL Order.

As an initial matter, Plaintiffs are wrong in claiming that Syngenta mischaracterized the MDL Order by explaining that it applied a case-by-case policy analysis. *See* Opp. 32. The MDL Court itself announced that it was using a "case-specific approach" to assess the policies behind the ELD, MDL Order 25, and repeatedly asserted that state courts would apply the ELD only in "circumstances" "in which the rationales for the doctrine would be furthered," *id.* at 23. Plaintiffs' assertion that the MDL Court was not creating an "exception" to the ELD for "interconnected markets" but instead was merely deciding not to "extend" the ELD, Opp. 29, 33, is also a red herring. It rests on Plaintiffs' mistaken theory that the stranger ELD applies only to isolated categories of cases. As explained above, that theory has things backwards. The ELD provides a generally applicable rule, and as a result, any decision *not* to apply the stranger ELD to an unintentional tort claim seeking stand-alone economic loss involves creating an exception

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from the rule. Even Plaintiffs ultimately contradict themselves and concede that by invoking the "special relationship" supposedly created by "this interconnected market," they are seeking an "exception" from "application of the SELD." *Id.* at 32.

Plaintiffs also offer no response to the numerous authorities Syngenta cited explaining that the stranger ELD provides a bright-line rule that applies without regard to any case-by-case policy assessment. The Restatement (Third), for example, explains that the rationales behind the ELD "do not apply equally to every claim," but that, nevertheless, "most courts *reject such claims categorically*" because "a case-by-case inquiry into the policies at issue cannot be made in a sufficiently principled manner." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 cmt. b (emphasis added). The Restatement acknowledges that this rule imposes "hardship" on those whose claims "fall outside the policies that make the rule attractive," but concludes that a bright-line rule denying recovery has other benefits. *Id.*[9] Plaintiffs do not even acknowledge these authorities rejecting a case-by-case approach and provide no rationale for distinguishing them.

Moreover, the cases Plaintiffs cite actually confirm Syngenta's point—exceptions to the ELD are assessed based on legal categories of claims, not the facts of particular cases. *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622 (Kan. 2013), for example, addressed whether the ELD should apply to negligent misrepresentation claims. *See id.* at 626. The court held that, given "the nature of the negligent misrepresentation tort, which contains its own scope-of-liability limits," the ELD should not apply. *Id.* at 627. The court explained that the elements of negligent misrepresentation already "confin[e] the universe of potential claimants to those for whose benefit the defendant supplied . . . information and whom the defendant intended to influence,"

[9] *See also Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 55 (1st Cir. 1985) (even though the rationales behind the ELD are "unlikely to apply with equal strength to every sort of 'financial harm' claim," nevertheless, "courts cannot weigh or apply them case by case"); *M/V Testbank*, 752 F.2d 1026, 1029 (rejecting a "case-by-case approach" and applying the ELD as a "bright line rule"); *Am. Petroleum & Transp., Inc. v. N.Y.C.*, 737 F.3d 185, 196-97 (2d Cir. 2013) (rejecting policy assessment based "on the particular facts here" in favor of "the benefits of adhering to the general rule that denies recovery").

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id. at 630, which means that "liability limitations are necessarily woven into the fabric" of the claim, *id.* at 632. Thus, there is no possibility of vast numbers of plaintiffs asserting claims for economic ripple effects and the ELD's purpose of "restricting potential extensive liability" does not apply.[10] *Id.* The court, moreover, expressly rejected the idea that the court should determine whether the ELD applied "'case-by-case,' depending on . . . whether the doctrine's goals would be furthered" under the facts of each case. *Id.* at 626.

Fireman's Fund Insurance Co. v. SEC Donohue, Inc., 679 N.E.2d 1197 (Ill. 1997), also provides no support for Plaintiffs. There, the court merely determined that the exception from the ELD for negligent misrepresentation did not extend to claims against engineers because engineers did not meet the criteria for a negligent misrepresentation claim (because they are not primarily in the business of providing information for others). *See id.* at 1201. The decision thus involved assessing whether a case fit within an established category of exceptions to the ELD. It did not remotely endorse a case-specific policy assessment.

Plaintiffs' analysis of the policies behind the ELD also rests on further errors. For example, Plaintiffs' argument that applying the ELD here would not serve the policy of preventing "remote and indeterminate liability," Opp. 28, rests on the same error as the MDL Order. Like the MDL Court, Plaintiffs assert that the only real concern for indeterminate liability in "access" cases arises where claims could be brought by "any member of the public." *Id.* In their view, if the initial tranche of plaintiffs is anything less than the public at large, the policy concerns behind the ELD are not triggered. That is wrong for at least two reasons.

First, the concern for massive and indeterminate liability arises not just from the size of the *initial* tranche of plaintiffs, but also from the fact that economic ripple effects spread

[10] *See also id.* at 630 (citing William E. Westerbeke, *Survey of Kansas Tort Law: Part II*, 50 U. Kan. L. Rev. 225, 278 (2002) ("These limitations [on negligent misrepresentation] restrict the number of potential plaintiffs and thus negate the fear of unlimited liability.")).

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indefinitely to further tiers of plaintiffs. *See* Mot. 33-34. The specter of indefinite liability from such ripple effects is plainly present here. Potential plaintiffs in Viptera litigation have already expanded from hundreds of thousands of corn farmers to include hundreds of thousands of soybean and milo farmers who claim that the price of their crops is affected by the price of corn.[11] If these claims are viable, Plaintiffs have offered no reason that their theories would not allow claims by others who argue that their economic interests were also affected by an alleged price drop in the country's largest commodity crop—including those who want to sell farmland and those who deal in farming equipment. *See* Mot. 25 & nn.52-53. Indeed, in just the last two weeks, the plaintiff pool has expanded yet again as ethanol producers have now started suing Syngenta.[12] Plaintiffs' unexplained assurance that the "potential class of injured parties is not indefinite," Opp. 30, provides no actual constraint whatsoever on the infinite expansion of economic loss claims.

Second, it is simply not accurate to say that the initial tranche of plaintiffs in access cases applying the ELD consists of the "public at large." *Id.* at 23; *see* Mot. 34. Such cases involve, for example, a pier, a factory, or retail space used by much smaller numbers of people. Plaintiffs' theory thus rests on the illogical assertion that there can be no concern for indeterminate and expansive liability in this case even though the initial tranche of plaintiffs is larger by *hundreds of thousands* than it is in cases where the ELD squarely applied. *See, e.g.*, *Barber Lines*, 764 F.2d at 55 (plaintiffs were users of a pier); *Aguilar v. RP MRP Wash. Harbor, LLC*, 98 A.3d 979, 980 (D.C. Ct. App. 2014) (plaintiffs were employees at a handful of flooded

[11] Plaintiffs now claim that the only soybean farmers who have filed Notices to Conform are also corn farmers. Opp. 62 n.27. But nothing in Plaintiffs' complaints extending Syngenta's liability to soybean farmers is limited to those who also grow corn, nor do the pleadings limit those plaintiffs to alleged losses on their corn harvests. Plaintiffs' theory would allow every soybean farmer in the country to bring a claim against Syngenta. And the full scope of the legal theory set out in the complaint is exactly what should be tested on this motion to dismiss.

[12] *See Ultimate Ethanol, LLC d/b/a POET Biorefining-Alexandria v. Syngenta Seeds, Inc.*, No. 48C05-1512-CI-184 (Madison Cty. Cir. Ct., Ind. filed Dec. 11, 2015); *Fostoria Ethanol, LLC d/b/a POET Biorefining-Fostoria*, No. 15-CV-323 (Seneca Cty. Ct. of Comm. Pleas, Ohio filed Dec. 11, 2015).

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retail establishments).

Plaintiffs' only explanation for that irrational outcome is that what matters for assessing the risk of "indeterminate liability" is not the "scope" of liability but rather the "reasonableness" of holding the defendant liable. Opp. 29. According to Plaintiffs, placing limits on tort recovery is an age-old question, and the ELD is simply one more tool that can be mixed in along with other concepts such as foreseeability, duty, and proximate cause to apply "an additional limitation where appropriate" on a case-by-case basis to restrict recovery according to a concept of "reasonableness." *Id.* That fundamentally misunderstands the ELD. The whole point of the ELD is to override a case-by-case analysis of factors such as foreseeability and to impose instead a bright-line rule foreclosing recovery for pure economic losses. Thus, when the court in *M/V TESTBANK* described the ELD as "a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability," 752 F.2d at 1023; *cf.* Opp. 29, it was not suggesting that the ELD is used to *supplement* foreseeability analysis and draw the line where recovery is "reasonable." Instead, the court made clear that the ELD *supplants* ordinary foreseeability analysis with a "bright-line rule" cutting off liability. 752 F.2d at 1029. Plaintiffs cite no authority whatsoever supporting their effort to distort the ELD into some vague, case-by-case rule of reasonableness.

Plaintiffs compound their error by arguing that the "special relationship" created by "inter-connected" relationships in the corn industry should create an exception from the ELD. Opp. 30-31. As Syngenta has explained, the MDL Order's invocation of "inter-connected relationships and markets," MDL Order 23, as a basis for avoiding the ELD is indistinguishable from the *minority* approach that refuses to apply the ELD as a bright-line rule. Just as minority jurisdictions use a case-by-case analysis to allow recovery of economic losses where there is "[a]n identifiable class of plaintiffs" that is "particularly foreseeable," *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985), the MDL Order pointed to "inter-

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connected relationships and markets," MDL Order 23, as marking out "discrete classes" of plaintiffs who were foreseen, *id.* at 24, who may be allowed to recover. Far from refuting Syngenta's point that the MDL Order reflects a *minority* analysis, Plaintiffs further embrace minority cases as they argue for a "special relationship" exception to the ELD under cases such as *Aikens v. Debow*, 541 S.E.2d 576, 589 (W. Va. 2000), and under the six-factor test in *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979). What Plaintiffs fail to acknowledge is that *J'Aire* is one of the three *minority* approach cases that rejects the ELD.[13] *Aikens* itself acknowledges that it adopts a "hybrid approach" mirroring analysis from "minority view" cases. *Aikens*, 541 S.E.2d at 590; *see also* Mot. 36. Plaintiffs' arguments thus confirm Syngenta's point: the MDL Order effectively applies the *minority* position on the ELD by failing to apply the ELD as a bright-line rule barring recovery for economic loss in the absence of physical injury. But neither the MDL Court nor Plaintiffs can provide any justification for holding that 22 States would adopt a *minority* view that, until now, has been limited to California, New Jersey, Alaska, and (depending on the breadth of the "special relationship" test in *Aikens*) West Virginia—all States whose law is irrelevant on this motion.

Finally, Plaintiffs are wrong in arguing that the policy of encouraging parties to address economic risks through contract does not apply. *See* Opp. 27. Even in the stranger context the ELD is designed to promote the use of contracts to address economic risks. *See, e.g., Barber Lines*, 764 F.2d at 54; *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 504 (Iowa 2011) (stranger ELD "encourages parties to enter into contracts"). The stranger ELD "encourages the party with the best information (that is, the party with knowledge of its *own* risk of loss) to decide whether to assume, allocate, avoid, or insure against its risk of loss." *Wiltz v.*

[13] As noted above, Dobbs, for example, cites three cases applying the minority approach: *J'Aire Corp, People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107 (N.J. 1985), and *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356 (Alaska 1987). *See* Dobbs § 655.

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Bayer CropScience, L.P., 645 F.3d 690, 697 (5th Cir. 2011) (emphasis added). Here, Producers who wanted to ensure their corn met standards for export to China could have sought guarantees from grain elevators that their corn would not be mixed with corn bearing non-exportable GM traits. Plaintiffs complain that farmers do not have the market power to demand such terms. But if the Producers could evade the ELD with that bare assertion, market pressure from large numbers of producers demanding such terms would never develop. This lawsuit, in effect, would short-circuit the market mechanism that would otherwise develop a contract-based solution to the problem raised by the asynchronous approval of GM traits in different countries.

Plaintiffs also miss the point by arguing that Syngenta is in a better position to avoid the loss. *Id.* The ELD incorporates the presumption that each party can best understand and plan for its "*own* risk of [economic] loss." *Wiltz*, 645 F.3d at 697 (emphasis added). In other words, the doctrine presumes that a manufacturer like Syngenta cannot be expected to anticipate how its product might affect the disparate economic expectations of thousands of other actors, from farmers to grain elevators to exporters. Instead, farmers themselves are in a better position to understand (i) how they intended to use their harvest (whether for feed on their farm, domestic use for ethanol, or export, or some other use), (ii) the potential economic impact of commingling given those plans, and (iii) how to protect by contract against that economic risk. Plaintiffs cannot displace that presumption with their bare assertion that they think Syngenta could have avoided the alleged loss (presumably by refraining from selling Viptera at all). Every plaintiff could always make a parallel assertion, but that is not sufficient to defeat the ELD.

C. Plaintiffs Cannot Avoid The ELD Based On Physical Injury.

None of Plaintiffs' assertions undermines Syngenta's point that Producers cannot avoid the ELD by arguing physical injury to their property.

First, the complaint does not even allege that every Producer suffered cross-pollination or

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commingling with respect to his individual corn. Mot. 26. Instead, it vaguely alleges "pervasive contamination of the U.S. corn supply." NCC ¶ 236. Contrary to Plaintiffs' assertions, the MDL Court's ruling that identical allegations[14] did not assert physical injury to every plaintiff's property was not based on special federal pleading standards. Opp. 55-56. The MDL Court did not invoke *Iqbal/Twombly* and point to a deficiency in *factual* allegations. It simply held that vague assertions about the "corn supply" did not present even an *allegation* that *all* producers had suffered contamination of their individual property. MDL Order 19-20. The same analysis applies here under Minnesota's pleading standards. *Cf. Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014). Indeed, Plaintiffs' brief confirms that they have not alleged injury to their own property as they argue instead that they are all "participants in the U.S. corn market" who are "reliant on the corn supply" and that it was the "corn supply"—not their property—that was "contaminated and damaged by Syngenta's conduct." Opp. 56.

Second, even if Plaintiffs had adequately alleged physical harm to their corn it would still be insufficient to defeat the ELD because Plaintiffs' theory of injury does not arise from any alleged intermingling of Viptera with *their* particular corn. Plaintiffs' theory is that the price of *all* U.S. corn was lowered due to the general dissemination of Viptera in the "corn supply" and China's actions in blocking shipments. Whether *their* particular corn was ever touched by Viptera is irrelevant to that theory of injury—the alleged price drop still would have occurred. As the MDL Court explained, where, as here, the alleged damages "are not derived from the physical harm alleged," there is no basis for declining to apply the ELD. MDL Order 20. Plaintiffs offer no response to that square holding from the MDL Court.

Third, Plaintiffs' allegations concerning commingling point primarily to areas such as

[14] The allegations in paragraph 236 of the Non-Class Complaint simply repeat verbatim the allegations from the Producers' Master Complaint in the MDL. *See* Mot. 26 & n.56.

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grain elevators and storage facilities that could affect corn only *after* the individual producer had sold his crop. NCC ¶ 236. But Plaintiffs have made no allegations suggesting that they still retained a property interest in their corn after it had been sold.

Fourth, even if Plaintiffs had adequately alleged commingling of *their* corn, that still would not amount to physical injury because Viptera was fully approved in the U.S. Both *Sample* and *Hoffman* recognized that commingling with an approved GM trait cannot be treated as physical harm because the commingled crop has not been damaged in any way—it can still be sold as a fungible crop like any other. *See Sample*, 283 F. Supp. 2d at 1093 & n.2; *Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 72. Plaintiffs provide no response whatsoever to that precedent.

D. All States Would Apply The Stranger ELD To Bar Producers' Claims.

As Syngenta has explained, all States relevant on this motion would follow the majority approach and apply the stranger ELD to bar producers' claims. Plaintiffs provide no persuasive basis for concluding that any State at issue here would reject the majority rule.

1. Nine States Have Adopted The Stranger ELD.

Minnesota. Plaintiffs offer no response to Minnesota cases applying the stranger ELD. *See, e.g., N. States Contr. Co. v. Oakes*, 253 N.W. 371, 372 (Minn. 1934); *Cariveau v. Golden Valley Mot., Inc*., No. 27CV06-11202, 2006 WL 6252343 ¶ 27 (Minn. Dist. Ct. Nov. 28, 2006). Instead, they claim that the codification of the ELD for sales of goods also eliminated the ELD in every other context in which it applied at common law. Opp. 34-36. That is not correct. Plaintiffs ignore the rule that "statutes in derogation of the common law are strictly construed," and courts "do not presume that the Legislature intends to abrogate or modify a common law rule except to the extent *expressly declared or clearly indicated* in the statute." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012) (emphasis added). Plaintiffs can point to nothing in the text of section 604.101 displacing the ELD in any context other than the sale of goods.. The

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statute applies only to claims by "a buyer against a seller" relating to "a defect in . . . goods sold or leased," Minn. Stat. § 604.101 subdiv. 2, and in the context of such claims simply states that the ELD "applies to claims only as stated in this section," *id.* subdiv. 5. Plaintiffs do not dispute, moreover, that the statute was passed in response to a ruling in the sale-of-goods context. *See* Mot. 38-39. Given that statutory text and context, there is no logical basis for concluding that the Legislature—without even considering the myriad situations in which the ELD might apply *other than* the sale of goods—would wipe out over 100 years of doctrine restricting the recovery of stand-alone economic loss in tort.

Nothing in Syngenta's reading would render part of the statute superfluous. *Cf.* Opp. 36. Subdivision 2(2) states that the statute applies to claims within its definitions "regardless of whether article 2 or article 2A of the Uniform Commercial Code" applies. Minn. Stat. § 604.101 subdiv. 2(2). That simply makes clear that section 604.101 applies to sales or leases that may not fall within the particular definitions of the U.C.C. Restricting the preemptive scope of section 604.101 to the sale of goods context does not limit the operation of that provision in the slightest. It can still do its work—making it clear that the statute applies even if the UCC does not—without regard to whether or not section 604.101 eliminates the ELD in wholly unrelated situations such as injury to another person's employee. *See, e.g.*, *Cariveau*, 2006 WL 6252343.

