IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: Syngenta AG MIR162 Corn Litigation	)	MDL No: 2591
	)	Case No. 14-md-2591-JWL-JPO
This Document Relates to: All Producer and Non-Producer Plaintiffs' Amended Class Action Master Complaints	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO SYNGENTA'S MOTION TO DISMISS PRODUCER AND NON-PRODUCER PLAINTIFFS' AMENDED CLASS ACTION MASTER COMPLAINTS

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INTRODUCTION

From the beginning to end of its brief, Syngenta ignores the most basic principles governing Rule 12(b)(6) motions to dismiss – that alleged facts are taken as true, all reasonable inferences are viewed in Plaintiffs' favor, and fact assertions beyond the *pleaded* facts are inappropriate except in limited situations inapplicable here. Syngenta attempts to recast the Complaints in the light most favorable *to itself* by asserting facts not contained in the Complaints, ignoring the facts alleged, and arguing inferences in its favor. Applying appropriate legal principles, no question should exist that the Complaints state claims for which relief may be granted.[1]

Syngenta thematically blames others for the consequences of its own actions. The Complaints, however, contain no allegations against anyone but Syngenta. For example, Syngenta argues about what Non-Producers could or should have done to minimize the risk that Syngenta created. But Plaintiffs allege that any efforts by others "would not work" absent a carefully imposed and monitored stewardship program *by Syngenta*. Producer Plaintiffs' Amended Class Action Complaint ("PC") ¶ 318; Non-Producer Plaintiffs' Amended Master Class Action Complaint ("NC") ¶ 273.[2] Plaintiffs also allege that Syngenta did not simply fail to take precautions against foreseen or clearly foreseeable harm, but "acted affirmatively" to create the harm. PC ¶ 322; NC ¶ 277. The Complaints squarely place the blame on Syngenta, not Non-Producers. Syngenta also wants to argue about whether China was a key export market, Mem. at 9-10, but, as alleged, *itself* referred to China as such. PC ¶¶ 143-45; *see also id*. ¶¶ 152-65, 170-

[1] Most if not all of the dismissal grounds Syngenta asserts are heavily fact dependent. Duty and proximate cause are prime examples. These issues must be assessed according to the facts alleged and reasonable inferences drawn in Plaintiffs' favor, not according to what Syngenta attempts to interject.

[2] The factual allegations of both Complaints are identical or nearly identical. Omission of a cross-reference is not meant to indicate otherwise.

77; NC ¶¶ 90-92, 99-112, 117-24.[3] Syngenta says that China did not have a "functioning regulatory system," and banned U.S. corn for economic reasons, Mem. at 15, but again, the allegations are otherwise. *See* PC at 2 & ¶¶ 129, 296-97, 140; NC at 2 & ¶¶ 76, 87, 251-52. Syngenta's suggestions that market price damages are "speculative" or due to a "bumper corn crop" in 2013 also are wholly inappropriate (and will be refuted by expert testimony).[4] Disputed facts cannot be the basis for a motion to dismiss. Plaintiffs object to all of Syngenta's inappropriate "fact" assertions and evidentiary arguments. *See* Plaintiffs' ("App.") Appendix A.

Syngenta's legal arguments also are systemically deficient. Among other things, Syngenta generalizes state law, using snippets from selective cases often outside relevant jurisdictions. This approach cannot withstand elemental scrutiny. When applicable state law is analyzed, the flaws in Syngenta's arguments become apparent.[5] Syngenta also posits well-worn, straw man arguments such as a cry against making it an "insurer" or holding it responsible for others' conduct, Mem. at 1, 3, 21-41, when this case is about the natural foreseen consequences of Syngenta's ***own*** conduct. Of course, insurers pay claims without regard to their own fault. Here, Plaintiffs unequivocally plead Syngenta's fault.

APPLICABLE STANDARDS

Dismissal under Rule 12(b)(6) is appropriate "only when the factual allegations fail to 'state a claim to relief that is plausible on [the complaint's] face,' or when an issue of law is dispositive." *Marten Transp., Ltd. v. Plattform Adver., Inc.*, No. 14-2464-JWL, 2015 WL

[3] One federal court already determined that Syngenta should have recognized that Chinese imports of U.S. corn for the 2011 crop year "might well be very significant." PC ¶ 229; NC ¶ 176.

[4] Syngenta attempts to hide behind the "U.S. regulatory framework" as a defense to its conduct. Nothing about the extra-record U.S. regulatory pronouncements cited by Syngenta (even if appropriately considered), however, justify its actions. Notably, Syngenta has not argued any form of preemption based on the U.S. "regulatory framework" or argued that Plaintiffs' claims conflict with federal law.

[5] Syngenta's failure to actually analyze relevant state laws is itself a basis for denying the motion. It should not be permitted to generalize first and particularize later.

363995, at *1 (D. Kan. Jan. 27, 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The issue is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Id.* (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)). Plaintiffs' facts must be taken as true, and all reasonable inferences are drawn in Plaintiffs' favor. *Id.* Additionally, "factual defenses" are not considered. *AZ DNR, LLC v. Luxury Travel Brokers, Inc.*, No. 13-2599-JWL, 2014 WL 644952, at *1 (D. Kan. Feb. 19, 2014). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence . . . but to assess whether the plaintiff's amended complaint alone is legally sufficient to state a claim for which relief may be granted." *Brokers' Choice of Am., Inc. v. NBC Univ., Inc.*, 757 F.3d 1125, 1135 (10th Cir. 2014) (quoting *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) (internal quotation marks omitted)).

Syngenta asks the Court to weigh potential evidence and assume facts and inferences not in or contrary to the Complaints. It generally is unacceptable, however, to "look beyond the four corners of the complaint" on a motion to dismiss. *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM, 2010 WL 5392666, at *2 (D. Kan. Dec. 21, 2010). Exceptions are "quite limited." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Unless attached (none were), documents may only be considered where referenced in the complaint and "central" to the claims, or properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Gee*, 627 F.3d at 1186; *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *see* Mem. at 5 n.1. These exceptions do not apply.

First, the documents cited by Syngenta are not "central" to Plaintiffs' claims. To meet that standard, the document must be "necessary to establish an element" of the claim. *Johnson v. Wells Fargo Bank, N.A.*, 999 F. Supp. 2d 919, 926 (N.D. Tex. 2014) (quoting *Kaye v. Lone Star*

Fund V (U.S.), L.P., 453 B.R. 645, 662 (Bankr. N.D. Tex. 2011)).[6] In other words, the "very existence" of the document, "and not the mere information it contains," must "give rise to the legal rights asserted." *Chesapeake Bay Found., Inc. v. Severtstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 611 (D. Md. 2011) (quoting *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 806 (E.D. Va. 2007) (internal quotation marks omitted)); *see also Alexander v. City of Greensboro*, 762 F. Supp. 2d 764, 822 (M.D.N.C. 2011). Documents on which Syngenta relies are not in this category and should not be considered. *Johnson*, 999 F. Supp. 2d at 926.

Even if a document is "central" to a claim, a dispute over the facts contained within the document precludes consideration. A court may not consider materials that "rebut, challenge, or contradict" the complaint without converting the motion into one for summary judgment. *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp. 2d 674, 686 (E.D. Mich. 2013) (quoting *Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993) (internal quotation marks omitted)).[7] Nor is it appropriate to take a partial view of the facts. *See Thomas v. Kaven*, 765 F.3d 1183, 1197 (10th Cir. 2014) (the record contained "isolated snippets" and did "not allow for a comprehensive review of the evidence"). Similarly, judicial notice of documents may be taken, but "not to prove the truth of matters asserted therein." *Operating Eng'rs Local 101 Pension Fund v. Al Muehlberger Concrete Constr., Inc.*, No. 13-2050-JAR-DJW, 2013 WL 5409116, at *2 (D. Kan. Sept. 26, 2013) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006)). Judicial notice is appropriate only so long as "those facts are not in dispute." *Cooper v. Old Dominion*

[6] Plaintiffs have not identified any Tenth Circuit or District of Kansas cases analyzing when a document is "central" for purposes of Rule 12.

[7] *See Gee*, 627 F.3d at 1187 (reliance on extrinsic documents effectively converted motion into one for summary judgment); *cf. Advanced Baseball Acad., LLC v. Google, Inc.*, 2015 WL 1440656, at *7 (D. Kan. Mar. 30, 2015) (refusing to consider extrinsic documents referred to in plaintiffs' complaint); *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1157 (D.N.M. 2013) (refusing to consider exhibits to defendants' motion to dismiss).

Freight Line, No. 09-cv-2441-JAR/GLR, 2010 WL 2609385, at *1 (D. Kan. June 25, 2010). Syngenta asks the Court to accept the truth of matters asserted, including a number of purported governmental policy statements. *See* Mem. at 3, 5 n.1, 6. This is improper.

Plaintiffs object to Syngenta's asserted facts and inferences outside of or contrary to the Complaints. *See* App. A. None are appropriately considered. If the Court determines it will consider and rely on that information by converting Syngenta's motion into a motion for summary judgment, Plaintiffs request notice and opportunity to submit a Rule 56(d) affidavit, conduct discovery, and submit additional briefing in order to fully respond to Syngenta's motion.

FACTUAL ALLEGATIONS[8]

Syngenta grossly mischaracterizes the nature of this lawsuit when it states that the Complaints "hinge on the premise that genetically modified ["GM"] crops must be segregated from those that are not." Mem. at 5. Plaintiffs do not make that allegation. Rather, they allege that commercialization of GM traits carries well-known risks, including "significant trade disruptions and enormous harm to farmers and other industry participants," PC at 2; NC at 2, and requires responsible practices, including approval from significant export markets. PC at 3 & ¶¶ 115, 142, 311; NC at 3 & ¶¶ 62, 89, 266, 401).[9] And Syngenta ***itself*** clearly expressed a commitment to stewardship when, among other things, it represented to the USDA that channeling to "divert [Viptera] away from" unapproved export markets would take place in an effective manner, and affirmatively signed on to industry policies calling for, *e.g.*, a test to detect its GM trait. PC ¶¶ 131, 197, 208; NC ¶¶ 78, 144, 155.

[8] Hereinafter referenced as "SOF."

[9] "[N]othing about USDA deregulation requires a developer like Syngenta to commercialize." PC ¶ 141; NC ¶ 88.

A. Syngenta created the risk of harm to Plaintiffs.

Syngenta publicly acknowledges that the commodity agricultural market is an integrated market where a seed manufacturer's decisions impact farmers, elevators and exporters. PC ¶ 107 ("Our stakeholders are the people affect[ed] by [our business];" referring specifically to "[g]rowers" and the "[i]ndustry"); NC ¶ 54 (same). When a seed manufacturer like Syngenta commercializes a new GM trait without approval from major export markets, that decision imposes substantial risk, further enhanced when done without responsible safeguards. PC at 2-3 & ¶¶ 83, 107; NC at 2-3 & ¶¶ 30, 54.

Syngenta commercialized Viptera "knowing that China would not approve MIR162 until sometime ***after*** that trait had entered export channels," creating "enormous risk that U.S. corn farmers [and non-producers] would lose one of their large and growing export markets." PC at 3; NC at 3; *see also* PC ¶¶ 232, 289; NC ¶¶ 179, 236. Then, in the 2012 and 2013 growing seasons, even though China had ***still*** not approved the trait, Syngenta expanded sales of Viptera seed, further increasing the risk of cross pollination and commingling within the U.S. corn supply. PC at 3, ¶¶ 232, 289; NC at 3, ¶¶ 179, 236. Syngenta also:

- "actively misled farmers, industry participants and others" about the importance of the Chinese market and the imminence of Chinese approval in order to encourage sales and thus the spread of MIR162. PC at 4; NC at 4.

- misled farmers and industry participants about the ability to "'channel' Viptera to non-Chinese markets and otherwise contain the infiltration of Viptera into the U.S. corn supply." PC at 4; NC at 4.

- encouraged growers to take actions increasing risk of cross pollination. PC ¶¶ 195, 201, 203 (encouraging growers to plant Viptera side-by-side with other corn and advising that they had no obligation to warn their neighbors); NC ¶¶ 142, 148, 150.

- misrepresented to the USDA and the public that deregulation would have no impact on the export market. PC ¶¶ 126, 129, 133; NC ¶¶ 73, 76, 80.

- told the USDA and the public that its filings in China were in process when they were not. PC ¶¶ 126, 136, 139, 143, 146-47; NC ¶¶ 73, 83, 86, 90, 93-94.

- told the USDA and the public that any risk of cross contamination was low since Syngenta would engage in a legitimate stewardship program, channeling MIR162 "away from export markets . . . where [MIR162] has not yet received regulatory approval for import." PC ¶¶ 126, 131; NC ¶¶ 73, 78.

- engaged in Viptera seed increases on U.S. land, affirmatively "increas[ing] the presence of MIR162 within U.S. agriculture and the widespread, pervasive contamination which has caused disruption of trade in U.S. corn with China U.S. corn supply." PC ¶ 204; NC ¶ 151.

- crafted a plan to mislead grain handlers and growers into believing that Chinese approval of MIR162 was forthcoming and continued its deception regarding the status of Chinese approval throughout 2012, further enhancing the risk of contamination. PC ¶¶ 240, 241-70, 271-84; NC ¶¶ 187, 188-217, 218-31.

- represented to Viptera growers on August 17, 2011, that Syngenta anticipated Chinese approval by March 2012; publicly represented in April 2012 that Chinese approval was expected in a matter of days; and disseminated a Bio-Safety Request Form and a Plant with Confidence Fact Sheet. PC ¶¶ 250, 275, 281-83, 378-79; NC ¶¶ 197, 222, 228-30, 373-74.

"Syngenta did not simply fail to take precautions against foreseen and at minimum, clearly foreseeable harm, *but acted affirmatively to create it*." PC ¶ 322 (emphasis added); NC ¶ 277. Absent effective stewardship and channeling, Viptera's movement into export channels was inevitable, as Syngenta knew.[10] That risk, and the resulting harm to Plaintiffs, was of Syngenta's making. PC ¶ 318; NC ¶ 273. Syngenta was not merely careless. It engaged in risk-

[10] *See* PC ¶¶ 268 (Syngenta knew that "every ship carrying corn into China this fall will have 162 in it at some level"), 318 ("As such, it was inevitable that Viptera® corn would move into export channels, including China, and cause trade disruption, as Syngenta well knew."), 403 ("[A]bsent robust isolation practices and effective channeling, it was virtually certain that Agrisure Viptera® or Duracade™ would disseminate throughout the U.S. corn supply and into export markets, including China, which had not approved import, causing market disruption."), 430 ("By commercializing Agrisure Viptera® and/or Duracade™ prematurely and without adequate systems to isolate and channel it, Syngenta intentionally intermeddled with and brought Agrisure Viptera® and/or Duracade™ into contact with non-Agrisure Viptera/Duracade corn."); NC ¶¶ 215, 273, 398, 411 (same).

enhancing marketing programs,[11] made misrepresentations in order to increase sales,[12] and decided not to implement a legitimate stewardship or channeling program for its own financial benefit.[13] When one exporter attempted to preserve the Chinese market, Syngenta sued to force it to accept Viptera. PC ¶¶ 223-26; NC ¶¶ 170-73.

"Syngenta could, and should have, waited to market Agrisure Viptera®." PC ¶ 166; NC ¶ 113. It "could, and should, have withdrawn it from the market before planting." *Id.* Instead, and "despite the risks," Syngenta sold Viptera seed "to approximately 12,000 corn producers with a projected yield estimated . . . of 250 million bushels," covering "1.1% of the acres in the U.S. on which corn had been grown." PC ¶¶ 167-68; NP ¶¶ 114-15. Syngenta "sold even more Agrisure Viptera® for planting in 2012, further increasing th[e] risks." PC ¶ 232; NC ¶ 179. And even after China had closed its market to U.S. corn, Syngenta launched another GM strain of corn unapproved by China, Agrisure Duracade, for the 2014 crop year, "thereby prolonging the economic harm." PC at 4; NC at 4.

B. The harm to Plaintiffs was actually foreseen by Syngenta.

After April 12, 2010, MIR162 was no longer "regulated by the USDA." PC ¶ 118; NC ¶ 65. When Syngenta began selling Viptera "for the 2011 crop year," it "well knew that it would

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[11] *See* PC ¶¶ 201-02; NC ¶¶ 148-49 (Syngenta "gave away free bags of Viptera" and encouraged growers to plant "side-by-side with other corn," increasing the risk of contamination).

[12] Syngenta strategized about how to mislead growers to "get them comfortable that [Chinese] approval is close" and ensure continued purchases of Viptera seed. PC ¶ 241; NC ¶ 188. It also developed a "strategy moving forward to neutralize grain-marketing related barriers to acceptance" of Viptera. PC ¶ 248; NC ¶ 195. As concern grew in 2011 among growers who had purchased but not yet planted Viptera, Syngenta exploited a seed shortage to ensure farmers would not return Viptera seed: "they likely won't be able to replace it." PC ¶ 267; NC ¶ 214. Syngenta's concern for its own customers was non-existent: "Poor things will have to roll the dice." *Id.* "In order to encourage further sales and planting" of Viptera, Syngenta, "by at least August 2011, was representing to stakeholders . . . that [it] would obtain China's approval by March 2012." PC ¶ 250; NC ¶ 197.

