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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation This Document Relates To: ALL ACTIONS[†]	Case Type: Civil Other Honorable Thomas M. Sipkins Court File No.: 27-cv-15-3785 **SYNGENTA'S MEMORANDUM OF LAW IN SUPPORT OF RULE 12.03 MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

[†] Pursuant to this Court's Scheduling Order No. 1 ¶ 12, this Motion for Partial Judgment on the Pleadings applies to all claims brought by Plaintiffs who reside in one of the 22 States currently at issue in the Federal MDL, with proceedings in all other cases deferred.

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INTRODUCTION

The Grain Standards Act ("GSA") preempts all of Plaintiffs' claims based on the theory that Syngenta was under a State-imposed legal obligation to ensure that corn grown from Viptera seeds was segregated from the general corn supply. The GSA prohibits States from imposing any requirements for the "inspection" or "description" of grain "in accordance with *any* standards of kind, class, quality, condition, or other characteristics" set by the State. 7 U.S.C. § 87g (emphasis added). The plain language of the Act prohibits state tort law from requiring anyone to inspect or test grain for the presence of the GM trait in Viptera or to segregate or channel Viptera corn, because a duty to segregate would necessarily require both "inspection" and "description" of the corn according to its genetic "characteristics." As the Federal MDL Court recently held, "the GSA preempts *any claim* against Syngenta based on a duty to make sure that Viptera corn is kept segregated from other corn." MDL Preemption Order 19 (emphasis added) (attached as Ex. A).[1]

To the extent Plaintiffs intend to claim that Syngenta should have forced *others* to isolate Viptera corn from the rest of the corn supply (through contracts or by other means), that theory is also preempted. The U.S. Supreme Court has consistently rejected creative attempts to impose an otherwise-preempted state-law requirement on a particular party (here, grain handlers) by stepping back one or more layers in the distribution chain and forcing another entity (here, Syngenta) to impose the same preempted requirements by contract. Following that precedent, the Federal MDL Court specifically held that "any claim based on a duty [on Syngenta] to *assist* in channeling or segregation of corn," including "through contract requirements [or] education,"

[1] "MDL Preemption Order" refers to the Federal MDL Court's August 17, 2016 Memorandum & Order, ECF No. 2426, *In re Syngenta AG MIR162 Corn Litig.*, Case No. 2:14-2591-JWL-JPO. "MDL Third-Party MTD Order" refers to the Federal MDL Court's April 4, 2016 Memorandum & Order, ECF No. 1803, *In re Syngenta AG MIR162 Corn Litig.*, Case No. 2:14-md-2591-JWL-JPO (attached as Ex. B). Unless otherwise noted, exhibits are attached to the November 23, 2016 Affidavit of D. Scott Aberson.

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is preempted. *Id.* at 25 (emphasis added).

At bottom, Plaintiffs' only theory of liability that is *not* preempted by the GSA is the assertion that Syngenta should have refrained from selling Viptera and Duracade seeds *at all* without Chinese import approval.

Indeed, in opposing Syngenta's motion for leave to serve its third-party complaint, Plaintiffs themselves argued that the theories of liability asserted by Syngenta against Cargill and ADM—which overlapped with the theory of a "channeling" duty asserted by Plaintiffs against Syngenta—were broadly preempted under the GSA and that Syngenta's third-party claims were therefore futile. *See* Pls.' Opp'n to Syngenta's Mot. for Leave to File a Third-Party Compl. at 9-10 (Aug. 4, 2016). In fact, Plaintiffs pointed out that the Federal MDL Court had held that similar third-party claims by Syngenta against Cargill and ADM were preempted, and they broadly announced that this Court should not "contradict the holding of a federal district court judge on a key question of federal preemption." *Id.*; *see also* Tr. of 8/11/2016 Hr'g on Syngenta's Mot. for Leave to File a Third-Party Compl. at 50-54 (attached as Ex. C). Shortly thereafter, the Federal MDL Court explained that the exact same preemption analysis that led the court to find Syngenta's third-party claims preempted also foreclosed a large swath of plaintiffs' claims against Syngenta and granted Syngenta judgment on the pleadings. *See* MDL Preemption Order 19-22. Having assured this Court that the Federal MDL Court's preemption analysis was sound, Plaintiffs have no principled or coherent basis for claiming that the Court should depart from the Federal MDL Court's analysis now, and that analysis requires holding that a large portion of Plaintiffs' claims against Syngenta are similarly preempted.

Likewise, although this Court noted that it would "exercise its own judgment" with respect to GSA preemption if Syngenta's third-party claims were fully presented on the merits, the Court also suggested that, for purposes of deciding whether to allow the third-party

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complaint, permitting Syngenta's third-party claims would likely be "futile" because they were preempted by the GSA under the Federal MDL Court's interpretation. Sept. 14, 2016 Mem. & Order ("Third-Party Compl. Order") at 12.[2] The Court has thus already accepted that GSA preemption is at least as broad as the Federal MDL Court found. Consistent with that analysis, the Court should similarly hold—as the Federal MDL Court did—that the GSA partially preempts claims against Syngenta. Any other result would require rejecting the fundamental principles defining GSA preemption that the Court has already endorsed.

BACKGROUND

In addition to alleging that Syngenta should have refrained from selling Viptera seed in the U.S. *at all* absent Chinese approval, Plaintiffs allege that Syngenta also should have taken unspecified actions to divert corn grown from Viptera seed away from foreign markets where the GM trait in Viptera had not been approved. Plaintiffs thus repeatedly assert that Syngenta had a duty to institute "stringent containment and channeling procedures" to prevent Viptera corn from "contaminat[ing] the U.S. corn supply and mov[ing] to export markets." 2nd Am. Class Compl. ¶ 37; *see also* 2nd Am. Non-Class Compl. ¶ 46 (same).[3] At the motion-to-dismiss stage, the Court held that Plaintiffs had sufficiently pled that Syngenta owed a duty of reasonable care with respect to the timing, manner, and scope of commercializing its GM seed products. Apr. 7, 2016 Mem. & Order ("MTD Order") at 25, 31.