Contrary to Plaintiffs' assertions, nothing in *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535 (Minn. Ct. App. 2014), establishes that section 604.101 displaces the ELD outside the sale-of-goods context. *Ptacek* involved a sale of goods (fertilizer). *See id.* at 536-37. The court held solely that, where the trial court had held that the plaintiff's negligence claim fell outside the "product defect" claims covered by the statute (a decision that was not appealed), the trial court could not rely on the common law ELD to bar the plaintiff's negligence claim concerning

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inadequate nitrogen in the fertilizer.[15] The court thus held solely that the statutory rule was exclusive *in that sale-of-goods context*. *Id.* at 539. It had no occasion to consider whether the common law ELD survived *outside* sale-of-goods scenarios.

Other cases make clear that the common law ELD *does* survive in Minnesota in other contexts. As Syngenta pointed out, a Minnesota court recently applied the stranger ELD where the defendant had injured the plaintiff's employee—a result that would be impossible if section 604.101 displaced the common law ELD as broadly as Plaintiffs claim. Plaintiffs fail even to acknowledge *Cariveau*. *See Cariveau*, 2006 WL 6252343 ¶ 27. In addition, in *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 n.3 (8th Cir. 1998), the Eighth Circuit explained that section 604.10, the similarly-worded predecessor to the current statute, "is limited to sales of goods" and there is "no indication that the statute was intended to replace or narrow the scope of the broader common law [economic loss] doctrine." *Id.*; *accord Praktika Design & Projectos Ltda. v. Marvin Lumber & Cedar Co.*, No. 06-cv-957 (JRT/RLE), 2007 WL 1582710, at *3 (D. Minn. May 30, 2007). Nothing in the successor statute suggests that it was intended to have any broader scope, and the Eighth Circuit's analysis is thus persuasive here. Once again, however, Plaintiffs fail even to acknowledge this precedent.

Instead, Plaintiffs rely on an unpublished federal district court decision concluding, without any analysis, that section 604.101 eliminated the ELD in another type of sales scenario—the sale of securities. *Smith v. Questar Capital Corp.*, No. 12-CV-2669 (SRN/TNL), 2013 WL 3990319, at *11 (D. Minn. Aug. 2, 2013).[16] This Court, of course, is not bound by a

[15] The posture of *Ptacek* makes the decision of limited persuasive value, because there was no appeal (and thus no analysis) concerning the lower court's holding that the plaintiff had not asserted a product-defect claim. It is not apparent from reported decisions why the plaintiffs' claim that the defendant was negligent in selling fertilizer with an allegedly inadequate nitrogen content would not qualify as a product defect claim, given that the statute is meant to encompass "all common law claims for product defects, such as negligence and strict products liability." Minn. Stat. § 604.101 subdiv. 1(e) Reporters' Note. That ruling may well have been erroneous.

[16] Newly cited unpublished federal and state Minnesota cases are attached as exhibits to the December 22, 2015

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federal district court's *Erie* guess concerning the meaning of Minnesota law. Especially where *Questar* is at odds with the Eighth Circuit's analysis explaining the limited preemptive scope of section 604.10, the Court should not treat it as persuasive precedent.

Illinois. Plaintiffs' arguments concerning Illinois proceed from the mistaken premise that the stranger ELD applies solely in "limited categories" of cases. Opp. 37. That is incorrect for the reasons explained above. The stranger ELD is the background rule, plainly adopted in Illinois law, *see, e.g.*, *In re Chicago Flood Litig.*, 680 N.E.2d 265, 274-75 (Ill. 1997), and applying that rule to a new fact pattern does not involve "extending" the law, as Plaintiffs claim. The assertion that Illinois courts have declared that "[i]n mapping the future course of the [ELD], this court should consider the policy behind it," Opp. 37 (citation omitted), is incorrect. The cited passage comes from a *dissenting opinion*. *See Congregation of the Passion v. Touche Ross & Co.*, 636 N.E.2d 503, 527 (Ill. 1994) (Heiple, J., dissenting). More importantly, any suggestion that Illinois courts use a case-specific policy assessment to decide whether to apply the ELD is also wrong. To the extent Illinois courts have referred to "policy" considerations in applying the ELD, it has been in the context of considering broad, categorical exceptions, such as the exception for negligent misrepresentation claims. *See, e.g.*, *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 452-53 (Ill. 1982). No Illinois case endorses a case-by-case assessment of the facts to determine whether the policies behind the ELD apply in a particular case.

Plaintiffs fare no better with their assertion that the ELD should not apply because: (i) it does not apply where "the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred," *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 352 (Ill. 1990), and (ii) the Plaintiffs (and the MDL Court) believe that Syngenta had such a duty here. That logic is just as circular now as it was when the MDL

Second Affidavit of D. Scott Aberson.

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Order announced the same mistaken rationale. *See* Mot. 42.

Iowa. Plaintiffs cannot and do not dispute that Iowa courts have applied the stranger ELD in multiple scenarios. Their effort to distinguish some of the rationales courts have invoked in applying the doctrine to injured-employee cases, Opp. 38 n.21, misses the point. The Iowa Supreme Court has made clear that such cases apply the stranger ELD, *see Annett*, 801 N.W.2d at 504, and such cases demonstrate that Iowa courts recognize the stranger ELD as the background rule and apply it across a range of scenarios in the absence of "any of the recognized exceptions or qualifications to the economic loss rule." *Annett*, 801 N.W.2d at 504.[17]

The claim that Iowa uses "a nearly identical policy analysis," Opp. 39, to that used in the MDL Order misrepresents the cited decisions. In *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684 (Iowa 2010), the court simply recognized that negligent misrepresentation claims, as a category, are an exception to the ELD because the tort "is, and always has been, an economic tort allowing for recovery of purely economic damages" and using the ELD to bar such claims "would essentially eliminate the tort." *Id.* at 693. *Van Sickle* thus confirms Syngenta's point. When courts develop exceptions to the stranger ELD, they are based on broad legal categories of claims and founded on legal characteristics that make the particular type of claim unsuited for application of the doctrine. Similarly, in *St. Malachy Roman Catholic Congregation of Genesco v. Ingram*, 841 N.W.2d 338 (Iowa 2013), the court's express rationale for holding that the ELD did not apply was that the claims "fall under the third recognized exception" to the ELD identified in *Annett* (for cases involving the negligence of an agent—there, a financial planner—in carrying out a principal's instructions). *Id.* at 352. Once

[17] The fact that *Anderson Plasterers* pointed to § 766C of the Restatement (Second) of Torts also provides no basis for distinguishing the case from the stranger ELD in any event. *Anderson Plasterers v. Meinecke*, 543 N.W.2d 612, 613 (Iowa 1996). It is well recognized that § 766C of the Restatement (Second) was the provision reflecting the ELD. *See, e.g., Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503-04 (Iowa 2011).

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again, the analysis confirms that the ELD supplies the background rule *unless* a case fits a "recognized exception." *Id.* Nothing in those decisions (or any other Iowa case) endorses a free-wheeling, case-by-case policy analysis for determining whether the ELD should apply.

Louisiana. Louisiana's duty-risk analysis incorporates the same fundamental concerns that animate the ELD. As a result, it is "highly unlikely" that the duty-risk analysis would ever countenance a tort award for economic loss that was not accompanied by physical injury, *PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058, 1061 (La. 1984), and Louisiana law has barred recovery for economic loss in scenarios similar to this case, *see, e.g.*, *Wiltz*, 645 F.3d at 597. There is no basis for a different result here.[18]

Plaintiffs' sole response is to claim that in *England v. Fifth Louisiana Levee Dist.*, 167 So. 3d 1105 (La. Ct. App. 2015), the court allowed recovery of economic loss in the absence of physical injury. That misstates the rationale in the case. Plaintiffs in *England* were denied the use of their home tap water for eight days due to feared contamination of the water supply. *Id.* at 1108. Although it turned out that there had been no contamination of their water or pipes, the court held that "damages for loss of use of property are recoverable in a tort action," *id.* at 1111, and it is clear that the court's rationale turned on the view that denial of the use of one's property is, in practical effect, equivalent to temporary damage. That rationale has no application here.

Missouri. By repeating the MDL Order's basis for discounting the adoption of the stranger ELD in *Brink v. Wabash R. Co.*, 60 S.W. 1058 (Mo. 1901), Plaintiffs miss the point. Missouri has applied the stranger ELD, and even if changes in the law concerning the particular wrongful-death scenario involved in *Brink* might alter the outcome in that case, that provides no basis for thinking that Missouri would now reject the majority-rule stranger ELD.

[18] Plaintiffs' effort to distinguish *Wiltz* is misplaced. *See* Opp. 40. Syngenta could no more foresee harm to these particular plaintiffs than the defendant in *Wiltz* could foresee harm to the particular users of crawfish that sued it. The rationale from *Wiltz* fully applies here.

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And Missouri cases recognizing exceptions to the ELD once again confirm Syngenta's point—exceptions are based on legal categories of claims. *See, e.g., Bus. Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 454 (Mo. Ct. App. 1994) (professional malpractice).[19] None of the cases cited by Plaintiffs provides any basis for thinking that Missouri would adopt a case-by-case policy analysis for applying the ELD.[20]

Ohio. Ohio embraces the "well-established general rule . . . that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Corporex Dev. & Constr. Mgmt., Inc. v. Shook*, 835 N.E.2d 701, 704 (Ohio 2005). And Ohio has applied that rule in numerous stranger scenarios. *See* Mot. 46. The MDL Court's ruling that the ELD would not apply in Ohio whenever a plaintiff asserts a tort claim independent of a contract misstates the law. *See id.* Even where the parties are not connected by contract the plaintiff must point to a tort duty *that provides a recognized exception to the ELD. See, e.g., Campbell v. Krupp*, 961 N.E.2d 205, 211-13 (Ohio Ct. App. 2011) (barring tort claim for economic loss despite absence of contract because the law does not recognize a tort action for negligence against title examiners).

Plaintiffs' oblique responses are unavailing. Contrary to their claims, *Ashtabula River Corp. Grp. II v. Conrail, Inc.*, 549 F. Supp. 2d 981 (N.D. Ohio 2008), rejected precisely the argument that "the economic loss rule does not bar tort claims that are independent of a contract claim." *Id.* at 987. Plaintiffs also point to language in *Corporex* suggesting that the ELD does

[19] The assertion that *Graham* was not a professional negligence case is specious. Opp. 41 n.22. *Graham* expressly turned on "a professional's common law duty of care," 891 S.W.2d at 454, and *Dannix*—a case cited by Plaintiffs—categorized *Graham* as a claim for "negligence in providing professional services." *Dannix Painting, LLC v. Sherwin-Williams Co.*, No. 4:12 CV 01640 CDP, 2012 WL 6013217, at *2 (E.D. Mo. Dec. 3, 2012), *aff'd*, 732 F.3d 902 (8th Cir. 2013). The existence of a contract in *Graham* simply confirms a characteristic of all professional negligence cases: the client has a contract for services with the defendant professional.

[20] Decisions in *In re Genetically Modified Rice Litigation* are irrelevant for the reasons Syngenta has explained. *See* Mot. 45 n.69. And the assertion that "Missouri has traditionally allowed tort claims even where the only damages sought were economic," 666 F. Supp. 2d at 1016, simply misstates Missouri law. *See* Mot. 45-46.

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not apply where there is a "discrete, preexisting duty in tort." 835 N.E.2d at 705. But Plaintiffs ignore that *Corporex* was referring to a *particular type* of preexisting duty—specifically, the duty involved in *Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212 (Ohio 1982), which recognized that, under the tort of negligent misrepresentation (an exception to the ELD), accountants have a duty to third parties and may be sued for economic losses resulting from negligent statements. *Id.*. The court went on to state that, to avoid the ELD, a plaintiff must identify a "duty in tort *analogous to* the duty identified in *Haddon View*"—that is, a duty that provides a recognized exception to the ELD. *Corporex*, 835 N.E.2d at 705 (emphasis added). Plaintiffs' bare assertion that they have "alleged" that Syngenta had an "independent tort duty" misses the point. Opp. 42. Their *ipse dixit* does not create a recognized exception to the ELD.

Eysoldt v. Proscan Imaging, 957 N.E.2d 780 (Ohio Ct. App. 2011), is irrelevant. It simply held that "the economic loss doctrine does not apply in this case because the causes of action are for *intentional torts*." *Id.* at 785 (emphasis added).

Tennessee. Tennessee applies the stranger ELD, *see, e.g.*, *United Textile Workers of Am. v. Lear Siegler Seating Corp.*, 825 S.W.2d 83, 85-87 (Tenn. Ct. App. 1992); *Ladd Landing, LLC v. Tenn. Valley Auth.*, 874 F. Supp. 2d 727, 732 (E.D. Tenn. 2012), and nothing in Tennessee cases suggests that a policy assessment limits application of the rule. *Lear Siegler* discussed policy rationales solely in the context of determining whether to adopt the ELD or to follow a minority approach. 825 S.W.2d at 85-86. Similarly, in *Lincoln General Insurance v. Detroit Diesel Corp.*, 293 S.W.3d 487 (2009), the court considered policy factors when it was deciding whether to adopt a majority or minority approach to the ELD in the products-liability context. *Id*. at 489-92. Nothing in either decision suggests a case-specific policy assessment after the ELD has been adopted in a given jurisdiction. The suggestion in *Ham v. Swift Transp. Co.*, 694 F. Supp. 2d 915, 922 (W.D. Tenn. 2010), that Tennessee would limit the ELD to products-

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liability cases fails to provide any convincing basis for failing to follow *Lear Seigler* as binding authority and is unpersuasive for the reasons Syngenta has explained. *See* Mot. 49.

Texas. Although Texas courts depart from the majority rule by considering the policy rationale for applying the ELD in each case, they also recognize that the "principal rationale[] for the rule" is that "[e]conomic losses *proliferate* more easily than losses of other kinds" and can result in "[i]ndeterminate and disproportionate liability." *LAN/STV v. Martin K. Eby Constr. Co., Inc.*, 435 S.W.3d 234, 240 (Tex. 2014) (emphasis added). For the reasons Syngenta has explained, that concern is plainly triggered by Plaintiffs' theories in this case, which would allow anyone claiming that his economic interests were affected by an alleged drop in the price of corn (including hundreds of thousands of soybean and milo farmers) to sue Syngenta.[21] Plaintiffs provide no sound reason to think that Texas courts would not apply the stranger ELD here.

Wisconsin. Wisconsin cases do not limit the ELD to products-liability/contract contexts. In *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 836 N.W.2d 807 (Wis. 2013), the ELD barred claims of homeowners (asserted by an assignee) against a supplier of concrete where there was no contract between the homeowners and the supplier. *Id.* at 822. Even if the case is viewed as a contractual ELD case due to the chain of contracts indirectly connecting the parties, it provides no basis for claiming that the ELD is *limited* to contract scenarios. Plaintiffs misstate the case in asserting that some claims survived because they "were not governed by a contract." Opp. 45. Those claims survived under the basic rule that the ELD does not apply where there is "damage to other property." *United Concrete*, 836 N.W.2d at 822 n.19. Plaintiffs' remaining cases are distinguishable for the reasons Syngenta has explained.

[21] Contrary to Plaintiffs' suggestion, Syngenta did not cite *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 793 (Tex. App. 2007), as authority undermining the federal MDL Order. Syngenta merely pointed out that *Sterling* does not stand for the proposition that the ELD applies only where the plaintiff could have recovered for the same injury under a contract. *See* Mot. 50 & n.76.

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2. The Remaining States Would Apply The Stranger ELD Here.

Alabama. Plaintiffs' cases do not reject the stranger ELD but instead fall within Alabama's inapplicable exception from the ELD in the "commercial-construction context." *Pub. Bldg. Auth. of City of Huntsville v. St. Paul Fire & Marine Ins. Co.*, 80 So. 3d 171 (Ala. 2010); *see Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84, 107 (Ala. 2004); *Tull Bros. v. Peerless Prods., Inc.*, 953 F. Supp. 2d 1245, 1256 (S.D. Ala. 2013).

Arkansas. Plaintiffs repeat the MDL Order in misstating the holding in *Carvin v. Arkansas Power & Light Co.*, Civ. Nos. 90-6055 & 90-6109, 1991 WL 540481 (W.D. Ark. Dec. 2, 1991). *Carvin* involved a classic stranger scenario in which the closure of a bridge caused plaintiff's economic losses due to reduced numbers of customers. The court applied the stranger ELD in barring recovery "for the purely economic losses stemming from the loss of the bridge." *Id.* at *5. To the extent the court reasoned—as Plaintiffs point out, Opp. 47—that the plaintiffs could not recover because they did not have a "property interest in the bridge," *Carvin*, 1991 WL 540481, at *5, that simply confirms that the court was applying the ELD. The ELD bars recovery for economic loss *unless* a plaintiff has suffered injury to his property.

Colorado. Plaintiffs' reliance on a Colorado decision addressing "interrelated contracts" is misplaced given the court's express statement that its holding was "narrowly" tailored to the "specific facts of th[at] case." *S K Peightal Eng'rs, LTD v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868, 868, 877 (Colo. 2015). Plaintiffs' remaining cases all arose in the context of parties connected by a contract or chain of contracts, which says nothing about how the court would rule in a stranger scenario. *See Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313 (Colo. 1981); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1042 (Colo. 1983).[22]

[22] *Kulik* is especially useless in predicting Colorado's treatment of the stranger ELD because the plaintiff suffered "*property damages* resulting from an explosion in their home." 621 P.2d at 315 (emphasis added).