[13] *See* PC at 4 & ¶¶ 178, 190, 195, 199-200, 207, 212-13, 221-22 (David Morgan said: "'To be clear, if we can do this with zero cost and minimal effort . . . then why not? If otherwise then I personally don't care about channeling.'"); NC at 4 & ¶¶ 125, 137, 142, 146-47, 154, 159-60, 168-69 (same).

not have import approval from China." PC ¶ 146; NC ¶ 93.[14] "The typical time period for import approval from China during this time period was 2-3 years." PC ¶ 147; NC ¶ 94. Approval takes longer if the application is "insufficient, incorrect, and/or incomplete," as Syngenta's was. PC ¶¶ 254-55; NC ¶¶ 201-02. Syngenta's request for cultivation approval, which is "more severely restricted," also delays the process. PC ¶¶ 262-63; NC ¶¶ 209-10.[15]

Syngenta commercialized Viptera for the 2011 growing season "despite the lack of regulatory approval from China, and despite [its] knowledge that China was a key (and growing) export market for U.S. corn."[16] PC ¶ 150; NC ¶ 97. Syngenta knew the "significant risk [that] MIR162 will be detectable in export channels" prior to export approval. PC ¶¶ 187-88; NC ¶¶ 134-35. In 2009, Syngenta classified the risk of contamination "before all import approvals are in place" as "high." PC ¶ 205; NC ¶ 152. By 2011, Syngenta said internally that "every ship carrying corn into China this fall will have 162 in it at some level." PC ¶ 268; NC ¶ 215; *see also* PC ¶ 186; NC ¶ 133. Syngenta's executives testified under oath that there was a "real risk" that China would reject corn if MIR162 were detected. PC ¶ 189; NC ¶ 136. In July 2011,

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[14] In fact, Syngenta had only just sought regulatory approval in China. *See* PC ¶ 139 ("Contrary to Syngenta's representations that its regulatory filings were 'in process' in China, Syngenta first sought regulatory approval for MIR162 from China's Ministry of Agriculture three years later in or around March 2010."); NC ¶ 86 (same).

[15] Syngenta relies on materials outside the Complaints to claim that Chinese law set specific time periods for authorities to act upon import applications and that failure to meet those deadlines evidences a non-functioning system. Mem. at 15. Syngenta also ignores its own alleged understanding that its application would not be approved in 270 days, PC ¶ 148; NC ¶ 95, and delays that resulted from Syngenta's own deficiencies. PC ¶¶ 254-55, 262-64; NC ¶¶ 201-02, 209-11 (same).

[16] Syngenta tries to re-characterize the Chinese export market as a "specialty product," akin to organic markets. Mem. at 22. But specialty and commodity markets are different. PC ¶¶ 102, 104-05, 107, 163, 183, 191; NC ¶¶ 49, 51-52, 54, 110, 130, 138. Commodity and export markets are integrated, meaning that prices for all corn are impacted by the loss of an export market. *See* PC ¶¶ 163 (Syngenta's CEO "stated that China's 'import requirements alone influence global commodity prices.'"), 324-61 (detailing extensive allegations regarding impact of losing China on entire commodity market); NC ¶¶ 110, 279-332 (same). Moreover, the ability to channel is much greater in specialty than commodity markets. *See* PC ¶¶ 191-92, 269 ("ability to channel in a 'closed loop' system different than a commodity crop."); NC ¶¶ 138-39, 216.

Syngenta was warned that the "likelihood of U.S. corn entering the China market with this unapproved market is substantial." PC ¶ 177; NC ¶ 124. "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." PC ¶ 115; NC ¶ 62. Syngenta also knew what that meant – "significant risk of trade disruption." PC ¶ 187; NC ¶ 134.[17] 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." PC ¶ 114; NC ¶ 61.

Syngenta also knew that China was a major, growing export market. On multiple occasions prior to commercialization, Syngenta recognized China as a "key" import market for U.S. corn. Industry groups also warned Syngenta of China's importance. PC ¶¶ 143-45, 152-59, 227; NC ¶¶ 90-92, 99-106, 174. By at least May of 2010, Syngenta was "well aware . . . of the strong likelihood that China would be a significant import market by 2011." PC ¶ 152; NC ¶ 99. Syngenta disclosed its recognition of China as a "key" market to the National Grain and Feed Association in 2010. PC ¶ 145; NC ¶ 92.[18] Syngenta continued to recognize China's importance in early 2011, still prior to the first planting of MIR162. PC ¶¶ 160-65, 170-77, 227, 229; NC ¶¶ 107-12, 117-24, 174, 176. And Syngenta was explicitly warned about the importance of Chinese approval before commercialization and throughout 2011. PC ¶ 155; NC ¶ 102. Even as China's importance continued to increase, Syngenta refused to stop marketing Viptera. PC ¶¶ 157-60, 164; NC ¶¶ 104-07, 111. By at least February 2011, Syngenta's own CEO publicly admitted

[17] Syngenta's conduct in the face of similarly foreseeable risks continued in the 2014 crop year, when it "announced that it would commercialize its Agrisure Duracade™ for the 2014 crop year . . . despite the continued failure to obtain approval from China." PC ¶ 295; NC ¶ 250.

[18] Despite these contemporaneous recognitions and representations, Syngenta now claims the opposite, citing outside materials contradicting the allegations. Mem. at 11 and n.23.

"that China's 'import requirements alone influence global commodity prices.'" PC ¶ 163; *see also id.* at ¶¶ 169-78 (prior to the first harvest, evidence of China's importance continued to mount); NC ¶¶ 110, 116-25.

C. Syngenta was fully capable of implementing legitimate stewardship and channeling.

Syngenta contracts with (non-Plaintiff) growers who purchase its seed. PC ¶¶ 131-32, 208; NC ¶¶ 78-79, 155. It could have required these "growers adhere to stringent practices that would have decreased the likelihood of contamination," but chose not to do so in order to avoid "reduced or eliminated sales." PC ¶ 200; NC ¶ 147.[19] Syngenta's contract did contain a provision for channeling (without reference to China), but gave no instruction on how to accomplish it. PC ¶¶ 214-17; NC ¶¶ 161-64. And Syngenta itself "could have instituted channeling measures but did not." PC ¶ 321; NC ¶ 276. As such, "it was inevitable that Viptera® corn would move into export channels, including China, and cause trade disruption, as Syngenta well knew." PC ¶ 318; NC ¶ 273.

D. Syngenta undertook stewardship obligations.

Syngenta knew the risks posed by premature commercialization and the importance of obtaining approval from key importing countries. PC ¶¶ 84, 86-95, 114-15; NC ¶¶ 31, 33-42, 61-62. Syngenta's own experience in 2007 with MIR604 prior to approval in Japan and other export markets lead to the Biotechnology Industry Organization's ("BIO") launch policy. PC ¶¶ 91-92, 96; NC ¶¶ 38-39, 43. Syngenta expressly agreed to implement that policy, including "[m]anage[ment]" of the GM product's introduction so that "choice of production methods . . .

[19] *See also* PC ¶¶ 303, 305-06 (Syngenta represented when it launched Duracade that it would require growers to feed the corn to livestock or poultry or deliver it to those not exporting to China, indicating an ability to do so, and declined to require planting/harvesting protocols not because it could not have done so, but because it "did not want to"); NC ¶¶ 258, 260-61.

are available and preserved." PC ¶¶ 97, 99; NC ¶¶ 44, 46.[20] Syngenta adopted its own launch policy in 2007, incorporating BIO policies, including an assessment to identify key importing nations and secure approval prior to commercialization. PC ¶¶ 97, 112, 115; NC ¶¶ 44, 59, 62. Syngenta also said it supports and will comply with stewardship standards of CropLife International and Excellence Through Stewardship. PC ¶¶ 95, 103, 113; NC ¶¶ 42, 50, 60.[21]

These policies are consistent with statements from industry organizations, including the National Grain and Feed Association ("NGFA") and North American Export Grain Association ("NAEGA"),[22] which state that "biotech-enhanced traits should be commercialized only after achieving broad, deep consumer acceptance, as well as authorizations from U.S. export markets, to . . . maintain access to global markets." PC ¶¶ 104-05; NC ¶¶ 51-52. NAEGA summarized the issue as follows:

> Biotechnology providers should be required to accept liability to compensate parties for economic damage resulting from a failure to adequately implement and enforce binding risk-management (stewardship) and supply chain management plans deemed sufficient and effective in prevent biotech events from becoming present in the general commodity stream at levels that could disrupt efficient commerce.
>
> One of the most important of these commitments is to voluntarily

[20] Syngenta claims the BIO policy is a non-binding suggestion. Mem. at 9. This argument ignores its own adoption of the policy. PC ¶ 112; NC ¶ 59. Syngenta also suggests that the U.S., Japan and Canada are the only "key" export markets (from which it obtained approval). Mem. at 10. Not so. The U.S., Japan, and Canada are "minimum" key markets. PC ¶ 100; NC ¶ 47. The BIO policy also expressly states that it "does not limit the implementation of additional measures designed to . . . prevent disruption of . . . the trading of the commodity." PC ¶ 102; NC ¶ 49.

[21] Syngenta asserts that these policies are mere educational tools or recommendations that neither define nor create legal rights or obligations. Mem. at 11-12. This again overlooks the fact that Syngenta adopted and embraced such policies. PC ¶¶ 112-13; NC ¶¶ 59-60.

[22] Syngenta criticizes Plaintiffs for citing a joint letter from NGFA and NAEGA sent two years after commercialization. Mem. at 12. That timing only points out that Syngenta had two years to take appropriate steps to prevent contamination, and the standards are remarkably consistent with aspects of the BIO and Syngenta's own launch policy. In any event, Syngenta's criticism goes to evidentiary weight, not to whether Plaintiffs have stated sufficient claims.

> restrict commercialization (marketing of seeds) under corporate stewardship plans until such time as the technology provider has obtained sufficient import authorizations from foreign governments. It is imperative that such import authorizations be in place to provide U.S. grains and oilseeds with competitive, reliable and efficient access to international markets.

PC ¶ 105; NC ¶ 52.

Syngenta not only agreed to these standards, but adopted its own corporate responsibility code identifying "Growers" and the "Industry" as "stakeholders" affected by Syngenta's decisions. PC ¶ 107; NC ¶ 54. That code requires Syngenta to respond to feedback from stakeholders, implement high stewardship standards, prioritize issues important to stakeholders, and institute safeguards. PC ¶¶ 108-111; NC ¶¶ 55-58. Consistent with these standards, "Syngenta . . . committed to not commercializing new [GM] traits that had not been approved by key import markets." PC ¶ 115; *see also id.* at ¶¶ 99, 127, 131, 136; NC ¶¶ 46, 74, 78, 83. Similarly, in its Deregulation Petition to the USDA, Syngenta represented that it would institute a "wide-ranging grower education campaign" to channel, which it said would be successful "based upon prior experience with the specialty maize market." PC ¶ 131; NC ¶ 78. Despite all this, Syngenta commercialized Viptera prior to Chinese approval without any legitimate stewardship at all. PC ¶ 210; NC ¶ 157.[23]

E. Syngenta embarked on a campaign of false statements in commercializing Viptera.

Syngenta engaged in a campaign of misinformation regarding Chinese approval to sell its Viptera seed. As the first step toward commercialization, Syngenta needed the USDA to deregulate MIR162. PC ¶ 116; NC ¶ 63. Deregulation petitions are publicly disseminated, and Syngenta's Petition assured that Viptera would not disrupt the export market for U.S. corn. PC

[23] Syngenta argues that China lacks a functioning regulatory system, Mem. at 15, despite express allegations, and its own employees' sworn testimony, to the contrary. PC ¶¶ 129, 140; NC ¶¶ 76, 87.

¶¶ 126, 129; NC ¶¶ 73, 76. It represented that there should be no effects on U.S. corn export markets, that applications for approval in export markets with functioning regulatory systems, including China, were in process, and that Syngenta would institute a stewardship program and wide-ranging grower education to channel away from markets that had not approved MIR162. PC ¶¶ 127, 129-32, 378, 380; NC ¶¶ 74, 76-79, 373, 375. Syngenta filed the Petition with full knowledge that its statements and representations would be published and contain commercial content. *See, e.g.*, PC ¶¶ 126, 138; NC ¶¶ 73, 85.[24]

After launch, Syngenta actively misrepresented that Chinese approval of MIR162 was coming soon and continued its deception regarding the status of that approval throughout 2012. PC ¶¶ 240, 271-84; NC ¶¶ 187, 218-31. On August 17, 2011, in response to increasing concern over the lack of Chinese approval and the prospect of grain handlers not purchasing corn grown from Viptera seed, Syngenta sent letters to growers and non-producers stating that Syngenta anticipated Chinese approval by March 2012. PC ¶ 250; NC ¶ 197. Syngenta's CEO stated in April 2012 that approval was expected "in the matter of a couple of days." PC ¶ 275; NC ¶ 222.[25] Syngenta instructed its employees to (verbally) tell potential customers that Syngenta anticipated approval soon. PC ¶ 273; NC ¶ 220. But Syngenta knew that these statements falsely represented Syngenta's true expectations. PC ¶¶ 252-60, 272-77; NC ¶¶ 199-207, 219-24. Syngenta also published and disseminated a pointless Bio-Safety Certificate Request Form, deceptively indicating that Viptera corn could be exported to China, and a Plant with Confidence Fact Sheet deceptively downplaying China's importance. PC ¶¶ 278-92; NC ¶¶ 225-29.

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[24] Syngenta says the USDA "allowed" commercialization, and rejected geographic restrictions, Mem. at 7, but ignores that the USDA did not ***require*** commercialization, and that Syngenta ***itself*** had control over both timing and scope. PC ¶¶ 141, 150, 166; NC ¶¶ 88, 97, 113.

[25] Syngenta asks the Court to draw an inference that this statement cautions that Syngenta could not handicap the Chinese regulatory process. Mem. at 14-15. Syngenta is not entitled to such an inference.

Syngenta was "focused on its bottom line." PC ¶ 245; NC ¶ 192. Contrary to its own policies, "Syngenta launched a 'blame the grain trade' campaign," attempting to shift the entire burden of channeling to grain handlers. PC ¶ 244; NC ¶ 191. Confronted with suggestions to "work 'with the grain channel to avoid issues with introductions of new trait technologies,'" a "Syngenta executive responded: '(you don't need to spend a lot of time on [this]),'" focusing instead on "how much this potentially will cost Syngenta." PC ¶ 245; NC ¶ 192. Syngenta developed a "Top 10" list as part of a sales program to neutralize concerns about Chinese approval. PC ¶¶ 246-48; NC ¶¶ 193-95. The program "provide[d] regular (and misleading) updates 'on progress and plans for China trait approval and to drive trait acceptance.'" PC ¶ 246; NC ¶ 193. Syngenta's true goal was to "maximize" its patent window "and realize income sooner." PC ¶ 249; NC ¶ 196. That could only happen by persuading growers that Viptera harvests would not cause a market disruption. Thus, despite knowing the falsity of its expectation that approval was forthcoming in March 2012, in order to "hold Agrisure Viptera orders [and avoid seed returns]," Syngenta decided that "[i]f we say March enough, there should be no issue." PC ¶¶ 251-52; NC ¶¶ 198-99.

Syngenta is *still* trying to shift responsibility to non-producers. But Syngenta ignores its own commitment to manage introduction of Viptera, and its own "ability to control the timing, size, and scope of commercialization . . ., as well as the extent to which adequate containment measures [were] required." PC ¶ 321; NC ¶ 276. Syngenta even recharacterizes the Complaints to support blaming its own customers for planting Viptera seed "in a way that permitted cross-pollution with neighboring fields." Mem. at 13. But it was *Syngenta* who recognized the risk that MIR162 would move to export channels. PC ¶¶ 204-05; NC ¶¶ 151-52. And it was *Syngenta* who encouraged farmers to grow Viptera "side by side" with other corn, and not warn

their neighbors. PC ¶¶ 201-03; NC ¶¶ 148-50.

Syngenta repeatedly resisted its promised stewardship program. In July 2010, Syngenta executives identified MIR162 as one of the reasons why Syngenta needed a GMO detection strategy, and that asymmetric approval of Viptera among export countries might affect the free flow of product trade. PC ¶ 198; NC ¶ 145. Such a detection strategy would have been in accord with the BIO policy and its internal policy, both requiring availability of a "reliable detection method or test." PC ¶¶ 196-97; NC ¶¶ 143-44.[26] Syngenta, however, did not do so. PC ¶ 199; NC ¶ 146.