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[2] While the Court indicated its considered view that the claims were likely futile, by denying leave to serve the third-party complaint the Court did not enter any holding on the merits of Syngenta's third-party claims. Indeed, the Court made clear that its ruling "would not cause significant prejudice to Syngenta because the claims for contribution and indemnity against Cargill and ADM may be asserted in a separate action following a determination of liability on Plaintiffs' claims." Third-Party Compl. Order 11.

[3] *See also id.* ¶ 97 (alleging that Syngenta commercialized Viptera "without adequate systems in place to either isolate Viptera or channel it away from markets" where it was not approved); *id.* ¶ 110 (alleging that Syngenta should have "trace[d] the product through the supply chain"); *id.* ¶ 115 (alleging that Syngenta "did not provide a test method to farmers or grain handlers"); *id.* ¶ 118 (alleging that Syngenta should have imposed "contractual requirement[s]" to, among other things, "segregate Viptera from non-Viptera corn"). The Non-Class Complaint alleges identical theories of liability. *See* 2nd Am. Non-Class Compl. ¶¶ 46, 106, 124, 127.

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Operating under that ruling, Syngenta asserted third-party claims and counterclaims against grain elevators and exporters who had accomplished the commingling of Viptera corn into the corn supply and exported the commingled corn to China. *See generally* Syngenta's Proposed Third-Party Compl. ¶¶ 4-7 (attached as Ex. A to Syngenta's Mot. for Leave to File a Third-Party Compl.). Syngenta's third-party claims alleged that the grain elevators and exporters had a "duty of reasonable care with respect to the acceptance, handling, and disposition of grain that they know or should have known is likely to enter export channels and that they know or should have known is likely to contain a GM trait that has not been approved for export to certain countries." *Id.* ¶ 54. Tracking Plaintiffs' claims against Syngenta, Syngenta alleged that the Third-Party Defendants should have, among other things, chosen to buy and export corn from Viptera-free sources, to negotiate warranties from corn sellers about whether their corn had been grown from Viptera seeds, and to divert corn containing the trait away from China, and/or choose not to ship U.S. corn to China. *Id.* ¶ 116.

Plaintiffs and the putative Third-Party Defendants opposed Syngenta's motion for leave to file its third-party complaint, arguing in part that the claims were futile because they were preempted by the Grain Standards Act ("GSA"), which prohibits States from imposing any requirements for the inspection or description of grain in interstate or foreign commerce according to characteristics set by the State. *See* Pls. Opp'n to Syngenta's Mot. for Leave to File a Third-Party Compl. at 8-10; Cargill & ADM's Opp'n to Syngenta's Mot. for Leave to File a Third-Party Compl. at 2-3, 5-6, 18. Syngenta agreed that the GSA preempted *some* claims—specifically, claims based on the theory that Third-Party Defendants had a state-law duty to inspect, test, describe, label and/or segregate corn based on the characteristic whether it contained the GM trait from Viptera. *See* Tr. of 8/11/2016 Hr'g on Syngenta's Mot. for Leave to File a Third-Party Compl. at 31:21-24. Syngenta explained, however, that the GSA did not

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preempt duties such as (1) the duty to exercise care in accepting grain into their facilities, such as by asking farmers whether they had used Viptera seeds; and/or (2) the duty to divert corn that they already *knew* contained the GM trait from Viptera (for example, through their own voluntary testing and knowledge of the likelihood of Viptera's presence in corn being delivered to their facilities) away from shipment to China. *See, e.g.*, Syngenta's Reply in Supp. of Mot. for Leave to File a Third-Party Compl. at 14; Syngenta's Proposed Third-Party Compl. ¶¶ 58, 116.

Syngenta had brought similar third-party claims against Cargill and ADM in the Federal MDL, and the Federal MDL Court had held that the claims were preempted under the GSA. *See* MDL Third-Party MTD Order 3-8. Plaintiffs in this case urged this Court to follow the Federal MDL Court's preemption ruling, arguing that this Court should not "contradict the holding of a federal district court judge on a key question of federal preemption." Pls.' Opp'n to Syngenta's Mot. for Leave to File a Third-Party Compl. at 9-10. Shortly after that, the Federal MDL Court also explained that the preemption analysis it had applied in dismissing Syngenta's third-party claims also meant that many of plaintiffs' claims against Syngenta were preempted by the GSA. MDL Preemption Order 19-22.

After the Federal MDL Court had made clear the breadth of its preemption analysis, this Court endorsed that analysis as it denied Syngenta's motion for leave to file its third-party complaint. In part, the Court suggested that permitting the complaint would likely be futile because the Federal MDL Court had already concluded that such third-party claims against grain elevators and exporters were preempted under the GSA. *See* Third-Party Compl. Order 12. The Court noted that it "would exercise its own judgment and analyses in reviewing such claims" if they were fully presented on the merits, but for purposes of deciding whether to allow the third-party complaint, the Court reasoned that no sufficient showing had been made to demonstrate why the Court should not follow the Federal MDL Court's preemption analysis and on that basis

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indicated that the claims were likely futile. *Id.*

LEGAL STANDARD

A Rule 12.03 motion for judgment on the pleadings follows the same standard as a Rule 12.02(e) motion to dismiss for failure to state a claim. Judgment on the pleadings is appropriate "if a complaint fails to state a legally sufficient claim for relief." *Burt v. Rackner, Inc.*, 882 N.W.2d 627, 629 (Minn. Ct. App. 2016).