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Indiana. Plaintiffs cannot provide any basis for concluding that Indiana would reject the majority-rule stranger ELD. Although it did not invoke the doctrine by name, the Indiana Court of Appeals has applied the stranger rule in an injured-employee case. *See Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 786 (Ind. Ct. App. 1990); *see also* Dobbs § 647 at 585 n.3 (listing *Merrillville Toyota* as a stranger ELD decision). The policy rationales the court described there simply mirror the rationales for the ELD. Indiana courts have also endorsed the proposition that the "existence or non-existence of a contract is not the dispositive factor for determining whether a tort action [for economic loss] is allowable," *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 748 (Ind. 2010), and have applied the ELD in the absence of contractual privity, *Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 739 (Ind. 2010). Such decisions bolster the conclusion that Indiana would not insist on the presence of a contract to apply the ELD and would apply the majority rule reflected in the stranger ELD.

Kansas. Plaintiffs concede that Kansas applies the stranger ELD where "permitting recovery would 'expand the potential pool of plaintiffs beyond reason.'" Opp. 50 (quoting *Long Motor Corp. v. SM & P Utility Res., Inc.*, 214 P.3d 707, at *2 (Kan. Ct. App. 2009)). As Syngenta has explained, that concern amply applies here, where growers of entirely different crops have brought claims and Plaintiffs could try to extend their alleged economic ripple effects to landowners, farm equipment dealers, and others. *See* Mot. 24-25.

Kentucky. Neither Kentucky's adoption of the ELD in the products-liability context, *see Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011), nor a federal court decision arising from a contract between the parties, *see NS Trans. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, No. 3:12-CV-00766 (JHM), 2015 WL 1020598, at *1 (W.D. Ky. Mar. 9, 2015), demonstrates that Kentucky would reject the stranger ELD if given the opportunity.

Michigan. The Michigan Court of Appeals has expressly left open the possibility that

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the stranger ELD applies in "a mass tort claim with the potential for disproportionate economic exposure." *Quest Diagnostics, Inc. v. MCI WorldCom, Inc.*, 656 N.W.2d 858, 866 (Mich. Ct. App. 2002). Given that reservation, Plaintiffs have provided no reason why Michigan would not apply the majority rule and apply the stranger ELD here.

Mississippi. Plaintiffs concede that Mississippi has not rejected the stranger ELD, Opp. 52, and cite cases addressing the ELD in the contract and products-liability contexts. *See, e.g.*, *Lyndon Prop. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 274 (5th Cir. 2007) (refusing to apply ELD to "a duty shaped by contract"). None of those cases arose in a stranger scenario and consequently they took no position on the rationales underpinning the stranger ELD.

Nebraska. *Lesiak v. Cent. Valley Ag Co-op, Inc.*, 808 N.W.2d 67 (Neb. 2012), did not reject the stranger ELD. The court did not consider the stranger ELD because the parties were in privity of contract. *Id.* at 72. Moreover, the court refused to apply the ELD in that circumstance simply because the plaintiff had suffered physical injury. *Id.* at 72, 85-86.

North Carolina. *Lord v. Customized Consulting Specialty, Inc.*, 643 S.E.2d 28 (N.C. Ct. App. 2007) addressed the contract rationale behind the ELD, *id.* at 32, and neither addressed nor rejected the stranger ELD.

North Dakota. *Leno v. K & L Homes, Inc.*, 803 N.W.2d 543, 550 (N.D. 2011), applied the ELD in the products-liability context; that does not imply rejection of the stranger ELD.

Oklahoma. Plaintiffs cite only a single case from Oklahoma in which the Supreme Court applied the ELD in the products-liability context. *See Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 652 (Okla. 1990). Nothing about the application of the ELD in the products-liability context implies that Oklahoma would reject the stranger ELD.

South Dakota. Plaintiffs erroneously characterize *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413 (S.D. 2014) as rejecting any application of the ELD outside the context

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of the U.C.C. Opp. 55. *Kresiers* merely carved out a well-recognized exception to the ELD for professional services "like legal malpractice." 852 N.W.2d at 422. This exception does not preclude adoption of the stranger ELD, as illustrated by South Dakota's reliance on Illinois law to create the exception—given that Illinois has unquestionably adopted the stranger ELD. *Id.* at 422 (citing *Collins v. Reynard*, 607 N.E.2d 1185 (Ill. 1992)).

E. Non-Producers' Claims Are Barred By The ELD.

Non-Producers miss the point in arguing that determining which strand of the ELD applies to their claims "does not hinge on injury to a proprietary interest." Opp. 57. Whether Non-Producers' claims are barred by the contractual or stranger ELD depends on whether the alleged injury arises from the particular corn *they purchased.* *See* Mot. 57-58. On one hand, to the extent they assert harm from the presence of Viptera in the general corn supply, their claims are indistinguishable from the claims of the Producers and are barred by the stranger ELD. On the other hand, to the extent Non-Producers allege that the corn *they purchased* contained Viptera, their claims are barred by the *contractual* ELD because they are merely complaining that the goods they purchased have failed to meet their economic expectations.[23]

Non-Producers cannot avoid the ELD on the theory that they have asserted physical injury for multiple reasons. To the extent Non-Producers complain about Viptera in the corn supply, their argument fails for the same reasons as the Producers'. *See supra* Part I.C; Mot. 60. And to the extent they complain about Viptera in the corn *they purchased*, the idea that physical

[23] *See, e.g.*, *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 820 (Minn. 1984), *overruled on other grounds by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990) (ELD bars tort claims for "failure of the product to perform to the level expected by the buyer"); *accord Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 450 (Ill. 1982) ("where only the defective product is damaged, economic losses caused by qualitative defects falling under the ambit of a purchaser's disappointed expectations cannot be recovered" in "strict liability or negligence"); *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333 (S.D. 1994) (ELD bars recovery in tort for "loss resulting from the failure of the product to perform to the level expected by the buyer and the consequential losses resulting from the buyer's inability to make use of the ineffective product, such as lost profits"); *see also* Minn. Stat. § 604.101, subdiv. 3 (Reporter's Note) (statute bars "recovery for damage to [or] diminution in the value of" the goods sold).

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injury to *that corn* evades the ELD simply misstates the law. Opp. 57. Avoiding the ELD requires damage to property *other than* the purchased goods.[24] Nor can Producers complain that some corn they purchased bearing the MIR 162 trait damaged *other* corn when they commingled it. Where one component in a finished product allegedly "injures" the overall product, that is not injury to "other property." *See, e.g., Jorgensen*, 824 N.W.2d at 419; *Minneapolis Soc'y of Fine Arts*, 354 N.W.2d at 820; Mot. 60-61 & nn.86-87; *Wasau Tile, Inc. v. Country Concrete Corp.*, 593 N.W.2d 445, 453-54 (Wis. 1999).[25] Here, Non-Producers commingled all the corn they purchased (including any that bore the MIR 162 trait) to create their finished product—fungible corn. Their action bringing Viptera corn into contact with other corn thus cannot create injury to "other property." Non-Producers do not even attempt to dispute that legal rule.

Non-Producers also make no attempt whatsoever to refute Syngenta's showing of fatal errors in the MDL Court's conclusion that the ELD does not bar non-producers' claims.

First, contrary to the MDL Order, the ELD applies even though Non-Producers did not purchase Syngenta's product (corn seed) from Syngenta and instead bought harvested corn from farmers. Lack of privity alone does not preclude application of the contractual ELD where a remote purchaser buys a manufacturer's product through a chain of intermediaries. *See, e.g.*, *Daanen & Jansen v. Cedarapids, Inc.*, 573 N.W.2d 842, 847-49 (Wis. 1998); *StarLink*, 212 F. Supp. 2d at 839-40. To the contrary, in this scenario the contractual ELD is intended to

[24] *See, e.g., East River S.S. Corp. v. Transam. Delaval, Inc.*, 476 U.S. 858, 871 (1986) (no recovery in tort where "a product injures itself"); *Charlier*, 929 N.E.2d at 729 ("[T]he economic loss rule provides that a defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a defective product . . . damage to the product or service itself)—but that a defendant is liable under a tort theory for a plaintiff's losses if a defective product or service causes personal injury or damage *to property other than the product . . . itself*.") (emphasis added); *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 388 (Miss. Ct. App. 1999); *see also* Minn. Stat. § 604.101, subdiv. 3(1) (plaintiff can recover solely for damage to "*other* tangible personal property") (emphasis added); Restatement (Third) of Torts: Prods. Liab. § 21 cmt. d (where product causes "harm to the product itself," "consequential economic losses" to the purchaser "are not recoverable in tort under the rules of this Restatement").

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

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encourage Non-Producers to bargain for guarantees from farmers (*e.g.*, that corn meets export requirements), which would, in turn, encourage farmers to bargain for comparable guarantees from seed manufacturers.[26] In addition, the ELD also applies where the plaintiff complains that the maker of a *component* or *input* in a purchased product has damaged the overall product. *See*, *e.g.*, *Transam. Delaval, Inc.*, 476 U.S. at 860-61; *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988); Restatement (Third) of Torts: Liab. for Econ. Harm § 2 illus. 1 (contractual ELD bars house buyer's tort claim against manufacturer of windows used in house). Here, Syngenta's Viptera seed is a component or input in the harvested corn that Non-Producers purchase from farmers, and the ELD bars their claim that the input has reduced the value of the product they purchased. Non-Producers do not even contest these points, nor do they provide any response to the abundant authority Syngenta cited showing the errors in the MDL Order. *See* Mot. 61-62.

Second, the MDL Order was also wrong in holding that the ELD applies only where the plaintiff has asserted a product "defect." MDL Order 47. As Syngenta explained, the doctrine applies *whenever* a plaintiff's claim boils down to a complaint that a product has disappointed the plaintiff's economic expectations. Mot. 64. Non-Producers fail to identify a single case holding that the mere pleading tactic of avoiding the word "defect" provides an end-run around the ELD.

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

Minnesota. Non-Producers' arguments for avoiding application of the ELD under Minn. Stat. § 604.101 are misplaced. First, Non-Producers cannot escape the statute on the theory that "they did not purchase a 'good' sold by Syngenta." Opp. 59. The statute expressly applies

[26] As *Daanen & Janssen* explained, "[i]f manufacturers [were] held liable to remote commercial purchasers under tort theories for frustrated economic expectations, all manufacturers would effectively be prevented from negotiating their liability" in the limited warranties they agree upon with initial purchasers. 573 N.W.2d at 848. The contractual ELD preserves the ability to contract and prevents the purchaser from "reach[ing] all the way back through intervening transactions, contracts, and warranties to sue the original manufacturer in tort." *Id.*

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"regardless of whether the seller and the buyer were in privity regarding the sale . . . of the goods," Minn. Stat. § 604.101 subdiv. 2(1), and it defines "goods" to include tangible property "regardless of whether that property is incorporated into or becomes a component of some different property," *id.* subdiv. 1(c). Under that definition, Non-Producers are "buyers" of "goods" vis-à-vis Syngenta because Syngenta's product (seed) has been "incorporated into" the product they bought (harvested corn). Non-Producers fail even to address these critical terms of the statute, and as a result their bare assertions are wholly misplaced.

Second, Non-Producers also cannot evade the statute with the assertion that they have not alleged a "product defect." Opp. 59. As an initial matter, Count III of the Class Complaint asserts a strict liability claim founded on the assertion that "Viptera and Duracade was [*sic*] in a defective condition." First Am. Class Compl. ("CC") ¶ 339. That claim is plainly barred under section 604.101. Similarly, Plaintiffs' strict liability/failure to warn claim, *see, e.g.*, NCC ¶¶ 349-60, also falls squarely within the statute, which makes clear that "[a] defect in the goods includes a failure to adequately instruct or warn." Minn. Stat. § 604.101 subdiv. 1(e).

In addition, as Syngenta has explained, nothing about the statute's reference to "product defect tort claims" limits the statute to a particular definition of product "defect." In context, the statute is best understood to apply to *any* claim that a product is deficient because it fails to meet the plaintiff's economic expectations. *See* Mot. 66-67. Only that approach ensures that the statute will fulfill its purpose and cannot be evaded by artful pleading omitting the word "defect" from a complaint. In any event, Plaintiffs' claims also fall in a recognized category of "product defect" claims, since they are essentially asserting that Viptera was not fit for its ordinary purpose. *Cf.* Minn. Stat. § 336.2-314(2)(c). Plaintiffs' bare assertion that they are not bringing such a claim is not dispositive. The fundamental premise of their lawsuit is that exporting corn to China is an expected and ordinary use of corn (not a specialty use) that everyone in the

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industry must plan around, including by making sure that their corn can be used for that purpose—and that any corn that cannot be exported to a "key" export market creates a tort duty on those marketing or handling it to ensure that it is not treated as fungible corn. Their claim is thus precisely that Viptera corn is in some way defective.[27]

Arkansas. As Syngenta has noted, *see* Mot. 53, Arkansas does not apply the contractual ELD to strict liability claims. For negligence claims, however, Non-Producers provide no sound reason to predict that Arkansas would reject the majority rule.

Louisiana. Non-Producers' arguments for evading the Louisiana Products Liability Act ("LPLA") are misplaced. First, Non-Producers assert that they have not argued that Viptera was "unreasonably dangerous." Opp. 60. But that does not mean that they can *evade* the LPLA and proceed *outside* the statute. The LPLA governs any claim based on a characteristic of a product. *See, e.g.*, *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1250-51 (5th Cir. 1997). That includes Non-Producers' claims, which hinge on the GM trait in Viptera. Their failure to allege that Viptera was "unreasonably dangerous" simply means that they fail to state a *viable* claim under the statute, *see* La. Rev. Stat. § 9:2800.54, and their claims are therefore barred.

Second, Non-Producers assert that their claims fit into a line of cases permitting claims outside the LPLA that are based on a manufacturer's "wrongful conduct unrelated to the product's manufacture, design, [or] warnings." Opp. 61. That is not correct. Those cases involved wrongful conduct *wholly apart* from the defendant's role as manufacturer and harm caused by factors *other than* the product's inherent characteristics. For example, in *Lavergne v. America's Pizza Co.*, a restaurant was held liable when an employee negligently placed hot pizza

[27] *Ptacek* provides no support for Plaintiffs' arguments. As explained above, *see supra* p.20, in *Ptacek*, the trial court's conclusion that the plaintiff did not bring a product defect claim was not explained, was not appealed, and was not even addressed by the Court of Appeals. The decision thus provides no guidance as to what qualifies as a "product defect tort claim" because the court did not even address that question. *See* Mot. 67 n.95.

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sauce near a child who was burned. 838 So. 2d 845, 847-48 (La. Ct. App. 2003). The restaurant was liable in "its role as an employer for the negligent acts of its employee, *independent of the nature of the product involved*." *Bladen v. C.B. Fleet Holding Co.*, 487 F. Supp. 2d 759, 771 (W.D. La. 2007) (emphasis added).[28] Here, Non-Producers cannot claim that they have alleged any injury "independent of the nature of the product involved," *id.*—their claimed injuries turn on the fact that Viptera contained a GM trait that was not yet approved in China.

II. Plaintiffs Cannot Establish Duty As A Matter of Law.

A. Plaintiffs' Theory That Syngenta Had A Duty Either To Refrain From Selling Viptera Or To Control The Way Everyone Else In The Industry Handled Viptera Is Not Supported By A Single Case.

Unable to point to any cases prior to this litigation endorsing the duties they would like to impose, Plaintiffs take a different approach. They retreat to the broadest level of generality to appeal to the "duty to exercise reasonable care when the actor's conduct creates the risk of injury to another," Opp. 65, and divert attention with an avalanche of cases in *unrelated* contexts. The reason for that approach is clear. Cases addressing scenarios similar to this case show that Syngenta's points stand unrefuted. Courts do not impose duties on the manufacturer of a safe, non-defective product to control the post-sale handling of the product by third parties—or to refrain from selling altogether—simply because third parties may use the product in a way that produces harm.[29] And, contrary to the MDL Court's unprecedented ruling, there is no duty in

[28] *See also Triche v. McDonald's Corp.*, 164 So. 3d 253, 258 (5th Cir. 2014) (claim that "employee failed to properly seat the coffee cups in the tray holder before handing" to customer); *Crawford v. Dehl*, No. 08-0463, 2008 WL 4186863, at *4 (W.D. La. July 21, 2008) (non-LPLA claim allowed against manufacturer for "act[ing] negligently when it loaded, secured, kept, transported, and trained its employees to deal with the hydrochloric acid"). *In re Genetically Modified Rice Litig.*, No. 4:06-MD-1811, 2011 WL 5024548, at *3-4 (E.D. Mo. Oct. 21, 2011), is irrelevant. *Cf.* Opp. 61. The defendant there did not raise the LPLA and the court did not address it.

[29] That lack of post-sale control is precisely why the MDL Court correctly rejected nuisance and trespass claims. The same policy considerations that cause courts to reject liability for a manufacturer in nuisance or trespass based on others' use of its products, *see* Mot. Parts IX.A, VII.A; MDL Order 54, 59, support rejecting liability in negligence as well. *See, e.g.*, *Williams*, 809 N.E.2d at 478 (cell-phone maker not liable for accidents caused by drivers using cell phones because it "cannot control what people do with the cell phones after they purchase them").

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tort for a business to restrict its operations—especially the introduction of innovative products—in order to ensure that it acts for the "mutual benefit" of *others* in an "inter-connected industry" simply because others might find that new products produce economic disruptions for their existing way of doing business. MDL Order 10. Tellingly, Plaintiffs do not even directly defend the MDL Court's rationale for this novel duty.[30]

Instead, Plaintiffs resort to two-pages of irrelevant *personal-injury* cases invoking and applying the general duty of care. Opp. 65-66. Whether this Court should radically expand tort law in Minnesota and twenty-one other States by imposing the novel duties that Plaintiffs propose cannot be determined by consulting decisions about car accidents and medical malpractice.[31] Nor is that the way courts routinely assess novel assertions of new duties in tort.