F. Plaintiffs suffered both physical and economic harm.

The pervasive contamination brought on by Syngenta's acts "cause[d] physical harm to Plaintiffs' corn, harvested corn, equipment, storage facilities and land." PC ¶ 319; NC ¶ 274. Syngenta's conduct also caused economic harm. PC ¶ 323; NC ¶ 278. The corn industry began to suffer the enormous consequences of Syngenta's actions around November 2013, when China began rejecting U.S. shipments testing positive for MIR162. PC ¶ 296; NC ¶ 238. It still took Syngenta another 13 months to obtain Chinese import approval. PC ¶ 316; NC ¶ 244. By then, Syngenta had already launched Duracade, not approved in China, thereby prolonging the harm. *Id.*; *see also* PC at 5; NC at 5. China's approval of MIR162 is not likely to lessen the impact of Syngenta's conduct anytime soon. *Id.*[27] Under basic laws of supply and demand, less demand

[26] Syngenta also tries to blame grain elevators and other non-producers by claiming they opted not to test for MIR162. Mem. at 14. This both assumes that an adequate test was available, and that grain elevators are equipped to test and segregate corn for genetic traits, which they are not. NC ¶ 296. Nor is there any support for Syngenta's additional, impermissible inference that the mythical "cost" decision by grain elevators was because "the Chinese market accounted for only about one-third of 1% of U.S. corn production when Viptera was launched in the U.S." Mem. at 14.

[27] Syngenta seeks to insulate itself from its own mishandling of Duracade by saying that Plaintiffs have not alleged that any shipments were rejected due to its presence. Mem. at 17. Syngenta ignores Plaintiffs' allegations that the NGFA issued dire forecasts of damage due to the premature release of Duracade, and that Syngenta pulled it from Canada "to ensure the acceptance of any trait technology

means lower price. PC at 5 & ¶¶ 355-60; NC at 5 & ¶¶ 321-26. As a result of Syngenta's actions, Plaintiffs have been harmed. PC ¶¶ 324-61; NC ¶¶ 279-332.[28] That harm likely will be long lasting, PC ¶¶ 343, 354; NC ¶¶ 309, 320, in part because U.S. corn exports to China have not begun to recover. PC ¶¶ 340-44; NC ¶¶ 306-10.

ARGUMENT

I. CHOICE OF LAW

Producers do not disagree generally that the law of their respective home states governs most of their claims. Mem. at 17-18. In certain cases, the law of the home state may also apply to Non-Producer Plaintiffs' claims, although Syngenta has acknowledged that the state of export is the most relevant state for exporter claims.[29] Plaintiffs' Lanham Act claim is, of course, governed by federal law, and their Minnesota statutory claims are governed by Minnesota law. Plaintiff Trans Coastal's claims are somewhat different. It has offices in Illinois and California and operates both nationally and globally. *See* NC ¶¶ 10, 347-56. It uses its California location with respect to exports to China. *Id.* at ¶ 10. Trans Coastal's claim for negligent interference is pleaded under California law, which Syngenta does not dispute. Mem. at 70. The choice of law on Trans Coastal's other claims is further addressed below. *See, infra*, § X.B.

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grown in Canada meets end-market requirements." Syngenta did not take similar action to protect stakeholders in the U.S. PC ¶¶ 308-14; NC ¶¶ 263-68. Plaintiffs also allege that Syngenta's decision to launch Duracade has prolonged the economic harm. PC at 4 & ¶ 316; NC at 4 & ¶ 244.

[28] Syngenta improperly claims that China "abruptly" began testing U.S. corn shipments in 2013 because of a "bumper crop" that caused prices to drop. Mem. at 1, 15-16. But Plaintiffs assert that China's rejection of U.S. corn was because of the MIR162 contamination and that the NGFA, for one, tied trade disruption with China's positive detections of MIR162. PC ¶¶ 296-97; NC ¶¶ 251-52.

[29] *See* ECF No. 323 (Defs' Opp. to Mot. to Remand) at 9 n.12.

II. SYNGENTA HAS A DUTY TO EXERCISE REASONABLE CARE.

Plaintiffs allege that Syngenta owes a duty to exercise reasonable care in the "timing, scope and terms under which it commercialize[s]" GM traits. *See, e.g.*, PC ¶ 416; NC ¶ 417. Syngenta well knew the risks that it created absent approval by major export markets and adequate stewardship. PC ¶ 83; NC ¶ 30. Syngenta's efforts to escape that duty depend on mischaracterization and an incomplete and inaccurate discussion of public policy.[30]

A. Syngenta's conduct created the risk of harm to Plaintiffs.

Engrained in the law is the proposition that in performing "acts which affect[] the interests of another, there is a duty not to be negligent with respect to the doing of the act." Restatement (Second) of Torts, Div. 2, Ch. 12, Topic 4, Scope Note; *see also* Dan. B. Dobbs et al., The Law of Torts § 125 (2d ed. 2015) ("In the ordinary case . . . the defendant does owe a duty of care.") ("Dobbs"); 57A Am. Jur. 2d Negligence § 88 ("[T]he law imposes upon every member of society the duty to refrain from conduct of a character likely to injure a person with whom he or she comes in contact and to use his or her own property in such manner as not to injure that of another."). And, relevant courts have adopted the duty to exercise reasonable care

[30] Syngenta's no-duty arguments appear directed at claims for trespass to chattels, nuisance, and tortious interference. But trespass and tortious interference are intentional torts and do not require a duty. *See* Restatement (Second) of Torts § 218 (1965) (duty not an element of trespass to chattels); *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009) (tortious interference does not require duty); *Baptist Health v. Murphy*, 373 S.W.3d 269, 281-82 (Ark. 2010); *Melton v. Ousley*, 925 N.E.2d 430, 440 (Ind. Ct. App. 2010); *Cmty. Title Co. v. Roosevelt Fed. Sav. & Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. banc 1990); *Tuffy's, Inc. v. City of Oklahoma City*, 212 P.3d 1158, 1165 (Okla. 2009); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). Likewise, in many states, duty is not among elements of nuisance. 2 Ala. Pattern Jury Instr. Civ. 31A.25 (3d ed.); 1 Ark. Law of Damages § 28:1 (5th ed.); *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239, 242 (Kan. Ct. App. 1981); Minn. Stat. Ann. § 561.01 (West); *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula*, 521 So. 2d 857, 860-61 (Miss. 1988); *Hall v. Phillips*, 436 N.W.2d 139, 144-45 (Neb. 1989); *Evans v. Lochmere Recreation Club, Inc.*, 627 S.E.2d 340, 342 (N.C. Ct. App. 2006); 1 CV Ohio Jury Instructions 621.05 & Comment; 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 9.13 (2014 ed.); *Warwick Towers Council of Co-Owners ex rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P.*, 298 S.W.3d 436, 444 (Tex. Ct. App. 2009).

when the actor's conduct creates the risk of injury to others:[31]

- *Taylor v. Smith*, 892 So. 2d 887, 893 (Ala. 2004) ("'every person owes every other person a duty imposed by law to be careful not to hurt him' . . . In a variety of circumstances, this Court has recognized a duty to foreseeable third parties, based on a general 'obligation imposed in tort to act reasonably.'");

- *Hill v. Wilson*, 224 S.W.2d 797, 800 (Ark. 1949) ("Actionable negligence itself is a relational concept. There is no such thing as 'negligence in the air'. Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of injury to others.");

- *Greenberg v. Perkins*, 845 P.2d 530, 537 (Colo. 1993) ("people owe a duty to use reasonable care with regard to their affirmative conduct" and "such a duty extends to all who may foreseeably be injured if that conduct is negligently carried out," rejecting application of the no-duty-to-control rule);

- *Karas v. Strevell*, 884 N.E.2d 122, 129 (Ill. 2008) ("every person owes a duty of ordinary care to guard against injuries to others.");

- *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) ("An 'actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.'");

- *Greenburg v. Cure*, No. 12-2107-EFM, 2013 WL 1767792, at *5 (D. Kan. Apr. 24, 2013) (applying Kansas law and holding that "'[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm,' and it is only in exceptional cases that no such duty is present");

- *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908 (Ky. 2013), as corrected (Nov. 25, 2013) ("'The concept of liability for negligence expresses a universal duty owed by all to all.' And 'every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.'");

- *Knox v. Calcasieu Parish Police Jury*, 900 So. 2d 1128, 1132 (La. Ct. App. 2005) ("every person has an 'almost universal' legal duty to conform his or her actions "to the standard of conduct of a reasonable person in like circumstances."); *see also* La. Civ. Code Art. 2315 ("Every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it");

- *Farwell v. Keaton*, 240 N.W.2d 217, 220 (Mich. 1976) ("Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.");

- *Doe ex rel. Doe v. Wright Sec. Servs., Inc.*, 950 So. 2d 1076, 1079 (Miss. Ct. App. 2007) ("The general duty is to act as a reasonable prudent person would under the circumstances.");

[31] Internal citations and quotation marks in the bullet point parentheticals may be omitted.

- *Tharp v. Monsees*, 327 S.W.2d 889, 893 (Mo. banc 1959) ("'Every person has the duty to exercise ordinary care to so conduct himself as not to injure others, and is liable to one who is harmed by a breach of that duty.'");
- *Riggs v. Nickel*, 796 N.W.2d 181, 187 (Neb. 2011) ("[A]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.");
- *Pinnix v. Toomey*, 87 S.E.2d 893, 897-98 (N.C. 1955) (duty "arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.");
- *Hansen v. Scott*, 645 N.W.2d 223, 232 n.1 (N.D. 2002) ("'Every person has a duty to act reasonably to protect others from harm.'");
- *Akers v. Levitt*, No. 12471, 1992 WL 10288, at *1 (Ohio. Ct. App. Jan. 27, 1992) ("Every person has a duty to exercise that degree of care that a reasonably careful person would use under the same or similar circumstances.");
- *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 964 (Okla. 2007) ("[A] person owes a duty of care to another person whenever the circumstances place the one person in a position towards the other person such that an ordinary prudent person would recognize that if he or she did not act with ordinary care and skill in regard to the circumstances, he or she may cause danger of injury to the other person.");
- *Dodson v. S. Dakota Dep't of Human Servs.*, 703 N.W.2d 353, 355 (S.D. 2005) (every person has a duty of care "that a reasonable and prudent person would exercise in the same or similar circumstances.");
- *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008) ("persons have a duty to others to refrain from engaging in affirmative acts that a reasonable person 'should recognize as involving an unreasonable risk of causing an invasion of an interest of another' or acts 'which involve[ ] an unreasonable risk of harm to another.'");
- *Midwest Employers Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770, 776 (Tex. Ct. App. 2009) ("Every person has a duty to exercise reasonable care to avoid a foreseeable risk of injury to others."); and
- *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575 (Wis. 2009) ("[I]n the vast majority of cases . . . every person is subject to a duty to exercise ordinary care in all of his or her activities.").

Plaintiffs allege that Syngenta owed its stakeholders a duty to use at least reasonable care in the timing, scope and terms under which it commercialized MIR162. *E.g.*, PC ¶ 416; NC ¶ 417. This duty arises from Syngenta's own knowledge of and affirmative conduct, which "create[ed] an enormous risk that U.S. corn farmers would lose one of their large and growing

export markets." PC at 3; NC at 3. These acts equally created a risk (and caused) "physical harm to plaintiffs' corn, harvested corn, equipment, storage facilities, and land" as a result of the "pervasive contamination of the U.S. corn supply." PC ¶ 319; NC ¶ 274. These allegations are supported by numerous other affirmative acts that Syngenta took to create the risk of harm to Plaintiffs: (1) Syngenta recognized Plaintiffs as stakeholders without regard to a contractual relationship;[32] (2) Syngenta knew commercialization created a risk of losing the Chinese market; (3) absent Chinese approval, Syngenta gave away, planted,[33] and sold Viptera seed; (4) Syngenta increased commercialization even as certainty of a Chinese ban intensified; (5) Syngenta took other action to increase seed sales, including calculated misrepresentations; (6) Syngenta purposefully decided to not institute stewardship and channeling, and affirmatively tried to frustrate the efforts of others; and (7) even after China's ban on MIR162, Syngenta introduced a new unapproved trait, enhancing and prolonging the risk and duration of injury. SOF § A. "Syngenta did not simply fail to take precautions against foreseen and at minimum, clearly foreseeable harm, *but acted affirmatively to create it*." PC ¶ 322; NC ¶ 277 (emphasis added). Syngenta's affirmative conduct "create[d] the risk of harm that has befallen" Plaintiffs. PC at 3; *id.* at ¶ 322; NC at 3, ¶ 277. A duty of reasonable care is triggered by the ordinary rules stated above.[34]

Syngenta's argument that Plaintiffs seek to impose a "duty to control the conduct of third parties," Mem. at 21, is inaccurate. Syngenta wants to fit this case into Restatement (Second) of

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[32] *See, e.g.*, *Doe v. WTMJ, Inc.*, 927 F. Supp. 1428, 1434 (D. Kan. 1996) (radio station had a duty of care because it "create[d] and foster[ed] a relationship with its listeners.").

[33] Syngenta itself "has grown [MIR162 corn] on land within the United States . . . increase[ing] the presence of MIR162 within U.S. agriculture and the widespread, pervasive contamination which has caused disruption of trade in U.S. corn with China." PC ¶ 204; NC ¶ 151.

[34] Syngenta does not dispute that Plaintiffs plead breach of duty or that the harm was foreseeable. As this Court recognized, the harm was not just foreseeable but actually foreseen. *See In re Syngenta AG MIR162 Corn Litig.*, No. 14-MD-2591-JWL, 2015 WL 2092435, at *6 (D. Kan. May 5, 2015).

Torts § 315 (absent a special relationship, "no duty so to control the conduct of a third person"). But Syngenta's *own conduct* (in timing, scope, and manner of its commercialization) is being challenged. PC ¶ 416; NC ¶ 417. In light of Syngenta's own premature commercialization, Plaintiffs disavow that any third party could prevent the harm, absent adequate stewardship and channeling programs managed by Syngenta. *See* SOF § A; *see also* PC ¶¶ 318, 403, 430.

Moreover, the "no-duty-to-control" rule turns on the distinction between "nonfeasance" and "misfeasance." As to the former, there generally is no duty to remove an existing risk for the benefit of another. *See Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1319 n.2 (Ohio 1997);[35] W. Page Keeton et al., Prosser & Keeton On the Law of Torts § 56, at 373-74 (5th ed. 1984) ("Prosser"). A nonfeasing defendant is one which "at least made [plaintiff's] situation no worse, and has merely failed to benefit him by interfering in his affairs." Prosser, *supra*, § 56, at 373.[36] Syngenta did not fail to remove a *preexisting* risk, but created "a new risk of harm to the plaintiff." *Satterfield*, 266 S.W.3d at 356 (quoting Prosser, *supra*, § 56, at 373). That is misfeasance, for which liability extends "to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct" Prosser, *supra*, § 56, at 375; *accord* Restatement (Second) of Torts, Div. 2, Ch. 12, Topic 4, Scope Note. The no-duty-to-control rule "has no logical application" when a defendant affirmatively "creat[es] a risk of harm

[35] The classic example is an ordinary bystander, even an expert swimmer with a rope, who has no duty to save a child from drowning. *Estates of Morgan*, 673 N.E.2d at 1319 n.2; Restatement (Second) of Torts § 314 Illustr. No. 4. Modern cases involve the duty of a mental health professional to act with regard to patients for the benefit of third parties. *Estates of Morgan*, 673 N.E.2d at 1328.

[36] *See* Dobbs, *supra*, § 414 ("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."); Fowler V. Harper & Posey M. Kime, The Duty to Control the Conduct of Another, 43 Yale L.J. 886 (1934) ("Harper & Kime) (Restatement draft founded on nonfeasance, where relationship of the parties imposes an "affirmative obligation.").

. . . through the instrumentality of another or otherwise." Dobbs, *supra*, § 414.[37] Thus, a person is always under a duty "'to see that other persons are not immediately exposed to an unreasonable risk from his acts.'" *Satterfield*, 266 S.W.3d at 356 (quoting Harper & Kime, *supra*). Syngenta's own cases, *see* Mem. at 41, recognize that misfeasance establishes a duty, even if a third-party intermediary might alleviate the harm. *See Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) (defendant who "jump-start[ed] an automobile for an obviously drunken driver" took "an affirmative act" creating a duty).[38] No cases cited by Syngenta excuse negligent commercialization when the harm was specifically foreseeable.[39]

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[37] *Accord Albertson v. Wabash R. Co.*, 253 S.W.2d 184, 191 (Mo. 1952) (flagman's failure to warn oncoming automobile of train in crossing was misfeasance; premature signaling was active, not passive, negligence); *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011) (general negligence law imposes a duty when defendant's own conduct "creates a foreseeable risk of injury"); *Greenberg v. Perkins*, 845 P.2d 530, 537 (Colo. 1993) (people owe a duty of reasonable care regarding "their affirmative conduct," which extends "to all who may foreseeably be injured if that conduct is negligently carried out.").