ARGUMENT

I. Any Claim That Syngenta Had A Duty To Segregate Viptera Is Preempted By The Grain Standards Act.

Any theory that Syngenta had a duty to ensure the inspection, testing, description and/or segregation or channeling of corn based on the presence of the genetic trait from Viptera, or that it had a duty to force others to do so (by contract or otherwise), is expressly and impliedly preempted by the GSA. *See, e.g.*, 2nd Am. Class Compl. ¶ 37 (alleging that Syngenta had a duty to institute "stringent containment and channeling procedures" to prevent Viptera corn from "contaminat[ing] the U.S. corn supply and mov[ing] to export markets"); *see also supra* note 3. The Federal MDL Court recently agreed with Syngenta that "the GSA preempts any claim against Syngenta based on a duty to make sure that Viptera corn is kept segregated from other corn." MDL Preemption Order 19. As that court explained, "any claim based on a duty to assist in channeling or segregation of corn (through contract requirements, education, inspection, or tracing the product through the supply chain) is preempted." *Id.* at 25 (emphasis omitted); *see also* MDL Third-Party MTD Order 4 (Ex. B). Plaintiffs' only theory against Syngenta that does not fail due to preemption under the GSA is the unprecedented assertion that Syngenta should have refrained from selling Viptera *at all* until the GM trait in Viptera had been approved in China.

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A. The GSA Expressly Preempts Any State-Law Duty On Syngenta To Ensure Or Facilitate The Testing, Inspection, Description, Labeling And/Or Segregation Or Channeling Of Corn Based On The "Characteristic" Of Whether or Not It Contained The GM Trait From Viptera.

"There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012). Exercising that authority, Congress included in the GSA a sweeping express preemption provision that broadly removes any state authority to impose mandatory standards for inspecting or describing grain in interstate or foreign commerce:

> ***No State*** or subdivision thereof ***may require the inspection or description in accordance with any standards of kind, class, quality, condition, or other characteristics of grain*** as a condition of shipment, or sale, of such grain in interstate or foreign commerce . . . .

7 U.S.C. § 87g(a) (emphasis added). Although that express preemption provision was added to the statute in 1968, it is long settled that, even as originally enacted in 1916, Congress intended the GSA to "establish a uniform system for the inspection and grading of . . . grain moving in interstate commerce." *Farmers' Grain Co. of Embden v. Langer*, 273 F. 635, 651 (8th Cir. 1921); *accord* 7 U.S.C. § 74(a) (1968) (congressional purpose to "establish[] official United States standards for grain, [and] to promote the uniform application thereof"). Prior to the enactment of the Act, some States had developed their own conflicting standards for the inspection and grading of grain, and in some instances such competing systems were designed to advantage one State's interests over another. *See generally Globe Elevator Co. v. Andrew*, 144 F. 871, 882 (W.D. Wis. 1906), *aff'd*, 156 F. 664 (7th Cir. 1907) ("Wisconsin is attempting to build up her trade at the expense of Minnesota."); *see also* 19 A.L.R. 164 (noting that conflicting requirements for grading of grain in Minnesota and Wisconsin "were in many respects affected by the commercial rivalry of Duluth and Superior"). Such a patchwork of different state

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standards was an impediment to the movement of grain in interstate and foreign commerce, because renewed inspections and grading could be required as grain moved from one State to another.[4] Thus, the GSA "was passed in 1916 to meet the need for national standards" "based on the concept of requiring the use of Federal grades" and "outlawing the use of local grades."[5] As the Department of Agriculture explained at the time of the 1968 amendments, "[w]hen enacted in 1916, the act eliminated the confusion resulting from the use of many different sets of grain standards applied by many different grain inspection organizations without national coordination and supervision" and "prohibited description of grain shipped in such [interstate or foreign] commerce as being of any grade other than one fixed for such grade in the [U.S.] standards." H.R. Rep. No. 1344, 90th Cong., 2d Sess. at 5 (Mar. 3, 1968) (Administrative View of the Department of Agriculture).

Under the Act today, parties may agree by contract to apply their own descriptions and standards for a purchase of grain, *see* 7 U.S.C. § 77(a)(1); *see also* H.R. Rep. No. 1344, 90th Cong., 2d Sess. at 20 (explaining that 1968 amendments "would not require the use of official grades or official inspection for grain in domestic commerce"), but under the express preemption provision, States are prohibited from *imposing* any requirements for "inspection" or "description" of grain under standards devised by the State.[6] That prohibition on state-imposed duties necessarily forecloses all of Plaintiffs' claims that Syngenta was under a duty to ensure that corn containing the GM trait from Viptera was "segregated" or "channeled" to keep it apart

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[4] *Cf. Globe Elevator Co.*, 144 F. at 883, *aff'd*, 156 F. 664 (7th Cir. 1907) ("It is also clear to me that so important a matter as fixing the grades by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress. Certainly it cannot readily be bought and sold according to two systems of inspection. It cannot be bought by one and sold by another. Conflicting state systems would only obstruct.").

[5] H.R. Rep. No. 1344, 90th Cong., 2d Sess. at 13 (Mar. 3, 1968) (Statement of George R. Grange, Deputy Administrator for Marketing Services, Consumer and Marketing Service, Dep't of Agriculture).

[6] It is well settled that a common law duty imposed under state tort law qualifies as a state "requirement" that would be preempted by the language in the express preemption provision here. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 332 (2008).

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from other corn, because any such system would necessarily require state-imposed duties to test, inspect, and describe corn according to the characteristic whether or not it contained the GM trait from Viptera.

The Court must apply the plain terms of the express preemption provision without regard to any supposed "presumption against preemption." As the Federal MDL Court has recognized, the Supreme Court recently "ruled . . . fairly definitively" that courts may not invoke any presumption against preemption in interpreting an express preemption clause. MDL Preemption Order 7. As the Supreme Court put it in framing its preemption analysis: "because the statute 'contains an express pre-emption clause,' *we do not invoke any presumption against pre-emption* but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Commonwealth of Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (emphasis added) (citation omitted). Given that the GSA includes an express preemption clause, the same approach applies here.

