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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation This Document Relates to: *Daniel Mensik* (Orig. Case No. 27-CV-15-16826) *Van Tilburg Farms* (Orig. Case No. 27-15-13191) *Kirk Kuechenmeister* (Orig. Case NO. 27-CV-15-12102) *Charles W. Ledeboer* (Orig. Case No. 34-CV-15-117) *Douglas Maher* (Orig. Case No. 27-CV-15-17386)	Case Type: Civil Other Honorable Thomas M. Sipkins Court File No.: 27-CV-15-3785 **AMENDED PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES**

INTRODUCTION

Syngenta had a duty "to exercise reasonable care in the manner, timing, and scope of its commercialization of its Viptera and Duracade products." Order re Motion to Dismiss, 31. Syngenta breached that duty to the value chain through commissions or knowing omissions in deliberate disregard of the rights of American corn farmers.[1] Plaintiffs have more than established a *prima facie* case to amend their Complaints to include a claim for punitive damages. Conversely, Syngenta's opposition relies on inapplicable legal theories and rebuttal evidence that, at this stage of the litigation, is not relevant. *Swanlund v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990) (holding that the trial court should consider "only the evidence presented by [plaintiffs] without cross-examination or other challenge.") Accordingly, this Court should grant Plaintiffs' Motion and permit them to amend their Complaints to add a claim for punitive damages.

[1] Plaintiffs seek punitive damages for Syngenta's gross negligence, not for their statutory claims under the Minnesota Unfair Trade Practices Act or Minnesota Consumer Fraud Act.

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ARGUMENT

I. Plaintiffs' Motion is Timely Under Scheduling Order No. 5 Entered by the Court.

Syngenta spends more than a page arguing that this motion is "untimely." *See* Syngenta's Opposition Brief ("Syn. Opp."), 14-15. But Syngenta ignores the fact that this Court explicitly granted Plaintiffs leave to file this Motion in Scheduling Order No. 5. The second line of that Order, which was stipulated to by Syngenta's counsel, grants Plaintiffs leave to file a motion to add a claim for punitive damages by October 26, 2016. Plaintiffs' Motion is timely under this Court's most recent Scheduling Order.

II. Minnesota Law Applies to Plaintiffs' Punitive Damages Claim and Syngenta's Waiver Argument is Unavailing.

Syngenta overstates the scope of this Court's prior choice of law ruling in its Order denying Syngenta's Motion to Dismiss. There, the Court applied "the law of each Plaintiff's state of residence to their *common law claims*." *See* Order re Motion to Dismiss, 16 (emphasis added). Minnesota's law on punitive damages is statutory, not common law. *See* Minn. Stat. §§ 549.191 & 541.20. In fact, the Court permitted the extraterritorial application of Plaintiffs' statutory claims under the Minnesota Unfair Trade Practices Act and Minnesota Consumer Fraud Act. *See* Order re Motion to Dismiss, 44. The Court's prior choice of law ruling thus *supports* Plaintiffs' request to seek punitive damages under Minnesota law. Moreover, Syngenta does not cite any Minnesota case law to support its assertion that "the substantive law of those States also governs the availability of punitive damages." Syn. Opp., 15. Rather, it cites *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 429 (1996), which does not even involve punitive damages, but rather analyzes whether in a diversity case state or federal law applies to implicate a statutory cap on the amount of recoverable damages. *Gasperini* is not applicable here and Syngenta's reliance on that case is misplaced.

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In all likelihood, Syngenta does not include a choice of law analysis because the case law does not support its argument. As to plaintiff Mensik, Syngenta argues that Nebraska law does not provide for punitive damages, but ignores that a Nebraska district court applied Minnesota law on punitive damages in a case involving a plaintiff suing a Minnesota corporate defendant in Nebraska. *See Fanselow v. Rice*, 213 F. Supp. 2d 1077 (D. Neb. 2002) ("After considering these contacts and the policies underlying the law of punitive damages, I am persuaded that, with respect to the issue of punitive damages, Minnesota law should govern the claims against the defendant American Transport . . . ."). There, the plaintiff was injured in a car accident that occurred in Nebraska. Plaintiff sued a Minnesota company in Nebraska federal court and sought punitive damages. The court applied Minnesota law on punitive damages, reasoning that the state of domicile for the defendant corporation had the most significant interest in regulating the conduct of the defendant, and that "Nebraska has little interest in applying its punitive damages laws to a case such as this, where the only connection it has with the defendants is that it is was the location of the accident giving rise to the lawsuit." *Id.* at 1085; *see also Tracy Broad. Corp. v. Spectrum Scan, LLC*, No. 8:06CV336, 2008 U.S. Dist. LEXIS 10819, at *16 (D. Neb. Feb. 11, 2008) (holding that "Nebraska's prohibition on punitive damages does not work to preclude any application of such damages" and applying Kentucky law.). Syngenta's negligent conduct was carried out in Minnesota, and therefore Minnesota has a substantial interest in regulating the conduct of a Minnesota corporation. *See* Restatement (Second) of Conflict of Laws, § 145, cmt. c ("If the primary purpose of the tort rule involved is to deter or punish misconduct . . . the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship").