[38] Numerous cases in the relevant states hold that the no-duty-to-control rule does not apply where defendant's affirmative acts create or enhance the risk of harm. *See Simmons v. Homatas*, 925 N.E.2d 1089, 1100 (Ill. 2010) (club that "affirmatively assisted" intoxicated driver into car had duty to victims); *Bell v. Hutsell*, 955 N.E.2d 1099, 1109-10 (Ill. 2011) (discussing *Simmons* and distinguishing it from a "case of true nonfeasance" where the defendant "took no action"); *Calwell v. Hassan*, 925 P.2d 422, 431 (Kan. 1996) (identifying as a "basis for imposing a 'special relationship' duty under § 315" of the Restatement where defendant's "actions created a risk of harm to" the plaintiffs, but finding record inadequate); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1144 (Ohio 2002) (rejecting defendant's attempt to characterize duty as one of control over third persons, where plaintiffs alleged that they "engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms."); *Joyce v. M & M Gas Co.*, 672 P.2d 1172, 1174 (Okla. 1983) (where actor's "own affirmative act" created or exposed another to risk of harm, no-duty rule inapplicable); *Smith ex rel. Ross v. Lagow Const. & Developing Co.*, 642 N.W.2d 187, 192 (S.D. 2002) (landlord whose "own affirmative acts or omissions create a high risk of harm from crime owe a duty to exercise reasonable care to protect tenants from that increased risk"); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) ("One who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care."); *Robb v. City of Seattle*, 295 P.3d 212, 216 (Wash. 2013) (no-duty rule does not apply when "the actor's own affirmative act creates a recognizable high degree of risk of harm"); *accord Ginapp v. City of Bellevue*, 809 N.W.2d 487, 492-93 (Neb. 2012) (identifying relationship between Restatement (Second) § 315 and Restatement (Third) § 37).

[39] Rather, Syngenta's cases excusing misfeasance do so because the harm was unforeseeable. *See Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (manufacturer of video game had no reason to foresee plaintiff's son was mentally ill and would commit suicide after playing game); *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 670 (8th Cir. 2009) (criminal acts were an intervening cause between

As to Syngenta's failure to institute proper stewardship or channeling, Mem. at 22, negligence can be omissive without being nonfeasance. *See, e.g., Satterfield*, 266 S.W.3d at 356-57 ("One can be led astray by thinking that a defendant's negligent act must be characterized 'as an affirmative act for a duty to exist, rather than appreciating that it is the defendant's entire course of conduct that must constitute an affirmative act creating a risk of harm and that negligence may consist of an act or omission creating an unreasonable risk.'" (quotations omitted)).[40] The question is whether defendant's conduct created the risk or simply failed to remove a preexisting risk. *See* Prosser, *supra*, § 56 at 375 (when defendant has engaged in acts that have "begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him," the course of conduct is misfeasance). Here, "Syngenta did not simply fail to take precautions against foreseen and at a minimum, clearly foreseeable harm, but acted affirmatively to create it." PC ¶ 322; NC ¶ 277; SOF § A. And Syngenta's "failure" to implement stewardship and channeling programs was not omissive but part of Syngenta's affirmative conduct. In choosing not to do so, for its own gain, it created the risk of pervasive contamination. That choice was affirmative and created of risk. At worst, its failures are proof that Syngenta commercialized in a negligent manner without mitigating the risk it already created. Since Syngenta has not and cannot argue lack of foreseeability, *see* SOF § B, existence of a duty is well founded.

Tacitly acknowledging the flaw in its no-duty-to-control premise, Syngenta makes straw man arguments that Plaintiffs seek to impose a "novel theory of strict products liability" and impose a duty "to refrain from selling Viptera *at all*." Mem. at 41, 43. Not so. Plaintiffs do not

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chemical manufacturer and city fighting methamphetamine crime). Here, the harm was actually foreseen. SOF § B.

[40] This has long been the rule. *See* Prosser, *supra*, § 56, at 374 ("It is clear that it is not always a matter of action or inaction as to the particular act or omission which has caused the plaintiff's damage").

assert strict liability. Neither do they allege that GM seed developers must never commercialize, or must always wait for approval from every foreign export market, "effectively transferring that decision to foreign sovereigns," as Syngenta argues. Mem. at 42. The duty invoked is one of "reasonable care" under the circumstances *of this case.* *See* Dobbs, *supra*, § 253 ("duty states a rule or standard of law rather than a conclusion about the defendant's breach of duty on the particular facts"); *see, e.g.*, PC ¶ 416; NC ¶ 417. The timing and manner of Syngenta's commercialization are fact questions in assessing whether Syngenta satisfied its duty.[41]

This Court has rejected similar efforts to recast duty so specifically as to conflate its existence with breach. *See Ludwikoski v. Kurotsu*, 840 F. Supp. 826 (D. Kan. 1993). In *Ludwikoski*, the victim of an errant golf ball sued the golfer for negligence. Defendant moved to dismiss, arguing that Kansas law "does not impose upon a golfer a duty to hit a golf ball precisely." 840 F. Supp. at 827. The Court rejected that argument: "Contrary to defendant's position, it is not necessary . . . to recognize a duty to 'hit a ball precisely' in order to find that plaintiff states a claim. The court need only find that the defendant had a duty to exercise

[41] All relevant states agree that whether a duty was breached is a question of fact. *See, e.g.*, *Durflinger v. Artiles*, 727 F.2d 888, 898 (10th Cir. 1984) ("Whether the duty has been breached is a question of fact."); *Pritchett v. ICN Med. Alliance, Inc.*, 938 So. 2d 933, 938 (Ala. 2006); *Clark v. Transcon. Ins. Co.*, 197 S.W.3d 449, 455-56 (Ark. 2004); *Perreira v. State*, 768 P.2d 1198, 1208, 1220 (Colo. 1989); *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1054 (Ill. 2006); *Cox v. Paul*, 828 N.E.2d 907, 911 (Ind. 2005); *Keystone Elec. Mfg., Co. v. City of Des Moines*, 586 N.W.2d 340, 345 (Iowa 1998); *Siruta v. Siruta*, 348 P.3d 549, 558 (Kan. 2015); *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 212 (Ky. Ct. App. 2007); *Broussard v. State ex rel. Office of State Bldgs.*, 113 So. 3d 175, 185 (La. 2013); *Bailey v. Schaaf*, 835 N.W.2d 413, 418 (Mich. 2013); *Dempsey v. Jaroscak*, 188 N.W.2d 779, 783 (Minn. 1971); *Lyle v. Mladinich*, 584 So. 2d 397, 400 (Miss. 1991); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 157-58 (Mo. banc 2000); *Peterson v. Kings Gate Partners-Omaha I, L.P.*, 861 N.W.2d 444, 449 (Neb. 2015); *Mozingo by Thomas v. Pitt Cnty. Mem'l Hosp., Inc.*, 415 S.E.2d 341, 346 (N.C. 1992); *Keyes v. Amundson*, 391 N.W.2d 602, 607 (N.D. 1986); *Simmers v. Bentley Constr. Co.*, 597 N.E.2d 504, 507 (Ohio 1992); *Wood v. Mercedes-Benz of Oklahoma City*, 336 P.3d 457, 460 (Okla. 2014); *Johnson v. Matthew J. Batchelder Co.*, 779 N.W.2d 690, 693-94 (S.D. 2010); *West v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 552 (Tenn. 2005); *Rudolph v. ABC Pest Control, Inc.*, 763 S.W.2d 930, 933 (Tex. Ct. App. 1989); *Jandre v. Wisconsin Injured Patients & Families Comp. Fund*, 813 N.W.2d 627, 661 (Wis. 2012).

ordinary care, or the care of a reasonable person under the circumstances." *Id.* (applying Kansas law); *see also* Dobbs, *supra*, § 253 (discussing the "duty vs. breach confusion").[42] The same is true here. By collapsing duty and breach, Syngenta is trying to turn a jury question into a legal one. *See, supra*, n.38. Syngenta also wants to (repeatedly) say that the USDA's deregulation precludes a duty "to refrain from selling Viptera *at all*." Mem. at 1, 28 n.56, 41. But that is not the duty invoked. And, of course, an activity need not be unlawful to be negligent.[43] As much to the point, "nothing about USDA deregulation requires a developer like Syngenta to commercialize" or dictates the timing, scope and manner of that commercialization. PC ¶ 141; NC ¶ 88. Deregulation meant Viptera was no longer under USDA oversight at the time of commercialization.[44] Syngenta cites no USDA regulation addressing when, where, or how to

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[42] *See also, e.g.*, *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158, 163 (Wis. 2002) ("[T]he primary question we ask is not whether the defendant has a duty to take (or refrain from) certain actions, but whether the defendant's actions (or lack thereof) were consistent with the general duty to exercise a reasonable degree of care under the circumstances."); *Hesse v. McClintic*, 176 P.3d 759, 763 (Colo. 2008) ("[T]here is no general requirement that a driver *always* pull over to the side of the road when confronted by animals on the road. However, simply because a driver need not pull over *every* time she is confronted by animals on the road does not mean that she *never* needs to pull over in such a situation.").

[43] Even *Vancura v. Katris*, 939 N.E.2d 328, 344 (Ill. 2010), cited by Syngenta, acknowledges that "the mere existence of a statute . . . does not foreclose the possibility of a common law negligence action based on an extra-statutory duty of care." Every other relevant state agrees. *See Stewart v. Hewlett-Packard Co.*, No. 7:12-CV-589-LSC, 2012 WL 6043642, at *5 (N.D. Ala. Nov. 29, 2012); *Little Rock Land Co. v. Raper*, 433 S.W.2d 836, 842 (Ark. 1968); *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 79 (Colo. 1998), *as modified on denial of reh'g* (June 22, 1998); *North Ind. Pub. Serv. Co. v. Sell*, 597 N.E.2d 329, 331-32 (Ind. Ct. App. 1992); *Schmitt v. Clayton Cnty.*, 284 N.W.2d 186, 190 (Iowa 1979); *Glynos v. Jagoda*, 819 P.2d 1202, 1210 (Kan. 1991); *Corley v. Gene Allen Air Serv., Inc.*, 425 So. 2d 781, 784 (La. Ct. App. 1982); *Burt v. Fumigation Serv. & Supply, Inc.*, 926 F. Supp. 624, 634 (W.D. Mich. 1996); *Blasing v. P. R. L. Hardenbergh Co.*, 226 N.W.2d 110, 115 (Minn. 1975); *Illinois Cent. R. Co. v. Brent*, 133 So. 3d 760, 772 (Miss. 2013); *Kersey v. Harbin*, 591 S.W.2d 745, 750 (Mo. Ct. App. 1979); *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 376 S.E.2d 425, 428 (N.C. 1989); *Keyes v. Amundson*, 391 N.W.2d 602, 607-08 (N.D. 1986); *Nichols v. Coast Distrib. Sys.*, 621 N.E.2d 738, 740 (Ohio Ct. App. 1993); *Roadway Express v. Baty*, 114 P.2d 935, 937-38 (Okla. 1941); *Zacher v. Budd Co.*, 396 N.W.2d 122, 133 (S.D. 1986); *Walton v. Chattanooga Rapid Transit Co.*, 58 S.W. 737, 739 (Tenn. 1900); *Idar v. Cooper Tire & Rubber Co.*, No. CIV.A. C-10-217, 2011 WL 2412613, at *6 (S.D. Tex. June 6, 2011); *Hoffmann v. Wisconsin Elec. Power Co.*, 664 N.W.2d 55, 62 (Wis. 2003).

[44] Syngenta does not attempt a preemption argument, which would be ill taken even if it did. *See In re Genetically Modified Rice Litig.*, No. 4:06MD1811 CDP, 2010 WL 1049837, at *1 (E.D. Mo. Mar. 18, 2010) (common-law claims are not preempted by the Plant Protection Act).

commercialize after deregulation is conferred. Syngenta's argument is like saying a driver's license confers a right to drive negligently. It does not.[45] Finally, Syngenta seeks to avoid the universal rule that industry standards are relevant in determining whether Syngenta exercised reasonable care. *See* Mem. at 43-46. The question here is not whether these standards *created* a duty (although they did under the voluntary undertaking doctrine discussed below), but whether Syngenta's noncompliance is evidence of a breach, a point Syngenta concedes. *See* Mem. at 44.

B. Alternatively, Syngenta voluntarily undertook a duty.

It is well established that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, ***or*** (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (emphasis added); *see also id.* § 324A (applying same principle to third parties). Each relevant state law recognizes these principles.[46]

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[45] *See, e.g., Smith v. Waggoners Trucking Corp.*, 69 So. 3d 773, 778 (Miss. Ct. App. 2011) ("statutory driving laws [do not] supplant the common-law duty of ordinary care," and that a driver who had the statutory right-of-way "still owed a duty of reasonable care during the entire parking maneuver.").

[46] *Beasley v. MacDonald Eng'g Co.*, 249 So. 2d 844, 846-47 (Ala. 1971); *Capel v. Allstate Ins. Co.*, 77 S.W.3d 533, 543 (Ark. 2002); *Jefferson Cnty. Sch. Dist. R-1 v. Justus By & Through Justus*, 725 P.2d 767, 771 (Colo. 1986); *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769, 773 (Ill. 1964); *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1219-20 (Ind. Ct. App. 1983); *DeBurkarte v. Louvar*, 393 N.W.2d 131, 135 (Iowa 1986); *Sall v. T's, Inc.*, 136 P.3d 471, 477-78, 82 (Kan. 2006); *Louisville Cooperage Co. v. Lawrence*, 230 S.W.2d 103, 105 (Ky. 1950); *Dornak v. Lafayette Gen. Hosp.*, 399 So. 2d 168, 170 (La. 1981); *Schanz v. New Hampshire Ins. Co.*, 418 N.W.2d 478, 481 (Mich. Ct. App. 1988); *Isler v. Burman*, 232 N.W.2d 818, 821-22 (Minn. 1975); *Dr. Pepper Bottling Co. of Miss. v. Bruner*, 148 So. 2d 199, 201 (Miss. 1962); *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 433 (Mo. banc 1985); *Carroll v. Action Enter's, Inc.*, 292 N.W.2d 34, 36 (Neb. 1980); *Davidson v. Univ. of N. Carolina at Chapel Hill*, 543 S.E.2d 920, 929 (N.C. Ct. App. 2001); *Weiss v. Bellomy*, 278 N.W.2d 119, 121 (N.D. 1979); *Briere v. Lathrop Co.*, 258 N.E.2d 597, 602 (Ohio 1970); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 474 (Okla. 1987); *State Auto Ins. Cos v. B.N.C.*, 702 N.W.2d 379, 387-88 (S.D. 2005); *Biscan v. Brown*, 160 S.W.3d 462, 482-83 (Tenn. 2005); *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119 (Tex. 1976); *American Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 179 N.W.2d 864, 868 (Wis. 1970).

Syngenta voluntarily undertook a duty to exercise due care as it repeatedly and expressly acknowledged the integrated nature of the commodity market and adopted policies assuring stakeholders that it would engage in responsible commercialization consistent with industry policies. These included stewardship, channeling, and a commitment not to commercialize new GM traits without approval by key import markets. *See* PC ¶¶ 97-103, 106-13, 115, 127, 131, 136. Syngenta does not dispute that Plaintiffs have adequately pled these facts; it argues that they cannot satisfy the elements of a voluntary undertaking as a matter of law. Syngenta's arguments fail.

First, Syngenta notes that courts generally "limit[] liability for injury in a voluntary undertaking to 'physical harm.'" Mem. at 39. Syngenta's own cases, however, recognize that "physical harm" includes property damage.[47] All Plaintiffs allege physical harm to their own property. PC ¶ 319; NC ¶ 274.

Second, Syngenta's suggestion that the statements in its Deregulation Petition cannot be considered under the *Noerr-Pennington* doctrine is misconceived. In *Pennington* itself, the Supreme Court noted that conduct, which may otherwise be protected, is admissible to establish such facts as defendants' purpose, character, a continuing course of concerted conduct, and the effect of such conduct:

> It would *of course* still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly

[47] *See Hatleberg v. Norwest Bank Wis.*, 700 N.W.2d 15, 23-24 (Wis. 2005) ("physical harm" encompasses damage to property in discussing tax liability arising out of improperly drafted trust documents); *Northfields Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57, 63 (Minn. Ct. App. 1996) (tort "applied to property damage" in discussing a bad faith failure to settle within insurance policy limits); *Shaner v United States*, 976 F.2d 990, 994 (6th Cir. 1992) (finding no evidence of damage to persons "or their property" in litigation regarding cancellation of emergency loans); *Simms v. Jones*, 879 F. Supp. 2d 595 (N.D. Tex. 2012) (breach of contract action in which NFL failed to disclose that plaintiff's seating had obstructed view); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74 (Iowa 2001) (termination of employment); *Vancura*, 939 N.E.2d at 347 (recognizing distinction between "physical" harm and "bodily" harm in discussing an improperly notarized mortgage loan).

> prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 n.3 (1965) (emphasis added) (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 45 (1911) (allowing evidence regarding defendants' "purpose, of their continuing conduct, and of its effect") and *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 70 (1948) (permitting evidence to show a "continuous course of concerted efforts")). The Tenth Circuit explicitly recognizes this principle. *See Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1139 (10th Cir. 2002) (finding no error in admitting prior statements to agency in the course of rulemaking proceedings). Here, Plaintiffs do not premise liability exclusively on Syngenta's statements in the Deregulation Petition. Rather, they point to Syngenta's misrepresentations there,[48] along *with* the suit Syngenta waged against Bunge to enjoin channeling safeguards[49] and *in addition to* all of the other affirmative steps Syngenta took, in order to show the character and purpose of Syngenta's concerted, continuing efforts to get Viptera on the market and, once there, abandon undertakings to Plaintiffs' detriment.