As a threshold matter, the Act preempts any claim that Syngenta had a duty *itself* to segregate corn based on its genetic characteristics. It is difficult to understand exactly what it means for Syngenta to institute "systems . . . to isolate or channel Viptera" and to "segregate Viptera from non-Viptera corn," 2nd Am. Class Compl. ¶¶ 19, 118; 2nd Am. Non-Class Compl. ¶¶ 28, 127, given that it is undisputed that Syngenta, as a company that simply sells *seed*, does not handle harvested *corn grain* and physically could not "channel" corn grain that it never even touches, much less controls. Whatever Plaintiffs mean, this Court should hold—as the Federal MDL Court recently did—that the plain language of the Act prohibits state tort law from requiring *anyone* to inspect or test grain for the presence of the GM trait from Viptera or to segregate or channel grain according to that characteristic, because that would necessarily require both "inspection" and "description" of corn according to standards based on genetic

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"characteristics." That is, it would require determining and representing to others whether the corn contains the MIR162 trait. As the Federal MDL Court put it, "[t]he GSA preemption provision does not refer to state-law requirements imposed on any particular actor" and thus "the statute preempts any claims based on a requirement of inspection or description by *anyone*." MDL Preemption Order 22 (emphasis added).[7]

In addition, to the extent Plaintiffs assert that Syngenta should have contractually forced *others* to test for or isolate corn based on the presence of Viptera, that duty is preempted, too. For purposes of the broad preemption provision displacing state power in the GSA, there is no functional difference between a state law that directly requires elevators and exporters to inspect and segregate corn and a state law that requires a third party (like Syngenta) to use a contract to impose terms on elevators and exporters requiring the same inspection and segregation. Both are attempts to "require" the inspection or description of grain according to a characteristic set by the State and thus are preempted. A State cannot accomplish regulation indirectly if direct regulation would be preempted. As the Supreme Court has put it, "[w]e have often rejected efforts by States to avoid preemption by shifting their regulatory focus from one company to another in the same supply chain." *American Trucking Ass'ns, Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096, 2104 (2013).

Thus, the Supreme Court has held that, where federal law precludes a State from directly imposing a duty on Party A (here, grain handlers), the State cannot achieve the same result by requiring another party (here, Syngenta) to impose the same substantive requirements through its

[7] By contrast, Syngenta respectfully continues to believe that the GSA would *not* preempt the theory that grain elevators and exporters had a duty, when they were purchasing grain, to *ask* farmers whether the corn they were selling contained Viptera and to make responsible decisions based on that information. *See, e.g.*, Syngenta's Proposed Third-Party Compl. ¶¶ 116(a). Similarly, the GSA would not preempt a duty on exporters who had already voluntarily tested their corn to act responsibly on that information by refraining from illegally shipping corn that they knew contained Viptera to China. *See id.* ¶ 116(d)-(f). Requiring exporters to act with reasonable care based on such knowledge does not impose a requirement for them to "inspect" or "describe" grain in the first place.

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contracts with Party A. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008). For example, in *Rowe*, federal law preempted States from "enact[ing] or enforc[ing] a law . . . related to a price, route, or service of any motor carrier." *Id.* at 368. Unable to regulate motor carriers directly, Maine tried to circumvent federal preemption by imposing legal requirements on the *shippers* who hired motor carriers, requiring shippers of tobacco to contract only with carriers that promised to provide "a special kind of recipient-verification service." *Id.* at 368-69, 371. Even though Maine's law told "shippers what to choose rather than carriers what to do," the Supreme Court held it preempted, explaining that Maine could not indirectly regulate motor carriers by regulating the contracts that shippers must use in hiring motor carriers. *Id.* at 372-73.

Similarly, *American Trucking* involved the same preemption clause at issue in *Rowe* and addressed a city ordinance that required terminal operators at the Port of Los Angeles to impose particular terms in their contracts with motor carriers. The Supreme Court again held that federal preemption could not be evaded by the expedient of focusing on an entity one step removed and requiring *that* entity to impose terms on motor carriers in its contracts. Moreover, the Court expressly rejected the argument that such a state-imposed contract scheme should not be considered a provision "having the force and effect of law" and should escape preemption because it merely resulted in supposedly "voluntary" contracts. The Court explained that the resulting contract terms could *not* be viewed "as the result merely of the parties' voluntary commitments." *Id.* at 2103. Instead, the law "forced terminal operators—and through them, trucking companies—to alter their conduct" and as a result, "the contract here functions as part and parcel of a governmental program wielding coercive power over private parties." *Id.* Exactly parallel analysis applies to Plaintiffs' suggestion that Syngenta had a duty to impose contract terms on growers and grain elevators and shows that such contract terms would be state "requirements" that are preempted. *See also Fed. Housing Fin. Agency v. City of Chi.*, 962 F.

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Supp. 2d 1044, 1048 (N.D. Ill. 2013) ("[E]ven if the Ordinance is, on its face, only directly applicable to servicers, *American Trucking* holds that the Court's analysis is not confined to one level of the 'same supply chain' in deciding whether the Ordinance is preempted.").

Relying on the same cases cited above, the Federal MDL Court agreed with Syngenta that parallel claims brought by plaintiffs in the federal case were preempted. It "reject[ed] plaintiffs' argument that a duty [imposed on Syngenta] to limit sales to purchasers who made certain promises would not impose a requirement under the preemption provision." MDL Preemption Order 24. Thus, States cannot impose requirements for inspecting, labeling, channeling or segregating grain by requiring a seed seller (Syngenta) to create a regime imposing all of those requirements through its own contracts with Viptera purchasers and ensuing contractual requirements that allegedly should have flowed down to grain elevators and exporters. *Id.* at 25 (holding that "any claim based on a duty to assist in the channeling or segregation of *corn*," including "through contract requirements," is preempted).