To the contrary, the "concept of a 'general duty' is too nebulous a ground" for that analysis, *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 435 N.E.2d 210, 215 (Ill. App. Ct. 1982), *aff'd*, 449 N.E.2d 125 (Ill. 1983), and the general duty of care is only "a beginning point for any duty analysis." *Fryman v. Harrison*, 896 S.W.2d 908, 909 (Ky. 1995). The "examination [of duty] must be focused so as to determine whether a duty is owed, and consideration must be given to public policy, statutory and common law theories in order to determine whether a duty existed *in a particular situation*." *Id.* (emphasis added). As a result, courts routinely analyze whether there is a particularly defined duty under the circumstances of a given case—such as whether homeowners "owe a legal duty to affix a typical household object [a bookcase]" to the wall to prevent injuries to a child guest. *Foss v. Kincade*, 766 N.W.2d 317,

[30] Plaintiffs' theory that Syngenta should have "withdrawn" Viptera and Duracade from the market is barred by the settled rule that manufacturers do not owe a common-law duty to institute a product recall. *See* Mot. 94 n.130. Plaintiffs offer no response, and the Court should dismiss claims based on this "withdrawal" theory.

[31] *See* Appendix A (listing context of Plaintiffs' cited cases).

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319 (Minn. 2009).[32] The very treatise cited by Plaintiffs explains that courts do *not* simply leave duties defined at the general level of the duty of reasonable care and instead assess whether a more narrowly defined duty applies in the context of particular circumstances. *See* Dobbs § 254 (although "the general duty of care . . . could *conceivably* be applied in all cases, leaving it to the jury to determine whether, on the facts, the defendant breached that duty[,]" "courts *in fact* impose different standards of duty" depending on the context) (emphases added).[33]

The first step in assessing duty, therefore, is understanding the particular duty that a claim would impose. Here again, Plaintiffs resort to obfuscation. On one hand, they insist that they are not claiming that Syngenta had a duty "to refrain from selling Viptera *at all*" absent Chinese approval. Opp. 72. On the other hand, they simultaneously assert that Syngenta is liable for "commercializ[ing] [Viptera] without approval from major export markets," *id.* at 3, and their brief and complaints assert precisely that "Syngenta could—*and should have—waited* to market Agrisure Viptera®." *Id.* at 5 (emphasis added); CC ¶ 86; NCC ¶ 97 (emphasis added). Similarly, Plaintiffs insist that they are not trying to impose a duty "to reorganize the entire industry framework for growing and distributing corn" and that they only want the vague obligation for Syngenta to act "*reasonably.*" Opp. 85 (emphasis in original). But at the same time, they complain of a failure to institute "adequate stewardship and channeling programs"—which would require changing how the rest of the corn industry handles GM corn. Opp. 69 n.33.

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[32] *See also, e.g.*, *Royal Beach Hotel, LLC v. Crowley Liner Servs., Inc.*, Civ. Act. No. 1:06-CV-129, 2007 WL 1499815, at *5 (S.D. Miss. Mar. 14, 2007) (examining whether "defendant had a duty to ensure its containers would not wash away"); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995) (rejecting a "common law duty [on] the manufacturer of a nondefective handgun to control the distribution of that product to the general public"). This approach is universally applied and Syngenta need not cite a case from every State showing it. Nonetheless, out of an abundance of caution, Appendix B collects such cases.

[33] *Ludwikoski v. Kurotsu*, 840 F. Supp. 826 (D. Kan. 1993) (cited at Opp. 71-72), is not to the contrary and is irrelevant here. There, given that the Kansas Supreme Court had already decided that the duty to use ordinary care applied to golfers, the court merely rejected an attempt to define the duty more narrowly as a duty to "hit a ball precisely." *Id.* at 827. Like other personal injury cases, the decision has nothing to do with assessing proposals for unprecedented duties that would realign fundamental responsibilities in multi-billion dollar industries.

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Similarly, Plaintiffs nowhere expressly defend the federal MDL Court's novel theory that Syngenta had a duty to operate its business for the "mutual benefit" of others. MDL Order 10. But they obliquely concede that they think that is exactly what Syngenta is required to do. Their goal is to use tort law as a tool to regulate economic threats to their business model and to block any innovation that jeopardizes their preferred way of doing business, in which they have no need to incur the costs involved in segregating different types of corn for different markets. *See* Mot. 85-86. In their words, they want to impose tort liability on anyone who "upsets the *status quo* and expose[s] others to [economic] risks that would not [otherwise] exist." Opp. 88. Contrary to the premise behind that theory, tort law does not give Plaintiffs a protected property interest in their current model of operations and make it unlawful to introduce a product that may require them to alter that model. Apart from specifically defined economic torts, tort law does not generally protect the economic *status quo* in any marketplace or make it unlawful to disrupt the *status quo*. Economic disruptions from innovation are part of the inevitable operation of free markets. As Syngenta has explained, Mot. 85, Plaintiffs' unprecedented theory would make it a tort to "upset the *status quo*" by introducing a GM seed that doubled crop yields, but led to lower prices as a result—and Plaintiffs have not even attempted to deny that their theory leads to that absurd result.

The reason for Plaintiffs' retreat from any specifics in describing duty should be clear. When their claimed duties are clearly defined, it is obvious that there is no precedent to support them. At a minimum, their theories require an extension of current law. But "the task of extending existing law falls to the [S]upreme [C]ourt or the legislature," not district courts. *State v. Anderson*, 603 N.W.2d 354, 357 (Minn. Ct. App. 1999).[34]

[34] *See, e.g.*, *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 557 (Minn. Ct. App. 2011) (district court's "extension" of duties owed under negligence law "was improper"); *Lyzhoft v. Waconia Farm Supply*, Nos. A12-

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Plaintiffs' remaining arguments are diversions. For example, they misleadingly assert that "every American court has found that seed manufacturers owe a duty of care when their release of GM traits results in harm to others." Opp. 81. As Syngenta has explained, *Genetically Modified Rice* and *StarLink* are irrelevant. They involved the release of *unapproved* GM traits in violation of *express regulatory duties* in the U.S. In allowing a tort claim to proceed, each case relied on the duties imposed to contain the GM trait under federal regulations.[35] There are no comparable duties here because Viptera was fully approved.[36]

Plaintiffs' invocation of *Bunge* is also misplaced. Opp. 85-86. *Bunge* addressed whether Syngenta could *force* a grain elevator to accept Viptera corn when it did not want to. In that context, the court explained it would cost Bunge a significant sum to implement channeling and observed it was "not commercially reasonable or feasible for Bunge to make such modifications to its facilities"—that is, it was not reasonable to *force* the exporter to make changes by *forcing* it to accept the GM corn (which would require changes to its facilities to preserve the ability to export to China) when it preferred simply not to accept the GM trait at all. *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F. Supp. 2d 953, 990 (N.D. Iowa 2011). *Bunge* simply reaffirmed the right of one entity in the free market to refuse to buy from another when it found it in its interests

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2237, A12-2238, 2013 WL 3368832, at *3-4 (Minn. Ct. App. July 8, 2013) (declining to extend strict-liability law even though such an expansion "appears to be consistent with Minnesota law, the law in other jurisdictions, and the Restatement (Third) of Torts" because "no Minnesota appellate court has" done so).

[35] *See, e.g.*, *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 843, 847 (N.D. Ill. 2002) (pointing out duty "pursuant to the limited registration" imposed by the EPA and that Plaintiffs' claims were based solely on a failure to comply with "affirmative" regulatory obligations); *id.* at 835 ("Plaintiffs allege that the widespread StarLink contamination of the U.S. corn supply is a result of defendants' *failure to comply with the EPA's requirements*.") (emphasis added); *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1022 (E.D. Mo. 2009) (stating that Bayer's duty arose under USDA's GMO Regulations, which "unambiguously . . . do not allow adventitious presence of GM material outside the GM plants being tested"); *In re Genetically Modified Rice Litig.*, MDL No. 06-1811, 2011 WL 5024548, at *4 (E.D. Mo. Oct. 21, 2011) (stating that Bayer's duty under the GMO Regulations was "reflected in the Plant Protection Act").

[36] The two other cases Plaintiffs cite are also irrelevant. *See* Opp. 82. Both involved run-of-the-mill claims concerning defective seeds that caused physical crop losses. *See Nakanishi v. Foster*, 393 P.2d 635, 637 (Wash. 1964) (claims for "spurious and mislabeled" seed causing 75% crop failure); *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 216 (Or. 1968) (en banc) (defects in seed causing crop losses).

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to do so. *Bunge* did not address the very different question presented here—whether after *voluntarily accepting* corn with a GM trait, a grain elevator could later claim that the seed manufacturer had a duty to implement channeling throughout the industry, including channeling *for the grain elevator* at the grain elevator's *own facilities*.[37]

In addition to citing these inapposite cases, Plaintiffs fail to provide any persuasive basis for distinguishing the authorities Syngenta cited establishing that courts do *not* impose a duty on the manufacturer of a safe, non-defective product to control the post-sale handling of the product by third parties—or to refrain from selling the product altogether—simply because third parties may use the product in a way that produces harm. *See* Mot., Part III.B.

Plaintiffs insist that these cases rest on a lack of foreseeability and the fact that the third parties were "misus[ing]" the product. Opp. 79. That is incorrect. Courts have refused to hold manufacturers liable even when it was *expressly* alleged that the post-sale use of the product leading to harm was foreseeable.[38] Nor does labeling a third party's conduct as "misuse" of the product provide a meaningful distinction. As the MDL Court recognized, that term could be applied tautologically to any handling of a product that results in harm. *See* MDL Order 13. Plaintiffs' suggestion that the cell-phone cases actually turn on lack of foreseeability—because "it is not known to a cell phone manufacturer if any consumer would own a car or plan to use the

[37] Because *Bunge* did not decide identical issues to those here and the other requirements of collateral estoppel are not satisfied, Syngenta cannot be "collaterally estopped from challenging" the findings in *Bunge*, Opp. 86 n.59—an assertion for which Plaintiffs fail to offer any support, and that is incorrect on its face.

[38] *See, e.g.*, *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 670 (8th Cir. 2009) (rejecting claim against manufacturers "even if the manufacturers knew that cooks purchased their products to use in manufacturing methamphetamine"); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989) (no liability against manufacturer of safe, non-defective product despite allegation that the manufacturer "knew, or should have known, that [its] weapon would be used by the civilian population to kill and maim human beings"); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1062 (N.Y. App. 2001) (rejecting plaintiffs' argument for duty based solely on foreseeability because duty "do[es] not rise from mere foreseeability of the harm" and policy factors did not justify a duty); *First Commercial Trust Co.*, 900 S.W.2d at 205 (no reliance on foreseeability and rejecting duty because the manufacturer "had no control over its retailers or dealers, nor does a federal or state law otherwise impose a duty on" the manufacturer); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 479 (Ind. Ct. App. 2004) (finding no duty where "the foregoing public policy considerations substantially outweigh any foreseeability of the harm").

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phone while driving," Opp. 80 n.52—is nonsense. The cell-phone cases expressly recognize that the driver's conduct was foreseeable, but they still refuse to impose any duty given that it would not be "sound public policy" to force a seller to "stop selling otherwise safe [products] because the [product] might be negligently used in such a way that it causes an accident." *Williams*, 809 N.E.2d at 478. Under Plaintiffs' theory that Viptera can cause harm, there would be no reason not to treat the actions of a farmer growing Viptera in a way that causes cross-pollination, a grain elevator that commingles Viptera, and an exporter that unlawfully attempts to import Viptera into a country where it has not been approved, *see* Mot. 84, as examples of alleged "misuse" as well. Plaintiffs offer no response to this straightforward point.

Nor can Plaintiffs circumvent the longstanding rule that parties like Syngenta do not have a duty to control third parties. Despite Plaintiffs' assertion that the no-duty-to-control rule does not apply because they have alleged misfeasance, Opp. 69-70, courts have applied the rule that manufacturers have no duty to control third persons even when plaintiffs allege supposed misfeasance in how a company manufactured or sold a safe, non-defective product. And Plaintiffs cannot get around the no-duty-to-control rule by arguing that "Syngenta's conduct [in] timing, scope, and manner of commercialization[] is being challenged" rather than Syngenta's failure to control third parties. Opp. 68-69. When Plaintiffs complain about the "manner" of commercialization, they are actually complaining about a "fail[ure] to implement and effectively run a stewardship program" controlling the rest of the industry. Opp. 114.

Plaintiffs also fail to distinguish the analysis in the one case that has actually addressed the existence of duty on parallel claims—*Hoffman v. Monsanto Canada*.[39] While Plaintiffs decry *Hoffman* as a Canadian case, Opp. 83 & n.57, they do not dispute that the court applied the

[39] *See Hoffman v. Monsanto Canada (Hoffman I)*, 2005 SKQB 225, 2005 SK.C. LEXIS 330 (Can. Sask. Q.B. 2005), *aff'd*, *Hoffman v. Monsanto Canada (Hoffman II)*, 2007 SKCA 47, 2007 SK.C. LEXIS 194 (Can. Sask. C.A. 2007); Mot. Part I.D.

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same fundamental common-law concepts that apply here. And the superficial factual differences Plaintiffs point out are either incorrect or irrelevant, or both. For example, they complain that *Hoffman* involved "organic growers" in a "specialty market" who received a "premium" price for their crop, *id.* at 83. But that mischaracterizes *Hoffman*. The claims there sought to recover not only the premium organic price, but also economic damages for "loss of the European market for *all Canadian canola*" because Monsanto launched the product before getting import approval from the EU. *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 21-22 (emphasis added); *see* Mot. 80-81. Finally, Plaintiffs say that there was no allegation in *Hoffman* that the defendant knew about the European rule prohibiting the use of GMOs, thus suggesting that there may have been a lack of foreseeability. Opp. 83-84. That is also incorrect, *see Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 64 (describing allegations). In fact, the *Hoffman* court expressly *assumed* foreseeability. *Id.* ¶ 66.[40]

B. Policy Considerations Confirm That Syngenta Owed No Duty.

Plaintiffs fail to provide any assessment of the policy considerations that—under all States' laws—must inform consideration of the unprecedented duty that Plaintiffs demand. As the Supreme Court of Minnesota has explained, duty "is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Becker v. Mayo Found.*, 737 N.W.2d 200, 212 (Minn. 2007).[41]

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[40] Plaintiffs' additional arguments for distinguishing *Hoffman* are meritless. *See* Opp. 83 n.57 (citing MDL Order 16-17). Contrary to Plaintiffs' assertions, referring to industry participants as "stakeholders" in a few policy documents cannot create a voluntarily undertaken duty. *See* Mot. Part III.F. And *Hoffman* rejected the same duty that the federal MDL Court incorrectly accepted here—a duty on a manufacturer to control how it sells GM seeds so as to avoid economic harm. *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 46, 72 (rejecting the claim that the manufacturer of a domestically approved GM seed owed a duty "to take reasonable care to prevent their GM canola from infiltrating and contaminating farmland" and causing "pure economic loss" due to "loss of use of organic canola as a marketable crop"); *see also id.* ¶¶ 112-22 (rejecting the argument that the GM seed manufacturer had a duty to control use of seed by downstream third parties and refusing to hold the manufacturer liable for "commercial marketing of the product"); *id.* ¶ 132 (finding "no [] public policy" to "place[] an onus on the defendants not to have commercially released GM canola"). Lastly, the assertion that "Syngenta grew Viptera," Opp. 84, is irrelevant. Plaintiffs do not allege that Syngenta's growing of Viptera for "purposes of seed increase and to develop inventories of product to sell to farmers," NCC ¶ 129; CC ¶ 118, caused their harm.

[41] Plaintiffs contend that "in five relevant states (Minnesota, Alabama, Arkansas, North Dakota, and Wisconsin),

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Plaintiffs do not dispute that their novel theory of liability would "embroil the judiciary in an ongoing flood of policy choices" that are properly the role of the political branches, including how to define "key" export markets, how to determine which countries have "functioning regulatory systems," and whether changed circumstances have altered a country's status as a "key" market or a "functioning regulatory system." Mot. 90. And while legislatures have been—and still are—considering related policy questions in debating bills that would impose the very sort of liability on GM-seed manufacturers that Plaintiffs advance here, *see* Mot. 79-80; Mot. App. A,[42] Plaintiffs provide no reason for this Court to wade into those issues rather than deferring to the ongoing legislative debate.[43] They also provide no response to the obvious fact that, to the extent their suit relies on a duty not to sell Viptera pending Chinese approval, it is effectively seeking to impose a form of strict liability that would circumvent established limits

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foreseeability is [] the ultimate test" of duty and that policy factors cannot be considered. Opp. 78. That misstates the law. These states, like all others, consider policy factors to restrict tort liability (whether analyzed under the heading "duty," "proximate cause," or some other element). *See, e.g.*, *K.L. v. Riverside Med. Ctr.*, 524 N.W.2d 300, 303 (Minn. Ct. App. 1994) ("Whether a duty will be imposed is ultimately a policy question."); *DiBiasi v. Joe Wheeler Elec. Membership Corp.*, 988 So. 2d 454, 461-63 (Ala. 2008) ("In determining whether a duty exists in a given situation, [] courts should consider a number of factors, including public policy, social considerations, and foreseeability."); *Ashley Cty., Ark.*, 552 F.3d at 671 (Arkansas law) (relying on the policy factors establishing "lack of a duty owed" as "instructive on the issue of proximate cause"); *Hurt v. Freeland*, 589 N.W.2d 551, 555 (N.D. 1999) (following the broad policy factors for duty described by *Prosser & Keeton on the Law of Torts*); *Hoida, Inc. v. M&I Midstate Bank*, 717 N.W.2d 17, 27, 31-32 (Wis. 2006) (explaining that the "application of judicial public policy factors to preclude recovery for negligence has a long history in Wisconsin" and describing the "six public policy factors that Wisconsin courts use today to limit liability in negligence claims").