Third, Syngenta misreads its own cases when it argues that "a voluntary undertaking creates a duty *only if* the promise induces detrimental reliance." Mem. at 40 (emphasis added; internal quotations and citations omitted). Detrimental reliance is only one of the potential elements. If a defendant's failure to exercise reasonable care increases the risk of harm, for

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[48] Syngenta's statements to the effect that it "is actively pursuing regulatory approvals for MIR162 maize in . . . China," NC ¶ 76, for example, also are admissible to establish foreseeability and knowledge that China was an important market. *See Pennington*, 381 U.S. at 670; *Telecor*, 305 F.3d at 1139.

[49] Syngenta's contention that *Noerr-Pennington* prohibits this Court from considering Syngenta's lawsuit against Bunge, Mem. at 31 n.62, fails for the same reasons discussed above.

example, then reliance is not required. *See* Restatement (Second) of Torts §§ 323 & 324A (liability attaches if failure to exercise reasonable care increases risk of harm ***or*** plaintiff detrimentally relied on the undertaking); *American Mut. Liab. Ins. Co.*, 179 N.W.2d at 868 ("[N]either the [common law] nor the Restatement section make 'reliance' . . . a necessary element for recovery . . . reliance on the act is merely an alternative basis for liability."); *Nelson*, 199 N.E.2d at 779 ("Defendant's contention that the element of reliance is essential to its liability . . . either overlooks or misapprehends that defendant was charged with misfeasance").

Syngenta's cases are not to the contrary. Some jurisdictions draw a distinction between misfeasance and nonfeasance; only the latter requires detrimental reliance. *See Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 480 (Ind. Ct. App. 1993) ("Where nonfeasance is involved . . ., liability may arise only where the beneficiaries have actually relied on the performance."); *Chisolm v. Stephens*, 365 N.E.2d 80, 85 (Ill. 1977) ("The instant case involves non-feasance . . . rather than misfeasance").[50] Syngenta committed misfeasance that not only increased the risk of harm, but actually harmed Plaintiffs.

C. Foreseeability and public policy support finding Syngenta has a duty.

1. Syngenta's cases are inapposite.

Likening farmers who purchased and planted Viptera to "gun-wielding killers," *Young v. Bryco Arms*, 821 N.E.2d 1078, 1089-90 (Ill. 2004), Syngenta urges the Court to release it from liability as some courts have done for firearm manufacturers. As an initial matter, Syngenta's argument is premised on its assertion that foreseeability alone is "not sufficient to create a duty." Mem. at 22. But in at least five relevant states (Alabama, Arkansas, Minnesota, North Dakota

[50] *See also Kassis v. Perronne*, 209 So. 2d 444, 446 (Miss. 1968) (distinguishing between nonfeasance and misfeasance and holding that if a landlord "voluntarily repairs . . . he will be responsible for the want of due care in the execution of the work"); *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1221 (Ind. Ct. App. 1983) ("reliance is not an issue in a case involving misfeasance").

and Wisconsin), foreseeability is indeed the ultimate test.[51] In virtually all other states, while duty may be refused on public policy grounds, foreseeability remains the most important consideration.[52] Syngenta does not contest foreseeability, so dismissal of these claims is wholly improper. More than that, Plaintiffs allege that the harm was actually foreseen. SOF § B. The Court therefore should begin from the premise that duty exists, asking whether circumstances warrant exception from normal tort principles. To be clear, Syngenta seeks immunity for itself and all GM seed manufacturers – a rule that would free the industry to act with impunity, regardless of the risk of harm to others.

The cases on which Syngenta relies deal with misuse of a manufacturer's product. *See* Mem. at 25, 26 & n.53, 27, 35 (using "misuse" to describe conduct justifying the no-duty rule).

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[51] *See Bush v. Alabama Power Co.*, 457 So. 2d 350, 353 (Ala. 1984) ("ultimate test of a duty" is "foreseeability that harm may result if care is not exercised."); *Shannon v. Wilson*, 947 S.W.2d 349, 352 (Ark. 1997) (same); *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) ("If the injury is foreseeable, the duty owed to the plaintiff is one of ordinary care."); *Dinger ex rel. Dinger v. Strata Corp.*, 607 N.W.2d 886, 891 (N.D. 2000) (quotations omitted) ("'The risk reasonably to be perceived defines the duty to be obeyed . . . within the range of apprehension.'"); *Janis v. Nash Finch Co.*, 780 N.W.2d 497, 502 (S.D. 2010) ("'The risk reasonably to be perceived defines the duty to be obeyed.'" (quotation marks omitted)); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) ("duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person.").

[52] *See Perreira v. State*, 768 P.2d 1198, 1209 (Colo. 1989) (while not alone sufficient, foreseeability is "an important factor for consideration"); *Ward v. K Mart Corp.*, 554 N.E.2d 223, 226 (Ill. 1990) (foreseeability "is one important concern"); *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 517 (Ind. 1994) (duty imposed "where a reasonably foreseeable victim is injured by reasonably foreseeable harm."); *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013) ("duty of care is intertwined with the foreseeability of harm."); *Shelton*, 413 S.W.3d at 908 (foreseeability is the "most important factor in determining whether a duty exists"); *Bonds v. SAPA Extrusions, LLC*, 135 So. 3d 799, 802-03 (La. Ct. App. 2014) (error to find no duty where harm foreseeable); *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991) ("important component" of duty is that injury is "reasonably forseeable."); *Lopez*, 26 S.W.3d at 156 ("foreseeability is paramount in determining whether a duty exists."); *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 695 S.E.2d 437, 440 (N.C. 2010) (duty extends to injury "reasonably foreseeable and avoidable through the exercise of due care."); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 693 N.E.2d 271, 274 (Ohio 1998) (duty "depends on the foreseeability of the injury."); *Fargo v. Hays-Kuehn*, No. 111416, --P.3d--, 2015 WL 3967082 (Okla. 2015) ("one of the most important considerations in establishing a duty is foreseeability." (quotation marks omitted)); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 365 (Tenn. 2009) (to determine duty, "courts must first establish that the risk is foreseeable"); *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) ("foreseeability weighs heavily in favor of imposing a duty").

Thus, while some courts are reluctant to hold firearm manufacturers liable for injuries or social costs associated with policing illegal firearm use, those holdings are premised on the fact that most people use the firearms lawfully and safely. *See City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 899 (E.D. Pa. 2000) (stating that "more than 99% of the gun maker's vendees transact their business lawfully" and distinguishing a case where defendant "k[new] of illegal resales.").[53] In other cases, the no-duty rule rested, in part, on a lack of foreseeability the product would be misused. *See Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004) ("cellular phone does not cause a driver to wreck a car. . . . Drivers frequently use cellular phones without causing accidents"); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 394 (Ill. 1987) (drug manufacturers could not foresee that "drugs would be dispensed without warnings by physicians, . . . [and] patient would be discharged from the hospital, drink alcohol, drive a car, lose control of it, hit a tree, and injure the passenger"); *Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1119-20 (Colo. Ct. App. 1993) (finding no evidence that component supplier knew that final product was dangerous).[54]

Unlike these cases, the harm here was foreseen and Viptera seed was not misused. *See* SOF § B. To the contrary, it was used *exactly* as Syngenta intended. *Id.* Even misuse is no defense if the defendant knew of impending harm. *See City of Philadelphia*, 126 F. Supp. 2d at

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[53] Most of Syngenta's cases address laws of states not relevant here. *See City of Philadelphia*, 126 F. Supp. 2d at 899 (Pennsylvania law); *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (New York law); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194 (N.Y. App. Div. 2003) (same); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 538 (3d Cir. 2001) (New Jersey law). Courts in relevant states have held to the contrary. *See, e.g.*, *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003) (plaintiff stated claim where gun manufacturers were alleged to have notice of illegal handgun sales and ability to control distribution).

[54] The Nebraska case cited by Syngenta, *J.A.H. ex rel. R.M.H. v. Wadle & Associates, P.C.*, 589 N.W.2d 256 (Iowa 1999), held on public policy grounds that a mental health professional owed no duty to the child of a patient who claimed that therapy caused estrangement between the patient and the child. In rejecting a duty to protect the child, the court relied on doctor-patient confidentiality as inconsistent with a duty to warn. *Id.* at 260-64. This case has no resemblance to the circumstances here.

901-02 (distinguishing cases on this ground). The Court should not abide Syngenta's request for judicial clemency.

2. This is not an exceptional case warranting a no-duty determination.

As one of Syngenta's own leading cases acknowledges, an analysis of public policy is required only "[i]n cases in which the existence of a duty is not previously established." *Williams*, 809 N.E.2d at 476. Such an analysis might be appropriate in cases attempting to hold firearm manufacturers liable for "gun-wielding killers," cold-medicine makers liable for meth-cooking criminals, or cell-phone makers liable for irresponsible drivers. But here, every American court has found that seed manufacturers owe a duty of care when their release of GM traits results in harm to others. To paraphrase Judge Perry in the *Rice* litigation, Syngenta had a duty to introduce Viptera and Duracade "without negligence" and contamination of non-GM [corn] and a resulting disruption of the U.S. [corn] markets was "the known and foreseeable risks that [Syngenta] had a duty to prevent." *In re Genetically Modified Rice Litig.*, No 4:06-MD1811 CDP, 2011 WL 5024548, at *5-6 (E.D. Mo. Oct. 21, 2011) (granting plaintiffs' summary judgment motion on Bayer's intervening-cause defense); *accord In re StarLink Corn Prods Liab. Litig.*, 212 F. Supp. 2d 828, 843 (N.D. Ill. 2002) (denying motion to dismiss founded on a purported lack of duty, holding that "Aventis had a duty to ensure that StarLink did not enter the human food supply, and their failure to do so caused plaintiffs' corn to be contaminated.").[55] *See also State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 218-19 (Or. 1968) (manufacturer had duty to avoid foreseeable harm and that complaint alleged that defendant "negligently reproduced and sold seed which caused plaintiffs to lose the expected profit from

[55] Syngenta attempts to distinguish *Rice* and *StarLink* because the USDA had not yet or completely deregulated the traits at issue in those cases. But again, deregulation is not a license to commercialize negligently. In *Rice*, the court implicitly rejected this distinction when it held that plaintiffs could not pursue a negligence per se claim. *See In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1022 (E.D. Mo. 2009).

their crop."); *Nakanishi v. Foster*, 393 P.2d 635, 642 (Wash. 1964) (seed distributor had duty on ground that manufacturer or processor who offers goods on the market "must use reasonable care where there is a foreseeable risk of harm to the consumer"). Duty is not foreign in this area, and there is no need to impose a policy-based limitation. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003) (declining balancing test of factors "[w]here a duty is already recognized").[56]

Syngenta turns to a Canadian court applying Canadian law. That case involved whether seed manufacturers owed a duty to *organic* growers when contamination from GM canola seed contaminated their organic crops, depriving them of the premium that organic produce commands. *Hoffman v. Monsanto Canada*, 2007 SKCA 47, 2007 SK.C. LEXIS 194, at *8 (Can. Sask. C.A. May 7, 2007) ("*Hoffman II*").[57] As Syngenta knows, specialty markets are far different than commodity markets. Among other things, they are "closed loop" systems where specialty producers have incentive to isolate because they get a premium. *See* PC ¶¶ 191-92, 269; NC ¶¶ 138-39. Commodity markets are not a "closed loop" system, and Plaintiffs do not allege they are seeking "premium" over commodity price. Here, it was not just those exporting to China who were harmed, but everyone whose corn was priced on the commodity market. Syngenta is the intermeddler in this non-specialty system by destroying (or at least diminishing) its own stakeholders' market (the commodity market) – something Syngenta itself represented would not happen. And importantly, the *Hoffman* plaintiffs did not allege that defendant knew

[56] Relevant policy factors seem to vary by state. Indiana, for example, considers just three factors: relationship between the parties, foreseeability, and "public policy concerns." *Williams*, 809 N.E.2d at 476. Syngenta has not identified what factors are relevant in which states. Its motion should be denied for this reason alone and attempts to cure this deficiency in a reply brief should be denied.

[57] Also, plaintiffs in *Hoffman* did "not allege physical harm to themselves or their property." *Hoffman v. Monsanto Canada*, 2005 SKQB 225, 2005 SK.C. LEXIS 330, at *59 (Can. Sask. Q.B. May 11, 2005) ("*Hoffman I*"). Neither did they allege that they were "stakeholders" of the defendant. *Id.*

of a European standard prohibiting use of GMOs and GMO derivatives in products labeled or advertised as organic. *Hoffman I*, at *59. In fact, the defendant could not have known of that standard because it did not exist when the trait was commercialized. *Hoffman II*, at *8-10. By contrast, Syngenta is alleged to have known that China was a key market, and required its own approval of MIR162. PC ¶ 150; NC ¶ 97. The court also emphasized that "defendants are not alleged to have grown Roundup Ready and Liberty Link canola." *Hoffman II*, at *39. Here, by contrast, Syngenta did grow Viptera. PC ¶ 311; NC ¶ 266. Plaintiffs also allege (missing in *Hoffman*) "a close and direct relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiffs' legitimate interests." *Hoffman I*, at *61. Plaintiffs allege that Syngenta acknowledges them as stakeholders, and took affirmative, strategic steps that created, and increased, the very risk that befell them. *See id*. at *75 (distinguishing *Hoffman I* plaintiffs from other plaintiffs whose losses were "clearly foreseeable" and were in a class "vulnerable" to defendants' actions).

If one thing stands clear: "No better general statement can be made than that the courts will find a duty, where in general reasonable persons would recognize it and agree that it exists." Prosser, *supra*, § 53, at 359. Here, seed manufacturers pledge to "responsibly introduc[e] new bio-engineered genetic traits into the market." PC at 2 & ¶¶ 99-100; NC at 2, ¶¶ 46-47. Even Syngenta acknowledges this is reasonable, having obtained approval from export markets (except China) prior to commercializing Viptera. Syngenta's no-duty rule *disregards* what the industry – and Syngenta itself – recognizes as responsible practice against a known risk of harm. Now, Syngenta wants complete discretion to act with impunity. Rather than promoting responsible conduct, such immunity promotes a race to the bottom. Nothing would prevent manufacturers from introducing a new GM trait before any export market had approved it, a

devastating proposition to the American agricultural industry.

Moreover, the present system is working. In the last fifteen years, there have been three other recorded lawsuits of this nature (the *Rice* case, the *Wheat* litigation, and *StarLink*). That hardly heralds a dysfunctional tort system in need of the radical protection demanded by Syngenta. The fact that some states have declined to pass legislation on this issue, Mem. at 35, proves, at most, that they believe the current tort system is adequately policing unreasonable commercialization of GM crops.[58] Good policy favors keeping the *status quo*, not upending it to allow GM developers impunity to alter their conduct to cause new, widespread harm. Thus, Syngenta's protestations are empty since it offers nothing to demonstrate that the "magnitude of the burden" on seed manufacturers would, in fact, be "extraordinary" or that recognizing liability would create a "flood of litigation." Mem. at 33; *see CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011) (rejecting argument that proximate cause instruction would "open the door to unlimited liability" when defendant and dissent could "not identify even *one* trial in which the instruction generated an absurd or untoward award").

Plaintiffs are not asking Syngenta "to reorganize the entire industry framework for growing and distributing corn," Mem. at 3, but to act *reasonably*. By contrast, and having disregarded its own commitment to "work closely" with stakeholders and to manage introduction in a responsible way, PC ¶¶ 99, 111; NC ¶¶ 46, 58, Syngenta wants to force the burden onto non-producers at huge and unreasonable individual cost. The only other court to have considered these issues, *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 820 F. Supp. 2d 953 (N.D. Iowa 2011), readily concluded, on a fulsome record that included fact and expert testimony, that it was

[58] *See, e.g., Al-Salehi v. I.N.S.*, 47 F.3d 390, 394-95 (10th Cir. 1995) ("Mere nonadoption" of legislation "is not probative of congressional intent . . . since several equally tenable inferences[ ] may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal citations omitted)).

"not commercially reasonable or feasible for Bunge [an exporter] to make . . . modifications to its facilities" to ensure segregation of even a *single* GM trait "that would then service the Chinese market." *Id.* at 990. The cost to Bunge was "$6 million to $8 million *per facility*." *Id.* (further finding that it would cost "$4 million to $20 million" to "redirect[] a shipment of corn that China refused on delivery because of Viptera tainting"). And that was just the cost to a *single* exporter to preserve a *single* export market from a *single* unapproved trait. Syngenta is the one that wants to sell its seed. Syngenta is the one that created the problem. "[N]o reasonable balance of equities would impose upon [non-producers] the prodigious additional expense of segregating Viptera corn (or segregating non-Viptera corn earmarked for Chinese export), where [they] did not create the situation in which Viptera corn has not been yet approved for import in China." *Id.* The problem "arises entirely because Syngenta decided to commercialize Viptera corn knowing that it did not yet have Chinese and some other import approvals and would not have them for the 2011 crop year, and under circumstances in which Syngenta should have reasonably recognized that Chinese imports of United States corn for the 2011 crop year might well be very significant." *Id.* The court rejected Syngenta's request to shift the risk to Bunge. *See id.* at 988.