Indeed, allowing States to use intermediaries like Syngenta to impose contract terms demanding the inspection or description of grain would result in various state requirements governing the handling of grain that would defeat the core objective of the GSA—eliminating disparate State requirements. Corn purchased in some States could be subject to one set of restrictions while corn purchased in another State would carry with it different contract terms for identifying and isolating GM traits, making it impossible for national grain handlers like Cargill and ADM to organize their facilities sensibly in response to disparate and potentially conflicting state-imposed contract terms. If every State could impose such obligations the patchwork of conflicting state requirements that the GSA has prevented since 1916 could be reborn.[8] In

[8] *Cf. Rowe*, 552 U.S. at 373 ("To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements

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Nebraska, GM seed manufacturers could be required to enter new contractual relationships with grain elevators requiring them to use dedicated facilities to accept and channel corn containing certain GM traits away from export markets where they are not approved. But in Missouri, GM seed manufacturers might have to require their purchasers to implement different "stringent containment and channeling procedures" to "isolate Viptera" corn from the rest of the corn supply. 2d Am. Class Compl. ¶¶ 37, 97.

For the same reason, the Act preempts Plaintiffs' theory that Syngenta failed to educate and provide "instructions" to Viptera farmers on how they were "supposed to channel." 2nd Am. Class Compl. ¶ 132; 2nd Am. Non-Class Compl. ¶ 141. As the Federal MDL Court explained, since there can be no state-imposed duty to inspect or describe corn based on the presence of Viptera, "any claim based on a duty to *assist* in the channeling or segregation of *corn*," including "through . . . education," is preempted. MDL Preemption Order 25 (first emphasis added).

Indeed, it would be legally incoherent to hold that a claim survives based on the theory that Syngenta had a duty to *educate* others about how to inspect, label, segregate or channel corn based on the presence of Viptera when others have *no duty* (and cannot be placed under a state-law duty) to actually carry out any of those actions. Where there is no duty for others to make use of information or assistance provided by Syngenta, Plaintiffs cannot allege (and have not alleged) any causal connection between Syngenta's supposed duty and Plaintiffs' alleged injury. Critically, Plaintiffs themselves have explained that segregation and channeling of Viptera can be effective only when *everyone* in the industry participates. As they put it: "[c]hanneling can *only* work *if all* grain handlers and others in the supply chain are engaged in that endeavor." 2nd

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could easily lead to a patchwork of state service-determining laws, rules, and regulations.").

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Am. Class Compl. ¶ 135 (emphasis added); 2nd Am. Non-Class Compl. ¶ 144.[9] In other words, this is not a case where farmers in Minnesota could have avoided injury if several grain elevators in Minnesota had voluntarily segregated corn to keep it Viptera-free. Instead, the only way Plaintiff could allege that a failure by Syngenta to educate growers, elevators, and exporters about channeling was a but-for cause of their alleged injury would be to allege that, if Syngenta had provided that assistance, *all* grain elevators that feed corn into export channels and *all* exporters shipping corn to China would have *voluntarily* participated in a comprehensive segregation and channeling regime sufficient to keep export channels to China free from Viptera corn. Plaintiff does not and cannot allege that *every* elevator and exporter in the industry would have voluntarily taken up Syngenta's assistance and would have committed the money and resources needed to perform testing and segregation that they had absolutely no state-law obligation to do.

Plaintiffs have already praised the Federal MDL Court's preemption analysis. Indeed, when the Federal MDL Court dismissed Syngenta's third-party claims, Plaintiffs urged this Court to follow the federal court's ruling, arguing that this Court should not "contradict the holding of a federal district court judge on a key question of federal preemption." Pls.' Opp'n to Syngenta's Mot. for Leave to File a Third-Party Compl. 9-10. But as the Federal MDL Court has made clear, it is the exact same preemption analysis that also requires dismissing a large swath of Plaintiffs' claims against Syngenta. *See* MDL Preemption Order 19 (explaining that "for the reasons stated in the Court's previous [third-party preemption] order . . . the GSA preempts any claim against Syngenta based on a duty to make sure that Viptera corn is kept

[9] *See also e.g.*, 2nd Am. Class Compl. ¶ 37 (alleging that "without stringent containment and channeling procedures, Viptera would contaminate the U.S. corn supply and move to export markets, causing significant trade disruption"); *id.* ¶ 320 (alleging that "absent robust isolation practices and effective channeling, it was virtually certain that Viptera or Duracade would disseminate throughout the U.S. corn supply"); 2nd Am. Non-Class Compl. ¶¶ 46, 324 (same).

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segregated from other corn."). This Court was aware of the full extent of the Federal MDL Court's rationale when it relied, in part, on the federal court's analysis in indicating that Syngenta's third-party claims were likely futile. *See* 8/19/2016 Letter from Cargill & ADM to Hon. Thomas M. Sipkins (attaching MDL Preemption Order as supplemental authority). Having asked this Court to follow the Federal MDL Court's analysis when it suited their interests in blocking Syngenta's third-party claims, there is no principled basis on which Plaintiffs can do an about-face and ask the Court to reject the very same preemption analysis when it comes time to apply it equally to *their* claims. All claims based on an alleged duty to keep Viptera corn separated from other corn are expressly preempted, and the Court should enter judgment on the pleadings for Syngenta on such claims.

