STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to: ALL ACTIONS

FILE NO. 27-CV-15-3785

ORDER

The above-entitled matter came on for hearing before the Honorable Thomas M. Sipkins, Judge of District Court, on January 8, 2016, pursuant to Defendants' motion to dismiss the First Amended Non-Class and First Amended Minnesota Class Action Master Complaints for Producers and Non-Producers.

Attorneys Lewis A. Remele, Jr., Francisco Guerra, IV, Daniel E. Gustafson, William R. Sieben, Robert Shelquist, and Paul Byrd appeared on behalf of Plaintiffs.

Attorneys Patrick F. Philbin, Edwin J. U, David T. Schultz, D. Scott Aberson, and Patrick Haney, appeared on behalf of Defendants.

Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Defendants' motion to dismiss the First Amended Non-Class Complaint for Producers and Non-Producers is granted in part, and denied in part. Pursuant to Plaintiffs' voluntary dismissal, all claims for trespass and private nuisance, and variations thereof, are dismissed with prejudice. All claims for failure to warn to the extent based on a lack of warnings in

materials accompanying Defendants' products are dismissed with prejudice. The claims for violations of Minnesota's consumer protection statutes are dismissed, with leave to amend. To the extent Plaintiffs' claims for violations of North Dakota's consumer protection statutes are based on the deregulation petition, earnings conference call, or request form, they are dismissed.

2. Defendants' motion to dismiss the First Amended Class Action Master Complaint for Producers and Non-Producers is granted in part and denied in part. Pursuant to Plaintiffs' voluntary dismissal, the claim for strict liability – products liability is dismissed with prejudice. The Class Action claims for violation of the Minnesota consumer protection statutes, negligence, and strict liability – duty to warn are dismissed with leave to amend. Plaintiffs shall have until **May 6, 2016** to file and serve a Second Amended Class Action Complaint.

3. The attached Memorandum of Law is incorporated herein.

BY THE COURT:

Dated: 4-7-2016

Thomas M. Sipkins
Judge of District Court

MEMORANDUM OF LAW

Factual History

The master complaints in these consolidated matters contain the following factual allegations. Plaintiffs are growers ("Producers") and sellers ("Non-Producers"), such as grain elevators and exporters, of corn, soybean, and milo (collectively "Plaintiffs"). There are six companies identified as Defendants (collectively "Syngenta"). Syngenta AG, a corporation organized and existing under the laws of Switzerland, wholly owns, directly or indirectly, the six entities. One of the companies, Syngenta Seeds, Inc., is a Delaware corporation with its principal place of business in Minnesota.[1] Syngenta develops, manufactures, and sells genetically-modified ("GM") corn seeds. At issue is Syngenta's development of two genetic corn seed traits MIR162 and Event 5307, which are intended to make corn crops resistant to insects and pests. Syngenta incorporated MIR162 into its Viptera corn seed and Event 5307 into its Duracade corn seed.

The process of commercialization of GM traits requires approvals from federal agencies, including the United States Department of Agriculture ("USDA"). Syngenta field tested Viptera and Duracade under permits issued by the USDA, including multiple field tests in Minnesota. Syngenta petitioned the USDA in 2007 for deregulation of MIR162 and in 2011 for Event 5307. In the MIR162 petition for deregulation, Syngenta represented that: (1) there should be no effects on U.S. corn export markets; (2) applications for approval in export markets with functioning regulatory systems, including China, were in process; and (3) Syngenta would institute a stewardship program and wide-ranging grower education campaign to channel away from markets

[1] The other Defendants are: Syngenta Corporation, a Delaware corporation with its principal place of business in Delaware; Crop Protection LLC, a Delaware limited liability company with its principal place of business in North Carolina; Syngenta Biotech, a Delaware corporation with its principal place of business in North Carolina; and Crop Protection AG.

that had not approved MIR162, which it said would be successful "based on prior experiences with the specialty maize market." The USDA approved MIR162 for deregulation in April 2010 and Event 5307 in January 2013 without any restrictions on how it could be grown, handled, or sold.

Once a GM trait is deregulated, it may be sold commercially. The Biotechnology Industry Organization ("BIO") first issued a "Product Launch Stewardship Policy" on May 10, 2007, setting forth recommendations for actions companies should take before launching a new GM trait. BIO issued an update of the Policy on December 10, 2009. The BIO Policy recommends that before launching a GM seed, manufacturers assess which countries are key export markets and obtain import approval from those key export markets that have functioning regulatory systems.

Syngenta adopted its own launch policy in 2007, incorporating the BIO Policy provision that import approval from key export markets with functioning regulatory systems should be obtained prior to commercializing a new GM trait. Syngenta also said it supports and will comply with stewardship standards of CropLife International and Excellence Through Stewardship. Syngenta promulgated a "Corporate Responsibility" section on its website identifying "Growers" and the "Industry" as "stakeholders" affected by Syngenta's decision. The section indicates Syngenta is committed to respond to feedback from stakeholders, implement high stewardship standards, prioritize issues important to stakeholders, and institute safeguards.

Plaintiffs allege "Syngenta clearly knew the risks of premature commercialization, and knew that without stringent containment and channeling procedures, MIR162 would contaminate the U.S. corn supply and move to export markets." Syngenta knew this meant significant risk of trade disruption. Plaintiffs claim the importance of obtaining import approval from key markets was well known and recognized within the biotechnology industry and by Syngenta before it commercialized MIR162.

Syngenta commercialized Viptera for the 2011 growing season. Plaintiffs allege Syngenta: (1) misrepresented the measures it would take to prevent Viptera from contaminating other crops; (2) encouraged farmers to plant Viptera side-by-side with other corn and advised that they had no obligation to inform neighbors; and (3) told the USDA and the public that any risk of contamination was low because Syngenta would engage in a legitimate stewardship program, channeling MIR162 away from export markets where MIR162 had not yet received regulatory approval for import. Syngenta did not require growers to adhere to practices to reduce the likelihood of contamination and did not institute channeling measures. During the 2012 and 2013 growing seasons, Syngenta expanded sales of Viptera, increasing the known risk of cross-pollination and commingling within the U.S. corn supply. When it launched Duracade, Syngenta required growers to feed the corn to livestock or poultry or deliver it to those not exporting to China but did not require planting/harvesting protocols. Corn grown by farmers who did not purchase Syngenta's products gradually became contaminated with the MIR162 and Event 5307 traits through cross-pollination. In addition, Viptera and Duracade corn was commingled with other corn in grain elevators and other storage facilities. Eventually, Viptera corn infiltrated the general domestic corn supply.

Syngenta commercialized Viptera and Duracade before those products were approved for import into China. Neither the May 10, 2007 nor the December 10, 2009 Bio Policy lists China as a key import country. But Plaintiffs claim Syngenta knew China was a major, growing export market for U.S. corn. Industry groups such as the North American Export Grain Association ("NAEGA") informed Syngenta of China's importance and Syngenta recognized China as a key market to others, such as the National Grain and Feed Association ("NGFA"). Plaintiffs contend Syngenta commercialized Viptera despite the lack of regulatory approval from China and its knowledge that China was a key export market for U.S. corn.

Syngenta applied for import approval from China in March 2010. According to Plaintiffs, the typical time period for import approval from China at that time was approximately 2-3 years. The approval process could take longer if the application was insufficient, incorrect, or incomplete. Plaintiffs claim Syngenta's request for cultivation approval, which is "more severely restricted," delayed the process.

Plaintiffs allege that Syngenta commercialized Viptera with knowledge that "China would not approve MIR162 until sometime after that trait had entered export channels," creating a "huge risk that the U.S. corn industry could lose one of their large and growing export markets." Plaintiffs allege Syngenta: (1) actively misled Producers and Non-Producers about the importance of the Chinese market and the imminence of Chinese approval in order to encourage sales and the spread of MIR162; (2) misrepresented to the USDA and to the public that deregulation would have no impact on the export market; (3) told the USDA and the public that its filings in China were in process when they were not; and (4) crafted a plan to mislead Producers and Non-Producers into believing that Chinese approval of MIR162 was forthcoming and continued its deception regarding the status of Chinese approval throughout 2012.

After the launch of Viptera, Plaintiffs contend Syngenta made misrepresentations that Chinese approval of MIR162 was forthcoming. On August 17, 2011, Syngenta sent letters to growers and non-producers stating that Syngenta anticipated Chinese approval by March 2012. Syngenta's CEO stated in April 2012 that approval by China was expected "in the matter of a couple of days." Syngenta instructed its employees to verbally tell potential customers that Syngenta anticipated approval soon. Syngenta published and disseminated a Bio-Safety Certificate Request Form and a Plant with Confidence Fact Sheet. Plaintiffs claim these documents deceptively indicate that Viptera corn could be exported to China and downplayed China's

importance to the market. Syngenta developed a "Top 10" list as part of a sales program designed to neutralize concerns about Chinese approval. The program "provide[d] regular updates 'on progress and plans for China trait approval and to drive trait acceptance.'"

In November 2013, China began rejecting all corn from the United States containing the MIR162 trait. China eventually approved the import of such corn in December 2014. Plaintiffs claim that Syngenta's launch of Duracade during the period China was not accepting U.S. corn prolonged the harm. The loss of the Chinese market for that period caused prices in the United States to decrease. Plaintiffs allege Syngenta's actions "cause[d] physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land." They also allege Syngenta's conduct caused significant economic harm. Plaintiffs claim they have been harmed by lower prices for corn and that the harm is likely to last in part because U.S. corn exports to China have not begun to recover.

Procedural History

Thousands of lawsuits based on these allegations have been filed against Syngenta in various federal and state courts.[2] Approximately 800 federal cases are pending in a multidistrict litigation ("MDL") proceeding in the United States District Court for the District of Kansas, captioned *In re Syngenta AG MIR162 Corn Litigation*, MDL Docket No. 2591, before U.S. District Judge John W. Lungstrum and U.S. Magistrate Judge James P. O'Hara ("MDL Court"). Lead counsel in the MDL seek to certify a national class action which would include virtually every corn farmer in America. On June 1, 2015, the MDL Court remanded a substantial number of cases from the MDL to state courts based on his determination that Syngenta's invocation of the federal common law of foreign relations in removing those cases did not create a basis for federal jurisdiction.

[2] Cargill, Inc., Archer Daniels Midland Company, and other exporters have pending lawsuits in Louisiana state courts against Syngenta.

More recently, three additional federal actions, involving more than 2,800 plaintiffs, were filed in the United States District Court for the Southern District of Illinois before U.S. District Judge David R. Herndon. In addition, about 200 cases are pending in the Illinois First Judicial Circuit Court before Judge Brad K. Bleyer.

Some of the lawsuits were filed in district courts throughout the State of Minnesota. In an Order dated May 22, 2015, the Minnesota Supreme Court transferred venue of all cases filed or pending in a Minnesota state district court other than Hennepin County against Syngenta involving this subject matter to Hennepin County. The Court then appointed the undersigned to hear and decide all matters, including pretrial and trial proceedings pursuant to Minn. Gen. R. Prac. 113.03 and Minn. Stat. §§ 2.724, 480.16 (2014). The cases remanded from the MDL, along with other cases remanded by stipulation or subsequently filed directly with this Court have been consolidated into the present action. This matter currently includes approximately 2,375 cases involving over 20,000 Plaintiffs.