These findings are inapplicable to the "gun-wielding killer" cases Syngenta cites, where a fraction of customers misuse a product and the court is asked to impose a duty on the manufacturer to prevent such misuse. In contrast, "public interest strongly favors allocating the risks of a decision to introduce a new transgenic grain into the commercial market on the company that decided to commercialize before obtaining all import approvals, not on the party that is simply confronted with that decision and has reasonable countervailing business interests

in not accepting the grain." *Bunge*, 820 F. Supp. 2d at 992.[59]

Moreover, seed manufacturers not only are the parties with a profit motive to commercialize before approval by major export markets, but the only market participants with knowledge about the status of any export approval they have sought. Immunizing them from liability would make no sense given their ability to mislead the market about that approval, as Syngenta did here. *See* PC ¶¶ 197, 203, 210, 240, 244, 250-52, 272. Indeed, as internal communications reveal, Syngenta capitalized on farmers' lack of knowledge about the status of Chinese approval, celebrating that by the time growers learned of non-approval, "they likely won't be able to replace" Viptera because of a seed shortage. PC ¶ 267. As Syngenta phrased it: "Poor things will have to roll the dice." *Id.* A party with the ability to manipulate the flow of information should not be immunized from its negligence and push responsibility downstream.

Seed manufacturers also are the only parties capable of shifting the cost of acting non-negligently to the users of those seeds. *See* Prosser, *supra*, § 98 at 692-93 ("Those . . . engaged in the manufacturing enterprise have the capacity to distribute the losses of the few among the many who purchase the products."). "This can be regarded as fairness and justice reason of policy." *Id.* at 693. Where the cost of negligence can be incorporated into the sale, the natural forces of an economic market disperse the harm caused by that seed to beneficiaries of that seed.

And it is not outside Syngenta's control to exercise reasonable care. Manufacturers go to extensive lengths to control use of GM seed when it serves their profit interests. *See Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1765 *reh'g denied*, 134 S. Ct. 24 (2013) (GM seed manufacturers limit growers from "sav[ing] any seed" to preserve their patent monopoly profits).

[59] It is hypocritical for Syngenta to argue that seed manufacturers have no duty because non-producers (like Bunge) can police segregation given that when Bunge attempted to do so, it was sued by Syngenta because it interfered with Syngenta's ability to sell Viptera seed. PC ¶¶ 223-26; NC ¶¶ 170-73. That action alone exposes Syngenta's thinly veiled motive in seeking a no-duty rule.

They have equal ability to enact stewardship requirements to preserve the *status quo* until there is approval from major export markets. SOF § C. Plaintiffs are not seeking to make seed manufacturers "insurers," Mem. at 33, but to hold them accountable when their unreasonable conduct upset the *status quo* and expose others to harm that would not exist but for their (monopoly) profiteering.

Syngenta's quest for immunity because GMOs are "highly regulated" is misleading. Firearms are regulated at the point of sale. Syngenta cites no comparable USDA regulation to prevent the harm alleged here. The USDA was out of the picture once MIR162 was deregulated. Even in terms of the decision to deregulate, Syngenta asserts that the USDA has no authority to consider (much less weigh) the financial impact on the commodity market. Mem. at 39.[60]

Finally, a decision to not extinguish Syngenta's duty has no implications beyond this case while, by contrast, a no-duty rule would have wide implications, freeing manufacturers to avoid even considering market-wide harms, both known to them and created by their decisions.

3. Public policy should not be adjudicated absent a factual record.

Alternatively, it would be premature to extinguish Syngenta's liability on an incomplete factual record because Syngenta relies on assertions and inferences that are nowhere in the Complaints and are, in fact, contradicted by the allegations. *See* App. A. Even in the context of duty, disputed facts are submitted to the jury.[61] The Court cannot simply accept Syngenta's

[60] Syngenta's inflammatory assertion that Plaintiffs seek to impose "by judicial fiat" the same sort of restrictions the USDA imposed on StarLink corn is false. Mem. at 34. As explained above, Plaintiffs simply seek to hold Syngenta to a duty to exercise reasonable care and have not pled strict liability.

[61] *Ex parte BASF Const. Chemicals, LLC*, 153 So. 3d 793, 804 (Ala. 2013) ("Where the facts upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury" (internal citations and quotation marks omitted)); *Heigle v. Miller*, 965 S.W.2d 116, 121 (Ark. 1998) (reversing summary judgment because "there was an issue of disputed facts" regarding duty to warn); *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 203-04 (Colo. 1992) ("Because of the evidentiary conflict, the district court's instruction on the duty owed . . properly left the factual determination of [what the duty encompasses] . . . for the jury"); *DeVecchis v. City of Chicago*, No. 1-08-3047, 2013 WL 6002084, at *12

contradictory assertions, such as when it claims that recognizing a duty would "run flatly counter to the policy determination that the USDA made in approving Viptera," Mem. at 33, while simultaneously arguing that the "USDA 'has no power to regulate the adverse economic effects that could follow [a GM trait's] deregulation,'" *id.* at 39. Moreover, the findings in *Syngenta Seeds, Inc.*, 820 F. Supp. 2d at 966-67, which were made on a more complete record, counsels against adopting a no-duty argument, as Syngenta requests.

III. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SYNGENTA'S CONDUCT PROXIMATELY CAUSED THEIR INJURIES.

Syngenta's claim, Mem. at 22, that in each of the 22 states at issue, proximate cause depends upon "purely legal policy judgments" that must be resolved by the Court, is again largely unsupported by any relevant authority. Syngenta primarily relies on jurisdictions that have nothing to do with Plaintiffs' causes of action, including New Jersey, New York, Pennsylvania and even Canada. *See StarLink*, 212 F. Supp. 2d at 846 (dismissing cited gun cases because "[n]one is an authoritative state decision from the jurisdictions involved here").

While "the lack of consensus on any one definition of 'proximate cause' is manifest," *CSX Transp., Inc.*, 131 S. Ct. at 2642 (plurality opinion), the 22 states at issue share two

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(Ill. App. Ct. 2013) ("where the duty depends on the existence of facts that are in dispute, the existence of the relevant facts presents a question for the jury to resolve" (internal quotations omitted)); *Nagel v. Northern Ind. Public Serv. Co.*, 26 N.E.3d 30, 44 (Ind. Ct. App. 2015) ("whether a duty exists . . . may depend upon resolution of underlying facts by the trier of fact"); *Farwell*, 240 N.W.2d at 220 (disputed fact issues pertaining to duty "must be submitted to the jury, our traditional finders of fact, for ultimate resolution" (internal citations and quotation marks omitted)); *Bjerke v. Johnson*, 742 N.W.2d 660, 667 n.4 (Minn. 2007) (although duty is generally a question of law, "this would not foreclose the possibility that there may be situations in which the facts necessary to establish a special relationship are in dispute and should be submitted to the jury."); *Mozingo by Thomas v. Pitt Cnty. Mem'l Hosp., Inc.*, 400 S.E.2d 747, 753 (N.C. Ct. App. 1991) ("when the facts are in dispute or when more than a single inference can be drawn from the evidence, the issue of whether a duty exists is a mixed question of law and fact. The issues of fact must first be resolved by the fact finder"); *Butz v. Werner*, 438 N.W.2d 509, 511 (N.D. 1989) ("if the existence of a duty depends upon factual determinations, their resolution is for the trier of fact."); *Peyer v. Ohio Water Serv. Co.*, 720 N.E.2d 195, 201 (Ohio 1998) (sufficient evidence created fact issue on duty).

commonalities: first, proximate cause is a fact question for the jury; and second, these fact questions turn on foreseeability. Plaintiffs have properly pled that Syngenta proximately caused their injuries and foresaw the very harm they experienced. At the motion to dismiss stage, such allegations are sufficient to defeat Syngenta's motion.

A. Plaintiffs properly and sufficiently allege proximate cause.

Plaintiffs allege not merely that their harm was foreseeable, but that Syngenta had actual knowledge that its actions would directly harm them. *See* SOF § B. Syngenta knew the risks *before* commercializing Viptera – that commingling and pollenization would lead to detection in the corn supply, leading to China's rejection of U.S. corn – the very harm alleged.

In more than 90 pages of briefing, Syngenta fails to cite to or distinguish this Court's own analysis and resolution of many of the same arguments Syngenta raised in opposing remand. While Syngenta now says foreseeability is irrelevant to a proximate cause analysis, it said just the opposite when it then suited Syngenta's purpose.[62] Syngenta even cited authority in Arkansas, Louisiana and Texas, defining proximate cause in relation to foreseeability. ECF No. 323 at 13.

As the Court recognized, a "negligent party may still be liable if the third party's intentional act is foreseeable and thus falls within the scope of the risk created by the original negligence." ECF No. 395 (May 5, 2015 Mem. and Order) at 13. The Court found that Plaintiffs "pleaded facts that make a claim of foreseeability plausible without reference to the lawfulness of China's acts." *Id.* at 15 n.8; *see also id.* at 12-13 ("The ultimate inquiry, however,

[62] *See* ECF No. 323 (Defs.' Opp. to Mot. to Remand) at 14 ("It is well settled that foreseeability generally marks the boundaries of proximate cause."); Apr. 27, 2015 Tr. (Mot. to Remand Hr'g) at 31:11-15 (counsel for Syngenta stating for "[Plaintiffs] to trace a chain of causation all the way through an intervening action by an independent actor, they have to put that actor's action into a category that the law will deem foreseeable. And that means that they have to allege certain things about the way China acted to put it in the category of foreseeable actions.").

remains whether the third party's act was foreseeable, whether or not that act was criminal, and Syngenta has not provided any authority to suggest that a plaintiff cannot simply prove that the third party's act was foreseeable without attempting to answer the question of the criminality of the act.").[63] Plaintiffs allege these same facts here.

The Court's analysis is consistent with the two courts that have evaluated similar causation arguments. *See In re Genetically Modified Rice Litig.*, No. 4:06-MD-1811 CDP, 2011 WL 5024548, at *3 (E.D. Mo. Oct. 21, 2011) (denying summary judgment under Arkansas, Louisiana, and Texas law based on evidence of foreseeability); *Syngenta Seeds, Inc.*, 820 F. Supp. 2d at 988 ("Syngenta should reasonably [have] recognized that Chinese imports of United States corn for the 2011 crop year might well be very significant."). Syngenta disputes the causal chain, but that dispute cannot be resolved on a motion to dismiss. *See StarLink* 212 F. Supp. 2d at 843 ("[I]n presenting their version of the causal chain, however, defendants have imposed their own construction on the complaint. . . . This is a simple factual dispute. . . . Plaintiffs have alleged otherwise, and for now, that is sufficient.").

B. Proximate cause is a fact issue.

Every one of the states at issue recognizes that proximate cause is a fact-intensive element that should be resolved by a jury. An intervening or superseding-cause defense also turns on the foreseeability of the intervening cause, which again is a fact question:

- Alabama: *Green v. Ala. Power Co.*, 597 So. 2d 1325, 1327-28 (Ala. 1992) *Galaxy Cable, Inc. v. Davis*, 58 So. 3d 93, 100 (Ala. 2010) ("A foreseeable intervening act does not break the causal relationship between the defendant's action and the plaintiff's injuries."); *Davison v. Mobile Infirmary*, 456 So. 2d 14, 24 (Ala. 1984) ("the proximate cause issue is one for the jury; and it becomes a legal issue only where there is a total lack of evidence from which the factfinder may reasonably infer

[63] Moreover, Syngenta's claim that the causal chain was interrupted by criminal actions by China, Mem. at 32 n.64, relies on a Reuters article and a letter from a trade group, and such allegations and inferences from these allegations are not properly before the Court on a motion to dismiss.

a direct causal relation between the culpable conduct and the resulting injury");

- Arkansas: *Ouachita Wilderness Inst., Inc. v. Mergen*, 947 S.W.2d 780, 785 (Ark. 1997) ("Proximate cause is usually an issue for the jury to decide"); *id.* (causation not broken by intervening act if defendant "could have reasonably anticipated that the intervening event might . . . follow . . . or if the negligence is of a character which, . . . is calculated to invite or induce the intervention of some subsequent cause.");

- Colorado: *Westin Operator, LLC v. Groh*, 347 P.3d 606, 617 (Colo. 2015) ("the factfinder at trial . . . will evaluate causation"); *Redden v. SCI Colo. Funeral Servs., Inc.*, 38 P.3d 75, 81 (Colo. 2001) ("[I]ntervening cause only relieves the defendant of liability if it was not reasonably foreseeable.");

- Illinois: *Heastie v. Roberts*, 877 N.E.2d 1064, 1083 (Ill. 2007) ("Proximate cause is ordinarily a question of fact for the jury to decide."); Ill. Pattern Jury Instr.-Civ. 15.01 (proximate cause jury instruction);

- Indiana: *Green v. Ford Motor Co.*, 942 N.E.2d 791, 795 (Ind. 2011) ("broad range of potentially causative conduct initially may be considered by the fact-finder" and "the jury is first required to decide whether an actor's negligence was a proximate cause of the plaintiff's injury"); *Correll v. Indiana Dep't of Transp.*, 783 N.E.2d 706, 709 (Ind. Ct. App. 2002) (foreseeability and intervening cause for the jury);

- Iowa: *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998) ("proximate cause [is] generally for the jury and only in exceptional cases can [it] be decided as a matter of law."); *Thompson v. Kaczinski*, 774 N.W.2d 829, 839 (Iowa 2009) ("factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.");

- Kansas: *Yount v. Deibert*, 147 P.3d 1065, 1070 (Kan. 2006) ("causal connection between the breached duty and the injuries sustained is a question of fact.");

- Kentucky: *Shelton*, 413 S.W.3d at 914 ("the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis."); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 292 (Ky. Ct. App. 2009) (superseding cause is a factor of extraordinary, unforeseeable nature);

- Louisiana: *Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1087 (La. 2009) ("cause-in-fact issue is a question of fact."); *id.* at 1088 (legal cause "depends on factual determinations "of foreseeability and ease of association." (citation and quotation marks omitted));

- Michigan: *Jones v. Detroit Med. Ctr.*, 806 N.W.2d 304, 305 (Mich. 2011) (proximate cause should be submitted to jury "rather than decided as a matter of law" when "reasonable minds can[] differ that injury was foreseeable, natural and probably consequence of defendant's negligence"); *Dawe v. Bar-Levav & Assoc.*, 808 N.W.2d

240, 249-50 (Mich. Ct. App. 2010) ("There may be more than one proximate cause of an injury . . . [and] criminal acts by third parties can be foreseeable" as found by jury (internal citation and quotation marks omitted));

- Minnesota: *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008) (proximate cause "is a question of fact for the jury to decide."); *Canada, By and Through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997) (intervening event "must not have been reasonably foreseeable by the original wrongdoer");

- Mississippi: *Hoover v. United Servs. Auto. Ass'n*, 125 So. 3d 636, 641-42 (Miss. 2013) ("proximate cause is treated as one of fact" for the jury); *Cheeks v. AutoZone, Inc.*, 154 So. 3d 817, 823 (Miss. 2014) ("intervening cause is one that could not have been reasonably foreseen" (internal citation and quotation marks omitted));

- Missouri: *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 200 n.17 (Mo. banc 2014) ("whether the plaintiff was injured by the defendant's negligence remains a jury question."); *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 398-99 (Mo. Ct. App. 2013) ("intervening cause will not preclude liability if it is itself a foreseeable and natural product of the original negligence" (internal citation and quotation marks omitted));

- Nebraska: *Wilke v. Woodhouse Ford, Inc.*, 774 N.W.2d 370, 382 (Neb. 2009) ("causation is, ordinarily, a matter for the trier of fact."); *id.* at 383 ("if a third party's negligence is reasonably foreseeable," it is not an intervening cause);

- North Carolina: *Hairston v. Alexander Tank & Equip. Co.*, 311 S.E.2d 559, 566 (N.C. 1984) (proximate cause "is ordinarily a question for the jury." (internal citation and quotation marks omitted)); *id.* at 567 ("intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.");

- North Dakota: *Moszer v. Witt*, 622 N.W.2d 223, 229 (N.D. 2001) (proximate cause is "a question of fact for the jury"); *Loper v. Adams*, 795 N.W.2d 899, 905 (N.D. 2011) ("intervening cause must be both independent and unforeseeable.");

- Ohio: *Strother v. Hutchinson*, 423 N.E.2d 467, 471 (Ohio 1981) ("both negligence and proximate cause are . . . questions of fact" and "where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability" (internal citation and quotation marks omitted));

- Oklahoma: *Lockhart v. Loosen*, 943 P.2d 1074, 1079-80 (Okla. 1997) (causation "lies within the realm of fact, not law. . . . . Whether an intervening act is foreseeable also calls for an exhaustive determination by the trier of fact."); *Brewer v. Murray*, 292 P.3d 41, 53 (Okla. Civ. App. 2012) ("criminal conduct" may be "within the zone of risk created" by a defendant's conduct and it "is for a jury to determine the proximate

cause");

- South Dakota: *Thompson v. Summers*, 567 N.W.2d 387, 394 (S.D. 1997) ("Questions of proximate cause are for the jury in 'all but the rarest of cases.'" (internal citations omitted)); *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 114 (S.D. 1992) ("superseding cause and questions of proximate cause are normally for the jury.");

- Tennessee: *Wilson v. Americare Sys., Inc.*, 397 S.W.3d 552, 559 (Tenn. 2013) (cause in fact and proximate cause are "ordinarily jury questions" (internal citations omitted)); *Haynes v. Hamilton Cnty.*, 883 S.W.2d 606, 612 (Tenn. 1994) ("Proximate cause, as well as superseding intervening cause, are ordinarily jury questions.");

- Texas: *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 929 (Tex. 2015) ("proximate cause is ultimately a question for a fact-finder"); *Law Office of Oscar C. Gonzalez, Inc. v. Sloan*, 447 S.W.3d 98, 114 (Tex. Ct. App. 2014) ("actor's negligence will not be excused where the criminal conduct is a foreseeable result of the actor's negligence." (internal citations omitted)); and

- Wisconsin: *Estate of Cavanaugh by Cavanaugh v. Andrade*, 550 N.W.2d 103, 110 (Wis. 1996) (whether conduct was a substantial factor in producing the injury is generally one of fact for the jury).