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As to plaintiffs VanTilburg and Maher, Ohio and Iowa law on punitive damages is substantially similar to that of Minnesota, further supporting the application of Minnesota law here because the tortious conduct occurred largely within this state. *See* Iowa Code § 668A.1 (providing for punitive damages where "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights and safety of another."); Ohio Rev. Code Ann. § 2315.21 (permitting punitive damages where the "actions or omissions of that defendant demonstrate malice . . . .").[2]

Not only does the case law demonstrate that Minnesota law should apply, Syngenta's failure to raise the conflict of laws issue has waived any argument to the contrary. *See Miller v. A.N. Webber, Inc.*, 484 N.W.2d 420, 422 (Minn. Ct. App. 1992) ("Where a conflict of law question has not been raised, Minnesota law will govern."). Any argument that the Court has already decided this issue or that Plaintiffs waived their ability to seek punitive damages for non-Minnesota plaintiffs is unsupported by both common reason and Syngenta's own cited case law.

III. Defendants' Attempt to Introduce Rebuttal Evidence is Improper and Its Legal Arguments are Plainly Inapplicable.

A. Syngenta's Attempt to Introduce Rebuttal Evidence is Improper.

The standard for the Court's analysis of the evidence in this case is clear. Under Minnesota law, this Court is to examine the evidence presented by the Plaintiffs to determine

[2] Minnesota law has the most significant relationship to the injury because it was the domicile state of Syngenta Seeds, Inc. and the location of the tortious conduct. *See, e.g., Williams v. Novartis Pharms. Corp.*, 15 F. Supp. 3d 761, 768 (S.D. Ohio 2014) (applying New Jersey law on punitive damages over the law of Ohio where the tortious conduct occurred in the home state of the Defendant corporation); *Keene Corp. v. Ins. Co. of N. Am.*, 597 F. Supp. 934, 938-39 (D.D.C. 1984) ("When the primary purpose of a rule of law is to deter or punish conduct, the States with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of defendant are located."); Restatement (Second) of Conflict of Laws, § 145, cmt. e ("When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous . . . the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law.).

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whether, if *unrebutted*, the evidence clearly and convincingly demonstrates that Syngenta acted with "deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a). But Syngenta spends much of its brief arguing rebuttal evidence submitted in the accompanying affidavit. Simply put, that rebuttal evidence is improper and should not be considered at this stage in the Court's analysis. *See, e.g.*, *Swanlund*, 459 N.W.2d at 154; *Nw. Airlines v. Am. Airlines*, 870 F. Supp. 1499, 1502-03 (D. Minn. 1994) ("To determine if plaintiff has made the proper showing, the evidence in support of the motion should be thoroughly examined, without considering evidence submitted in opposition.").[3]

B. U.S. Government Approval of Viptera Does Not Foreclose Punitive Damages.

Syngenta argues that punitive damages are improper because it adhered to "environmental and safety regulations." But the cases Syngenta relies on do not support that argument. *See, e.g.*, *Nissan Motor Co. v. Maddox*, 486 S.W.3d 838, 839 (Ky. 2015) ("mere compliance with regulatory products standards, either mandatory or voluntary, does not automatically foreclose a punitive damages jury instruction"). In fact, as Syngenta acknowledges, the Minnesota Supreme Court has explicitly held that punitive damages can be recovered based on the manufacture of an unsafe product even where the applicable safety regulations were followed. *See Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 733 (Minn. 1980); *see also Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 840 (Ky. Ct. App. 2004); *GM Corp. v. Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994). As stated in *Nissan*, "proof indicating that a manufacturer exercised slight care by complying with relevant regulatory mandates is not

[3] *See also Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 n.3 (D. Minn. 2003) ("Thus, as we have observed in prior cases, in reaching such a determination, the Court makes no credibility rulings, and does not consider any challenge, by cross-examination or otherwise, to the plaintiff's proof."); *Olson v. Snap Products, Inc.*, 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998); *Ulrich v. City of Crosby*, 848 F. Supp. 861, 867 (D. Minn. 1994).

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dispositive where additional evidence is presented that tends to prove reckless or wanton conduct." 486 S.W.3d at 843-44.