On August 21, 2015, Syngenta moved to dismiss the three master complaints in the MDL. In an Order dated September 11, 2015 ("MDL Dismissal Order"), the MDL Court granted in part and denied in part Syngenta's motion. Specifically, the MDL Court dismissed: (1) all claims based on an alleged failure to warn to the extent based on a lack of warnings in materials accompanying the products; (2) for claims under all states' laws except Louisiana, the corn producer and non-producer plaintiffs' trespass to chattels claims; (3) the corn producers' claims for private nuisance; (4) plaintiffs' claims under the Minnesota consumer protection statutes; (5) corn producer plaintiffs' class claims for violations of Colorado's consumer protections statutes; (6) corn producer plaintiffs' claims for violations of North Carolina's consumer protection statutes to the extent based on misrepresentations; and (7) corn producer

plaintiffs' claims for violations of North Dakota's consumer protection statutes to the extent based on representations in the deregulation petition, earnings conference call, or request form. The Court granted Plaintiffs leave to file amended complaints to cure certain of the deficiencies.

This Court appointed lead and liaison Plaintiffs' counsel in this matter, who filed a First Amended Master Complaint for Producers and Non-Producers ("Non-Class Complaint") and a First Amended Minnesota Class Action Master Complaint for Producers and Non-Producers ("Class Action Complaint"). It is unclear from the Non-Class Complaint, but it appears that the litigation includes both Producers that used and did not use Viptera and Duracade. Plaintiffs assert the following claims in the Non-Class Complaint: negligence, trespass to chattels, tortious interference, private nuisance, violation of Minnesota consumer protection statutes, strict liability based on failure to instruct or warn and various state-law claims on behalf of the Plaintiffs residing in 22 different states, including claims for negligence and some combination of claims for trespass to chattels, private nuisance, tortious interference, and statutory consumer protection violations for those states with such statutes. The 22 states at issue are: Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.[3] In response to the current motion, Plaintiffs voluntarily dismissed all claims, and variations thereof, for nuisance and trespass to chattels from the Non-Class Complaint.

The Class Action Complaint is brought on behalf of a proposed class consisting of only Minnesota Producers and Non-Producers. The four proposed class Plaintiffs did not buy corn seed

[3] It appears Notices to Conform to the Master Complaint have been filed by at least one Plaintiff from each of the 22 states. For claims under the law of any State other than Minnesota to survive, there must be a plaintiff from that State to assert those claims. Non-residents of a State lack standing to bring claims under the laws of that State. *See generally Snyder's Drug Store, Inc. v. Minnesota State Bd. of Pharm.*, 221 N.W.2d 162, 165 (Minn. 1974). In the event Notices to Conform are not filed by at least one Plaintiff in each of the 22 states, claims under the laws of any State lacking a plaintiff will be dismissed without prejudice.

with MIR162. The one proposed Class Plaintiff Non-Producer "operates a grain elevator at which it bought, stored, and sold grain, including corn." The Class Action Complaint asserts causes of action for violation of Minnesota's consumer protection statutes, negligence, strict liability – products liability, and strict liability – failure to instruct and/or warn. In response to this motion, Class Action Plaintiffs voluntarily dismissed the claim for strict liability – products liability.

Legal Analysis

I. Legal Standard

Syngenta moves the Court to dismiss the Non-Class Complaint and Class Action Complaint. A motion to dismiss may be granted for failure to state a claim upon which relief may be granted. Minn. R. Civ. P. 12.02(e). The court must determine whether the complaint sets forth a legally sufficient claim for relief. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 831-32 (Minn. 2004). "Such a motion to dismiss will be granted only if it appears to a certainty from the pleadings as a whole that no facts exist which could be introduced consistent with the pleadings to support granting the relief demanded." *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 27 (Minn. 1963). "It is immaterial whether or not the plaintiff can prove the facts alleged." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). The plaintiff, however, must provide more than labels and conclusions to show entitlement to relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). The court is not bound by legal conclusions stated in the complaint. *Id.*

In assessing such a motion, the Court accepts the facts alleged in the complaint as true, and makes all reasonable inferences in favor of the nonmoving party. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Matters outside the pleadings must be excluded. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). If matters outside the pleadings are

considered, the motion shall be treated as one for summary judgment and the parties given reasonable opportunity to present all relevant material. Minn. R. Civ. P. 12.03. However, the Court may consider documents referenced in a complaint or otherwise central to the claims without converting the motion to dismiss into a motion for summary judgment. *Northern States Power Co. v. Minnesota Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004).

In Minnesota, a complaint need only contain a short and plain statement showing an entitlement to relief. Minn. R. Civ. P. 8.01; *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601 (Minn. 2014). In *Walsh*, the Minnesota Supreme Court rejected application of the federal plausibility standard established in *Iqbal* and *Twombly* to civil pleadings in Minnesota state court. *Walsh*, 851 N.W.2d at 603. "'[T]here is no justification for dismissing a complaint for insufficiency ... unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.'" *First Nat'l Bank of Henning v. Olson*, 246 Minn. 28, 38, 74 N.W.2d 123, 129 (1955) (quoting *Dennis v. Village of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)).

> A claim is sufficient against a motion to dismiss ... if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.

Northern States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963) (citations omitted). *Walsh* makes clear that, "a claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d at 603.

In the MDL Dismissal Order, the MDL Court applied the stricter pleading standards of *Twombly* and *Iqbal* to Syngenta's motion to dismiss and permitted Plaintiffs, at this early stage, to

proceed on many of their claims. Syngenta asks this Court, in sum and substance, to act as a United States Court of Appeals, on an interlocutory appellate basis, from the MDL Court's decision. The Court declines to do so in most respects. It is true that the MDL Court's rulings have no precedential effect on this Court but the Court finds the legal analysis thorough and well-reasoned. For the reasons outlined herein and based upon the State of Minnesota's application of Minn. R. Civ. P. 8.01, Syngenta's motion is granted with respect to:

- All claims in the Non-Class Complaint for the failure to warn to the extent they involve a lack of warnings in materials accompanying Syngenta's products;
- Claims in the Non-Class Complaint for violation of Minnesota's consumer protection statutes, with leave to amend;
- All claims in the Non-Class Complaint for violations of North Dakota's consumer protection statutes that are based on the deregulation petition, earnings conference call, or request form;
- The claim in the Class Action for violation of Minnesota's consumer protection statutes, with leave to amend;
- Count II of the Class Action Complaint for negligence, with leave to amend; and
- Count IV of the Class Action Complaint for strict liability – failure to warn, with leave to amend.

The motion is denied in all other respects.

II. Choice of Law

In the MDL Dismissal Order, the MDL Court agreed with the parties that each Plaintiff's state law claims are governed by the Plaintiff's state of residence. Syngenta similarly argues that this Court may not apply Minnesota substantive law to the claims of non-resident Plaintiffs. In this

case, however, Plaintiffs urge this Court to apply Minnesota substantive law to all common law claims of Non-Class Plaintiffs, regardless of their location.[4] As discussed herein, the substantive law of each Plaintiff's home state applies to the Plaintiffs' common law claims.

A. Conflict of Laws

In analyzing the choice of law issue, the Court must first consider whether the choice of one state's law over another's creates an actual conflict. *Jepson v. General Cas. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). A choice between laws is required where "the choice of one forum's law over the other will determine the outcome of the case." *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 93-94 (Minn. 2000). There is no choice of law issue with respect to the Class Action Complaint, in which Plaintiffs propose a class of Plaintiffs located entirely within Minnesota and have thus stated claims only under Minnesota law. With respect to the Non-Class Complaint, conflicts of law such as the application of the economic loss doctrine have been identified.

B. Constitutionality

Application of the forum state's law to a nonresident's claim must be constitutional. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). "When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). Here, Syngenta conducted field tests of Viptera in Minnesota. One of the Syngenta Defendants has its principal place of business in Minnesota. While this is only one of the six Defendants, it appears to

[4] Plaintiffs also move the Court to apply Minnesota's consumer protection laws to all Plaintiffs. The Court addresses this argument in Section VIII.A.1, *supra*.

be an entity with control over Syngenta's seed business. Plaintiffs have alleged Syngenta had operations in, made misrepresentations from, and directed other Syngenta entities from Minnesota. These contacts are sufficiently significant to pass constitutional muster.

As a Minnesota corporation, Syngenta cannot claim surprise by the application of Minnesota law to conduct emanating from Minnesota, since Minnesota has a "substantial interest in preventing the corporate form from being a shield for unfair business dealing." *See Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987)). It is fair that Syngenta would expect Minnesota law to apply to its actions since it does business in Minnesota. It is also reasonable for a non-resident Plaintiff to expect either the law of its home state, where it grew, stored, or shipped corn and sustained economic harm, or the law of Minnesota, where Syngenta operated and made misrepresentations. The choice of Minnesota law in this case is neither arbitrary nor fundamentally unfair. Therefore, the Due Process and Full Faith and Credit Clauses do not preclude the application of Minnesota law to non-residents' claims.

C. Choice of Law

While the contacts with Minnesota are sufficient to constitutionally apply Minnesota law, the Court must next weigh the following factors to determine if the application is appropriate. If there is an outcome-determinative conflict and the law of either forum may be constitutionally applied, Minnesota looks to five factors to determine which State's law applies: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.*; *see also Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004). When analyzing choice-of-law questions that involve torts, the Minnesota Supreme Court has stressed that only the last two

choice-influencing factors, advancement of the forum's governmental interests and application of the better rule of law, are relevant. *H Enter. Int'l. v. General Elec. Capital Corp.*, 833 F. Supp. 1405, 1416 (D. Minn. 1993) (citing *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408, 412 (1973)).

1. Predictability of Results

The first factor "addresses whether the choice of law was predictable before the time of the transaction or event giving rise to the cause of action." *Danielson v. National Supply Co.*, 670 N.W.2d 1, 7 (Minn. Ct. App. 2003). This factor applies "primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001). Predictability of results has little bearing on a tort case. *See Reed v. University of N. Dakota*, 543 N.W.2d 106, 108 (Minn. Ct. App. 1996). As noted above, it is reasonable for non-resident Plaintiffs and Syngenta to expect the law of Minnesota to apply but it is equally reasonable to assume the law of the state where the injury occurs to apply to the common law claims. *See, e.g., Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985) (for tort claims, Kansas applies law of state where Plaintiff suffered injury); *Boudreau v. Baughman*, 368 S.E.2d 849, 854 (N.C. 1988) (under North Carolina choice-of-law rules, law of place of injury govern tort claims). This factor does not weigh in favor of Minnesota law or the home state law.