Syngenta bears the burden[64] and fails to establish that Plaintiffs' allegations, along with all reasonable inferences, do not as a matter of law allege proximate cause. It has not met its burden and dismissal should be denied on this contested factual question.

C. A disputed chain of causation presents a fact issue.

Syngenta argues that proximate cause is necessarily "restricted by public policy concerns that place a limit on how far courts permit liability to extend." Mem. at 23. Some, but not all, courts separate proximate cause into: factual causation (a jury issue); and legal causation (often is a mixed question of policy and fact).[65] But Syngenta fails to disclose two things about legal

[64] *See, e.g., Turner v. Nationwide Ins. Co.*, 503 So. 2d 734, 737 (La. Ct. App. 1987) ("The burden of proving a superseding intervening cause rests with defendants."); *Benson v. Temple Inland Forest Prods. Corp.*, 942 S.W.2d 252, 254 (Ark. 1997) (placing on the defendant "the burden of proving" that "intervening or superseding acts of negligence" relieves the defendant of liability).

[65] *See, e.g., Lee v. Chicago Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992) ("Legal cause is essentially a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct." (internal citations and quotation marks omitted)); *Rando*, 16 So. 3d at 1088.

causation, both of which require denial of its motion: an essential element is foreseeability (a fact question); and outside of extraordinary circumstances not present here, such policy questions are only addressed by juries or a court on a full factual record.

1. Syngenta has created fact issues.

Rather than acknowledge that the very results Syngenta predicted, by the ordinary use of its product, would occur exactly as foreseen, Syngenta alleges that its actions are "too remote from their alleged harm," Mem. at 21, and that other, intervening causes are responsible, *id.* at 21-36. Once again, it cites to law in unrelated states[66] or to unrelated causes of action, including numerous product liability or strict liability cases,[67] none of which are relevant to whether Plaintiffs have alleged proximate cause here. As described above, causation in each state turns on foreseeability, particularly when a defendant, as here, alleges that an intervening or superseding cause breaks the Plaintiff's proffered chain of causation.[68]

Again, Syngenta's cases largely rest on third parties who misuse products. Mem. at 25, 26, 26 n.53, 27, 33 n.65. Plaintiffs' allegations, however, are not that the GM seed (or even harvest) was misused, but that contamination occurred while used exactly as intended by Syngenta, which does not break the chain of causation. *See Wilson*, 400 S.W.3d at 399 (rejecting

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[66] *See Camden Cnty. Bd. of Chosen Freeholders*, 273 F.3d at 541 (New Jersey); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3rd Cir. 2002) (Pennsylvania).

[67] *See, e.g., Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1201 n.1 (7th Cir. 1984) ("Plaintiffs' claims, then, are solely grounded on strict liability and not on negligence."); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1207 (N.D. Tex. 1985) ("This is a products liability action."); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1251 (5th Cir. 1985) (ultrahazardous activity giving rise to absolute liability and strict products liability).

[68] *See* Dobbs, *supra*, § 204 ("The rule is that if the intervening cause itself is part of the risk negligently created by the defendant, or if it is reasonably foreseeable at the time of the defendant's negligent conduct, then it is not a superseding cause at all. In that case, the defendant is not relieved of liability merely because some other person or force triggered the injury. The wordy labels—superseding, intervening, efficient, independent—although almost always invoked, turn out to be surplusage. The ultimate inquiry on scope of the defendant's liability is merely whether the intervening cause is foreseeable or whether the injury is within the scope of the risk negligently created by the defendant.").

superseding cause because harm was "a normal result of the situation" created by defendant and was "reasonably foreseeable"); *Causey v. Sanders*, 998 So. 2d 393, 405 (Miss. 2008) (intervening cause does not break the chain of causation if "reasonably to be anticipated").

Syngenta tries to avoid this result by characterizing China's rejection of U.S. corn as criminal, but Plaintiffs do not allege that, and there is no factual record on which such a conclusion could be made. Moreover, as this Court has recognized, the causation analysis does not have a categorical exception for intervening criminal acts. Syngenta's attempts to blame farmers, elevators, exporters and even China do not excuse its own alleged negligence. *See In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1025 n.10 ("Even if other actors such as Riceland or the Cheniere commercial seed growers were also negligent . . . their negligence does not mean Bayer's negligence was not the proximate cause of the injuries . . . Whether multiple negligent actors contributed to the damage does not lessen the liability of the original negligent actor, where the later alleged negligence was a foreseeable result of the original negligence."), *adhered to on reconsideration*, No. 4:06-MD-01811 CDP, 2011 WL 5024548 (E.D. Mo. Oct. 21, 2011).[69]

In the exceptionally rare cases in which an intervening criminal cause has broken the causal chain as a matter of law, truly extraordinary events must occur, none of which are present here. *See, e.g., Shelton v. Bd. of Regents of Univ. of Nebraska*, 320 N.W.2d 748, 822-829 (Neb. 1982) (employee, responsible solely for feeding rats in lab, first stole a poisonous drug, then

[69] *See also O'Cain v. Harvey Freeman & Sons, Inc. of Miss.*, 603 So. 2d 824, 830 (Miss. 1991) ("[T]he question of reasonable foreseeability of criminal activity would be for the trier of fact. Furthermore, the question of superseding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact."); *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 550 (Tex. 1985) ("[N]egligence will not be excused where the [intervening] criminal conduct is a foreseeable result of such negligence."); *Dawe*, 808 N.W.2d at 249-50 ("Courts in Michigan have long recognized that criminal acts by third parties can be foreseeable"); *Brewer*, 292 P.3d at 53 ("criminal conduct" may be "within the zone of risk created" by a defendant's conduct and it "is for a jury to determine the proximate cause").

criminally broke into a home, then intentionally poisoned another person); *see also Young*, 821 N.E.2d at 1082, 1090-91 (gun sold to first independent distributor, then to distributor, then to independent dealer, who sold to straw purchaser, who sold to an adult, who illegally made the gun available to a juvenile, who used it in a crime). There are no relevant intervening causes here that break the chain of causation linking Syngenta's conduct to the harm it foresaw. Judge Perry rejected similar arguments by Bayer on summary judgment. *See In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1024 ("Bayer argues that the jury could find that 'intervening actors' . . . could be the cause of plaintiffs' injuries. But the negligence, if there was any, was in Bayer's handling of the GM rice."). Here, competing factual arguments make a motion to dismiss even more inappropriate. *See, e.g.*, App. A.

2. Courts typically do not rule on causation on a motion to dismiss.

Because even legal causation turns on factual questions of foreseeability, this issue is appropriately resolved after the motion to dismiss stage.[70] A jury is in a better position to resolve proximate cause issues because they turn on disputed questions of fact. *See State Farm Fire & Cas. Co.*, 30 F. Supp. 3d at 1125 ("Only when all the evidence . . . is undisputed and susceptible of only one inference does the question of proximate cause become a question of law. That is not the case here. Because there are questions of fact about the foreseeability of the harm, the trier of fact must resolve the issue of proximate cause. Consequently, the Court denies defendant's motion for summary judgment." (internal citations and quotation marks omitted)).[71]

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[70] *See State Farm Fire & Cas. Co. v. Bell*, 30 F. Supp. 3d 1085, 1123 (D. Kan. 2014) (under Kansas law, "summary judgment is seldom proper in negligence cases" (internal citations and quotation marks omitted)); *Simmons v. Garces*, 763 N.E.2d 720, 732 (Ill. 2002) (legal cause could not be rejected based on disputed facts); *accord* Dobbs, *supra*, § 198 (legal cause "does not arise until negligence and factual cause have been proven).

[71] *See also Leibreich v. A.J. Refrigeration, Inc.*, 617 N.E.2d 1068, 1071 (Ohio 1993) ("intervening causation generally presents factual issues to be decided by the trier of fact."); *accord City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *7 (Mass. Super. Ct. July 13, 2000)

Even Syngenta described proximate cause as a summary judgment, not a motion to dismiss, question in opposing remand. ECF No. 323 at 18-19 (citing cases from Louisiana and Arkansas for proposition that "plaintiff bears the burden of showing that the intervening action was not an intervening cause" and "courts will grant *summary judgment* for the defendant if the plaintiff cannot produce evidence showing that an intervening act was foreseeable." (emphasis added)). Accordingly, dismissal should be denied.

3. Syngenta's cases are inapposite.

In attempting to combat the weight of 22 states requiring fact finders to resolve disputed questions of proximate cause, Syngenta cites factually dissimilar cases, primarily involving the gun and drug industries. Plaintiffs are not governmental or regulatory bodies asking to cure amorphous "societal problems." *See, e.g., People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91, 105 (N.Y. App. Div. 2003); *Ashley Cnty., Ark.*, 552 F.3d at 663 (twenty counties sought to "recoup costs expended" with "societal effects of the methamphetamine epidemic"); *Hoffman II*, at *12, ¶ 12 (criticizing litigation "driven" by Saskatchewan Organic Directorate-Organic Agriculture Protection Fund"). Nor are they seeking to hold Syngenta accountable for acts akin to "gun-wielding killers." *Young*, 821 N.E.2d at 1089-90. And the causal connections in Syngenta's gun citations are far more tenuous than here.[72] Courts have focused on circuitous proximate cause chains when holding that illegal creation of meth and resultant "societal effects" were not the "natural and probable consequences" of the defendants' sales of cold medicine.

("Even if Plaintiffs' allegations present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory."); Restatement (Second) of Torts § 453, cmt. c ("[I]f the liability of the actor depends upon the wrongful character of the intervening act of the third person, the judge should, if the evidence is conflicting, leave it to the jury").

[72] *See Young*, 821 N.E.2d at 1090 (gun "passed through at least eight sets of hands before it reached Tolliver. The [gun] used to kill Stephen Young passed through at least six sets of hands"); *City of Philadelphia*, 126 F. Supp. 2d at 904 (tracing tortuous route required to link the manufacturer with damage to plaintiff); *Camden Cnty. Bd. of Chosen Freeholders*, 273 F.3d at 541 (same).

Ashley Cnty., Ark., 552 F.3d at 663, 668.[73] Here, however, a defendant's conduct did not "merely create a condition that makes the eventual harm possible." *Id.* at 668. Syngenta instead knew it was "nearly impossible" to prevent contamination of non-GM corn. PC ¶¶ 185-86. The harm was not merely possible but probable given Syngenta's wholesale lack of stewardship and its affirmative steps to further the risk of harm by, *e.g.*, growing Viptera throughout the U.S. and giving away free bags of GMO seed, *id.* at ¶¶ 201, 204; encouraging farmers to grow Viptera side-by-side with non-GM corn, *id.* at ¶ 201; encouraging farmers to hide knowledge of Viptera crops from neighbors, *id.* at ¶ 203; declining measures to reduce the risk in stewardship agreements, *id.* at ¶¶ 200, 202, 217, and refusing channeling measures, *id.* at ¶¶ 221-22, 225-26.

Based up the facts alleged, Plaintiffs' causal chain is hardly remote. Neither did Syngenta lack "control over its retailers[,] dealers, and others in the distribution chain to force them to change." Mem. at 26. Syngenta did not solely utilize an "independent retailer" like a firearms dealer or drug store. *See e.g., Ashley Cnty., Ark.*, 552 F.3d at 670. It was in part the retailer, selling "directly to growers" using its own subsidiaries and distribution network, its own stewardship agreement, and purported "wide-ranging grower education campaign." PC ¶¶ 69, 131, 208, 211. When a grain elevator tried to channel, Syngenta sued it. *Id.* at ¶ 223.

Finally, Syngenta raises the specter of duplicative recoveries or challenges in apportioning damages. Mem. at 31. Plaintiffs in previous GMO cases have presented damage models surviving both *Daubert* and post-trial motions. *E.g., In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1032-34 (denying *Daubert* motions seeking to exclude plaintiffs'

[73] *See Ashley Cnty., Ark.*, 552 F.3d at 668 (causation chain involved: "conduct of the independent retailers in selling the products; the illegal conduct of methamphetamine cooks purchasing the cold medicine along with numerous other items with the intent to manufacture methamphetamine; the illegal conduct of cooking the items into methamphetamine; and the illegal conduct of distributing the methamphetamine to others in Arkansas.").

damages experts). It is premature for the Court to conclude as a matter of law that Plaintiffs, who have sufficiently alleged *the fact* of damage, will be unable to prove the amount of damages.[74] And, although not required to do so, Plaintiffs have extensively detailed the impact of losing the Chinese market on grain prices. PC ¶¶ 324-61; NC ¶¶ 279-332. Moreover, Syngenta utterly fails to explain what duplicative recovery there might be. There is not the same risk of duplicative damages here as in Syngenta's cigarette cases, if Plaintiffs – those directly damaged – are allowed to pursue their claims, nor will Plaintiffs double recover, as in Defendants' governmental fund cases.[75] Here, farmers and non-producers, as the directly injured parties, are in the best position to enforce the law.

Plaintiffs properly and sufficiently allege that Syngenta's actions proximately caused their injuries, requiring the denial of Syngenta's motion.

IV. THE ECONOMIC LOSS DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS.

Syngenta next invokes the economic loss doctrine ("ELD") as a broad rule that "solely economic losses are generally not recoverable in tort actions." Mem. at 46.[76] The ELD,

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[74] *See Jordan v. Unified Gov't of Wyandotte Cnty.*, No. 14-2539-JWL, 2015 WL 1756840, at *7 (D. Kan. Apr. 17, 2015) ("[T]he court doubts whether an equitable accounting is available to plaintiffs as a method of calculating their damages in this case . . . . Nonetheless, it is premature to decide on defendants' motion to dismiss, prior to the commencement of discovery, whether plaintiffs are able to pursue this remedy and, if so, whether they can obtain that remedy from any of the defendants."); *City of Greenville, Ill. v. Syngenta Crop Prot., Inc.*, 756 F. Supp. 2d 1001, 1012-13 (S.D. Ill. 2010) (denying motion to dismiss challenging plaintiffs' claims for future damages because plaintiffs "adequately pled some damages," and question of amount "to be decided at a later stage of this case.").

[75] *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 676, 671 (E.D. Tex. 1998) ("not only would Tobacco be subject to multiple liability for the same conduct, but the Funds could very well receive double recovery for the same injury . . . [by] seeking to enforce subrogation rights;" individual smokers "far better positioned to vindicate the public interest in enforcing the law than more indirectly injured . . . Funds"); *City of Philadelphia*, 277 F.3d at 425 (those "immediately and directly injured by gun violence," such as gunshot wound victims "more appropriate plaintiffs" than City or organizations whose injuries were "more indirect").

[76] Syngenta argues that the ELD bars Plaintiffs' claims for negligence, nuisance, and negligent misrepresentation. Mem. at 46. Syngenta does not seek dismissal of the statutory, trespass, or tortious interference claims on this basis.

however, is not the uniform and sweeping rule Syngenta suggests. To the contrary, the vast majority of state laws adopt a much narrower view of the ELD, applying it where a product (and sometimes service) provided to the plaintiff in a commercial transaction fails to perform as anticipated. As described in *Insurance Company of North America v. Cease Elec. Inc.*, 688 N.W.2d 462, 467 (Wis. 2004), cited by Syngenta, Mem. at 51, "economic loss" means "loss in a product's value which occurs because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Id.* at 467 (internal quotation marks and citation omitted). These states view such loss as best addressed through the UCC. Syngenta's own cases confirm this view.[77] That scenario is not present here. Even states taking a more expansive view of the ELD have not done so in the circumstances here. And even in its broadest form, the ELD does not apply where there is harm to Plaintiffs' own property.