[42] *See also* SB 1158, 189th Leg. Reg. Sess. (Mass. 2015) (pending Massachusetts bill nearly identical to two prior rejected bills that would impose strict liability on GMO manufacturers); HB 2007, 2014 Leg. Sess. (W.Va. 2014) (pending West Virginia bill that would make "a biotech company . . . liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering").

[43] Plaintiffs' suggestion that failed legislation to impose liability on GM manufacturers shows that current law already provides sufficient liability, Opp. 85, is disingenuous at best. Existing law has never recognized a cause of action for selling an *approved* GM seed before the Viptera litigation, and the legislative history of failed bills shows that they were introduced to establish a *new* regime of liability that was not recognized under common law. *See, e.g.*, Vt. J. of the Senate 1873 (May 10, 2006) (Governor's veto of Vermont bill because it would "saddle seed manufacturers and local distributors with greater business risk" and "encourag[e] expensive lawsuits against our farmers and those who sell them their seeds"); Assem. B. 984, Assem. Comm. on Jud. 5 (Cal. Mar. 31, 2005) (bill introduced in part because "under current law the financial loss associated with a product tainted with GE is solely born by the farmer or handler," who "would have to proceed against neighboring farmers who may be growing GE products"—not the manufacturers).

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on strict-liability law. *See infra* Part V.[44]

Plaintiffs also offer no response to the fact that, in analyzing petitions for deregulating GM traits, the USDA has repeatedly rejected concerns that a trait has not been approved in export markets and has indicated that grain elevators and grain buyers bear the burden of taking measures to address the risk of rejection in such markets. *See* Mot. 75-76 & n.109. Plaintiffs ask this Court to ignore the USDA's considered policy judgment that the entities who actually accomplish the commingling of corn—not GM seed manufacturers—are responsible for avoiding any risk of economic losses from the lack of approval in foreign markets.

Plaintiffs' few responses on policy matters only highlight the defects in their duty theories. They concede that Syngenta should not be made an insurer, Opp. 88, but they contradictorily insist that Syngenta should owe a duty because it can "distribute the losses of the few among the many who purchase [its] products," Opp. 87 (internal quotation marks omitted). That is the very definition of making Syngenta an insurer (and on a policy that Plaintiffs never purchased). Relying on *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1765 (2013), Plaintiffs insist that Syngenta really can control the actions of third-party growers—and even grain elevators—because GM "[m]anufacturers go to extensive lengths to control use of GM seed when it serves their profit interests." Opp. 87. But the mere fact that a *different* manufacturer used licensing agreements to put *different*, more enforceable restrictions on growers of a *different* product hardly shows that Syngenta can control entities at multiple levels of the grain distribution industry, many of whom (such as grain elevators) it does not currently contract with at all.

Plaintiffs ultimately rest on the assertion that policy concerns can be ignored because

[44] As explained above, *see supra* pp. 35-36 & n.28, Louisiana Plaintiffs' negligence and other tort claims are foreclosed by the LPLA, which provides the exclusive means in Louisiana for seeking damages from a manufacturer for injuries allegedly caused by a product. *See* Mot. 43 & n.73; La. Rev. Stat. § 9:2800.52 (LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products").

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establishing a duty on Syngenta "has no implications beyond this case." Opp. 88. That blithe assurance is contrary to the judgment of every court that has considered similar duties. Those courts have consistently pointed out that imposing a duty on manufacturers to control post-sale use of safe, non-defective products ignores the problem that the judiciary is the "least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution, and sale" of goods. *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 199 (N.Y. App. Div. 2003). It also threatens massive liability that would "in practice drive manufacturers out of business," *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984), and would spawn a flood of litigation against other manufacturers. *See* Mot., Part III.D.

Rather than addressing such policy concerns, Plaintiffs resort to distractions. First, Plaintiffs claim that "it would be premature" to assess policy factors with an "incomplete factual record." Opp. 88. That misunderstands the law. Determining duty as a matter of law depends on legislative facts, not adjudicative facts that require development in a particular case. "Legislative facts involve questions of law and policy and normally are decided by the court." Minn. R. Evid. 201 comm. cmt. 1989 (following Fed. R. Evid. 201 and "agree[ing] with the promulgators of the federal rule of evidence in not limiting judicial notice of legislative facts").[45] "When a court develops law or policy, it functions 'legislatively,' and the facts which aid the court in exercising its discretion are legislative facts." Ronald I. Meshberger & James B. Sheehy, 23 Minn. Prac., Trial Handbook for Minn. Lawyers § 11:1 (2015 ed.). "Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally." *In re Guardianship of Doyle*, 778 N.W.2d 342, 349 (Minn. Ct. App. 2010)

[45] *See* Fed. R. Evid. 201 advisory committee's note to subdiv. (a) ("Legislative facts . . . are those which have relevance to legal reasoning . . . in the formulation of a legal principle or ruling by a judge or court.").

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(quoting *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976)). Adjudicative facts, by contrast, are "the facts of the particular case" such as "'who did what, where, when, how, and with what motive or intent.'" Fed. R. Evid. 201 advisory comm.'s notes subdiv. (a).

It is well settled that "whenever a tribunal engages in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record." *Gould*, 536 F.2d at 220; *see also* William J. Keppel, 23 Minn. Prac., Trial Handbook for Minn. Lawyers § 9.43.1 (2d ed.) ("Thus, a trial judge may make *free* use of legislative facts without advising the parties or providing them an opportunity to be heard on such use."). Developing a record is unnecessary because such facts do not vary and courts may take judicial notice of them.[46] As one court has explained, it 'is no part of the province of the jury' to weigh the considerations of precedent and sound public policy that inform decisions regarding the existence and extent of a defendant's duty of care," as such decisions involve a "policy debate, not an evidentiary one." *Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184, 201 (Mo. 2014) (en banc); *see generally* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 7 cmt. b (2010) ("Courts determine legislative facts necessary to decide whether a no-duty rule is appropriate in a particular category of cases.").

As a result, courts routinely make policy determinations to reject a finding of duty at the pleading stage.[47] Plaintiffs do not cite a single case deferring ruling on the existence of a duty in

[46] *See, e.g.*, *Kimminau v. City of Hastings*, 864 N.W.2d 399, 404 (Neb. 2015) ("A no-duty determination is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case."); *United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006) ("unquestionable" that courts "take judicial notice" of "legislative facts"); *see also Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1177 n.5 (Cal. 2011) (relying on DoT Traffic Manual "as it bears on the legal issue of existence of a duty of care," explaining that evidentiary rules on judicial notice of adjudicative facts "do[] not restrict courts in their consideration of materials for the purpose of determining the law"); *Estate of Templeton ex rel. Templeton v. Daffern*, 990 P.2d 968, 974 (Wash. Ct. App. 2000) (question of duty is answered "in part by tak[ing] notice of legislative facts—social, economic, and scientific facts that simply supply premises in the process of legal reasoning").

[47] *See, e.g.*, *Packard v. Darreau*, No. 4:11-cv-3199, 2012 WL 6086889, at *8 (D. Neb. Dec. 6, 2012) (dismissing proposed duty on ground that "the expense of traffic control on the public roadways should be borne by the public, not by individuals who own or control nearby land"); *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir.

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order to allow factual development, and courts routinely reject requests for such delay.[48] Instead, Plaintiffs' cases concern solely disputes over *adjudicative facts*, such as what the defendant knew, whether the defendant breached a given duty, or the standard of care in medical malpractice (which requires evidence as to the prevailing standards in community).[49]

Second, the charge that Syngenta relies on assertions outside the complaints, Opp. 88, is similarly flawed. The Court may take judicial notice of legislative facts—indeed, it may do so without the constraints of Rule of Evidence 201.[50] To the extent the material Syngenta has cited is not merely background information that is unnecessary for resolving this motion, it consists of legislative facts or indisputable facts subject to notice under Rule 201. Thus, the USDA's policy

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2009) (on motion for judgment on the pleadings, relying on legislative fact that proposed duty would open a "Pandora's box to [an] avalanche of actions that would follow"); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478-79 (Ind. Ct. App. 2004) (on motion to dismiss, relying on legislative fact that imposing a duty "would effectively require the companies to stop selling cellular phones entirely"); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1126 (Ill. 2004) (affirming trial court's grant of motion to dismiss public nuisance claim predicated on negligence because, among other things, of the legislative fact that "the magnitude of the burden that plaintiffs seek to impose on the manufacturer and distributor defendants by altering their business practices is immense").

[48] *See, e.g.*, *Kadi v. Henry Schein, Inc.*, No. 4:13-cv-584, 2014 WL 1118139, at *2 (E.D. Tex. Mar. 19, 2014) (on motion to dismiss, rejecting plaintiff's request for "factual development" in response to argument that the complaint "fails to identify any legal duty owed by [d]efendant to [p]laintiff"); *Mercier v. Greenwich Acad.*, No. 3:13-cv-4 (JCH), 2013 WL 3874511, at *8 (D. Conn. 2013) (on motion to dismiss, rejecting argument that "discovery is needed to show [that defendant] owed a duty"); *Blount v. The Pantry, Inc.*, 936 So. 2d 967, 969 (Miss. Ct. App. 2006) (dismissing claim and bid for factual development on ground that, "[b]ecause [the defendant] owed no duty to [the plaintiff], discovery would not have created a duty that would have allowed his claim to succeed").

[49] *See* Opp. 88-89 & n.61 (citing the following cases); *Bjerke v. Johnson*, 742 N.W.2d 660, 667 n.4 (Minn. 2007) (factual question whether sexual abuse was foreseeable); *Heigle v. Miller*, 965 S.W.2d 116, 121 (Ark. 1998) (disputed fact whether particular dangers were "hidden"); *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 203-04 (Colo. 1992) (en banc) (disputed factual issue about foreseeability of plaintiff's actions and about industry customs); *DeVecchis v. City of Chi.*, No. 1-08-3047, 2013 WL 6002084, at *12 (Ill. App. Ct. Nov. 7, 2013) (factual dispute whether defendant "controlled" the property); *Nagel v. N. Ind. Pub. Serv. Co.*, 26 N.E.3d 30, 44 (Ind. Ct. App. 2015) (similar); *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976) (sufficient evidence that plaintiff and defendant were in a special relationship after recognizing a duty to affirmatively aid where there is a special relationship); *Mozingo by Thomas v. Pitt Cty. Mem'l Hosp.*, 400 S.E.2d 747, 753 (N.C. Ct. App. 1991) (factual questions about the "appropriate standard of care" for a physician); *Butz v. Werner*, 438 N.W.2d 509, 511 (N.D. 1989) (factual question whether rubber tire was unreasonably dangerous); *Peyer v. Ohio Water Serv. Co.*, 720 N.E.2d. 195, 200-01 (Ohio Ct. App. 1998) (disputed fact whether non-parent had taken "custody" of a child); *see also Ex Parte BASF Constr. Chems., LLC*, 153 So. 3d 793, 804 (Ala. 2013) (holding that there was no duty as a matter of law either under common law or voluntary undertaking without any factual development).

[50] *See* Minn. R. Evid. 201 comm. cmt. 1989 ("agree[ing] with the promulgators of the federal rule of evidence in not limiting judicial notice of legislative facts"); *see also, e.g.*, *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995) ("[W]hile courts may take judicial notice of either legislative or adjudicative facts, only notice of the latter is subject to the strictures of Rule 201."); Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact.").

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position that non-GMO producers have responsibility for avoiding contact with GMOs, Mot. 75 & n.107, its policy view that U.S. grain buyers and elevators (not GM-seed manufacturers) are responsible for mitigating the risk of export-market rejection when a GM trait is approved in the U.S., *id.* at 75-76 & n.109, the observation that one corporation generally lacks the ability to control independent entities in a distribution chain, *id.* at 71-72, and the observation that an outsider in a different line of business is not in the best position to dictate how a grain elevator's facilities should be reorganized to achieve channeling are all in the nature of legislative facts.

C. Plaintiffs Concede That Supposed Industry Standards Do Not Independently Create A Duty.

Plaintiffs concede that industry guidelines, such as the BIO Policy, cannot independently impose a duty on Syngenta. In their words, "[t]he question here is not whether these standards *created* a duty," Opp. 74 (emphasis added)—because they cannot. *See* Mot., Part IV.B.[51]

D. Syngenta Did Not Voluntarily Undertake A Duty As A Matter Of Law.

Nor, contrary to Plaintiffs' claims, can Syngenta's corporate policies and statements in its Deregulation Petition establish that Syngenta voluntarily undertook a duty. *See* Opp. 76.

First, Syngenta's public statements and corporate policies do not constitute undertakings as a matter of law. Plaintiffs point to press statements expressing support for industry guidelines, corporate policies reflecting those guidelines, and a mission statement expressing responsibility to stakeholders. Opp. 75 (citing CC ¶¶ 27-35, 226). But courts have universally refused to find a duty on the basis of such statements. *See, e.g., Ark. Carpenters' Health & Welfare Fund v. Philip Morris Inc.*, 75 F. Supp. 2d 936, 944-45 (E.D. Ark. 1999) ("This Court finds no Arkansas case even remotely suggesting that one can assume the sort of 'special responsibility' plaintiff

[51] *See also, e.g., de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1311 (2d Cir. 2002) (noting that courts decline "to infer legal duties from internal 'house rules' or industry norms that advocate greater vigilance than otherwise required by law"); *Kelley v. Cairns & Bros., Inc.*, 626 N.E.2d 986, 995 (Ohio Ct. App. 1993) (industry customs "are not to be considered a manufacturer's standard of care, unless such standard is imposed by law").

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describes simply by placing advertisements or issuing corporate statements."); *Solis v. Lincoln Elec. Co.*, No. 1:04-CV-17363, 2006 WL 1305068, at *6-7 (N.D. Ohio May 10, 2006) ("corporate statements or advertising," "corporate mission statements," and "internal corporate policies" do not undertake a duty).[52] Plaintiffs offer no response. They have not cited a single case finding a voluntarily undertaken duty based on website statements or corporate policies.

Second, Plaintiffs do not dispute that Syngenta's lawsuit against Bunge and statements in the Deregulation Petition are protected petitioning under the First Amendment and cannot be the basis for liability under *Noerr-Pennington*. Their only argument is that the lawsuit and the Deregulation Petition are nonetheless "admissible" as evidence to establish "purpose, character, a continuing course of concerted conduct, and the effect of such conduct." Opp. 76. Whether or not that is true, it is irrelevant for purposes of this motion. What matters here is that neither can be used *at all* as the basis for liability. That does not mean, as Plaintiffs suggest, that they can be used for liability as long Plaintiffs do not rely on the protected activity "exclusively." *Id.*[53] It does not become open season on constitutionally protected petitioning just because Plaintiffs lump in other bases for a claim. Neither the *Bunge* lawsuit nor the Deregulation Petition can be used as the basis for claiming a voluntary duty or as the source of liability for any other claims.

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[52] *See also Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 848-49 (8th Cir. 2001) (manufacturer's "unilateral public statements" promising to "pursue public health research about the dangers of cigarette smoking" did not create a voluntarily undertaken duty); *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 7699456, at *2 (N.D. Ohio June 4, 2010) (rejecting voluntary-undertaking theory based on "defendant's marketing messages promising to be a leader in the field of welding safety"); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 178 (Iowa 2002) (rejecting argument that manufacturers' "statements that they would report on the results of their research into the health effects of cigarette smoking was an undertaking to render a service to its customers"); *Ky. Laborers Dist. Council Health & Welfare Tr. Fund v. Hill & Knowlton, Inc.*, 24 F. Supp. 2d 755, 774 (W.D. Ky. 1998) ("vaguely promissory statements" and pledges of "resources to assist the scientific and public health communities with tobacco research" did not undertake a duty); *Baryo v. Philip Morris USA, Inc.*, 435 F. Supp. 2d 961, 969-70 (W.D. Mo. 2006) (no undertaking from statements that defendants were forming a research committee "to provide services to the American Public . . . and to smokers and potential smokers in particular").

[53] Plaintiffs' own cases make clear that protected activity may be admissible only when relevant to a claim that is founded on *other*, non-protected conduct. *See FTC v. Cement Inst.*, 333 U.S. 683, 70 (1948) (claims based on anticompetitive agreement among codefendants, not petitioning); *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1128 (10th Cir. 2002) (claim based on "intentional campaign to make entry into the Oklahoma pay phone market more difficult," not on the statements to the agency).

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Third, as Plaintiffs agree, liability for voluntarily undertaken duties is limited to physical harm. Opp. 75; Mot. 87, 92. Plaintiffs' allegations of physical harm, however, turn on vague assertions of "pervasive contamination of the U.S. corn supply, including fields, grain elevators and other facilities of storage and transport." NCC ¶ 236. As the MDL Court recognized, *see* MDL Order 20, such assertions do not even allege physical harm to each Producer's property. *See supra* pp.17-18. And neither the Producers nor the Non-Producers explain how contact with Viptera—which left their corn fully marketable as U.S. fungible corn—caused any *physical* harm to the corn itself. Even under Plaintiffs' allegations, corn commingled with Viptera suffered no apparent "harm" for years. It was only when China embargoed U.S. corn in 2013 that Plaintiffs suffered purely economic losses. *See supra* pp.18-19.