2. Maintenance of Interstate Order

For this factor, the Court is "primarily concerned with whether the application of Minnesota law would manifest disrespect for [other states'] sovereignty or impede the interstate movement of people or goods." *Jepson*, 513 N.W.2d at 471. This factor "is generally satisfied as long as the state whose laws are purportedly in conflict has sufficient contacts with and interest in the facts and

issues being litigated." *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238, 242 (1974). As discussed above, Plaintiffs have sufficiently pleaded significant contacts with Minnesota. Application of Minnesota law would not manifest disrespect for the sovereignty of any other state.

3. Simplification of the Judicial Task

The third factor is not particularly significant here because no single state's law is more difficult to apply than the law of another state. *See Jepson*, 513 N.W.2d at 472.

4. Governmental Interest

Under this factor, the Court must weigh each state's governmental interest. *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 95 (Minn. 2000). As noted above, Minnesota has an interest in policing its corporations. However, each state presumably has an interest in providing a forum for their injured residents. The Court cannot say that Minnesota has a greater interest than the states with injured Plaintiffs.

5. Better Rule of Law

Courts generally have not emphasized the fifth factor. *Nodak*, 604 N.W.2d at 96. Plaintiffs have not identified any common law claim where Minnesota has a better rule of law than one of the other states.

For all of these reasons, the Court concludes that as a whole, the five factors weigh in favor of applying the law of each Plaintiff's state of residence to their common law claims.

III. Economic Loss Doctrine

Syngenta argues the economic loss doctrine ("ELD") bars the Non-Class Complaint's and Class Action Complaint's negligence claims and strict liability – failure to warn claims. The economic loss doctrine ("ELD") generally bars recovery of purely economic losses in certain tort

cases if there is no personal injury or physical damage to property. purely economic in negligence and strict liability when the plaintiff has suffered only economic loss. *See, e.g., Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011); *In re Chi. Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997); Dan B. Dobbs, et al., *The Law of Torts* § 611 (2d ed. 2011). Syngenta made the same argument in the MDL motion to dismiss. The MDL Court rejected the application of the ELD to bar Plaintiffs' claims in a very thorough and comprehensive analysis. With a few exceptions as discussed, none of Syngenta's arguments in this motion persuade this Court to vary from the MDL Court's analysis.

A. Physical Harm

Plaintiffs argue that they have sufficiently alleged such physical harm to their property here, including contamination of their corn and harm to their equipment and storage facilities, and that such allegations of physical harm place their claims beyond the reach of the ELD. The ELD does not bar the recovery of economic damages derived from physical harm to a plaintiff or its property resulting from negligence. *See, e.g., Ashtabula River Corp. Group II v. Conrail Inc.*, 549 F. Supp. 2d 981, 988 (N.D. Ohio 2008). However, the coupling of property damage with economic damages alone does not allow for recovery of economic damage in tort because the economic damage must arise from the property damage. *See, e.g., Queen City Terminals, Inc. v. General Am. Transp. Corp.*, 653 N.E.2d 661, 668 (Ohio 1995). The MDL Court found that some but not all Plaintiffs suffered contamination and that such contamination caused harm to all sellers in the market. The MDL Court determined that Plaintiffs had not alleged facts to support a claim that all Plaintiffs suffered contamination of their corn and that the contamination of some Plaintiffs' corn cannot be said to have caused the economic damages alleged because the sellers suffered the same injury whether or not their corn was contaminated. The Court

concluded that Plaintiffs' allegations of physical harm thus did not prevent application of the ELD.

Plaintiffs urge this Court to reach a different conclusion based on Minnesota's notice-pleading standard. *See* Section I, *infra*. Plaintiffs allege that "Syngenta's acts and omissions have resulted in, and will continue to result in, the pervasive contamination of the U.S. corn supply, including fields, grain elevators and other facilities of storage and transport, causing physical harm to Producers' and Non-Producers' corn, equipment, storage facilities, and land." (Non-Class Complaint ¶ 236.) The Court agrees that under the pleading standards established in *Walsh*, Plaintiffs have sufficiently pleaded property damage. In addition, the Non-Class Complaint sufficiently alleges that the Plaintiffs' economic harm arose from the property damage. In light of the pleading standards established in *Walsh*, Plaintiffs' allegations of physical harm are sufficient to prohibit the application of the ELD. The Court, however, will address further arguments in the ELD analysis.

B. Scope

The doctrine is not absolute and is subject to exceptions. *See* Dobbs, §§ 611, 645. The ELD does not apply to all tort claims but is limited to negligence and strict liability. *Id.* The ELD does not bar claims for intentional torts, such as fraud. *Id.* at § 606. It also does not bar claims for negligent misrepresentation. *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 843 N.E.2d 327, 338-39 (Ill. 2006); *Van Sickle Constr. Co. v. Wachovia Comm. Mort., Inc.*, 783 N.W.2d 684, 690-91 (Iowa 2010). This exception allows recovery for economic loss where a service provider has been negligent in providing information or a service that is intended to be relied upon by third parties. *Id.* While Plaintiffs have not asserted a claim for fraud, they have alleged misrepresentations made by Syngenta in their claim for negligence.

C. Stranger ELD Application

Syngenta argues that the Court should apply the "stranger" ELD ("SELD") in this case to those Plaintiffs that had no contractual or direct relationship to Syngenta. Syngenta contends that the SELD is the majority rule and Plaintiffs argue it is a minority rule with limited application. Three states, none of them at issue here, have expressly rejected SELD. *See, e.g., Aguilar v. RP MRP Washington Harbour, LLC*, 98 A.3d 979, 982 (D.C. 2014) (defendants urged the court to follow the ELD adopted in a majority of decisions); *Aikens v. Debow*, 541 S.E.2d 576, 583, 588 (W. Va. 2000) (noting that other jurisdictions "almost without exception" have applied the ELD and declining to follow the alternative "minority" view); *see also* Dobbs § 646 (SELD is the "general" rule in stranger cases, "[a] little authority" has rejected the rule). Seven of the 22 states at issue have arguably applied ELD in certain cases. The MDL Court rejected Plaintiffs' claim the SELD is a minority rule but determined that the SELD is not as widely adopted as Syngenta claims. This Court agrees. A review of the cases indicates the SELD has been applied primarily in three types of cases: (1) lack-of-access / public nuisance; (2) chain-of-contract; and (3) injured employees.

Lack-of-access cases involve situations where a negligent actor damages a public infrastructure or a public resource. *See, e.g., Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 125 (Iowa 1984); *Barber Lines*, 764 F.2d at 50-51; *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020-21 (5th Cir. 1985). In these cases, the public is typically denied access to the infrastructure or resource that was damaged. In lack-of-access cases, a concern is that any member of the public could potentially assert a claim for economic loss, leading to remote and indeterminate liability that would be far out of proportion to the tortfeasor's culpability. *See, e.g., In re Chicago Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997). This is not a situation where a member of the public could assert a claim for economic loss against Syngenta for damage to the U.S. corn

supply and market. This matter does not involve a lack-of-access case that would lead to remote and indeterminate liability.

Chain-of-contract cases usually involve parties that did not directly contract with each other but are only one step removed from each other in a "chain" of contracts. *See, e.g., Annett Holdings, Inc. v. Kum & Go, L.C.,* 801 N.W.2d 499 , 504-05 (Iowa 2011) (discussing examples of chain of contracts cases)*; Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927); *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 980 (D.C. 2014). Recognition of the SELD in these cases reflects the purpose of limiting recovery for economic losses, especially by commercial plaintiffs, in situations where the plaintiffs are able to insure and negotiate liability provisions through contract. *See Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.*, 272 F. Supp. 2d 482, 499 (E.D. Pa. 2003); *Barber Lines*, 764 F.2d at 54. Syngenta's argument that Plaintiff Producers could have contracted with grain elevators to prevent the risk of commingling is unconvincing. As alleged, Syngenta adopted and issued stewardship policies but failed to implement the policies and misrepresented the need for such measures. This matter is distinguishable from the chain-of-contract cases because it involves a highly interconnected market where Syngenta treated the Plaintiffs as "stakeholders."

The SELD has also applied in cases where employers bring a claim against a third-party tortfeasor who injured one of the employer's employees. *See, e.g., Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005); *Anderson Plasterers v. Meinecke*, 543 N.W.2d 612, 613 (Iowa 1996). This matter does not involve an employer's loss of business due to the loss of an employee's work. These cases are not instructive in this matter where Plaintiffs are alleging economic loss from Syngenta's allegedly negligent commercialization of a GM trait.

Plaintiffs argue that it is well settled that the SELD does not apply to negligence claims brought by farmers against GM seed companies. Three cases involving negligence claims against

manufacturers of GM traits have declined to apply the ELD. *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 842 (N.D. Ill. 2002); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 833 (Ark. 2011); *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1017 (E.D. Mo. 2009). While involving similar type claims and parties, there is a significant distinguishing factor between those three cases and this matter. In those three cases, the product at issue was either defective or restricted. Here, neither Viptera nor Duracade have been found defective or subject to restrictions in its distribution or use in the United States. This matter is thus, not automatically removed from the application of SELD based on this caselaw.

There are two cases involving non-defective and non-restricted GM traits where the courts applied the ELD to prohibit claims. The case of *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088 (E.D. Mo. 2003) involved claims that a GM trait approved in the U.S. contaminated the crop supply when rejected in Europe. The plaintiffs alleged that "non-GM farmers lost revenue because the European community rejected Monsanto's genetically modified products and boycotted all American corn and soy as a result." *Id.* at 1091. The court held the ELD precluded recovery under Illinois and Iowa law because the farmers were not alleging contamination or injury to their property. *Id.* at 1093. The *Sample* case was decided at the summary judgment stage not on a Rule 12 motion. According to the court, in the class certification hearing in that case, plaintiffs abandoned allegations relating to contamination or commingling; and the court found no evidence of physical injury to the person or property of the plaintiffs or any proposed class member. *See id.* at 1091-93. At this stage of this litigation, the Non-Class Plaintiffs have not abandoned those allegations. Indeed, they are part and parcel of their theory as pleaded.

In *Hoffman*, the plaintiffs claimed that GM canola had cross-pollinated with their non-GM crops, which they had hoped to sell at a higher price as an organic crop. *See Hoffman v. Monsanto*

Canada Inc., 2005 SK. C. LEXIS 330 (Sask. Q.B. May 11, 2005), *aff'd*, 2007 SK. C. LEXIS 194 (Sask. Ct. App. May 2, 2007). The Canadian court barred plaintiffs recovery of economic harm, finding there was no physical harm to the plaintiffs' crop because the GM canola had been approved for human consumption. Although the Court finds the Saskatchewan court's decision to be well-reasoned, it has no precedential impact on this Court. And, at least at this stage of the proceeding, the Court declines to follow its conclusion. *See* additional discussion, *infra*, on Duty in Section IV.

In accordance with the review of this caselaw and the MDL Dismissal Order, application of the SELD under the circumstances of this case would not serve the doctrine's underlying purposes. As noted above, the individual Producer Plaintiffs did not have the ability to avoid the alleged financial harm through the use of contract. The argument could be made that based on the allegations in the complaints, Syngenta was in the best position to insure against the economic losses by implementing stewardship practices such as securing import approval from key export markets and requiring channeling measures. Unlike other manufacturer and purchaser situations, this case involves an interconnected market.