B. The GSA Impliedly Preempts Any Liability Premised On A Duty To Isolate Corn Containing Viptera From Entering China.

Plaintiffs' theory of liability based on a duty to ensure channeling is also impliedly preempted.[10] "[S]tate law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2505 (internal quotation and citation omitted). State law is also preempted when it "regulate[s] conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* at 2501. Whether state law is impliedly preempted requires "examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Whether the analysis here is cast under the label of conflict preemption or field

[10] Implied preemption is unaffected by the fact that the GSA contains an express preemption clause. "[T]he existence of an express pre-emption provision does *not* bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 132 S. Ct. at 2504-05; *see also, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

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preemption, the point is the same: the GSA displaced state authority to set any standards or requirements for the inspection or description of grain in order to establish a uniform federal system. It was established long ago that Congress enacted the GSA to "establish a uniform system for the inspection and grading of . . . grain moving in interstate commerce." *Farmers' Grain*, 273 F. at 651. Congress accomplished that goal by centralizing exclusive authority in the Secretary of Agriculture "to fix and establish [] standards of kind, class, quality, and condition for corn," 7 U.S.C. § 76(a), and by simultaneously eliminating all State authority to establish inspection or description requirements based on *any* other characteristics, *id.* § 87g. The Secretary has exercised that power by establishing standards for inspecting and describing corn that do *not* require the identification of genetic content. *See generally* 7 C.F.R. §§ 810.103, 810.401 *et seq.* The Secretary routinely adds and modifies standards for corn to account for economic effects in the market.[11] For example, the USDA added standards based on the proportion of foreign material (*i.e.*, extraneous material) in grain shipments "[b]ecause the presence of materials other than the primary grain generally reduces the value to the buyer and processor." Lowell D. Hill, *Grain Grades & Standards: Historical Issues Shaping The Future* 116 (1990). But the Secretary has *not* chosen to impose inspection or description requirements that turn on corn's genetic content.[12] The comprehensive federal regulatory regime thus deliberately permits handling of grain without testing, segregation, or channeling requirements based on genetic content, and a state-imposed requirement to create such a testing and channeling regime would frustrate Congress's manifest objective in having uniform federal

[11] *See, e.g.*, Lowell D. Hill, *Grain Grades & Standards: Historical Issues Shaping The Future* 113-14 (1990) ("As grain-marketing firms put the new quality standards into operation, buyers and sellers discovered adverse economic effects . . . . The Grain Standards Act gave the USDA the responsibility for balancing the conflicting interests among the participants and deciding what changes would ultimately be made.").

[12] It makes no difference whether the Secretary has *actually* imposed standards for inspecting or describing grain based on genetic content. Congress assigned the decision whether and how to regulate the inspection or description of grain to the USDA, and that delegation displaces state law. *See, e.g.*, *Arizona*, 132 S. Ct. at 2502 ("Field preemption reflects a congressional decision to foreclose *any* state regulation in the area[.]") (emphasis added).

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standards, and only those standards, control. *See, e.g.*, *Crosby*, 530 U.S. at 379-80 ("The fact of a common end hardly neutralizes conflicting means."); *Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 287 (1971) ("Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."). As the Supreme Court has explained, "[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls," state law cannot regulate what federal law has left unregulated. *Arizona*, 132 S. Ct. at 2505 (conflict preemption); *see also, e.g.*, *Crosby*, 530 U.S. at 380 (a comprehensive regulatory system is "drawn not only to bar what [it] prohibit[s] but to allow what [it] permit[s]").

Indeed, courts have consistently noted that similarly worded preemption provisions in other statutes reflect Congress' intent to comprehensively occupy an area of regulation, thereby displacing state law requirements, regardless of whether there are conflicting federal regulations. For example, the Clean Air Act's preemption provision forbids states from "requir[ing] certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." 42 U.S.C. § 7543(a). This language "*categorically* prohibits 'certification, inspection, or any other approval' as conditions precedent to sale" by States to ensure uniformity throughout the nation and to avoid the burden on manufacturers that would result from different state standards. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 257 (2004).

So too here. As explained above, the GSA's preemption provision broadly delegates the entire arena of the standards used for inspecting and describing grain to the USDA and displaces any state law requirements on the subject. The statue takes that approach because exclusive federal authority "is necessary to prevent or eliminate burdens on such [interstate or foreign] commerce and to regulate effectively such commerce.'" 7 U.S.C. § 74(a). Such burdens are

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precisely what would result if States could require Syngenta or others to perform channeling based on the presence of Viptera (or other GM traits). If each State could regulate the testing, inspecting, describing, labeling and/or channeling of corn based on the presence of particular GM traits and with respect to particular export markets—whether directly or indirectly—GM seed manufacturers and grain handlers would be subject to a "state regulatory patchwork" of different requirements. *Rowe*, 552 U.S. at 373. *Cf. supra* pp. 7-8, 12. As a result, any state-law liability on Syngenta related to isolating Viptera corn from other corn is impliedly preempted.[13]

C. All Of Plaintiffs' Causes Of Action Are Equally Subject To GSA Preemption.

The GSA equally preempts all of Plaintiffs' causes of action. As the Supreme Court has explained, the scope of preemption does not depend on the particular labels that state law uses to describe a cause of action. Instead, preemption depends on whether liability under state law "signals the breach of a duty" and how the duty imposed by state law "can be satisfied." *Mutual Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2475 (2013). A court must analyze preemption with respect to each of the Plaintiffs' particular theories as to how the defendant could have "escape[d] liability." *Id.* If a particular theory would impose a requirement that is prohibited under federal law, then that theory for establishing liability is preempted. *Id.* The Federal MDL Court has twice taken the same approach. *See* MDL Preemption Order 23-25 (analyzing preemption with respect to each particular theory of liability asserted by the complaint); MDL Third-Party MTD Order 7 (courts must "determine . . . whether the imposition of such a [general] duty [of reasonable care] in the circumstances of this case (as set forth in the pleadings) would fall within the scope of the GSA's preemption provision").[14]

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[13] The Federal MDL Court's observation in a footnote (citing no authority and addressing none of the arguments above) that implied preemption does not apply here was dicta. The Federal MDL Court has no occasion to rule on implied preemption because it held that identical claims were expressly preempted.