Fourth, Plaintiffs concede that breach of a voluntary undertaking based on nonfeasance is actionable only where there is detrimental reliance, which Plaintiffs have not alleged. *See* Opp. 77. To avoid that rule, Plaintiffs claim that they have alleged "misfeasance" or affirmative conduct increasing the risk of harm. But their supposed examples of misfeasance range from the inexplicable (vague statements "recogniz[ing] Plaintiffs as stakeholders," Opp. 67, are not misconduct) to the facially incorrect (Syngenta's alleged knowledge that "commercialization created a risk of losing the Chinese market," *id.*, is not misfeasance but merely an allegation of foreseeability). Most of their supposed instances of misfeasance amount to nothing more than selling Viptera and Duracade. Trying to cast that as "misfeasance" just returns the debate back to whether Syngenta had a general duty not to sell the products in the first place, and Plaintiffs have not cited a single case from any jurisdiction treating the lawful sale of a safe, non-defective product as misfeasance. The final supposed affirmative act—"*not* [] institut[ing] responsible stewardship or channeling," Opp. 68 (emphasis added)—is even described by Plaintiffs in terms

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of nonfeasance. Plaintiffs cannot contort that absence of action into affirmative misconduct.[54]

Fifth, Plaintiffs have no response at all to the point that any general statements from Syngenta cannot be read as a promise to refrain from selling Viptera absent approval from China because voluntarily undertaken duties must be strictly construed. Mot. 91-92.[55]

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

Plaintiffs concede that they "do not take issue with the MDL Court Order dismissing" identical failure to warn claims in the federal MDL. Opp. 89-90. The MDL Court found that "Plaintiffs have alleged, as a basis for their various claims, Syngenta's failure to warn farmers of risks in growing Viptera, and that claim is reasonably interpreted to include a claim that Syngenta failed to warn purchasers of its products." MDL Order 49. Given Plaintiffs' acquiescence to the analysis in the federal MDL Order on this issue, the Court should dismiss "any claim based on an alleged failure to warn to the extent that such claim is based on a lack of warnings in materials accompanying the products." *Id.*.

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

Plaintiffs concede that they cannot maintain a products-liability claim, which must be dismissed with prejudice. *See infra* Part V. And they do not respond to many of the fatal defects in their strict-liability failure-to-warn claim—defects that are confirmed by Plaintiffs' concession elsewhere in their brief that "[t]hey do *not* allege . . . that Syngenta's instructions or warnings on safe use were inadequate." Opp. 59 (emphasis added).

First, as explained above, Plaintiffs agree that their failure-to-warn claim must be dismissed insofar as it is preempted by FIFRA. *See supra* Part III.

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[54] *See, e.g., Jakubowski v. Alden-Bennett Constr. Co.*, 763 N.E.2d 790, 800 (Ill. App. Ct. 2002) (building a construction site without safety measures cannot be described as misfeasance; instead it amounted to "only acts of nonfeasance, such as allowing or permitting conditions to exist unguarded or unprotected, failing to implement safety measures, failure to institute safeguards, [and] failing to post warnings").

[55] *See also, e.g.*, *Ex Parte BASF Constr. Chems., LLC*, 153 So. 3d at 804 (rejecting the dissent's and plaintiff's argument that the voluntary duty undertaken by a letter should be read broadly).

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Second, Plaintiffs do not dispute that, apart from the ELD, tort law limits strict liability claims to physical harm. *See* Mot. 93-94. Plaintiffs have not adequately alleged physical harm, *see supra* Part I.C, and Plaintiffs do not even argue physical harm in connection with their failure-to-warn claim. Instead, they assert that Syngenta failed to warn of *economic* effects in "the international regulatory market." Opp. 93. According to Plaintiffs, Syngenta owed a duty to warn corn producers and non-producers about the risks inherent in their own businesses of growing and selling harvested corn. Under that view, every GM corn seed manufacturer would have a duty to warn *all* participants in the corn industry and *all* participants in some unknown set of additional markets that might be affected by the price of corn (allegedly including milo and soybean farmers) of the potential economic effects a GM seed might have depending on where it has been approved for import. *See* Mot. 99. That is not the law. Plaintiffs do not cite a *single* case creating a duty to warn of such potential economic consequences from a product.

Third, Plaintiffs' failure-to-warn claim is barred by the component-part doctrine. As Plaintiffs acknowledge, "'a supplier of a raw material should not be held liable when its product is integrated as a component into a finished product if the component itself is not dangerous.'" Opp. 91 (quoting *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 281 (Minn. 2004)). Plaintiffs' only argument in response is to assert that the component parts doctrine does not apply because "Viptera was a singular product, there were no other components[,]" and because "it was not sold to another manufacture[r] to be combined with any products prior to distribution." Opp. 92. Both parts of that argument are incorrect. First, the relevant question is not whether *Viptera* was made up of components, but whether Viptera *became* a component in another product. Second, the answer is that it *did* become a component. The product alleged to have caused Plaintiffs' injuries (commingled corn) was an integrated product of which corn grown from Viptera seed was one part. On that straightforward point, Plaintiffs have no response.

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Fourth, Syngenta did not owe any duty to warn to Plaintiffs. There is no duty to warn of risks "that should be obvious to, or generally known by, foreseeable product users." Restatement (Third) of Torts: Prods. Liab. § 2 cmt. j. Here, Plaintiffs themselves allege that economic risks from Viptera were obvious within the corn industry. The complaint alleges that the entire industry was aware that Syngenta began selling Viptera, that China had not yet approved that trait for import, and that "[i]t was *inevitable* that Viptera corn would move into export channels, including China, and cause trade disruption." CC ¶ 224 (emphasis added); *see* Mot. 99. Likewise, Plaintiffs do not dispute that there is no duty to warn a plaintiff about an inherent part of his own business, and Plaintiffs have no response to the indisputable point that the risk of market changes for the price of corn are inherent parts of the business in growing, harvesting, and selling corn.[56] *See, e.g., Ziglar v. E.I. Du Pont De Nemours & Co.*, 280 S.E. 2d 510, 514-15 (N.C. Ct. App. 1981) (no duty to warn farmer about drinking insecticide because there is no duty "to warn a person who in his occupation or profession regularly uses the product against any risk that should be known to such a regular user").[57]

Courts have repeatedly refused to allow strict-liability claims to proceed against manufacturers for marketing a safe, non-defective product. *See, e.g., Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1269 (5th Cir. 1985) (rejecting "[t]he argument that the manufacturer should become an insurer of all uses of those products, both legitimate and illegitimate, simply by virtue of having marketed them").[58] This Court should do the same.

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[56] Plaintiffs' only authority is irrelevant. Whether or not a turkey farmer should be expected to know the risks in large-scale fumigation projects, *see Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985), has no bearing on the fact that the risks of asynchronous approvals of GM traits are an inherent part of the corn business and are, under Plaintiffs' own allegations, known to all in the industry.

[57] *See also, e.g., Stults v. Int'l Flavors & Fragrances, Inc.*, No. C11-4077-MWB, 2014 WL 3405973, at *9 (N.D. Iowa July 11, 2014) ("[C]ommercial enterprises that use materials in bulk must be regarded as sophisticated users as a matter of law."); *Niles v. Bd. of Regents of Univ. Sys. of Ga.*, 473 S.E. 2d 173, 176 (Ga. Ct. App. 1996) (no duty to warn physics doctoral student about dangerous chemicals).

[58] *See also, e.g., Martin*, 743 F.2d at 1204 (rejecting liability where doing otherwise "would virtually make them

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V. Plaintiffs' Nuisance, Trespass, and Product-Liability Claims Should Be Dismissed With Prejudice.

Based on the MDL Order, Plaintiffs concede that their claims for nuisance and trespass fail and seek to "voluntarily dismiss" those claims as well as their product-liability claims. Opp. 2 n.2. That dismissal must be with prejudice at this stage of the litigation. *See* Minn. R. Civ. P. 41.01(a), 1993 advisory comm. cmt. ("[T]he right to dismiss without prejudice ought to be limited to a fairly short period after commencement of the action when prejudice to opponents is likely to be minimal."). Rule 41.01(a) allows voluntary dismissals "only in the very early stages of litigation, before a defendant has become involved with the case." *County of Anoka v. Petrik*, No. CX-98-574, 1998 WL 531864 at *2 (Minn. Ct. App. Aug. 25, 1998). Here, Syngenta has already briefed a Motion to Dismiss, the process of designating bellwether discovery plaintiffs will soon be completed, and discovery has begun. Syngenta has plainly "become involved with the case." *Id.* Moreover, dismissing with prejudice would not prejudice Plaintiffs, who concede that the federal MDL's "thorough analysis" forecloses these claims on the merits. Opp. 2 n.2.

VI. The Non-Class Plaintiffs' Threadbare Recitation Of The Elements Of Tortious Interference Fails To State A Claim.

Plaintiffs' tortious interference allegations are nothing more than a conclusory recitation of the barest, abstract outlines of the legal elements of the tort. With the exception of Minnesota plaintiffs, their allegations repeat the same formula, asserting that "Plaintiffs had business relationships and a reasonable expectancy of continued relationships with [unspecified] purchasers of corn," NCC ¶ 374, and that Syngenta "caused a[n] [unspecified] disruption of that expectancy," *id.* ¶ 397; *see also id.* ¶¶ 310-18, 494-500, 885-91, 1077-84, 1336-42, 1391-97,

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the insurer for such products as explosives, hazardous chemicals, or dangerous drugs even though such products are not negligently made nor contain any defects"); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1213 (N.D. Tex. 1985) ("If this unconventional and unfounded theory is accepted, then—contrary to one of the basic principles of products liability—handgun manufacturers would become insurers for all injuries resulting from their products.").

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1575-82, 1611-17, 1640-46 Those assertions provide no notice concerning exactly *who* Plaintiffs claim to have expectancies with, *why* they reasonably expect continued business with them, or *how* their expectancies were disrupted. If that were sufficient, *every* complaint could *always* state a claim by resorting to similar conclusory assertions, and a motion to dismiss could serve no useful function testing the sufficiency of the complaint. That is not the law.

A. The Plaintiffs Fail Adequately To Allege Specific Business Expectancies.

As Syngenta has explained, to state a tortious interference claim Plaintiffs must at least identify a "precise business expectancy" that is sufficiently concrete to warrant legal protection. *Country Corner Food and Drug, Inc. v. First State Bank and Trust Co. of Conway, Ark.*, 966 S.W.2d 894, 898 (Ark. 1998); *see also Stonebridge Collection, Inc. v. Carmichael*, 791 F.3d 811, 819 (8th Cir. 2015) (plaintiff must identify a "precise, certain, concrete, or definite business expectancy"). Thus, Plaintiffs "must specifically identify a third party with whom [they had] a reasonable probability of a future economic relationship." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W. 2d 210, 221-22 (Minn. 2014). "Generalized references to third parties simply fail[] to meet the specificity needed for this element." *Gold Sci. Consultants, Inc. v. Cheng*, No. 3:07-CV-152, 2009 WL 1256664, at *10 (E.D. Tenn. May 4, 2009); *see also, e.g., U.S. Bank Nat'l Ass'n v. Parker*, No. 4:09-CV-1755 HEA, 2010 WL 2735661, at *4 (E.D. Mo. July 9, 2010) (allegations of interference with "clients" were "simply too broad and conclusory" to state a claim); *Williams v. Finck & Assoc.*, No. 2:09-CV-63-MLM, 2010 WL 1992242, at *8 (E.D. Mo. May 18, 2010) (plaintiff failed to state claim where he did "not specify the names of employers who allegedly refused to hire him").

Plaintiffs fail to distinguish the cases Syngenta has cited. As an initial matter, Plaintiffs are wrong in claiming that cases at the summary judgment or post-trial stage are irrelevant. Opp. 94-95. In effect, Plaintiffs concede that they eventually must *prove* specific relationships, but

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claim that they need not *plead* such relationships now. That is incorrect. Syngenta's cases define the elements of tortious interference. *See* Mot. 106-07. At the motion to dismiss stage, the complaint must adequately *allege* those elements—including by at least *identifying* specific business expectancies. "[B]ald and conclusory assertions that [plaintiff] had a . . . business expectancy" are insufficient to state a claim. *Hunt v. Riley*, 909 S.W.2d 329, 332 (Ark. 1995).

Plaintiffs' arguments on specific cases are also misplaced. Contrary to Plaintiffs' claims, *Overnite Transp. Co. v. Teamsters Local Union No. 480*, No. M2002-02116-COA-R3-CV, 2004 WL 383313 (Tenn. Ct. App. Feb. 27, 2004), squarely addressed tortious interference with the plaintiff's "business relationships" with employees and others (only a claim concerning plaintiff's *customers* had been abandoned, *see id.* at *12) and held the claim failed where "there are no specific third parties named in the complaint, only general categories of persons." *Id.* at *13; *cf.* Opp. 95 n. 66. Plaintiffs similarly err in suggesting that *Stewart Title Guaranty Co. v. American Abstract & Title Co.*, 215 S.W.3d 596 (Ark. 2005), rejected any requirement that a plaintiff identify a specific business expectancy. Opp. 96 n.68. *Stewart Title* embraced the "well-established legal principle" that a complaint must identify some "precise business expectancy." 215 S.W.3d at 603 (citing *Country Corner*, 966 S.W.2d 894).[59] It thus remains black-letter law in Arkansas (as it is elsewhere) that a plaintiff "must *allege* more than conclusory statements of . . . business expectancies" to state a claim. *Tempur-Pedic Int'l, Inc. v. Waste to Charity, Inc.*, No. 07-2015, 2007 WL 2177142, at *3 (W.D. Ark. July 27, 2007) (emphasis added). Plaintiffs also cannot dismiss *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 552 (Ark. Ct. App. 2011), on the ground that the complaint

[59] Plaintiffs also miss the mark with their series of footnotes asserting that specific cases do not stand for the proposition that plaintiffs must identify specific third parties to state a claim for tortious interference. Opp. 95-96 nn. 63-65, 69-71. Syngenta did not cite those cases for that proposition, but instead for their general statement of the elements of tortious interference. *See* Mot. 105 n.139.

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asserted only a "general desire to be able to do business." Opp. 96 n. 68-69. Plaintiffs' own complaint similarly alleges only a general desire to contract with unspecified "purchasers of corn."

To the extent *Hayes v. N. Hills Gen. Hosp.*, 590 N.W.2d 243 (S.D. 1999), held that a plaintiff need not identify specific parties with whom it claims an expectancy, its analysis was geared to the context of that case—an enterprise "dependent upon a large pool of clientele," specifically, a physician who could not possibly name all of his prospective patients. *Id.* at 250. That analysis has no bearing here, where Producer Plaintiffs have not alleged that they are selling at retail to hundreds of customers whom they cannot predict, but instead are contemplating large contracts for selling their harvest. In any event, *Hayes* has no bearing on the abundant authority from other jurisdictions demanding specific identification of alleged business expectancies.

Finally, even if it were sufficient for Plaintiffs to point to an "identifiable class" of customers with whom they expect continued business, Plaintiffs would still have to allege a basis for thinking that business with the same customers will continue. *See Stonebridge*, 791 F.3d at 891 (claim failed where plaintiff failed to state "how many reorders a customer typically would place" or "whether its relationship with the reordering customers was long-term"). Absent those allegations (which Plaintiffs have not made),[60] Plaintiffs' claims amount to nothing more than a bare assertion that they have had customers in the past and hope to trade with them in the future. That is not sufficient. *See* Mot. 107. *Baptist Health v. Murphy*, 373 S.W.3d 269 (Ark. 2010), only confirms Syngenta's point. That case affirmed a finding of a business expectancy based on "specific findings . . . that there were contractual relationships between the appellee physicians

[60] As noted, *see* Mot. 107 n.142, Minnesota plaintiffs' allegations highlight the deficiency in the rest of the complaint. Minnesota plaintiffs at least allege that their relationships with elevators and exporters were "recorded by contracts, invoices, receipts and other documents *demonstrating a consistent course of sales*" and that they "reasonably expected to continue selling corn *to such customers*." NCC ¶¶ 311-12 (emphasis added).

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and their patients *and that these relationships were long term*." *Id.* at 282-83 (emphasis added).

B. Plaintiffs Fail To Plead The Requisite Injury: Termination Of A Relationship Or Refusal To Enter Into A Business Relationship.

Plaintiffs also misstate the law in arguing that they need not allege that any of the "corn purchasers" with whom they allege an expectancy of a "continued relationshi[p]" actually *ended* the relationship and stopped buying from them. Opp. 97-98. "A defendant faces potential liability for intentional interference with business relationships *only* when the interference causes a third person to *discontinue* a business relationship or to *refrain from entering* into a prospective business relationship." *Brown v. CVS Pharmacy, LLC*, 982 F. Supp. 2d 793, 805 (M.D. Tenn. 2013) (emphases added). For interference with a *prospective* relationship, a plaintiff must allege "that the defendant's actions *prevented the relationship from occurring.*" *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App. 2007) (emphasis in original); *see also* Restatement (Second) of Torts § 766B (requisite interference requires "(a) inducing or otherwise causing a third person *not to enter into* or *continue* the prospective relation or (b) *preventing* the other from *acquiring* or *continuing* the prospective relation") (emphases added); Mot. 108 & n.143 (collecting cases). Plaintiffs' theory—that they continued to sell corn to the same buyers, but at lower prices—fails to state a claim under settled law.

In dismissing the overwhelming authority Syngenta has cited as "uninformative," Opp. 99, Plaintiffs ignore the law. *Brown*, for example, makes clear that a tortious interference claim requires interference that causes another to "discontinue . . . or to refrain from entering into a prospective relationship." 982 F. Supp. 2d at 805 (emphases added). The plaintiff's inability to identify damages in *Brown*, *cf.* Opp. 99, was part and parcel of the fact that she could not point to any discontinued or prevented relationships. Plaintiffs disingenuously assert that *Texas Disposal Systems* turned on failure of proof. Opp. 100. But what the plaintiff failed to prove was that the

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"[defendant's] actions *prevented the contracts from forming.*" 219 S.W.3d at 590 (emphasis added). The court considered precisely the theory that tortious interference might apply "even though the formation of a contract was not prevented," but it rejected that attempt "to *expand* the doctrine of tortious interference." *Id.* at 590 (emphasis added).[61] Plaintiffs' dismissive discussion of other cases noting that they come from States not at issue here effectively concedes that the cases apply the rule Syngenta has described. And Plaintiffs have no response at all to the rule from the Restatement cited above or the statement from other Texas cases explaining that "[m]erely claiming that [a] contract would have been more advantageous to [Plaintiff] in the absence of Defendants' interference . . . does not satisfy the requirement that a business relationship be *prevented.*" *U.S. Enercorp, Ltd. v. SDC Montana Bakken Expl., LLC,* 966 F. Supp. 2d 690, 704 (W.D. Tex. 2013) (emphasis in original).