In addition, the SELD is not needed to avoid remote and indeterminate liability in this matter. While the Court appreciates Syngenta's claim of a ripple effect leading to possible claims by farm implement manufacturers and others with no end; that does not appear to be the case. The scope of liability is not completely open-ended because the claims involve a discrete class of growers and sellers in an interconnected market. Syngenta had the ability to foresee the possible group of Plaintiffs by identifying the stakeholders involved in the commercialization of its GM seed. Thus, the possible injuries and damages are not unlimited or too speculative. In addition, because the economic losses were foreseeable, liability is not too remote or open-ended. Finally, the allegations in this matter involve wrongful conduct rather than an accident. For these reasons,

the purpose of the SELD is not furthered by application in this case.

Syngenta argues that the MDL Court erred and adopted the "minority rule" by examining the rational for the rule on a case-by-case basis rather than following the "majority rule" that requires the ELD to be applied as a bright line rule. Syngenta's argument is unpersuasive. The ELD provides only a general principle that is subject to many exceptions. *See Barber Lines,* 764 F.2d at 55-56. The MDL Court exercised the common jurisprudence practice of thoroughly examining the purpose, rational, and application of a doctrine of law.

Syngenta, citing footnote 10 of the MDL Dismissal Order, further argues that the MDL Court recognized a new exception to the SELD in error because the exception is different in kind than other recognized exceptions. This case is similar to cases where a special relationship between the parties precludes application of the SELD. *See Aikens v. Debow*, 541 S.E.2d 576, 589 (W. Va. 2000) (defining the ELD as precluding recovery in the absent some "other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor"); *Union Oil Co. v. Oppen*, 501 F.2d 558, 565 (9th Cir. 1974). The "special relationship" cases are not confined to professional services. *See e.g., Duffin v. Idaho Crop Improvement Ass'n*, 895 P.2d 1195, 1201 (Idaho 1995). The recognition that the parties in this matter were in an interconnected market with foreseeable injuries is in accordance with the exception for special relationships.

The MDL Court concluded that unless a particular state's law requires application of the SELD to bar plaintiffs' claims, the Court would predict, that the relevant states would not bar the plaintiffs' claims under the SELD. When predicting the law of another state, a court's "duty is to conscientiously ascertain and apply state law, not to formulate new law based on our own notions of

what is the better rule." *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 612 (8th Cir. 2009). The Court then reviewed the law of each of the 22 relevant states. The MDL Court held that states that have not adopted the SELD would not adopt it in this case. In the states that have applied the SELD in some situations, the MDL Court predicted that they would not do so in these circumstances. This Court has reviewed the caselaw, examination by the MDL Court, and the parties' arguments regarding each of the 22 states. This Court concurs with the MDL's analysis and conclusion that none of the 22 states would adopt the SELD to prohibit Plaintiffs' recovery under these circumstances. The Court adopts the analysis and discussion of the MDL Dismissal Order on pages 25 to 46 and incorporates it herein.

D. Non-Producer Claims

Syngenta argues that the Non-Producer Plaintiffs' claims are barred by either the SELD or the contractual ELD, depending on whether their claim is based on injury by the general presence of Viptera in the corn supply or because corn they purchased contained Viptera. Even if the Non-Producer Plaintiffs claim they purchased corn containing Viptera, they would not have made the purchase from Syngenta but rather the Producer of the corn. Plaintiffs have not alleged that any of the Non-Producer Plaintiffs directly entered into a contract with Syngenta. The Court is not persuaded by Syngenta's argument that the contractual ELD should apply equally to remote purchasers as direct purchasers. In addition, there is no allegation that the corn purchased was defective. If the Non-Producer claims are prohibited, it would be through application of the SELD rather than the contractual ELD.

While the Non-Producers' claims differ in some respects from the Producer Plaintiffs' claims, the analysis of the application of the SELD to their claims is similar. The SELD does not prohibited Non-Producers' claims.

IV. Duty

Syngenta argues that the negligence claims in the Non-Class Complaint and Class Complaint should be dismissed because it did not owe a legal duty to Plaintiffs as a matter of law.[5] Syngenta did not analyze each of the 22 relevant states' law concerning the existence of a duty. While Plaintiffs rely on Minnesota law in their argument, they indicate other jurisdictions at issue have adopted similar general duties. Thus like the MDL Dismissal Order, the Court considers general statements of law concerning the existence of a duty in these circumstances.

In the complaints, Plaintiffs allege Syngenta owes a duty of reasonable care with respect to the timing, manner, and scope of Syngenta's commercialization of its Viptera and Duracade products. Syngenta argues that it cannot be held liable because it had no post-sale control over third parties' use of its safe and non-defective product absent a "special relationship" with the third parties. *See* Restatement (Second) of Torts § 315. Duty is an issue for the Court to determine as a matter of law. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). Pursuant to the Third Restatement, the default rule is that everyone owes a duty of care not to create unreasonable risks to others. *Dobbs* § 125 (citing Restatement (Third) of Torts (Liability for Physical and Emotional Harm) § 7(a) (2010)). In exceptional cases a court may consider specific policy matters in determining whether a duty exists, and thus the court might exempt a party from a duty of reasonable care where such a duty would conflict with social norms, another domain of tort law, or the relationship between the parties, or the duty would engage the courts beyond their institutional competence or fail to defer appropriately to another branch of government. *See id.* (citing Restatement (Third) of Torts § 7 cmts.).

[5] See Section IX.B, *infra*, for further discussion regarding duty and the Class Action Complaint.

A leading treatise lists a number of factors that courts have identified generally as being relevant to the determination whether a legal duty exists. *See* Dan B. Dobbs, et al., *The Law of Torts* § 255 (2d ed. 2011) (hereafter "Dobbs"). Those factors include the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; whether the injury is too wholly out of proportion to the tortfeasor's culpability; the moral blame attached to the defendant's conduct; the policy of preventing future harm by deterrence; administrative factors, including the feasibility of administering a rule that imposed a duty; the relationship of the parties and the customs to which they jointly subscribe; the expectations of the parties; the magnitude of the burden of guarding against the injury; whether allowing recovery would be too likely to open the way to fraudulent claims; and whether allowing recovery would have no sensible or just stopping point. *See id.* Accepting Plaintiffs' allegations as true, these factors weigh in favor of recognition of a duty in these circumstances.

Plaintiffs allege their particular injuries were not only foreseeable, they were actually foreseen by Syngenta, with Plaintiffs suffering the very harm expected to occur. "When a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others." *Domgala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). Plaintiffs allege that Syngenta created a foreseeable risk of harm to Plaintiffs when it: (1) recognized Plaintiffs as stakeholders affected by its actions; (2) knew premature commercialization created a risk of losing the Chinese market; (3) Syngenta increased distribution of Viptera despite uncertainty of Chinese approval; (4) did not institute stewardship or channeling programs; and (5) introduced Event 5307 when MIR162

was banned, prolonging the risk and duration of injury. Taking the allegations as true and in the light most favorable to Plaintiffs, Syngenta created a foreseeable risk of injury to Plaintiffs.

Syngenta contends foreseeability alone is not sufficient to create a duty. *See, e.g., Leeper v. Asmus*, 440 S.W.3d 478, 489 n. 5 (Mo. Ct. App. 2014); *Hutchings v. Bauer*, 599 N.E.2d 934, 935 (Ill. 1992). Plaintiffs, however, have alleged more than bare foreseeability in this case. First, Plaintiffs have not merely alleged that Syngenta breached a duty to control its customers' use of its products. Rather, Plaintiffs allege that Syngenta engaged in affirmative conduct that contributed to the harm. Plaintiffs allege Syngenta's affirmative acts of: (1) premature commercialization; (2) ineffective stewardship program; (3) sale of Viptera and Duracade to thousands; and (4) distribution of misleading and inadequate information concerning Viptera and Duracade and the timing of China's approval amounts to misfeasance. *See, e.g., Domgala*, 805 N.W.2d at 22 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984)). Dobbs notes that:

> The rule that one owes no duty to control others is a particular instance of the general rule that nonfeasance is not a tort unless there is a duty to act. Consequently, the no-duty-to-control rule has no logical application when the defendant is affirmatively negligent in creating a risk of harm to the plaintiff through the instrumentality of another or otherwise.

See Dobbs § 414. This misfeasance in addition to the foreseeability of harm gives rise to a duty.

Syngenta claims there is no duty to protect another from harm caused by a third party's conduct absent a special relationship with the third party or injured party. *See Gutierrez v. Eckert Farm Supply, Inc.*, No. C5-02-1900, 2003 WL 21500161, at *2 (Minn. Ct. App. July 1, 2003); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 398 (Ill. 1987); Restatement (Second) of Torts § 315. Plaintiffs, however, claim that the harm was not only caused by third parties but also Syngenta's own conduct. Furthermore, the parties were not strangers, but rather

were part of an interconnected industry and market. The foreseeability harm applied to the industry generally and as a whole. Moreover, Plaintiffs have alleged that Syngenta acted affirmatively to mislead the industry and to cover up its wrongdoing. The injury to Plaintiffs is thus proportionate to Syngenta's culpability.

Syngenta cites several cases where manufacturers were held not responsible for injuries resulting from third parties' post-sale use of safe non-defective products. *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478-79 ((declining to impose a duty on a cellphone retailer for injuries caused by a buyer using a cell phone while driving); *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 649, 663 (8th Cir. 2009) (dismissing claims for lack of proximate cause against makers of cold medicine for damages resulting from third parties' use of the medicine in making methamphetamine); *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) (failing to impose liability gun manufacturer for injury caused by of user). The Court is not persuaded that it should apply the same principles in these cell phone, cold medicine, and firearms cases to limit Syngenta's duty of care in this matter. The cases cited by Syngenta involve misuse of the product by the third party user. Syngenta argues that this is not a distinguishing factor because any use that results in harm can be considered "misuse." The misuse in the cell phone, cold medicine, and gun cases involved a small percentage of users and a criminal act. Here, the arguable "misuse" of the product would be by almost the entire group of users and pursuant to lawful actions. Thus the foreseeable harm was more inevitable and on a larger basis.

Syngenta argues that a duty should not be imposed because it had no ability to control the parties that grow, harvest, process, store, ship, and export corn. The parties, however, operated in an interconnected market wherein Syngenta could exercise influence on the other participants. For example, Syngenta could have required channeling measures for Viptera. In addition, due to

the interconnectedness of the market, the users were especially vulnerable to Syngenta's actions and the potential harm. Syngenta's relationship to the Plaintiffs is different that the manufacturer's relationship to the unknown victims in the cases involving guns, cell phones, and cold medicine. The general unfairness of holding a manufacturer liable for another's act is not implicated in this case since Syngenta's actions were tied much more closely to the product users' acts than in the cell phone, cold medicine, and gun cases.