Moreover, Plaintiffs' allegations against Syngenta have nothing to do with safety or environmental concerns and therefore adherence to safety and environmental regulations is irrelevant. *Compare Stone Man v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (sinkholes caused by a quarry); *Nissan*, 486 S.W.3d 838 (seatbelt safety standards). But the *Gryc* decision is particularly instructive on this issue. In *Gryc*, the Minnesota Supreme Court allowed punitive damages in a case involving the manufacture of flammable pajamas even though the manufacturer had followed the required statutory procedures to test the flammability of the material. 297 N.W.2d at 729. The Court allowed punitive damages, in part, because the relevant regulation was meant "to protect the public against certain highly flammable synthetic products, not all unreasonably dangerous clothing." *Id*. at 734. Here, the connection between USDA, EPA, and FDA regulations and Syngenta's conduct is far more attenuated than in *Gryc*. At this stage, plaintiffs need only present *prima facie* evidence of Syngenta's deliberate disregard for their rights that, if unrebutted, support a judgment in plaintiff's favor. *See Swanlund*, 459 N.W.2d at 154. Plaintiffs have provided ample evidence that Syngenta acted with deliberate disregard to their rights.

C. Plaintiffs' Negligence Theory is Well Established.

Syngenta also argues that punitive damages are precluded by the Due Process Clause and Minnesota law because it somehow did not know that it could be held liable for negligence for causing a trade disruption. But few legal tenets are more firmly established than the proposition that one who fails "to exercise reasonable care to prevent his conduct from harming others" can be held liable for negligence. *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). Syngenta does not cite a single case in which a court held that punitive damages are not allowed in a

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negligence case, let alone because of the defendant's subjective belief that it was somehow immune from liability or because the facts underlying the claim are purportedly distinctive. Moreover, even if Syngenta had been able to cite such a case, Plaintiffs' moving brief is replete with evidence showing that Syngenta acted with deliberate disregard for the rights of Plaintiffs, and therefore, Syngenta should have known that it could be held liable for its negligent conduct.

Syngenta misconstrues *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987) and *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876 (Minn. 1986) in suggesting that whenever a purportedly new set of facts leads to a negligence claim, punitive damages cannot be awarded. In *Phipps*, the Court disallowed punitive damages on a newly articulated cause of action that had not been previously recognized by Minnesota courts. 408 N.W.2d at 573. Negligence is not a newly articulated cause of action. In *Lewis*, the Court held that punitive damages were not allowed for claims of defamation based on compelled self-publication (whether or not the cause of action was new). Similarly, *Lewis* is inapplicable because this case does not seek to create a new theory of liability. Nothing in the Court's reasoning in either case applies on the facts presented here.

Finally, Syngenta's due process argument is flawed. In essence, Syngenta argues that because it believed it could not be held liable, punitive damages cannot be awarded. In fact, Syngenta's conduct warrants punitive damages, in part, precisely *because* it acted based on its belief that it would never be held to account for its actions. As discussed in Plaintiffs' moving brief, Syngenta *knew* that releasing Viptera created an unreasonable likelihood of damage to the interconnected market. Despite that, Syngenta proceeded with commercialization because it intended to shift any legal responsibility to the grain trade. At bottom, Syngenta should not be

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permitted to foist the risk onto other members of the interconnected market and then invoke its own subjective belief that it would not be held liable to avoid punitive damages.

D. The Stewardship Agreements Do Not Bar Punitive Damages.

Syngenta next argues that four Plaintiffs are "bound" by Syngenta Stewardship Agreements (or associated fine print) that purport to waive any claims for punitive damages. This argument is both procedurally premature and substantively flawed for a number of reasons.

First, Syngenta's waiver argument is procedurally premature. Waiver is an affirmative defense that requires Syngenta to prove all necessary factual elements. *See* Minn. R. Civ. P. 8.03. *See also MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). Here, Syngenta attempts to circumvent ordinary summary judgment procedure by asking the Court to essentially rule as a matter of law that it has established all necessary elements of a waiver defense. Syngenta's less than one-page argument, which does not even define the elements of waiver or explain how those elements are met, is insufficient for the Court to rule as a matter of law that amendment would be futile. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) ("Waiver generally is a question of fact, and it is rarely to be inferred as a matter of law.").

Second, Syngenta's waiver argument relies on disputed and unproven facts and requires the Court to assume, without proper foundation, both the applicability and enforceability of the Stewardship Agreements. At minimum, a contractual waiver argument would require Syngenta to prove the formation of enforceable contracts between Syngenta and all four Plaintiffs. That would require proof of "communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. Ct. App. 2008). These elements are vigorously disputed and are highly

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individualized, fact-specific inquiries as to several Plaintiffs.[4] The fact disputes alone warrant rejection of Syngenta's waiver argument at this juncture. *See Leffert*, 756 N.W.2d at 918 ("Whether a contract exists generally is a question for the fact-finder.").