Plaintiffs not only fail to distinguish Syngenta's authorities; they also fail to cite a single case supporting their theory that interference short of terminating a relationship suffices to state a claim. Plaintiffs' cases all involved either the termination of a relationship (or prevention of a relationship from forming)[62] or circumstances making performance of an *existing contract* more

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[61] Similarly, Plaintiffs' misleading suggestion that *Golf Science Consulting v. Cheng* turned on "insufficient evidence," Opp. 100, fails to acknowledge that the court held there was "insufficient evidence that Defendants' alleged acts caused either [third party] to *breach or break their relationships* with Plaintiff," 2009 WL 1256664, at *11 (emphasis added). *Schoedinger v. United Healthcare of Midwest, Inc.* squarely held that "[f]ailing to allege whether [defendant's] actions caused any identified patient to terminate his/her business relationship with the plaintiffs is fatal to plaintiffs' cause of action," No. 4:07-CV-904-SNLJ, 2011 WL 97735, at *7 (E.D. Mo. Jan. 12, 2011), and the ruling that the claim was actually governed by contract, Opp. 99, was an alternative holding.

[62] *White Sands Grp., L.L.C. v. PRS II, LLC* involved allegations that the claimant lost "*all* investment opportunities," and consequently the entire "business relationship with the Langan entities." 32 So. 3d 5, 17 (Ala. 2009) (emphasis added). In stating that the plaintiff need not show that "but for" the interference it would have secured the contract, the court was merely addressing the level of certainty necessary to establish the expectancy. The court did not suggest that a plaintiff could state a claim for interference even though it had secured the relationship it was seeking. In *Stebbins v. Edwards*, 224 P. 714, 714 (Okla. 1924), the defendants allegedly set out to "ruin" the plaintiff's business by preventing customers from dealing with him *at all* and "making it *impossible* for him to continue in business in Tulsa." *Columbus Med. Servs. Org., LLC v. Liberty Healthcare Corp.*, involved assertions that the plaintiff lost out on a contract entirely and that an existing business relationship "would have *continued uninterrupted*" but for the defendant's conduct. 911 N.E.2d 85, 92 (Ind. Ct. App. 2009) (emphasis added). In *St. Onge Livestock Co. v. Curtis*, 650 N.W.2d 537 (S.D. 2002), the plaintiff asserted tortious interference

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burdensome.[63] In an action for interference with *contract*—where the parties have set precise terms—interference causing a breach that makes the contract less valuable but that falls short of a complete repudiation or termination may state a claim. That principle is irrelevant here, because Plaintiffs have not alleged interference with a contract.

C. The Plaintiffs Fail Adequately To Allege Improper Means.

Whether "improper means" requires independently tortious conduct or is determined by a multi-factor test, Plaintiffs have failed adequately to allege it. At bottom, Plaintiffs are trying to treat the lawful sale of a U.S.-approved product as "improper means." That ignores basic restrictions on the concept of "improper means" that protect the ability of actors in a free market to pursue their own economic advantage—which is exactly what Syngenta was doing when it sold Viptera after obtaining U.S. approvals. *See* Mot. 112 & n.146; *see also* Dobbs § 640 ("The defendant's pursuit of economic gain deserves as much protection as the plaintiff's."); Alex B. Long, *The Business of Law and Tortious Interference*, 36 St. Mary's L.J. 925, 933 (2005) (noting that "*legitimate competition* is typically not considered improper" and "the desirability of encouraging *fair competition* is most frequently cited as the basis for allowing defendants greater

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with its employment contract with a key employee. *See id.* at 542-43. In assessing alleged harm on that claim, the court noted that plaintiff had provided evidence that customers had "eliminated" their business with plaintiff entirely. *See id.* at 543. The court also noted in dicta that, to be liable for tortious interference with a business *expectancy* (a claim not asserted), a defendant must "induc[e] a third person *not to enter into or continue* a business relation with another or . . . *preven[t] a third person from continuing* a business relation with another." *Id.* (emphasis added). *Vowell v. Fairfield Bay Cmty. Club, Inc.*, 58 S.W.3d 324 (Ark. 2001), involved a "strategy to entice [third parties] to *terminate their relationship*" with a club, and the claim was sustained because the defendant "induced 270 Club members to *terminate* their relationship with the Club," which meant that "the Club's expectancy to those dues was also *terminated*." *Id.* at 329 (emphases added). *Carlson v. Roetzel & Andress*, Civ. No. 3:07-cv-33, 2008 WL 873647, at *14 (D.N.D. Mar. 27, 2008), is irrelevant because the court held that tortious interference did not "ha[ve] any application to the facts of this case." *Kantel* stands only for the unremarkable proposition that tortious interference with business expectancy may exist even where the plaintiff did not expect to secure an enforceable contract. *Kantel Commn's, Inc. v. Casey*, 865 S.W.2d 685, 693 (Mo. App. 1993).

[63] *Niemeyer v. U.S. Fid. and Guar. Co.* 789 P.2d 1318, 1321-22 (Okla. 1990), involved alleged interference that caused an insurer to breach a *contract* by paying out less than a full claim. *Wilspec Technologies, Inc. v. DunAn Holding Group, Co.,* 204 P.3d 69 (Okla. 2009), similarly involved an existing contract and merely recognized the action for tortious interference with a contract described in Restatement (Second) of Torts § 766A, which addresses "interfer[ence] with performance of a contract" that causes "performance to be more expensive and burdensome." *Id.* at 69, 72 (quoting Restatement (Second) of Torts § 766A).

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latitude to interfere in the non-contractual relationships of others") (emphases added).

D. Plaintiffs Fail Adequately To Allege Intent.

Plaintiffs claim that they sufficiently allege intent by alleging that Syngenta knew that interference with their expectancies was "substantially certain" to result from Syngenta's conduct. Opp. 103 & n. 78. As explained above, in this context, cognizable interference would consist of corn purchasers terminating their relationships or refusing to do deal with Plaintiffs. *See supra* Part VI.B. Plaintiffs have not plausibly alleged that Syngenta knew that would happen. They do not even claim that sort of interference ever did happen. And even under Plaintiffs' mistaken theory that the "interference" was merely a reduced price for corn, Plaintiffs still fail to plausibly allege that such a price drop was "substantially certain." Myriad factors facially apparent from the complaints or from judicially noticeable sources—such as the volume of U.S. exports to China, Chinese changes in rules for testing for Viptera, and Chinese delays in approving Viptera—are all relevant to determining whether the complaint plausibly alleges that it was "substantially certain" that a whole series of contingent events would align in precisely the right way and produce a supposed drop in the price of corn more than two years after Syngenta decided to sell Viptera. Because the complaint does not plausibly allege that that outcome was "substantially certain," Plaintiff's allegations of intent fail even under their own theory.

VII. Plaintiffs' Consumer Protection Claims Must Be Dismissed.

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

Plaintiffs' Minnesota consumer protection claims fail as a matter of law for three reasons.

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

As a matter of law, MUTPA and MCFA cannot be applied to nonresidents' claims because (1) the statutes do not apply extraterritorially; (2) Minnesota does not have sufficient

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constitutional contacts; and (3) choice of law rules do not point to Minnesota law. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005).

First, Minnesota law "impose[s] a presumption against the extra-territorial application of state law." *Olson v. Push, Inc.*, Civ. No. 14-1163 ADM/JJK, 2014 WL 4097040, at *2 (D. Minn. Aug. 19, 2014). Contrary to Plaintiffs' suggestion, the mere use of the phrase "any person" to describe possible plaintiffs in a statute does not show legislative intent that the statute should apply extraterritorially. *See id.* at *3; MDL Order 99; *cf. Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 328 (S.D.N.Y. 2013) (phrase "any individual" "does not give a clear indication of intent" for extraterritorial application). *Schwartz v. Consol. Freightways Corp.*, 221 N.W.2d 665, 669 (Minn. 1974), is irrelevant as a response to the presumption "against the extra-territorial application of a state's *statutes.*" *Longaker v. Boston Sci. Corp.*, 872 F. Supp. 2d 816, 819 (D. Minn. 2012) (emphasis added). *Schwartz* involved state common law, and even in that context it applied Minnesota law solely to the claims *of a Minnesota resident*.[64]

Second, Plaintiffs' allegations do not establish sufficient contacts for Minnesota law to apply consistent with Due Process. *See supra* pp.4-6. The claim that misrepresentations emanated from Minnesota has no basis in the complaint. Nor can Plaintiffs argue that Syngenta Seeds "directed its fellow-Defendant subsidiaries from Minnesota." Opp. 18-19. The complaint *contradicts* that theory, alleging instead that the Swiss parent was in control. NCC ¶¶ 17-21. That leaves Plaintiffs only with the fact that that one defendant out of six is based in Minnesota, which is not a sufficient constitutional contact. *See* MDL Order 100-01.[65]

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[64] Plaintiffs' other cases are equally unavailing. *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309 (PAM/JGL), 2004 WL 909741, at *5-6 (D. Minn. Apr. 28, 2004), contained no extraterritoriality analysis and involved a single defendant "organized under the laws of Minnesota and . . . headquartered in Minnesota" and allegations that "the genesis of the misrepresentations at issue was [the company's] home office." Thus, the case did not actually involve extraterritoriality at all.

[65] *Accord Murphy v. DirecTV, Inc.*, No. 2:07-cv-06465, 2011 WL 3325891, at *3-4 (C.D. Cal. Feb. 11, 2011).

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Third, Minnesota's choice-of-law rules point to each plaintiff's home state. *See supra* pp.4-6. Contrary to Plaintiffs' assertions, *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015), does not stand for the broad proposition that a "conflict of law analysis is unnecessary." Opp. 105. *Target* used an abbreviated analysis solely because Minnesota's contacts in that case were "legion." The sole defendant (Target) was headquartered in Minnesota, the computer servers that had been breached were in Minnesota, and all relevant decisions related to data security had been made in Minnesota. *In re Target Corp.*, 309 F.R.D. at 486. The one case *Target* cited for its decision to apply Minnesota law expressly held that "a choice-of-law analysis ***is*** necessary" where the law of each plaintiff's home state can be constitutionally applied. *Mooney v. Allianz Life Ins. Co. of N.A.*, 244 F.R.D. 531, 535 (D. Minn. 2007) (emphasis added); *see also Cruz v. Lawson Software, Inc.*, No. 08-5900, 2010 WL 890038, at *7 (D. Minn. Jan. 5, 2010) ("*St. Jude* . . . provides that a Minnesota statute must both be subject to extraterritorial application ***and*** able to be applied under the constitutional analysis ***and*** choice of law test before it can be applied to a nationwide class.") (second emphasis added).

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

Plaintiffs wrongly contend that commercial corn growers do not qualify as "merchants" because they lack some unspecified expertise. Opp. 108-09. "But specialized expertise is not necessary to become a merchant under Minnesota law . . . ." *Klinge v. Gem Shopping Network, Inc.*, No. 12-cv-2392, 2014 WL 7409580 at *3 (D. Minn. Dec. 31, 2014). Rather, the growers are merchants because they "deal[] in goods of the kind" by purchasing corn seed, growing the corn, and selling the corn to grain elevators and other buyers. *Id.*; *see Tisdell v. ValAdCo*, Nos. C0-01-2054 *et al.*, 2002 WL 31368336, at *10 (Minn. Ct. App. Oct. 16, 2002); *Huntting*

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Elevator Co. v. Biwer, No. C9-98-548, 1998 WL 747170, at *2 (Minn. Ct. App. Oct. 27, 1998).[66]

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

Plaintiffs wrongly claim that their action will benefit the public because (1) Syngenta made misrepresentations to the public, (2) Syngenta's conduct affected a large segment of the public, and (3) their action will clarify the duties of seed manufacturers. *See* Opp. 109-110; NCC ¶ 346; CC ¶ 325. First, Plaintiffs "rel[y] on alleged misstatements directed at most to a specific industry," MDL Order 95, and do not allege that these misrepresentations are ongoing, *see Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 11 F. Supp. 3d 933, 937 (D. Minn. 2014) (identifying as a public-benefit factor "whether the alleged misrepresentations are ongoing"). Second, Plaintiffs allege that Syngenta's actions affected "Producers and Non-Producers," NCC ¶ 283, but not the public. Moreover, Plaintiffs fail to explain how the remedy they seek—damages for themselves and fees for their attorneys—will benefit the public. *See Zutz v. Case Corp.*, No. Civ. 02-1776 (PAM/RLE), 2003 WL 22848943, at *4 (D. Minn. Nov. 21, 2003) ("Where recovery is sought for the exclusive benefit of the plaintiff, there is no public benefit."). Third, the "suggestion that a recovery here could help clarify duties for future manufacturers of genetically-modified seeds" is "too remote or theoretical to pass muster." MDL Order 94-95 (quoting *Buetow v. A.L.S. Enters., Inc.*, 888 F. Supp. 2d 956, 962 (D. Minn. 2012)). As the MDL Court recognized, "[P]laintiffs' claims asserted under the Private Attorney General Statute would not serve a public benefit and are therefore subject to dismissal." MDL Order 95.

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

Plaintiffs' concession that they have neither requested injunctive relief nor pled a likelihood of future harm means their MDTPA claim must be dismissed. *See, e.g., Dennis*

[66] Contrary to Plaintiffs' assertions, *see* Opp. 109, Minnesota courts have decided merchant status at the motion-to-dismiss stage. *See, e.g., Pugh v. Westreich*, No. A04-657, 2005 WL 14922, at *3 (Minn. Ct. App. Jan. 4, 2005).

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Simmons, D.D.S., P.A. v. Modern Aero, Inc., 603 N.W.2d 336, 339 (Minn. Ct. App. 1999). The complaint, which alleges solely *past* harm, provides no support for their request that the Court "draw an inference of future harm."[67] *See Damon v. Groteboer*, 937 F. Supp. 2d 1048, 1070 (D. Minn. 2013) ("The [M]DTPA provides relief from future damage, not past damage.").

B. Illinois Consumer Fraud And Deceptive Business Practices Act

Plaintiffs' Opposition confirms that they lack standing to bring an ICFA claim for three reasons. First, Plaintiffs' allegations fail to show any harm to actual consumers, *see Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 868 (7th Cir. 1999), meaning "the ultimate buyers of the finished product." *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004). Plaintiffs' argument that growers qualify as consumers merely because they sell corn in a different market (the "corn market") from the market in which they purchase seed cannot be reconciled with the ICFA's component-part test. *See Williams*, 366 F.3d at 579 (plaintiff not a consumer where "it purchased components . . . not for resale but instead for use in manufacturing its video games"); *Tile Unlimited, Inc. v. Blanke Corp.*, 788 F. Supp. 2d 734, 739 (N.D. Ill. 2011) (tile seller not a consumer of Uni-Mat Pro because it "is an inseparable component of the final tile product"); *CTS Corp. v. Raytheon Co.*, No. 92-c-3878, 1993 WL 157464, at *1-3 (N.D. Ill. May 12, 1993) (seller of oscillators not a consumer of transistors because it "incorporated the . . . transistors into oscillators").[68] A commercial grower of corn does not qualify as a consumer under the ICFA because "his only use of the purchased product [the seed] is as an input into the making of a product that he sells [the corn]." *Williams*, 366 F.3d at 579.

Plaintiffs' and the federal MDL Court's reliance on *Sluis v. Nudelman*, 34 N.E.2d 391

[67] CC ¶ 304 (alleging misrepresentations "*were* likely to cause and/or *did* cause confusion and mistake") (emphases added); *id.* ¶ 321 (alleging Syngenta's actions "*caused* a likelihood of confusion") (emphasis added).

[68] If Plaintiffs' approach were the law, these cases all would have come out differently. The *CTS Corp.* plaintiff, for example, would have been a consumer in the transistor market and a seller in the oscillator market.

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(Ill. 1941), is misplaced because, unlike the ICFA, the statute at issue in that case did not have a component-part test. The court held only that "seeds [are] used or consumed by the farmer" in the growing of a crop. *Id.* at 392. After *Sluis*, the legislature "change[d] the rule of the Sluis case" by adding a component part test to the statute.[69] *People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 898 (Ill. 1953). Under the new version of the statute, which more closely parallels the ICFA test, seeds sold to farmers who then sell their crop are *not* deemed to be used or consumed by the farmer and instead are treated as property transferred for resale.[70] *Lyons*, 115 N.E.2d at 898.

Second, Plaintiffs fail even to argue that their requested relief would serve the interests of consumers. Plaintiffs seek damages on behalf of individual growers and attorneys' fees. NCC ¶¶ 923-34. Because "[n]one of these requests would benefit [consumers] in the least," Plaintiffs "do not have statutory standing to bring this claim." *Prescott v. Argen Corp.*, No. 13-cv-6147, 2014 WL 4638607, at *7 (N.D. Ill. Sept. 17, 2014).

Third, Plaintiffs do not allege that Syngenta's actions were directed at the market generally. *See Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012). The allegation that Syngenta's acts "were directed to all corn farmers generally," NCC ¶ 872(a), is insufficient both (i) because it "is conclusory and clearly does not establish an implication of consumer protection concerns," *Freedom Mortg. Corp. v. Burnham Mortg., Inc.*, 720 F. Supp. 2d 978, 1004 (N.D. Ill. 2010); and (ii) because "all corn farmers" are not the market generally. *See Tile Unlimited, Inc. v. Blanke Corp.*, 788 F. Supp. 2d 734, 740 (N.D. Ill. 2011) (rejecting claim

[69] "The Sluis case was decided on February 14, 1941. The General Assembly was then in session and it amended section 1 of the statute by adding the following provision: 'Sales of tangible personal property, which property as an ingredient or constituent goes into and forms a part of tangible personal property subsequently the subject of a 'sale at retail', are not sales at retail as defined in this Act.'" *Spiegel*, 115 N.E.2d at 898 (citation omitted).