The Court acknowledges Syngenta's concerns about the potential for the ripple effect and open-ended liability. The liability for breach of a duty of care in commercializing a GM trait, however, is limited. Since Syngenta's conduct occurred in the interconnected market, the foreseeability and limits of the potential liability are known. Similarly, imposing a duty will not result in the undue risk of speculative damages. The Court does not believe that the risk of a flood of new litigation is sufficiently great and sufficiently unfair to preclude the recognition of a legal duty here. Similarly, the fear that the imposition of a duty will result in a complete change in the practices of the GM crop industry appears overstated and unfounded. As the BIO Policy and Syngenta's own launch policy indicate, a duty of stewardship is already recommended by the participants.[6] The Court is not persuaded that recognition of a duty in this case would allow for a recovery that is too remote, or would open the door too much to fraudulent or speculative claims, or would allow for recovery without any stopping point.

Syngenta also argues that it should not be subject to a legal duty with respect to the sale of its products because those products were approved for sale by regulatory agencies. The allegations in the complaints indicate those agencies regulate the safety of the products but do not prescribe the manner of commercialization of the products. There is no claim that the

[6] Plaintiffs argue that Syngenta voluntarily undertook a duty. The Court need not address this alternative argument. The Court mentions the BIO Policy not to show a voluntary assumption of a duty but to dispute Syngenta's argument that significant changes would occur.

government agencies' approval extended to the area of the financial impacts in the market of any decision by Syngenta regarding commercialization of the products. Questions about whether an export market is "key" or whether that market is subject to a functioning regulatory system are not part of the USDA's evaluation. Accordingly, the agencies' deregulation of the products did not necessarily immunize Syngenta from any liability for wrongful acts connected to the commercialization or sale of those products. The Court thus does not agree that, by recognizing a duty here, it would become a super-regulator or usurp the role of other branches of government that regulate or legislate aspects of GM products.

Finally, Syngenta argues that in the only truly comparable case, the court concluded that no legal duty existed. *See Hoffman v. Monsanto Canada Inc.*, 2005 SK. C. LEXIS 330 (Sask. Q.B. May 11, 2005), *aff'd*, 2007 SK. C. LEXIS 194 (Sask. Ct. App. May 2, 2007). The *Hoffman* case involved an application for class certification by organic grain farmers in Canada that alleged GM canola had cross-pollinated with their non-GM crops, which they had hoped to sell at a higher price as an organic crop. The opinion of a Canadian provincial trial court is not precedent this Court is obligated to follow and it is distinguishable. The Court found that the plaintiffs had not alleged facts sufficient to establish that the losses claimed were foreseeable or to establish a relationship of proximity and had not alleged any expectations, representations, reliance, or special relationship between the parties. As discussed herein, the Plaintiffs in this matter have alleged foreseeability, misrepresentation by Syngenta, and a special relationship as stakeholders in an interconnected market. The *Hoffman* court also cited as a policy consideration that the imposition of a duty not to release the substances into the environment would conflict with the governmental approval of the product, *see id.* ¶ 71; in comparison, the duty asserted by Plaintiffs in this case is broader than a mere duty not to sell the products, and the Court has

concluded that recognition of a duty here would not usurp any regulatory agency's function. The *Hoffman* court also based its ruling on the plaintiffs' claims for purely economic damages, *see id.* ¶¶ 72-80; this issue is addressed separately in the application of ELD rather than duty. *Hoffman* is thus distinguishable and the Court declines to find it controlling on the issue of duty.

The Court concludes that policy considerations do not compel the conclusion that this case is sufficiently extraordinary to require an exception to the general rule that a party has a duty to exercise reasonable care not to create an unreasonable risk of harm to others. The Court cannot say as a matter of law that Syngenta did not have a legal duty to Plaintiffs to exercise reasonable care in the manner, timing, and scope of its commercialization of its Viptera and Duracade products. For all these reasons, Syngenta is not entitled to dismissal of Plaintiff's negligence claims as a matter of law.

V. FIFRA Preemption

Plaintiffs have included a strict liability failure to warn claim in Count VI of the Non-Class Complaint. In addition, the Plaintiffs have included allegations of the failure to warn in other claims. For example, Plaintiffs claim Syngenta failed to adequately warn and instruct farmers of the risk that planting Viptera would lead to loss of the Chinese market. Syngenta argues that any claims by Plaintiffs based on its alleged failure to warn growers using its products are preempted by a provision in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

Under FIFRA, "a State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). FIFRA preempts any states rule or cause of action that satisfies two conditions: (1) a requirement for labeling or packaging; and (2) that is different or in addition to those under the statute. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443-444 (2005). The MDL Court held

Plaintiffs' complaints do appear to include a claim that seeks to impose a labeling requirement not found among FIFRA's statutory requirements and dismissed all claims based on alleged failure to warn to the extent based on a lack of warnings in materials accompanying the products. Plaintiffs do not oppose applying the same rule of preemption in this matter. Therefore, all claims based on Syngenta's failure to warn to the extent based on a lack of warnings in materials accompanying Syngenta's Viptera or Duracade products are dismissed.

VI. Strict Liability - Duty to Warn

The Non-Class Complaint[7] asserts a cause of action for strict liability – duty to warn. Manufacturers have a "duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use." *Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 274 (Minn. 2004). The duty to warn arises when a manufacturer knew or should have known about an alleged defect or danger, and should have reasonably foreseen that the defect or danger would cause injury. *Block v. Toyota Motor Corp.*, 5 F. Supp. 3d 1047, 1070 (D. Minn. 2014). To prevail on a strict liability claim based on the duty to warn, a plaintiff must show that "(1) the defendant [ ] had reason to know of the dangers of using the product; (2) the warnings fell short of those reasonably required, breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff's injuries." *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (citing *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161, 1166 (8th Cir. 2012)). Plaintiffs allege that Syngenta owed them a duty to warn of the danger of Viptera and Duracade and a duty to Viptera and Duracade growers to give adequate instructions as to the use of Viptera and Duracade. The Non-Class Complaint sufficiently alleges that Syngenta knew of the dangers posed to the corn market by releasing MIR162, Syngenta made no warnings of the dangers, and that failure caused Plaintiffs' damages.

[7] The Class Action Complaint also asserts a claim for strict liability – failure to warn. The Court discusses the Class Action Complaint cause of action for strict liability – failure to warn in Section IX.A, *supra*.

As discussed in Section V, *supra*, to the extent Plaintiffs' claim for strict liability is based on a lack of warnings in materials accompanying Viptera or Duracade, it is preempted by FIFRA.

Syngenta argues Plaintiffs' failure to warn claims are barred by the component-part doctrine. 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. Restatement (Third) of Torts: Prod. Liab. "A failure to warn claim brought against suppliers of multi-purpose components is precluded by the same raw/material component part supplier analysis that forecloses design defect claims." *In re TMJ Prods. Liab. Litig.*, 97 F.3d 1050, 1058 (8th Cir. 1996). The purpose of the component-part doctrine is to protect a manufacturer who produces a safe component from liability when used correctly in an otherwise dangerous product. *See Thompson v. Hirano Tecseed Co.*, 456 F.3d 805, 810 (8th Cir. 2006). Syngenta did not supply a raw material that was integrated into a finished product. Syngenta's product, corn seed, had a single use and was not integrated into a product with more than one component. The corn seed was not combined with other components or materials to create a multi-component product. The component-part exception does not apply to Plaintiffs' failure to warn claims.

Syngenta also claims Plaintiffs' failure to warn claims fail as a matter of law because it had no duty to warn of obvious risks. There is no duty to "warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users." Restatement (Third) of Torts: Prods. Liab. § 2, cmt. j. Even in situations of an intended or reasonably foreseeable unintended use, a manufacturer has no duty to warn when the product user is aware of the risk. *Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 884 (Minn. Ct. App. 1993). Syngenta argues that the Plaintiff Producers were knowledgeable users expected to know about inherent parts of their own business including the biological fact of cross-pollination.

Past experience with a product, however, "does not necessarily alert users to all of the dangers associated with the product." *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985). Furthermore, Plaintiffs' claims are broader than just warning about the danger of cross-pollination but include approval for export to a foreign market. Based on Minnesota notice pleading standards, Non-Class Plaintiffs have sufficiently pleaded a claim for strict liability - failure to warn.

VII. Tortious Interference

In the Non-Class Action Complaint, Producer Plaintiffs in Alabama, Arkansas, Indiana, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas assert claims for tortious interference. Plaintiffs generally allege that they "had business relationships and a reasonable expectancy of continued relationships with purchasers of corn" and that Syngenta "induced or caused a disruption of that expectancy." Syngenta seeks dismissal of those claims on the basis Plaintiffs' allegations lack: (1) specific business relationships; (2) adequate injury; (3) intentional conduct; and (4) improper means. Under the Rule 8.01 pleading requirements, Plaintiffs' allegations are sufficient.

A. Identification of Relationships

The Court is not convinced that any of the ten states require Plaintiffs to identify particular third parties with whom they had business relationships or expectancies in the complaint to survive a motion to dismiss. To prove a claim in some states, Plaintiffs must 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). In Alabama, Arkansas, Indiana, South Dakota, and Tennessee, a claim for tortious interference requires interference with an identifiable class of third parties. *See, e.g., Golf Sci. Consultants, Inc. v. Cheng*, 2009 U.S. Dist.

LEXIS 37721, at *6 (E.D. Tenn. May 4, 2009); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002); *Baptist Health v. Murphy*, 373 S.W.3d 269, 282 (Ark. 2010). Missouri, North Dakota, Oklahoma, and Texas require interference with a reasonably expected economic advantage. *See, e.g., Winston v. Am. Med. Int'l*, 930 S.W.2d 945, 953 (Tex. App. 1996); *Bell v. May Dep't Stores Co.*,6 S.W.3d 871, 876-88 (Mo. 1999); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 717 (N.D. 2001). None of the cases cited by Syngenta granted a motion to dismiss based on the failure to specifically identify the third party or class of third parties. The cases relied upon by Syngenta examined the claim after submission of proof at either the summary judgment or trial stage of the case. Even if Plaintiffs were required to identify particular third parties or groups of third parties by name in order eventually to prove the required expectancy under each state's substantive law, Plaintiffs would not necessarily be required to plead such facts in their complaint.

In the MDL Dismissal Order, the MDL Court concluded that identical allegations were sufficient to meet the heightened federal pleading standards. Here Plaintiffs have alleged relationships and expectancies with an identifiable class of third parties, namely purchasers of corn from them. The Non-Class Complaint provides "information sufficient to fairly notify [Syngenta] of the claim against it." *See Walsh*, 851 N.W.2d at 605. The Court concludes that such allegations are sufficient to state a claim for tortious interference under the pleading standards of Rule 8.01 of the Minnesota Rules of Civil Procedure.

B. Injury

Syngenta argues that the Plaintiffs' allegations with respect to the requisite injury for tortious interference claims are insufficient. Specifically, Syngenta contends Plaintiffs must allege that business relationships must be ended or prevented. There are variations among the state laws as to what injury is required for the tort. Plaintiffs argue that the relationship need not be terminated,

and that it is enough the defendant made a relationship with a third party more expensive or burdensome or that the defendant interfered with an expected economic advantage. *See e.g., White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 17 (Ala. 2009); *Columbus Med. Servs. Org., LLC v. Liberty Healthcare Corp.*, 911 N.E.2d 85, 92 (Ind. App. 2009); *Wilspec Techs., Inc. v. Duncan Holding Grp. Co.*, 204 P.3d 69, 73 (Okla. 2009); *Geiseke*, 844 N.W.2d at 219; *Vowell v. Fairfield Bay Cntry. Club*, 58 S.W.3d 324, 329 (Ark. 2001); *Kantel Commc'ns v. Casey*, 865 S.W.2d 685, 693 (Mo. App. 1993).