[14] The Federal MDL Court did not address preemption with respect to claims other than negligence, as it

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Plaintiffs assert that Syngenta was under the same legal duties constraining its primary conduct under a variety of causes of action—negligence, tortious interference, consumer protection, and Minnesota strict liability failure-to-warn claims. All of these claims are equally preempted to the same extent. As the Supreme Court has explained, "common-law liability is premised on the existence of a legal duty, and a tort judgment therefore establishes that the defendant has violated a state-law obligation" to carry out the actions required to fulfill a particular legal duty. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). Such obligations constitute state-imposed "requirements" that are preempted under federal laws—like the GSA—that expressly prohibit States from "requiring" particular actions. *Id.* Courts have thus consistently held that negligence, strict liability, and tortious interference claims rest upon state-imposed duties that may be preempted under federal law. *See, e.g.*, *id.* (negligence and strict liability claims preempted); *Angeles v. Medtronic, Inc.*, 863 N.W.2d 404, 414 & n.1, 416 (Minn. Ct. App. 2015) (finding that a strict liability failure to warn claim was a preempted state "requirement"); *Munro v. Lucy Activewear, Inc.*, No. 16-79 (JRT/KMM), 2016 WL 5660422, at *9 (D. Minn. Sept. 29, 2016) (tortious interference claim preempted). Here, Plaintiffs' tortious interference claims rest on the theory that it was somehow "improper" interference with their prospective contractual relations for Syngenta to sell Viptera seed without ensuring the subsequent channeling of Viptera corn to isolate it from Chinese export channels. The assertion of that obligation to ensure channeling is just as preempted when it is packaged into a tortious interference claim as it is when it is packaged into a negligence claim.

Similarly, courts have held that consumer protection laws, including Minnesota's, impose "requirements" subject to preemption. *See, e.g.*, *Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp. 2d 1012, 1018, 1020-21 (D. Minn. 2002) (holding that consumer fraud claim under

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interpreted Syngenta's motion as limited to the plaintiffs' negligence claim. *See* MDL Preemption Order 19 n.7.

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Minn. Stat. § 325F.69 imposed preempted pesticide labeling "requirements"). Here, to the extent Plaintiffs' consumer protection claims rest on a duty to ensure the segregation or channeling of Viptera corn, they are preempted.

D. The Only Duty That Survives Preemption Is The Theory That Syngenta Should Not Have Sold Viptera And Duracade Seeds At All Absent Chinese Import Approval.

Plaintiffs' only theory of liability that is not preempted by the GSA is the assertion that Syngenta should have refrained from selling Viptera and Duracade seeds *at all* without Chinese import approval. Although the Federal MDL Court held that certain narrow duties about limiting sales and use of Viptera and Duracade seed (before they grew into corn grain subject to the GSA) were not preempted, *see* MDL Preemption Order 22-25, the Federal MDL Court allowed those theories to proceed because it treated Syngenta's motion for partial judgment on the pleadings as "based solely on GSA preemption" and thus declined to address Syngenta's arguments that duties restricting sales or use of the seed failed for lack of causation, *id.* at 21. Here, however, Syngenta affirmatively raises those causation arguments as part of this motion.

Any newfound theories that Syngenta could have avoided Plaintiffs' harm by limiting seed sales in certain ways—for example, to sell Viptera seed only to farmers in hypothetical counties from which no grain is exported or who agree to use all their corn on-farm—fail for lack of causation as a matter of law. Limiting seed sales does nothing to address the issue of cross-pollination, which, under the facts as affirmatively alleged by the complaint, is one of the primary mechanisms that allegedly results in the GM trait in Viptera being dispersed throughout the corn supply. Plaintiffs squarely allege that cross-pollination cannot be completely avoided, *see* 2nd Am. Class Compl. ¶¶ 99, 101, and that it was "*inevitable* that Viptera corn would move into export channels, including China, and cause trade disruption," *id.* ¶ 231 (emphasis added). That is precisely the intractable defect undermining any theory of duty that relies on restricted

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sales for Viptera seed: under Plaintiffs' allegations, if Syngenta sold Viptera *at all*, the GM trait in it would still be spread by cross-pollination, which ignores farm, county, and state lines independently of whether Syngenta restricted its seed sales in certain ways. *See* 2nd Am. Class Compl. ¶ 103 (alleging a "very high likelihood that if commercialized, MIR162 would disseminate throughout the supply chain — in fields, storage and transportation — via the numerous routes that transgenic contamination occurs"); *id.* ¶ 231 (alleging that without adequate "channeling," "it was *inevitable* that Viptera® corn would move into export channels") (emphasis added). The only way to account for the independent mechanism of cross-pollination and avoid that hole in the causation element of Plaintiffs' negligence claim, of course, would be to *change* the duty to include the imposition of testing, inspection, description, and segregation requirements to ensure that corn grown by *other* farmers (and being sent into interstate and foreign commerce) did not contain the GM trait from Viptera. But those are exactly the requirements that are preempted. *See supra* Part I.A. In short, because Plaintiffs allege that cross-pollination independently makes it "inevitable" that the GM trait in Viptera would disperse throughout the corn supply and into export channels once it is sold at all, any limited-sale theories fail for lack of causation as a matter of law. The only non-preempted duty that may proceed is the theory that Syngenta should not have sold Viptera and Duracade seeds at all without Chinese import approval.

II. Plaintiffs Cannot Rely On Any Misrepresentation Theory Of Liability For Their Negligence Claim.

Although Plaintiffs have not asserted any separate cause of action based on misrepresentations from Syngenta, the complaint repeatedly alleges that Syngenta supposedly made "misrepresentat[ions]" about "the importance and status of China's approval." 2nd Am. Class Compl. ¶ 19; 2nd Am. Non-Class Compl. ¶ 28. Plaintiffs have also repeatedly tried to rely

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on these alleged misrepresentations as a basis for their negligence claims. *See* 2nd Am. Class Compl. ¶ 341(f)-(g); 2nd Am. Non-Class Compl. ¶ 302(f)-(g). The Federal MDL Court recently held that such an approach was barred as a matter of law and granted Syngenta judgment on the pleadings *precluding* the use of alleged misrepresentations as a basis for liability on a negligence claim. That court agreed with Syngenta that, where "plaintiffs by these complaints have not asserted any claim for negligent misrepresentation," there is "no basis for Syngenta's liability based on false representations or omissions of fact." MDL Preemption Order 20. This Court should follow the same approach and make clear that, in the absence of a claim for negligent misrepresentation (which Plaintiffs have not asserted), Plaintiffs cannot invoke misrepresentations as a basis for liability under their general negligence cause of action.