[70] Plaintiffs' criticism of *Spiegel* as a decision in which the court "simply defers to the executive branch on rules promulgated pursuant to statute," Opp. 112, only undercuts Plaintiffs' own reliance on *Sluis*—a case in which the court analyzed an earlier version of the same statute and a rule promulgated under that statute, 34 N.E.2d at 391-92; *see* Opp. 112 ("*Spiegel* was based on the same issue as *Sluis*: the taxability of the sale of seeds.").

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where representations were directed to "tile installers, not to consumers").

C. Nebraska Consumer Protection Act

Plaintiffs do not dispute that Syngenta "comes within the jurisdiction of some regulatory body," *Wrede v. Exch. Bank of Gibbon*, 531 N.W.2d 523, 529-30 (Neb. 1995), and instead rely on the MDL Court's analysis that the NCPA exemption does not apply because "the specific manner in which Syngenta sold its products" was not regulated, Opp. 114-15. But the MDL Court relied entirely on an analysis of *Illinois's* consumer protection law, MDL Order 109-10, which limits its exception to a regulatory authorization that is "specific"—that is, "related to a particular thing." *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 42 (Ill. 2005). The NCPA exemption, on the other hand, requires only that the "actor comes within the jurisdiction of some regulatory body" and that the act "was at least *indirectly approved*." *Wrede v. Exch. Bank of Gibbon*, 531 N.W.2d 523, 529-30 (Neb. 1995) (emphasis added). The USDA not only approved Viptera and Duracade for sale but also "indirectly approved" the manner of sale and use by choosing not to impose requirements such as geographic restrictions or isolation distances.[71] *Wrede*, 531 N.W.2d at 530. The exemption from the NCPA thus applies.

D. North Carolina Unfair And Deceptive Trade Practices Act

As Syngenta has explained, "[w]hen there is no business, competitive, or consumer relationship between two business entities, a business tort" may be brought under the NCUTPA only "where the defendant's actions have a negative effect on the consuming public." *Exclaim Mktg., LLC v. DirecTV, LLC*, ___ F. Supp. 2d ___, 2015 WL 5773586, at *6 (E.D.N.C. Sept. 30, 2015). Plaintiffs' contention that they "bought non-MIR162 seeds to grow corn," Opp. 116, does

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

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not satisfy this requirement because they were not "engaged in a commercial dealing *with defendant*." *Exclaim Mktg.*, 2015 WL 5773586, at *5 (emphasis added); *see Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999).[72]

Nor do Plaintiffs allege any harm to the consuming public. Plaintiffs cite allegations that commercial producers, grain elevators, and exporters suffered harm but fail to provide any explanation as to how these business entities possibly qualify as the consuming public. Opp. 116. Instead, under Plaintiffs' theory of harm, Syngenta's actions produced lower corn prices for "the broader consuming public."[73] *Exclaim Mktg.*, 2015 WL 5773586, at *7 (no harm to consuming public where defendant's actions "had a net positive effect on plaintiff's clients").

Moreover, as the MDL Court correctly recognized, to the extent Plaintiffs' NCUTPA claims are based on misrepresentations, "the claims are subject to dismissal for lack of any allegation of reliance." MDL Order 115; *see Tucker v. Boulevard At Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002). Plaintiffs' response that their "claims are based on more than misrepresentation," Opp. 117, does not save the claims to the extent they *are* based on misrepresentations. *See Tucker*, 564 S.E.2d at 251.

E. North Dakota Unlawful Sales Or Advertising Practices Act

Plaintiffs erroneously contend that statements on Syngenta's website and in a fact sheet qualify as misrepresentations made "in connection with the sale of merchandise."[74] *Benz Farm,*

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[72] Plaintiffs' case indicates only that the relationship does not need to be one of contractual privity. *See* Opp. 116 (citing *J.M. Westall & Co. v. Windswept View of Asheville, Inc.*, 387 S.E.2d 67 (N.C. App. 1990) (parties connected through third party via contract)).

[73] Plaintiffs assert that the Court may not reasonably infer that a drop in the commodity price of corn would yield lower retail prices for consumers. Opp. 113-14, 116-17. But the source they cite supports that exact inference. *See* Opp. 113 n.82 (citing Randy Schnepf, *Farm-to-Food Price Dynamics* 21 (CRS Sept. 27, 2013), available at https://www.fas.org/sgp/crs/misc/R40621.pdf (noting that retail prices "fall back . . . slowly and partially when commodity prices recede")). In any event, whether or not the inference of a consumer *benefit* justified, Plaintiffs have not affirmatively alleged *harm* to the "broader consuming public." *Exclaim Mktg.*, 2015 WL 5773586, at *7.

[74] Plaintiffs do not dispute that statements (1) in the deregulation petition, (2) in the biosafety certificate request form, (3) and made to investors in the earnings call were not made in connection with the sale of merchandise. *See* Opp. 118-19. Claims based on these statements must be dismissed. *See* MDL Order 115-16.

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LLP v. Cavendish Farms, Inc., 803 N.W.2d 818, 825 (N.D. 2011). But the allegations Plaintiffs cite do not assert misrepresentations on the website at all. NCC ¶¶ 38-44. They merely quote the "Corporate Responsibility," "Code of Conduct," and "Bio Product Launch Policy" sections of Syngenta's website without alleging any misrepresentations. *Id.* Even if the complaint did make that allegation, these sections of the website do not advertise Syngenta's products and are not statements made in connection with the sale of merchandise. *Cf. DJ Coleman, Inc. v. Nufarm Americas, Inc.*, 693 F. Supp. 2d 1055, 1077 (D.N.D. 2010) (statement made in connection with sale where the defendant "advertised on its website that [its product] is safe for use"). Similarly, the fact sheet makes no statements in connection with the sale of merchandise because the purpose of that document, on its face, is to help *existing* Viptera farmers *sell* their corn—not to persuade growers to purchase Viptera in the first place.[75]

F. South Dakota Consumer Protection Act

Plaintiffs concede that South Dakota has "required a showing of reliance" under the SDCPA, Opp. 120,[76] and the case they cite expressly held that "a plaintiff must have relied on the alleged misrepresentation" to recover under the SDCPA, *Rainbow Play Sys., Inc. v. Backyard Adventure, Inc.*, No. CIV-06-4166, 2009 WL 3150984, at *7 (D.S.D. Sept. 28, 2009). Because Plaintiffs fail to allege reliance, their SDCPA claims fail. *See Nygaard*, 731 N.W.2d at 198.

G. Texas Deceptive Trade Practices Act

Plaintiffs erroneously contend that they have standing under the TDTPA because they bought corn seeds. Opp. 121. That is incorrect. To have standing, the TDTPA requires that the

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[75] Syngenta, *Plant with Confidence*, http://www.syngenta-us.com/viptera_exports/images/Agrisure-Viptera-Fact-Sheet.pdf (addressing the recipient as "an innovative farmer *experiencing* the advantages of Agrisure Viptera technology," and offering assistance concerning "options for marketing and selling your grain") (emphasis added).

[76] Plaintiffs are mistaken in claiming that *Nygaard* imposes only a general proximate cause requirement. Opp. 119-20. Immediately after explaining that an SDCPA claim requires "a causal connection" the court stated in a footnote that "[b]oth intentional and negligent misrepresentation ***also*** require reliance." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 197 & n.13 (S.D. 2007) (emphasis added).

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plaintiff must have purchased goods or services and "the goods or services purchased . . . must form the basis of the complaint." *AdvoCare Int'l, LP v. Ford*, No. 05-10-00590-CV, 2013 WL 505210, at *2 (Tex. App. Feb. 5, 2013). Plaintiffs' complaint is not based on corn seeds generally, but rather on Syngenta's Viptera and Duracade seeds and the way they were sold. *See* NCC at 2; *id.* ¶ 1656. As a result, by alleging solely that they bought "corn seed" generally—not that they bought Viptera or Duracade seed—Plaintiffs fail to establish that they have standing as consumers for purposes of the claims raised in the complaint. *See AdvoCare*, 2013 WL 505210, at *2 (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981)).

Even if some Plaintiffs may have purchased Viptera or Duracade, moreover, their claims must be dismissed because they have not alleged reliance. The TDTPA requires the plaintiff to show that the alleged misrepresentation was "relied on by a consumer to the consumer's detriment."[77] Tex. Bus. & Com. Code § 17.50(a)(1)(B); *see McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 30 (Tex. App. 2004) (requiring reliance). Plaintiffs' claims fail as a matter of law because they do not allege such reliance. *See, e.g.*, *Bowles v. Mars, Inc.*, No. 4:14-cv-2258, 2015 WL 3629717, at *4 (S.D. Tex. June 10, 2015); *Deburro v. Apple, Inc.*, No. A-13-CA-784-ss, 2013 WL 5917665, at *5 (W.D. Tex. Oct. 31, 2013).

CONCLUSION

For the foregoing reasons, and for the reasons explained in Syngenta's opening brief, the First Amended Non-Class and First Amended Minnesota Class Action Master Complaints for Producers and Non-Producers should be dismissed with prejudice.

[77] This requirement applies to all TDTPA claims based on Tex. Bus. & Com. Code § 17.46 (commonly referred to as "laundry list" TDTPA claims), which are the claims Plaintiffs allege. *See* NCC ¶ 1654.

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Appendix A: Plaintiffs' Cases Applying A General Duty Of Reasonable Care

Every case cited by Plaintiffs applying a general duty of reasonable care is a personal-injury case or a property damage case arising from negligent performance of a construction contract. *See* Opp. 65-66; *see supra* Part II.A.

- *Taylor v. Smith*, 892 So. 2d 887 (Ala. 2004) (car accident).
- *Hill v. Wilson*, 224 S.W.2d 797 (Ark. 1949) (car accident).
- *Greenberg v. Perkins*, 845 P.2d 530 (Colo. 1993) (medical malpractice).
- *Karas v. Strevell*, 884 N.E.2d 122 (Ill. 2008) (hockey injuries).
- *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (car accident).
- *Greenburg v. Cure*, No. 12-2107-EFM, 2013 WL 1767792 (D. Kan. Apr. 24, 2013) (car accident).
- *Shelton v. Ky. Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013) (personal injuries caused by unsafe premises).
- *Knox v. Calcasieu Parish Police Jury*, 900 So. 2d 1128 (La. Ct. App. 2005) (personal injuries caused by unsafe premises).
- *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976) (assault).
- *Doe ex rel. Doe v. Wright Sec. Servs., Inc.*, 950 So. 2d 1076 (Miss. Ct. App. 2007) (sexual assault).
- *Tharp ex rel.Tharp v. Monsees*, 327 S.W.2d 889 (Mo. 1959) (en banc) (personal injuries from burning gasoline).
- *Riggs v. Nickel*, 796 N.W.2d 181 (Neb. 2011) (injuries caused by unsafe premises).
- *Hansen v. Scott*, 645 N.W.2d 223 (N.D. 2002) (murder).
- *Akers v. Levitt*, No. 12471, 1992 WL 10288 (Ohio Ct. App. Jan. 27, 1992) (medical malpractice).
- *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959 (Okla. 2007) (physical injuries from deficient customer service in repairing satellite dish).
- *Dodson v. S. D. Dep't of Human Servs.*, 703 N.W.2d 353 (S.D. 2005) (medical malpractice).
- *Satterfeld v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) (death from asbestos inhalation).
- *Midwest Emp'rs Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770 (Tex. Ct. App. 2009) (injuries caused by football game).
- *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568 (Wis. 2009) (physical injuries from exploding oil tank).
- *Pinnix v. Toomey*, 87 S.E.2d 893 (N.C. 1955) (negligent performance of contract causing damage to school).
- *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158 (Wis. 2002) (death from car accident).
- *Hesse v. McClintic*, 176 P.3d 759 (Colo. 2008) (injuries from car accident).

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Appendix B: Courts' Analysis Of Specific, Not General, Duties

- **Arkansas:** *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995) (rejecting a "common law duty [on] the manufacturer of a nondefective handgun to control the distribution of that product to the general public").

- **Alabama:** *Graham v. Sprout-Waldron & Co.*, 657 So. 2d 868, 875 (Ala. 1995) (manufacturer had "no duty to install catwalks or scaffolding").

- **Colorado:** *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 295 (Colo. Ct. App. 2009) (rejecting "a reviewing engineer's duty to discover and inform bidding parties of problems with a project's design").

- **Illinois:** *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 435 N.E.2d 210, 215 (Ill. Ct. App. 1982) (rejecting a theory of negligence that "rests on a general indefinite duty to exercise due care in the development and construction of [a townhome complex]" because the "it is obvious that the scope of the 'duty' is so broad as to be almost indefinable in limit").

- **Indiana:** *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004) (rejecting a "duty on Cingular to stop selling cellular phones because they might be involved in a car accident").

- **Iowa:** *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009) ("One who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of the independent contractor. Instead of the broad general duty of care . . . , employers of independent contractors owe only [certain] limited dut[ies] . . .").

- **Kansas:** *Calwell v. Hassan*, 925 P.2d 422, 430 (Kan. 1996) (rejecting a duty based on a "special relationship between a medical doctor and patient in an outpatient setting").

- **Kentucky:** *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003) (rejecting a manufacturer's "duty to retrofit a product [that is] not defective when sold").

- **Louisiana:** *Miller v. Nat. Res. Recovery, LLC*, No. 10-537, 2011 WL 3841641, at *8-9 (M.D. La. Aug. 29, 2011) (granting motion to dismiss claim based on "employer duty relative to polygraph examinations").

- **Michigan:** *Halbrook v. Honda Motor Co., Ltd.*, 569 N.W.2d 836, 443 (Mich. Ct. App. 1997) (rejecting "a legal duty on motor vehicle manufacturers to design and market vehicles with limited speed and acceleration capabilities").

- **Minnesota:** *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 965 (D. Minn. 2000) (holding that trade associations do not owe "a duty to the purchasing public unless they have some measure [of] control over their manufacturing members or some direct involvement in the development or marketing the product").

- **Mississippi:** *Royal Beach Hotel, LLC v. Crowley Liner Servs., Inc.*, No. 1:06-129, 2007 WL 1499815, at *5 (S.D. Miss. Mar. 14, 2007) ("The court rejects plaintiffs' view that defendant had a duty to 'ensure' its containers would not wash away.").

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- **Missouri:** *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293, 302–3 (Mo. Ct. App. 2013) (co-employees do not owe a "duty to provide a reasonably safe work environment").

- **Nebraska:** *Packard v. Darveau*, No. 4:11-CV-3199, 2012 WL 6086889, at *5 (D. Neb. Dec. 6 ,2012), *aff'd*, 759 F.3d 897 (8th Cir. 2014) (framing question on motion to dismiss as whether def. "had a duty to control, regulate, direct, guide, or warn of the danger of the traffic at the Intersection where the collision occurred"); *Ashby v. State*, 779 N.W.2d 343, 355 (Neb. 2010) (state had no duty "to ensure that a possible biological father has consented to an adoption or has not claimed paternity before approving a child's placement in a prospective adoptive home").

- **North Carolina:** *Laumann v. Plakakis,*, 351 S.E.2d 765 (N.C. Ct. App. 1987) (holding that business owner did not have a duty to provide a crossing guard, warning signals, or other traffic controls on adjacent city street); *McCollum v. Grove Mfg. Co.*, 293 S.E.2d 632, 636 (N.C. Ct. App. 1982) (manufacturer "has no duty to equip his product with safety devices to protect against defects and dangers that are obvious").

- **North Dakota:** *Hurt v. Freeland*, 589 N.W.2d 551, 559 (N.D. 1999) (rejecting a "duty upon a guest passenger to a person outside the vehicle to exercise any control or give any warning to the driver of the vehicle").

- **Ohio:** *Taylor v. Dixon*, 456 N.E.2d 558, 560 (Ohio Ct. App. 1982) ("occupier of premises is not liable to a business invitee for dangers which the occupier did not know of and could not reasonably have anticipated").

- **Oklahoma:** *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1316 (W.D. Okla. 1996) (manufacturer of explosives had no duty to prevent a terrorist attack).

- **South Dakota:** *Poelstra v. Basin Elec. Power Co-op.*, 545 N.W.2d 823, 826–27 (S.D. 1996) (no duty as a matter of law for a utility company's "failure to mark power lines").

- **Tennessee:** *Grona v. CitiMortgage, Inc.*, No. 3-12-0039, 2012 WL 1108117, at *3 (M.D. Tenn. Apr. 2, 2012) (mortgage lender did not owe a "duty of care with regard to its handling and servicing of her loan").

- **Texas:** *Wall v. Skyline Drive Motel, Inc.*, No. 2-05-079-CV, 2006 WL 1562839 (Tex. Ct. App. June 8, 2006) (holding that motel adjacent to highway did not owe duty to warn passing motorists of danger caused by motel guests entering the highway).

- **North Dakota:** *Tomdra Inv. L.L.C. v. CoStar Realty Info., Inc.*, 735 F. Supp. 2d 528, 534 (N.D. Tex. 2010) (refusing to impose a duty of care on defendant for supplying market data to a third-party appraiser and rejecting the plaintiff's argument that the defendant "has a duty to conduct its business in a reasonable, careful and prudent manner").

- **Wisconsin:** *Hoida, Inc. v. M&I Midstate Bank*, 717 N.W.2d 17, 27, 31-32 (Wis. 2006) (rejecting duty on "a disbursing agent for a construction loan" to "identify all subcontractors and all materialmen" who perform work on the project, "for every disbursement, assess the progress of the construction" and determine whether payment is appropriate, and "collect lien waivers" from them before disbursement).