Attempting to overcome these deficiencies, Syngenta next argues that the tags on the Viptera and Duracade seed bags, which reference a Stewardship Agreement, are sufficient to create binding contracts with each Plaintiff. Putting aside the legal validity of such purported contracts, Syngenta fails to establish that each of the four Plaintiffs (1) received the product tags, (2) accepted the terms of the product tags, and (3) did both of these at a time period such that they could apply to the parties' relationship when Plaintiffs' present claims arose.

Finally, Syngenta's waiver argument incorrectly assumes, and would require the court to erroneously accept, that the Stewardship Agreements apply to Plaintiffs' current claims and are legally enforceable. Syngenta's one-page argument does not even attempt to explain why the Stewardship Agreements, which purport to govern the sale of GMO corn seeds to Plaintiffs, apply to Plaintiffs' current claims, which do not arise from Plaintiffs' purchase or use of those purchased seeds.[5] This is a remarkable assumption under Minnesota law, which holds that exculpatory clauses are "not favored" and must be "strictly construed against the benefitted party." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005). Further,

[4] For example, Plaintiff Daniel Mensik strongly disputes he signed a Stewardship Agreement. Further, Syngenta fails to explain why there are two competing Stewardship Agreements and omits the serious possibility that at least one of the two agreements is a forgery that should not be presented to the Court as authentic evidence. Similarly, it cannot be assumed that a Stewardship Agreement signed by Plaintiff Chuck Ledeboer in March 2010 in an unrelated transaction would apply to the parties' relationship years later when the present claims arose.

[5] While Plaintiffs' claims arise from Syngenta's sale of Viptera and Duracade seeds in the United States, they do not arise from Plaintiffs' purchase and use of Viptera and Duracade seeds, which are the subjects of the Stewardship Agreement. Those Plaintiffs that purchased Viptera and Duracade were harmed in exactly the same manner as all other corn farmers—via Syngenta's contamination of the entire United States corn supply with unapproved traits.

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Syngenta assumes without argument its exculpatory clauses are legally enforceable, even though Minnesota courts will not enforce clauses that are "[1] ambiguous in scope, [2] purport[] to release the benefited party from liability for intentional, willful or wanton acts; or [3] contravene[] public policy." *Id.* All three conditions are likely present here and bar the enforcement of the Stewardship Agreement waivers. For all these reasons, Syngenta cannot establish that all four Plaintiffs waived claims for punitive damages as a matter of law, and thus, its futility argument fails.

E. Syngenta's Unclean Hands Argument is Unavailing.

Syngenta's entire unclean hands argument consists of rebuttal evidence and should not be considered by the Court at this time. *See* Section III(A), *supra*. Moreover, Syngenta is essentially asking the Court to rule *as a matter of law* that the plaintiff's conduct in buying its seed was unconscionable by reason of a bad motive. *Creative Commc'ns Consultants, Inc. v. Gaylord*, 403 N.W.2d 654, 658 (Minn. Ct. App. 1987) ("The unclean hands doctrine, however, will be invoked only against a party whose conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable.) (internal quotation omitted). Syngenta has provided no *evidence* to support an argument that any of the Plaintiffs had an improper motive by purchasing Viptera or Duracade seed. Syngenta's argument is properly viewed as an improper (and deficient) motion for summary judgment that cannot be decided at this stage. If the Court were to consider the issue, it should reject the argument[6] due to Syngenta's failure to identify *any* evidence in support of its assertion.[7]

[6] Syngenta's affirmative defense of unclean hands may also be rejected because it seeks equitable relief from Plaintiffs' *legal* claims of negligence and punitive damages. *See Hill v. Estate of Allred*, 216 P.3d 929, 935 (Utah 2009) ("Because the court never invoked equitable powers to award [plaintiff] damages, it was not justified when it turned to an equitable principle to defeat her claims for punitive damages and attorney fees.")

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CONCLUSION

Nothing in Defendants' opposition negates the overwhelming evidence that Syngenta acted with deliberate disregard for the rights of American corn farmers in the manner, scope and timing of its commercialization of Viptera and Duracade. Accordingly, Plaintiffs' Motion should be granted.

Dated: December 1, 2016

By /s/Lewis A. Remele Jr.

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[7] The following exhibits were inadvertently omitted from Plaintiffs' moving brief: Exhibits A, B, and C to the Second Declaration of Aram V. Desteian.