Negligent misrepresentation is an entirely different cause of action with different elements from negligence. Negligence requires duty, breach, causation, and damages. Negligent misrepresentation, on the other hand, requires "(1) a duty of care owed by the defendant to the plaintiff; (2) the defendant supplies false information to the plaintiff; (3) justifiable reliance upon the information by the plaintiff; and (4) failure by the defendant to exercise reasonable care in communicating the information." *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 843 N.E.2d 327, 334-35 (Ill. 2006) (similar) (relying on Restatement (Second) of Torts § 552). And for claims (like Plaintiffs') that seek purely economic losses, the law imposes additional requirements. As the Federal MDL Court has already recognized in dismissing a negligent misrepresentation claim under Illinois law, such claims may proceed *only* if the additional requirements are met that (i) the defendant is in the business of supplying information for the guidance of others in their business transactions and (ii) supplied the information intending to influence the plaintiff or knowing the plaintiff would rely on it for its business transactions. MDL MTD Order 91 (citing *Tyler v. Gibbons*, 368 Ill.

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App. 3d 126, 129 (3d Dist. 2006)); *see Smith v. Brutger Cos.*, 569 N.W.2d 408, 413-14 (Minn. 1997) (same, following Restatement (Second) of Torts § 552); *see generally* Restatement (Second) of Torts § 552. Plaintiffs do not even mention these elements in their complaint or allege that they are satisfied or plausibly allege facts showing, for example, that Syngenta is in the business of providing information for the guidance of others, that any statements Syngenta supposedly provided about its Viptera and Duracade products were supplied expressly for the guidance of business transactions by *non*-purchasers such as Plaintiffs, or that Plaintiffs in any way relied to their detriment on Syngenta's statements. To the contrary, Plaintiffs allege that Syngenta is *not* in the business of providing information because it is only a product "developer" and "manufacture[r]." *E.g.*, 2nd Am. Class Compl. ¶¶ 10, 63, 347; *see, e.g.*, *Tyler*, 368 Ill. App. 3d at 129 (dismissing negligent-misrepresentation claim against provider of "chemical products and equipment to agricultural producers" because it was not in the business of providing information).

The complaint here does not even mention the elements of negligent misrepresentation, and does not plead any facts to support those elements. Even if it did, any negligent misrepresentation claim would be barred by the ELD. *See* MDL MTD Order 91. Courts have construed similar attempts to smuggle misrepresentation theories into general negligence claims as *de facto* negligent misrepresentation claims and dismissed them when they fail to meet the stringent requirements for the distinct tort of negligent misrepresentation. For example, in *Perry v. Schumacher Grp. of La.*, No. 2:13-CV-36-FTM-29, 2014 WL 988751 (M.D. Fla. Mar. 13, 2014), the plaintiff attempted to "maintain her claim for negligence" based on a misrepresentation theory. The court treated that as a claim for negligent misrepresentation (not a claim for general negligence "supported" by allegations of misrepresentations), and dismissed it because the tort of negligent misrepresentation "evolved from the intentional tort of fraud, not

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negligence, and requires proof of" entirely different elements from a general negligence claim. *Id.* As in this case, the plaintiff did not include allegations that satisfied the elements for negligent misrepresentation, and thus the court dismissed the claim. *Id.* at *4-5. Other courts have likewise refused to allow a plaintiff to escape the limitations on negligent misrepresentation claims by trying to pursue assertions about allegedly negligent false statements as subsidiary theories for a general negligence claim.[15] This Court should do the same.

CONCLUSION

For the foregoing reasons, the Court should grant judgment on the pleadings dismissing all state-law claims against Syngenta to the extent they assert that Syngenta had a duty (1) to test, inspect, describe, label and/or segregate or channel corn based on the characteristic whether or not it contained the genetic traits from Viptera or Duracade; (2) to establish a regime (by contract or otherwise) requiring others to test, inspect, describe, label and/or segregate, channel, or restrict exports of corn based on the characteristic whether or not it contained the genetic traits from Viptera or Duracade; or (3) to take unspecified measures to assist the testing, inspection, description, labeling and/or segregating, channeling, or restricting export of corn based on the characteristic whether it contained the genetic traits from Viptera or Duracade. The Court should also grant judgment on the pleadings dismissing all state-law claims against Syngenta asserting that Syngenta is liable for negligent misrepresentations or omissions of fact.

[15] *See, e.g., In re Nat'l Century Fin. Enters., Inc.*, 504 F. Supp. 2d 287, 324-25 (S.D. Ohio 2007) ("treat[ing] [plaintiff's] negligence claim as one for negligent misrepresentation" and agreeing that the plaintiff's "negligence claim must be dismissed because it is indistinguishable from its negligent misrepresentation claim" where plaintiff alleged a general negligence claim premised on the defendant's breach of "duty by issuing Offering Materials replete with misrepresentations and omissions causing injury to [plaintiff]"); *Vanguard Mun. Bond Fund, Inc. v. Cantor, Fitzgerald L.P.*, 40 F. Supp. 2d 183, 188 (S.D.N.Y. 1999) ("[T]he Court does not find any substantial difference between Vanguard's negligence and negligent misrepresentation claims and will address them together as a claim for negligent misrepresentation.").

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