The Court is not persuaded that the required interference must be the termination or discontinuance of a business relationship. The Restatement, as cited by Syngenta, indicates the interference may consist of "(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other party from acquiring or continuing the prospective relation." Restatement (Second) of Torts § 766B. The Court does not read this requirement to be as restrictive as Syngenta contends. All of the cases cited by the parties indicate the interference can take a wide range of forms. Here, Plaintiffs have alleged that Syngenta's actions prevented the export of U.S. corn to China, resulting in decreased sales prices. This allegation states there was an expectation of sale at a particular price and that expectation was unrealized. Plaintiffs' alleged injury is sufficient to survive a motion to dismiss.

C. Improper Means

Syngenta also argues that Plaintiffs' tortious interference claims fail with respect to the "improper means" element, asserting that such means must be "independently tortious or unlawful." Plaintiffs claim Syngenta is creating an additional burden that is not required at the pleading stage. The states at issue use different formulations for this element. Some of the states have required that the alleged interfering act be independently tortious or unlawful. *See, e.g., Geiseke*, 844 N.W.2d at

219-20; *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 720 (N.D. 2001); *Community Title Co. v. Roosevelt Fed. Sav. and Loan Ass'n*, 796 S.W.2d 369, 373 (Mo. 1990) (en banc); *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 150 (Okla. 1998). Arkansas, Alabama, and South Dakota use a multifactor test to determine if a defendant's conduct was improper. *See, e.g., Baptist Health v. Murphy*, 373 S.W.3d 269, 281-82 (Ark. 2010); *Selle v. Tozser*, 786 N.W.2d 748, 753 (S.D. 2010); *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 13 (Ala. 2009). Tennessee examines the particular facts and circumstances of a case, including whether the defendant's predominant purpose was to injure the plaintiff. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 n. 5 (Tenn. 2002). The Restatement only requires "improper" interference, and it lists a number of factors that could be considered to determine whether interference was improper. *See* Restatement §§ 766B, 767. Most of the cases cited do not involve dismissing a claim for tortious interference based on the failure to properly plead this element. As the MDL Court noted, this is a fact-intensive inquiry more properly made upon submission of evidence. Syngenta has not shown that the Plaintiffs failed to properly plead Syngenta's actions were improper as a matter of law.

Even if the Court required allegations of independently tortious conduct, Plaintiffs have met that burden. Plaintiffs allege Syngenta made misrepresentations and breached its duty of care to Plaintiffs. Plaintiffs have alleged conduct that would be independently actionable. Thus, even if pleading an independently actionable conduct were required, there would be no basis for dismissal of Plaintiffs' tortious interference claims as a matter of law on this basis.

Syngenta claims that the alleged misrepresentations must be directed at preventing third parties from conducting business with Plaintiffs to constitute improper means. The case cited by Syngenta is not persuasive and involves Illinois law, which is not a state involving a claim for

tortious interference. *See, e.g., Grund v. Donegan*, 700 N.E.2d 157, 161 (Ill. Ct. App. 1998). As noted above, none of the ten states at issue use such a narrow test to determine if the tortious conduct was improper. The Court rejects imposition of such a requirement in the pleading.

The Court also rejects Syngenta's argument that it cannot have acted with improper means in light of the regulatory approval of Viptera. As discussed above, deregulation of MIR162 and Event 5307 does not mean that Syngenta could not have acted wrongfully in commercializing and selling Viptera and Duracade. For all these reasons, Plaintiffs have sufficiently pleaded that Syngenta acted with improper means.

D. Intent

Syngenta next argues that Plaintiffs failed to properly allege Syngenta acted with the requisite intent. Specifically, Syngenta avers Plaintiffs failed to plead that Syngenta "knew to a substantial certainty" that interference with Plaintiffs' business expectancies would result from Syngenta's actions. In general, the defendant must either desire to bring about the harm incurred or knew that the harm was substantially certain to occur. *See* Restatement (Second) of Torts § 8A. Plaintiffs allege that Syngenta knew Plaintiffs had a reasonable expectancy of continued relationships with corn purchasers and that Syngenta intentionally caused a disruption of that expectancy when it introduced Viptera into the marketplace.

Syngenta's argument that it could not know to a substantial certainty that introducing Viptera would have that effect because China was not a key export market at the time Viptera was launched is unconvincing. Syngenta's argument presents a question of fact. The Complaints include the allegation that Syngenta knew that Viptera had not been approved in a key export market, that contamination of Plaintiffs' corn would occur after commercialization of Viptera without certain safeguards, and thus that interference with Plaintiffs' sales would be substantially

certain to occur. The Court concludes that under Minnesota's notice pleading standard, Plaintiffs have sufficiently pleaded the element of intent.

VIII. Consumer Protection Claims

A. Minnesota

Plaintiffs assert claims for violations of the Minnesota Unfair Trade Practices Act ("MUTPA"), Minn. Stat. § 325D.13, which prohibits misrepresentations of the true quality of merchandise in connection with its sale; and for violations of the Minnesota Consumer Fraud Act ("MCFA"), Minn. Stat. § 325F.69, which prohibits the use of any fraud, misleading statement, or deceptive practice with the intent that others rely thereon in connection with the sale of any merchandise. Plaintiffs assert these claims for all Plaintiffs, residents and non-residents alike. Minnesota has established a private remedy for violations of MUTPA and MCFA under the Private Attorney General statute. *See* Minn. Stat. § 8.31.

1. Application to Non-Resident Plaintiffs

Syngenta seeks dismissal of the Minnesota statutory claims as asserted by Plaintiffs who are not residents of Minnesota. Before non-residents may assert claims under a Minnesota statute, they must meet three requirements: (1) the statute must apply extra-territorially; (2) such application cannot violate due process; and (3) Minnesota law must be chosen by the applicable choice-of-law rules. *See Cruz v. Lawson Software, Inc.*, 2010 WL 890038, at *3-9 (D. Minn. Jan. 5, 2010) (discussing and applying those three requirements); *see also In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005) (requiring constitutional and choice-of-law analyses for application of Minnesota consumer protection statutes to non- residents).

Plaintiffs sought application of Minnesota's consumer protection statutes to all plaintiffs in the MDL as well. In the MDL Dismissal Order, the MDL Court held that the MUTPA and MCFA

could not be applied to non-Minnesota residents. The MDL Court further dismissed the plaintiffs' claims under the MUTPA and MCFA on the basis that plaintiffs could not maintain a cause of action under the Private Attorney General statute because the claims would not serve a public benefit. As discussed below, at this stage of the proceeding and applying the pleading standards of Rule 8.01 of the Minnesota Rules of Civil Procedure, the Court respectfully reaches a different conclusion than the MDL Court on these issues.

a. Extraterritorial Application

Contrary to Syngenta's argument, there is precedent that Minnesota's consumer protection laws have extraterritorial application. "[T]he [MCFA] is intended to apply both to the conduct of foreign corporations that injures Minnesota residents and to the conduct of Minnesota companies that injures non-residents." *In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation*, 2004 WL 909741, at *6 (D. Minn. Apr. 28, 2004). In addition, two cases allowed non-Minnesota residents to pursue claims under the MUTPA and MCFA against Minnesota defendants. *See Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531 (D. Minn. 2007); *Maher v. Sempris, LLC*, 2014 WL 4749186 (D. Minn. Sept. 24, 2014).

In rejecting extraterritorial application of Minnesota's consumer protection statutes, the MDL Court relied on *Olson v. Push, Inc.*, 2014 WL 4097040 (D. Minn. Aug. 19, 2014), where the court rejected application of the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA") to a Wisconsin employer based on a presumption against extra-territorial application of state law. (MDL Dismissal Order pgs. 98-99). However, the holding in *Olson* was subsequently reversed and remanded. *Olson v. Push, Inc.*, ___ Fed. Appx. ___, 2016 WL 690844 (8th Cir. Feb. 22, 2016). The Eighth Circuit found that DATWA's broad definition of "employer" included all entities "doing business in" Minnesota and that the legislature drafted DATWA broadly to

encompass all employers that are located in Minnesota, and all employers that conduct business in Minnesota. *Id.* at *2. The Court noted that "DATWA is remedial in nature, which warrants a liberal construction in favor of the remedies the statute provides." *Id.* The Court further concluded that the claim was "not precluded based upon the presumption against extra-territorial application of Minnesota statutes or the dormant commerce clause" and found significant contacts sufficient to satisfy due process concerns. *Id.* at *3.

The language of the MCFA similarly contains broad language and is remedial in nature warranting a liberal construction. As the court in *Mooney* noted, "By allowing 'any person' to sue under the [MCFA], the Minnesota legislature has evinced a strong policy of providing redress for fraudulent business practices that occur within Minnesota's borders, regardless of where a consumer's injury occurs." *Mooney*, 244 F.R.D. at 537. This matter also has significant contacts with Minnesota supporting application of the statutory language to these circumstances. One of the six Defendants has its principal place of business in Minnesota and Syngenta states that its "U.S. corn seed business is based in Minnesota." (Defts. Mem. p. 121). Plaintiffs have alleged that Viptera field testing occurred in Minnesota. Plaintiffs have alleged Syngenta had operations in, made fraudulent statements from, and directed other Syngenta entities from Minnesota. Therefore, even if the Court were to apply a presumption against extraterritorial application, it is overcome by the statutory language and significant contacts with Minnesota. Based on Rule 8.01 of the Minnesota Rules of Civil Procedure pleading standards, this Court concludes Plaintiffs' allegations are sufficient to support extraterritorial application of the MUTPA and MCFA.

b. Due Process

Application of the forum state's law to a nonresident's claim must be constitutional. The Constitution's Due Process and Full Faith and Credit Clause provide "modest restrictions on the

application of forum law." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 105 S.Ct. 2965, 86 L.E.2d 628 (1985). In order for a state's substantive law to be constitutionally applied in a particular case, the state must have a significant contact or a significant aggregation of contacts with the parties or the underlying facts giving rise to the litigation, creating a state interest, such that the application of its law is neither arbitrary nor fundamentally unfair. *See Allstate Ins. Co. v. Hague,* 449 U .S. 302, 307–314 (1981). The Court incorporates the discussion and analysis in Sections II.B and VIII.A.1.a, and finds Minnesota law may be constitutionally applied in this matter.

c. Choice of Law

When considering to apply the substantive law of one state over that of another, the Court must conduct a choice of law analysis. *See e.g., Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 93-94, n. 1 (Minn. 2000). In the context of class actions, the Court must "conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member" before the Court can apply Minnesota law to all class members. *In re St. Jude Medical, Inc.* 425 F.3d 1116, 1120 (8th Cir. 2005). The Court does not agree that the requirement of conducting a choice of law analysis was abrogated by the Court in *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015). The court in *Target* was considering class certification for claims under Minnesota's Plastic Security Card Act. *Id.* at 485. Target argued that the complicated task of conducting a choice-of-law analysis with regard to each putative plaintiff's claim to determine which state's negligence law applies and evaluating each potential jurisdiction's choice-of-law rules to even conduct the choice-of-law analysis, rendered class treatment unworkable. *Id.* at 486. The Court then presumed there were substantive conflicts between the state laws of the plaintiffs' home state and Minnesota law and due to the significant contacts, Minnesota law could constitutionally apply to non-resident plaintiff's claims. *Id.* The Court labeled its examination a "Choice of Law

Analysis" and conducted an abbreviated analysis based on the circumstances of that case. *Id.* The Court in *Target* cited cases that require a choice of law analysis and did not distinguish or decline to follow *In re St. Jude*. *Id.* The Court thus finds that choice of law analysis is required.

If there is an outcome-determinative conflict and the law of either forum may be constitutionally applied, Minnesota looks to five factors to determine which State's law applies: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.*; *see also Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004).

The Court must first consider whether the choice of one state's law over another state's law creates an actual conflict. *Jepson v. General Cas. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). First, the Court must determine if Minnesota law conflicts with the laws of other states, because, if there is no conflict, then Minnesota law can be applied across the class. *St. Jude,* 425 F.3d at 1120. Of the other 21 states at issue, Plaintiffs have asserted claims under eight states' consumer protection laws.[8] As the Court's discussion in Sections VIII.B through VIII.G demonstrates, there are differences among the state consumer protection statutes such as who has standing under the statute, the intention required, and whether reliance is required. For these eight states, there is an outcome-determinative conflict and the law of either forum may be constitutionally applied. *See* Section II.B and VIII.A.1.b, *infra.* The Court must then conduct the five factor significant contacts test to determine which law to apply. *See Nodak*, 604 N.W.2d at 94. The Court incorporates the choice of law analysis conducted in Section II.C, *infra.* Pursuant to that analysis, the consumer protection law of each Plaintiff in these eight states shall apply to their claims for violation of a consumer protection law.

[8] The Non-Class Complaint contains claims for violation of consumer protection statutes in the states of Colorado, Illinois, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, and Texas.

The Non-Class Complaint does not assert any claims for the violation of a consumer protection statute in the other 13 states at issue.[9] There is thus no actual conflict between the laws of these 13 states and the consumer protection statutes of Minnesota. Since there is no conflict, Minnesota law can be applied. *See St. Jude*, 425 F.3d at 1120. As discussed above, the MUTPA and MCFA can be extraterritorially applied consistent with due process concerns. Therefore, the Court will apply the MUTPA and MCFA to Non-Class Plaintiffs that are residents of the 13 states with no claims for violation of the state's consumer protection laws.

2. Purchasers as Merchants

Syngenta argues that Plaintiffs may not assert claims under Minnesota's consumer protection statutes as a matter of law because the farmers who purchased Syngenta's products were merchants and not consumers. Courts examining MCFA and MUTPA have distinguished between "merchants" and consumers. *Securian Financial Group, Inc. v. Wells Fargo Bank, N.A.*, 2014 WL 6911100, at *6 (D. Minn. Dec. 8, 2014). In some instances, courts have precluded "merchants" from bringing MCFA and MUTPA claims but there is no blanket prohibition. *See id.* (citations omitted). "Courts focus their analysis on whether a party can be considered a sophisticated merchant in the specific skills or goods at issue, and only those parties that are in fact deemed to be sophisticated merchants in the specific skills or goods at issue have been precluded from asserting Minnesota consumer claims." *Id.* (citations omitted). In *Securian*, the court concluded that a fact question remained for trial concerning whether the plaintiffs were sophisticated merchants, even though they would "undoubtedly have an uphill battle convincing a jury of their lack of sophistication." *See id.* at *7. The determination of whether Producer Plaintiffs that purchased Viptera or Duracade were sophisticated merchants presents a question of fact and cannot be

[9] The thirteen states where no claim for violation of a consumer protection statute is asserted are: Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, and Wisconsin.

determined in this circumstance as a matter of law. Accordingly, the Court denies Syngenta's motion for dismissal on this basis of the claims under the MUPTA and MCFA.

3. Public Benefit

Syngenta argues that Plaintiffs' claims under these statutes should be dismissed because those claims would not benefit the public. Plaintiffs seek compensatory damages and attorney fees for violations of MUTPA and MCFA pursuant to Minnesota's Private Attorney General Statute, Minn. Stat. § 8.31, subd. 3a, which provides a private right of action for persons injured by such violations. The Private Attorney General Statute applies only to "those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). While the public benefit requirement is not onerous, it is a necessary element of a plaintiff's cause of action under the statute. *Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 11 F. Supp. 3d 933, 937-38 (D. Minn. 2014) (citing *Blue Cross & Blue Shield of Minn.*, 2012 WL 1343147, at *5 (D. Minn. Apr. 18, 2012); *Buetow v. A.L.S. Enter. Inc.*, 888 F. Supp. 2d 956, 960 (D. Minn. 2012)).

Minnesota courts have not set forth a clear test for determining when a claim benefits the public for this purpose. *See Buetow*, 888 F. Supp. 2d at 960. Courts generally consider, "the degree to which the defendants' alleged misrepresentations affected the public; the form of the alleged misrepresentation; the kind of relief sought; and whether the alleged misrepresentations are ongoing." *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1017 (D. Minn. 2012) (citing *In re Levaquin Prods. Liab. Litig.*, 752 F. Supp. 2d 1071, 1077–79 (D. Minn. 2010)). The Minnesota Supreme Court, in finding a public benefit in *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003), did not examine the type of relief sought, but instead looked at the defendant's misrepresentations. *See id.* at 329-30.

In Count V of the Non-Class Complaint, Plaintiffs seek only damages to compensate them for past wrongs and attorney fees. In Count I of the Class Action Complaint, the Plaintiffs include the term "injunctive" in their prayer for relief but provide no further description. The failure to seek injunctive or other forward-looking relief is not dispositive but weighs against the finding of a public benefit here. *See Buetow*, 888 F. Supp. 2d at 961 n.6. The public benefit requirement is also not satisfied by the argument that a recovery in this case would help clarify duties in the future commercialization of GM products. *See id.* at 962 (although any successful lawsuit recovering damages could have the potential to cause some deterrent public benefit, such a broad application of the Private Attorney General Statute would allow any "dog bite case" to fall within the statute; thus "this type of ostensible benefit is too remote or theoretical to pass muster").

In addition, the misrepresentations alleged by Plaintiffs to support their claim were not made to the public in general. Rather, the alleged misrepresentations were directed at all of the Producers and Non-Producers involved in all of these related actions. In other words, the alleged misrepresentations were made to the members of the interconnected market, who have brought personal claims in this matter. In addition, the alleged misrepresentations were made at the time of commercialization of Viptera and Duracade and are not ongoing. Thus, this factor also weighs against a finding of a public benefit here. For these reasons, the Court concludes that Plaintiffs have not sufficiently pleaded a public benefit required to bring a claim under the Private Attorney General Statute.

The MUTPA provides a private right of action providing for actual damages for any person injured by a violation of that statute. *See* Minn. Stat. § 325D.15. Plaintiffs did not assert their MUTPA claims under that provision, however, but instead asserted their statutory claims under the Private Attorney General Statute (likely because the latter statute allows for an award of attorney

fees). Accordingly, Plaintiffs' MUTPA claims, as pleaded, are subject to dismissal. *See Buetow*, 888 F. Supp. 2d at 960 (MUTPA's private right of action does not allow the plaintiffs to avoid dismissal for lack of a public benefit, as the plaintiffs brought their action under the Private Attorney General Statute). Plaintiffs are granted leave, however, to amend the Non-Class Complaint and Class Action Complaint to assert a claim under the MUTPA pursuant to that statute's private right of action.

B. **Illinois**

Syngenta argues that Plaintiffs lack standing under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA). Specifically, Syngenta claims Plaintiffs have failed to show a "consumer nexus" that shows how Syngenta's actions involve consumer protection concerns, and how the requested relief would benefit consumers. The ICFA allows actions by non-consumers where it meets the consumer nexus test. *See Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 911-12 (N.D. Ill. 2012) (citing, *inter alia*, *Bank One Milwaukee v. Sanchez*, 783 N.E.2d 217, 221 (Ill. Ct. App. 2003)). Under that test, a non-consumer has standing to sue under the ICFA for conduct that "involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *See Bank One*, 783 N.E.2d at 220 (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 41 (Ill. Ct. App. 1989)), *quoted in Thrasher-Lyon*, 861 F. Supp. 2d at 911-12. Plaintiffs must plead and otherwise prove (1) that their actions were akin to a consumer's actions to establish a link between them and consumers; (2) how defendant's representations ... concerned consumers other than themselves; (3) how defendant's particular breach ... involved consumer protection concerns; and (4) how the requested relief would serve the interests of consumers." *Brody v. Finch Univ. of Health Sciences / The Chicago Med. Sch.*, 698 N.E.2d 257, 270 (Ill. Ct. App. 1998).

Syngenta argues that a farmer who purchases Viptera seed is not a consumer because its seeds were components or inputs for the product sold by the purchasers of its seeds. *See Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004). Similarly, it argues that grain elevators, exporters, and others along the distribution chain are not consumers because they purchase corn for resale in the ordinary course of their business. Thus, Syngenta argues that Plaintiffs' claim that Syngenta's conduct lowered the overall price of corn falls outside the scope of the ICFA because the consumers of corn actually paid less for corn. In addition, Syngenta claims Plaintiffs cannot satisfy the second prong of the test for the "implication of consumer protection concerns" because the alleged misrepresentations related to Viptera growers and not to the ultimate corn buyers. Finally, Syngenta argues that Plaintiffs have not shown that the requested damages would serve the interests of consumers as required by the fourth prong of the test.

The MDL Court rejected Syngenta's arguments made here. The Court relied on an Illinois Supreme Court case holding that a seed becomes something different in producing a plant and that the seed purchaser therefore uses or consumes the seed and does not resell in the context of determining whether sales of seeds were taxable. *See Sluis v. Nudelman*, 34 N.E.2d 391, 392 (Ill. 1941). Syngenta argues that the MDL Court's reliance on *Sluis* is misplaced because a more recent version of the tax statute at issue in *Sluis* states that when property as an ingredient or constituent goes into and forms a part of a product that is later sold, it qualified as property transferred for resale. *See People ex rel. Spiegel v. Lyons*, 115 N.E.2d 895, 897 (Ill. 1953)). The change in the statute does not affect the analysis used by the MDL Court relevant to the issue under consideration. Spiegel was a matter of statutory interpretation and did not alter analysis of whether the seed purchaser uses or consumes the seed. The Court agrees with the MDL Court's conclusion that the growers that purchased Syngenta's seeds were consumers of Syngenta's product under the ICFA.

Thus, the Court rejects Syngenta's argument that the alleged misrepresentations did not relate to consumers.

C. **Nebraska**

Plaintiffs in Nebraska have asserted claims under the Nebraska Consumer Protection Act ("NCPA"), Neb. Rev. Stat. § 59-1602, which prohibits unfair or deceptive trade practices. Syngenta argues Plaintiffs have failed to plead a violation of the NCPA, which exempts "actions or transactions otherwise permitted, prohibited, or regulated under laws administered by the Director of Insurance, the Public Services Commission, the Federal Energy Regulatory Commission, or any other regulatory body or officer acting under statutory authority of this state or the United States." *See* Neb. Rev. Stat. § 59-1617(1). "[P]articular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, the immunity arises if the conduct itself is also regulated." *See Hage v. General Serv. Bur.*, 306 F. Supp. 2d 883, 890 (D. Neb. 2003). Syngenta argues that plaintiffs' NCPA claims are barred by this exemption. Syngenta is not as a matter of law subject to this exemption. As discussed above, deregulation of Viptera and Duracade by the USDA did not involve regulation of Syngenta's commercialization of the products. It has not been shown as a matter of law that the conduct complained of by Plaintiffs was regulated by the USDA or other regulatory agency. For these reasons, Syngenta is not entitled to immunity from the NCPA as a matter of law.

D. **North Carolina**

Syngenta moves to dismiss Plaintiffs' claims for violations of the North Carolina Unfair and Deceptive Trade Practices Act ("NCUTPA"), N.C. Gen. Stat. § 75-1.1. Syngenta argues as a matter of law that plaintiffs do not have standing to bring these claims because they did not compete with Syngenta, were not engaged in commercial dealings with Syngenta, and the conduct giving rise to

the cause of action did not have a negative effect on the consuming public. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999). The MDL Court thoroughly reviewed and analyzed the caselaw interpreting standing under the NCUTPA and concluded that North Carolina law does not require a NCUTPA plaintiff to be in competition or in commercial dealings with the defendant and Plaintiffs properly based their NCUTPA claims on alleged acts by Syngenta that affected commerce. Syngenta argues a recent case held, "When there is no business, competitive, or consumer relationship between two business entities a business tort only 'affects commerce' where the defendant's actions have a negative effect on the consuming public." *Exclaim Mktg., LLC v. DirecTV, LLC*, ___ F. Supp. 2d ____, 2015 WL 5773586, at *6 (E.D.N.C. Sept. 30, 2015). The Court is not convinced that *Exclaim* alters the caselaw analysis conducted by the MDL Court. *Exclaim* was decided on a motion for judgment as a matter of law post-trial and the Court determined, "in light of the facts found by the jury, there is no indication that the calls were made "in or affecting commerce" as required by the statute." *Id.* Here, Plaintiffs have alleged that Syngenta's actions affected commerce. Even if *Exclaim* holds these are the only three instances when a business has a claim under the NCUTPA against another business, Plaintiffs have sufficiently alleged such standing. Under Plaintiffs have alleged that they and Syngenta were part of an interconnected market constituting and Syngenta's conduct had a generalized negative effect.

Syngenta also argues that Plaintiffs' claims under the NCPA because to the extent they are based on alleged misrepresentations, Plaintiffs have not alleged reliance. "Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains." *See Tucker v. Boulevard at Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002) (citing *Pleasant Valley*

Promenade v. Lechmere, Inc., 464 S.E.2d 47, 58 (N.C. Ct. App. 1995)). It is not clear from the Complaint whether Plaintiffs base their claims solely on misrepresentations or other conduct but Plaintiffs indicate their claims are based on more than misrepresentations. The MDL Court held that to the extent Plaintiffs' claims are based on misrepresentations, the claims are subject to dismissal for lack of any allegation of reliance. Based on the more liberal pleading standards at play here, the Court finds Plaintiffs' allegations sufficient for violations of the NCUTPA.

E. **North Dakota**

Plaintiffs have asserted a claim under North Dakota's Unlawful Sales or Advertising Practices Act, N.D. Cent. Code § 51-15-02, which prohibits the use of deceptive practices "with the intent that others rely thereon in connection with the sale or advertisement of any merchandise." Syngenta argues that this claim should be dismissed because the alleged misrepresentations referenced in this count—from the earnings call, deregulation petition, request form, and fact sheet—were not made "in connection with the sale or advertisement" of Syngenta's products. The MDL Court granted Syngenta's motion to dismiss this claim finding the deregulation petition, earnings call statement, and request form were not directed to Syngenta's purchasers. The MDL Court, however, denied the motion with respect to the fact sheet because although directed to growers already using Viptera, it could be considered as advertising intended to induce future sales of the same product. Plaintiffs point out that the Complaint also alleges Syngenta used its website to make false and misleading statements. This Court agrees that Plaintiffs' claim is limited to alleged misrepresentations made in connection with the sale or advertisement of Syngenta's products, which at this time possibly includes the fact sheet and website statements.

F. South Dakota

South Dakota's Deceptive Trade Practices and Consumer Protection laws ("SDCPA")

makes it illegal for "any person to (1) Knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled, deceived, or damaged thereby." S.D. Codified Laws § 37-24-6. To state a claim under the SDCPA, Plaintiffs "must have pleaded that their economic damages were proximately caused by one or more of the three alleged violations of the Act." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 198 (S.D. 2007). Syngenta argues Plaintiffs' claim fails because they have not alleged that they heard the alleged misrepresentations or that the alleged misrepresentations caused them to act. As discussed previously in Section IV and elsewhere, Plaintiffs' have sufficiently pleaded that Syngenta's misrepresentations caused Plaintiffs damages.

G. Texas

Syngenta argues Plaintiffs lack standing to bring their claim under the Texas Deceptive Trade Practices-Consumer Protection Act ("TDTPA"), Tex. Bus. & Com. Code § 17.41, because they do not qualify as consumers. "To be a consumer, the plaintiff must have sought or acquired goods or services by purchase or lease, and those goods or services must form the basis of the complaint." *Ortiz v. Collins*, 203 S.W.3d 414, 424 (Tex. App. 2006). "[T]he plaintiff must show the defendant's deceptive conduct occurred in connection with a consumer transaction." *Sparks v. Booth*, 232 S.W.3d 853, 864-65 (Tex. App. 2007) (citing *Ortiz*, 203 S.W.3d at 424). Syngenta argues Plaintiffs have not alleged that they purchased Viptera but rather complain about the commercialization of the Viptera. As noted above, the Non-Class Complaint does clearly state whether some of the Plaintiffs purchased Viptera and Duracade or not. In addition, Plaintiffs have alleged that they bought corn seeds and those seeds form the basis of the complaint.

Syngenta also argues the claim must be dismissed because Plaintiffs fail to allege they relied on the alleged misrepresentations to their detriment. "To establish the producing cause element, the plaintiff must show the defendant's action was a substantial factor in bringing about the plaintiff's injury, without which the injury would not have occurred." *Id.* at 865. As discussed above, Plaintiffs have alleged the Syngenta's misrepresentations caused Plaintiffs harm. Based on the minimal notice pleading standards, Plaintiffs have sufficiently alleged a cause of action under the TDTPA.

IX. Class Action Complaint

As noted above, the Class Action Complaint is brought on behalf of a proposed class consisting of only Minnesota Producers and Non-Producers. After the voluntary dismissal of the claim for strict liability – products liability, the remaining claims asserted by the proposed class are violation of Minnesota's consumer protection statutes, negligence, and strict liability – failure to instruct and/or warn. While most of the Court's analysis *supra* applies to the Class Action Complaint, the Court discusses these claims in this separate section to clarify some differences and deficiencies.

A. Violation of the Minnesota Consumer Protection Statutes

Class Action Plaintiffs assert claims for violation of the MUTPA and MCFA. The Court's discussion of these claims in Section VIII.A.2 and Section VIII.A.3 are incorporated herein. Pursuant to that analysis, the claims for violation of MUTPA and MCFA are dismissed, with leave to amend.

Class Action Plaintiffs also assert a claim under the Minnesota Deceptive Trade Practices Act ("MDTPA"), Minn. Stat. § 325D.44. The MDTPA contains its own private enforcement mechanism. *See* Minn. Stat. § 325D.45. Syngenta moves to dismiss Class Action Plaintiffs' claims under the MDTPA. The sole statutory remedy for deceptive trade practices under the MDTPA is

injunctive relief. *See Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn. Ct. App. 1999) (quoting *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 476 (Minn. Ct. App. 1999)). Plaintiffs argue the allegations in the Class Action Complaint about Syngenta's commercialization of Viptera allow this Court to draw an inference of future harm. The Court disagrees. Class Action Plaintiffs have failed to allege any future deceptive acts. There is no basis for the Court to commit pure speculation and infer future harm. While the Class Action Complaint includes the word "injunctive" in its request for relief, the Court finds this insufficient. Even under Minnesota's notice pleading requirements, the allegations and request for relief are insufficient. The claim in the Class Action Complaint for violation of the MDTPA is dismissed, with leave to amend the complaint.

B. Negligence

In Section IV, *supra*, the Court found Syngenta was not entitled to dismissal of the claim for negligence based on the recognition of a duty of reasonable care with respect to the timing, manner, and scope of Syngenta's commercialization of its Viptera and Duracade products. That discussion and imposition of a duty is applicable to Class Action Plaintiffs as well. However, the Court finds the Class Action Complaint has not sufficiently pleaded that Syngenta owed that duty to them. Specifically, Class Action Plaintiffs have not alleged that they experienced contamination of their crops, harm to their crops, or harm to property, or that they relied on the alleged misrepresentations. As a limited and finite group in the interconnected market giving rise to Syngenta's duty, namely Minnesota Producers that did not use Syngenta products and Minnesota Non-Producers, additional allegations of why the duty to use reasonable care in the commercialization of Viptera and Duracade is appropriate. Therefore, the Court dismisses Count II with leave to amend.

C. Strict Liability – Duty to Warn

The Class Action Complaint asserts a cause of action for strict liability – duty to warn. Manufacturers have a "duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use." *Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 274 (Minn. 2004). The duty to warn arises when a manufacturer knew or should have known about an alleged defect or danger, and should have reasonably foreseen that the defect or danger would cause injury. *Block v. Toyota Motor Corp.*, 5 F. Supp. 3d 1047, 1070 (D. Minn. 2014). To prevail on a strict liability claim based on the duty to warn, a plaintiff must show that "(1) the defendant [ ] had reason to know of the dangers of using the product; (2) the warnings fell short of those reasonably required, breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff's injuries." *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (citing *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161, 1166 (8th Cir. 2012)).

In Section VI, infra, the Court found Plaintiffs' allegations that Syngenta owed them a duty to warn of the danger of Viptera and Duracade and a duty to Viptera and Duracade growers to give adequate instructions as to the use of Viptera and Duracade sufficient. The Class Action Complaint, as pled, is insufficient to support a claim for strict liability – failure to warn. The proposed class includes *only* Producers that did not use Syngenta's products. They thus do not constitute or include any "end users." *See Gray*, 676 N.W.2d at 274. Count IV will be dismissed with leave to amend to cure this deficiency.

T.M.S.