A. Development of the ELD.

The ELD began at the intersection between warranty and strict products liability. Often cited as a seminal case, *Seely v. White Motor Co.*, 403 P.2d 145, 149 (Cal. 1965), was a suit against the manufacturer of a defective truck. Plaintiff sought recovery of the purchase price, repair costs, and lost profits. The court rejected strict liability for what, in essence, were warranty claims, explaining:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort [*i.e.*, liability without negligence] indicates that it was designed, not to undermine the warranty provisions of the sales act or of the [UCC] but, rather, to govern the distinct problem of physical injuries.

[77] *E.g., Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 502 (Iowa 2011) (goal of ELD is "to prevent . . . tortification of contract law"); *7240 Shawnee Mission Holding LLC v. Memon*, No. 08-2207, 2009 WL 3185344, at *9 (D. Kan. Sept. 30, 2009) (ELD "designed to prevent a person from asserting a tort remedy in circumstances governed by the law of contracts.").

Id. at 149. The rules of warranty, the court said, "function well in a commercial setting . . . [to] determine the quality of the product the manufacturer . . . must deliver." *Id.* at 150. When a product subject to the UCC bargaining process malfunctions, the "carefully articulated" law of sales should govern expectations between buyer and seller, as distinguished from personal injury remedied through strict (no-fault) liability. The Supreme Court adopted this reasoning in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), an admiralty case involving a malfunctioning turbine. The court considered "whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts." *Id.* at 859. It observed that no-fault liability grew from the policy judgment "that people need more protection from dangerous products" than afforded by warranty law, but extending that too far would "drown [contract] in a sea of tort." *Id.* at 866. "[F]ailure of the product to function properly [] is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *Id.* at 868. "The maintenance of product value and quality is precisely the purpose of express and implied warranties." *Id.* at 872 (citing UCC).

States following *East River* decline tort recovery for "disappointed commercial expectations" in a product's performance. Some extend the ELD to deficient services and some do not.[78] Some limit the ELD to transactions in which the plaintiff has an "alternative avenue for protecting itself by contract."[79] While Syngenta says some apply the ELD absent privity, the cases it cites still involved a product supplied to a plaintiff via contract and/or a contractual relationship with the defendant directly or through a contractual network under which the parties

[78] *Ham v. Swift Transp. Co.*, 694 F. Supp. 2d 915, 922 (W.D. Tenn. 2010) (ELD not applicable to services); *Shister v. Patel*, 776 N.W.2d 632, 637 (Wis. Ct. App. 2009) (same).

[79] Mem. at App. B (citing *Engeman Enters. LLC v. Tolin Mech. Sys. Co.*, 320 P.3d 364, 368-69 (Colo. Ct. App. 2013); *Quest Diagnostics, Inc. v. MCI Worldcom, Inc.*, 656 N.W.2d 858, 864, 866 (Mich. Ct. App. 2002); *Lord v. Customized Consulting Specialty, Inc.*, 643 S.E.2d 28, 32-33 (N.C. Ct. App. 2007)).

were operating. *See, infra*, § IV.C.[80] As one court succinctly said, while the ELD has expanded beyond strict products liability, "the policy behind the doctrine has remained the same . . . to prevent a party from asserting a tort remedy in circumstance governed by the law of contracts." *In re Bryant Manor, LLC*, 434 B.R. 629, 635 (Bankr. D. Kan. 2010) (citations omitted); *see also David v. Hett*, 270 P.3d 1102 (Kan. 2011) (overview of ELD).

There are three categories in which the ELD generally is applied: product defect; contractual obligations; and "residual" areas not encompassed by the first two. Vincent R. Johnson, *The Boundary-Line Function Of The Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523, 526-28 (2009) ("Johnson"). *In re Chicago Flood Litig.*, 680 N.E.2d 265 (Ill. 1997) and *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984), cited by Syngenta, are within the third group. These cases are driven by policy issues inapplicable here. *See, infra*, § IV.D.

B. States' treatment of the ELD.

Syngenta quotes sound bites from cases that purport to support its arguments but do not. *See* Mem. at App. B. Each state must be analyzed to determine its version of the ELD.[81]

1. Many states do not recognize the ELD.

Arkansas has not adopted the ELD even in strict liability cases. *See Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 324 (Ark. 1981) (disavowing *Seely* and finding "no valid reason" why a plaintiff cannot sue for damage to the product itself).[82] *Willman v. Riceland Foods, Inc.*, 630 F.

[80] Many of Syngenta's cases do it more harm than good. For example, in *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010), the court held that a title company *could* be liable for a lender's pecuniary losses under claim of negligent misrepresentation, stating that even the "existence or non-existence of a contract is not the dispositive factor." *Id.* at 748.

[81] California law on Trans Coastal's negligent misrepresentation claim is discussed in § IX.C.

[82] *Accord Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128, 131 (Ark. 1983); *Farm Bureau Ins. Co. v. Case Corp.*, 878 S.W.2d 741, 743 (Ark. 1994); *see also Alaskan Oil, Inc. v. Cent.*

Supp. 2d 999 (E.D. Ark. 2007), involved Bayer's contamination of the U.S. rice supply and the court found the ELD did not apply: "Under Arkansas law, economic loss without other damage can be awarded in cases where negligence . . . [is] alleged." *Id.* at 1002-03; *accord In re Genetically Modified Rice Litig.*, No. 4:06MD1811, 2009 WL 4801399, at *2 (E.D. Mo. Dec. 9, 2009) ("Arkansas does not currently recognize the [ELD]."). In *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011), the Arkansas Supreme Court declined Bayer's invitation to "extend the doctrine to claims involving negligence." *Id.* at 832. Defendants seek to distinguish this case because there was harm to farmers' "lands, crops, and equipment," *id.* at 832-33, but there is no reason to presume that Arkansas would "extend" the ELD doctrine here when it has always declined to do so in the past.

Louisiana, in the words of Judge Fallon, "does not recognize the [ELD] . . . nor does it recognize a doctrine sufficiently similar to enable the Court to conduct an [ELD] analysis . . . tort damages for economic losses may be recoverable by Plaintiffs under laws unique to Louisiana." *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 680 F. Supp. 2d 780, 796 (E.D. La. 2010).[83] Louisiana rejects any *per se* rule barring tort recovery for "purely economic" losses, *PPG Indus. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), and specifically "abrogated" any "bright-line litmus test that require[s] a proprietary interest in the damaged property." *Phillips v. G & H Seed Co.*, 86 So. 3d 773, 779 (La. Ct. App. 2012). Rather, Louisiana adopts a case-

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Flying Serv., Inc., 975 F.2d 553, 555 (8th Cir. 1992) (Arkansas permits recovery for damage to product itself); *Rush v. Whirlpool Corp.*, No. 07-2022, 2008 WL 509562, at *1 (W.D. Ark. Feb. 22, 2008) (Arkansas does not adhere to ELD); *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, No. 05-2310, 2007 WL 4191717, at *8 n.12 (D. Minn. Nov. 21, 2007) (same).

[83] *See also Brookshire Bros. Holding v. Total Containment, Inc.*, No. 04-1150, 2007 WL 184600, at *7 (W.D. La. Jan. 18, 2007) (ELD simply "does not apply to . . . injuries that occurred in Louisiana.").

specific, duty/risk analysis. *PPG*, 447 So. 2d at 1061-62.[84] "There is no 'rule' for determining the scope of the duty;" rather, the inquiry "is ultimately a question of policy as to whether the particular risk falls within the scope of the duty." *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1992). "Louisiana does not apply the ELD as a bright line rule, but only considers it when determining whether a plaintiff has demonstrated legal cause." *In re Genetically Modified Rice Litig.*, 2011 WL 5024548, at *4 (denying summary judgment); *see also In re Genetically Modified Rice Litig.*, No. 4:06MD1811 CDP, 2010 WL 2326036, at *3 n.6 (E.D. Mo. June 7, 2010) (same). Louisiana permits economic loss claims if the risk was within scope of the duty.[85]

2. Some states recognize the contract-based version of the ELD.

Alabama applies the ELD only in product liability cases, such as in the cases cited by Defendants. *See Bay Lines, Inc. v. Stoughton Trailers, Inc.*, 838 So. 2d 1013, 1019 (Ala. 2002) (freight trailer buyer sued manufacturers under warranty, contract, and product liability theories. The court disallowed recovery "where the only injury is to the product itself."); *Vesta Fire Ins. Corp. v. Milam & Co. Const.*, 901 So. 2d 84, 107 (Ala. 2004) (rejecting the ELD absent determination that damage was caused by a "product" within the ambit of Alabama's product liability statutes); *accord AGF Marine Aviation Transp. v. LaForce Shipyard, Inc.*, No. CIV.A. 02-0834-CG-L, 2006 WL 2402345, at *2 (S.D. Ala. Aug. 18, 2006) (same). In *Public Bldg.*

[84] *Accord Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 698 (5th Cir. 2011) (*PPG* "left the door open for case-by-case adjustments," given its emphasis "that policy considerations determine the 'reach' of the rule"); *see also Istre v. Fid. Fire & Cas. Ins. Co.*, 628 So. 2d 1229, 1232 (La. Ct. App. 1993) (construction company liable for automobile accident resulting from company's backhoe accidentally knocking out power, causing area traffic lights to fail; "operator knew the risk of his backhoe knocking out power," and "company knew or should have known the risks to people and property caused by power outages, and the predictability of widespread effects and delays in restoring power").

[85] *E.g.*, *Phillips*, 86 So. 3d at 774-82 (loss to crawfish buyers and resellers stemming from introduction of insecticide-coated rice seed); *Nehrenz v. Dunn*, 593 So. 2d 915, 918 (La. Ct. App. 1992) (employment discharge resulting from false positive test); *Elliott v. Lab. Specialists, Inc.*, 588 So. 2d 175, 176 (La. Ct. App. 1991) (stigmatization as drug user resulting from negligent urinalysis). Louisiana has long permitted tort claims for purely economic losses. *E.g. Pharr v. Morgan's L. & T.R. & S.S. Co.*, 38 So. 943, 945-46 (La. 1905) (losses sustained on account of defendant's negligent obstruction).

Auth. of City of Huntsville v. St. Paul Fire & Marine Ins. Co., 80 So. 3d 171 (Ala. 2010), the court rejected the ELD in a construction case, holding that tort remedy simply depends on tort duty based on familiar factors. *Id.* at 184-85.[86] Other courts hold that Alabama's ELD does not apply outside the product liability context.[87]

Colorado holds that where the loss goes beyond expectancies arising from contract, or results from breach of duties independent of contract, the ELD does not apply. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262-64 (Colo. 2000). Such an independent duty can exist where it is beyond the scope of duties recognized in the contract, or, even if not, there is a recognized independent duty supporting a tort claim. *S K Peightal Engr's, Ltd. v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 875 (Col. 2015).

Indiana's ELD applies only where the claim entails "failure of a product or service to live up to expectations," and "[t]he buyer and seller are able to allocate these risks and price the product or service accordingly." *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 155 (Ind. 2005).[88] "[E]conomic loss" arises where a product "does not work for the general purposes for which it was manufactured and sold." *Reed v. Cent. Soya Co.*, 621 N.E.2d 1069, 1074 (Ind. 1993) (citation and quotation marks omitted), *modified on other grounds*, 644 N.E.2d 84 (1994). If plaintiff is not seeking "the benefit of the bargain or other matters governed by contract and/or

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[86] Recognizing that these factors necessitate "a fact-intensive inquiry," the court declined resolution as a matter of law, calling for "further evidence regarding the parties' relationships" before it could "comfortably address the matter." 80 So. 3d at 186.

[87] *E.g., Tull Bros. v. Peerless Prods., Inc.*, 953 F. Supp. 2d 1245, 1256 (S.D. Ala. 2013) (ELD did not apply in suit by subcontractor who installed aluminum windows where "there has been no damage to the product" but only costs to install a new one).

[88] *See also First Internet Bank of Ind. v. Lawyers Title Ins. Co.*, No. 1:07-CV-0869-DFH-DML, 2009 WL 2092782, at *8 (S.D. Ind. July 13, 2009) (ELD "is a response to efforts . . . to transform breaches of contract into torts"); *cf. American United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 705 (Ind. Ct. App. 2004) (ELD inapplicable to case "not . . . seeking recovery for losses caused to the product by the product").

related principles, the [ELD] does not bar a negligence action." *KB Home Ind. Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 305 (Ind. Ct. App. 2010); *see also Hoffman v. WCC Equity Partners, L.P.*, No. 54A04-0807-CV-393, 899 N.E.2d 756 (table), 2008 WL 5195974, at *2 (Ind. Ct. App. Dec. 11, 2008) (ELD inapplicable where parties lacked contractual relationship).[89]

Kansas recognizes the ELD in defective product cases, *Koss Constr. v. Caterpillar, Inc.*, 960 P.2d 255, 259 (Kan. Ct. App. 1998), where the defect "precludes the product from being fit for its intended use or functioning as expected for the purpose it was designed." *Elite Profs., Inc. v. Carrier Corp.*, 827 P.2d 1195, 1197 (Kan. Ct. App. 1992). The Kansas Supreme Court takes a doctrinal approach in determining applicability of the ELD. In *David*, 270 P.3d 1102, it rejected the ELD in home construction cases, finding the *Seely*/*East River* rationales inapplicable where "service contracts lack [UCC] warranty protections afforded to goods" and contracts "rarely involve sophisticated parties with equal bargaining positions present in commercial products cases." *Id.* at 1114. Further, injuries should not be treated differently because one involves money and one involves personal injury. *Id.* "Whether a claim sounds in tort or contract is determined by the nature and substance of the facts alleged in the pleadings." *Id.* Tort is based on a duty "independent of the contract." *Id.* Even if there is a contract, duty may be "imposed by or arise[] out of the circumstances surrounding or attending the transaction, [in which case] the breach . . . is a tort." *Id.* (quoting *Malone v. Univ. of Kansas Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976)). In *Rinehart v. Morton Buildings, Inc.*, 305 P.3d 622 (Kan. 2013), the court considered the ELD in an action arising from disputes over a structure's quality. It refused to

[89] Syngenta cites two cases for the idea that Indiana applies the ELD absent privity. Mem. at App. B-1. *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010) recognized a claim of negligent misrepresentation absent privity and without applying the ELD. *Indianapolis-Marion Cnty. Pub. Lib. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010) applied the ELD despite "technical[]" lack of privity because plaintiff and defendant nonetheless were part of a "network" of contracts through which all were operating. *Id.* at 739.

"extend the doctrine" to negligent misrepresentation because "the duty at issue arises by operation of law and the doctrine's purposes are not furthered by its application under these circumstances." *Id.* at 626, 632. It rejected a broad rule disapproving tort liability for economic loss, recognizing that "a much narrower definition" of the ELD is revealed when traced back to its "[*Seely*/*East River*] roots." *Id*. at 627. It also rejected a rule "requiring parties to enter a contract or risk having no rights at all," *id*., and reaffirmed that "the absence of remedies under the [UCC]" is a reason the ELD should not apply. *Id.* at 632. While the ELD in Kansas is "still unfolding," the high court refuses to "extend the doctrine," *id.* at 625, 626, where its rationales are absent. *See also Bryant Manor*, 434 B.R. at 635 (rejecting ELD in case "not involv[ing] the sale of goods or services" or seeking to circumvent contract with tort).

Kentucky recognizes the ELD in product defect cases where losses "are best addressed by the parties' contract and relevant portions of . . . the [UCC]." *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 738 (Ky. 2011). The ELD is limited "to claims arising from a defective product sold in a commercial transaction," and applying the ELD to bar "tort claims[] which are not products liability claims, would be improper." *Ronald A. Chisholm, Ltd. v. Am. Cold Storage, Inc.*, No. 3:09-CV-00808-CRS, 2013 WL 2242648, at *11 (W.D. Ky. May 21, 2013). Where a "negligence claim does not arise from the sale of a defective product in a commercial transaction . . . under the controlling authority of Kentucky's highest court, the [ELD] does not apply." *NS Transp. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, No. 3:12-CV-00766-JHM, 2015 WL 1020598, at *3 (W.D. Ky. Mar. 9, 2015). It also does not apply when there is a duty independent of contract. *See Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 589-90 (Ky. 2004) (breach of independent duty "may support a tort action") (Keller, J., concurring); *Barton Brands, Ltd. v. O'Brien & Gere, Inc. of N. Am.*, 550

F. Supp. 2d 681, 686 (W.D. Ky. 2008) (ELD inapplicable where duty arises outside contract obligations); *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 836 (Ky. Ct. App. 2007) (same).

Michigan applies the ELD to defective products subject to a bargaining process between plaintiff and defendant. "The [ELD], simply stated, provides that '[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.'" *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 615 (Mich. 1992) (quoting *Kershaw Cnty. Bd. of Ed. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 371 (S.C. 1990)). Such remedy "is provided by the UCC." *Id*. at 618. In *Quest Diagnostics*, a ruptured water main cut off water to and curtailed plaintiffs' business operations. Analyzing *Neibarger* and its progeny, the court concluded that "parties to a transaction for goods are precluded recovery in tort for economic loss caused by inferior products where: (1) the parties or others closely related to them had the opportunity to negotiate the terms of the sale of the good or product causing the injury, and (2) their economic expectations can be satisfied by contractual remedies." 656 N.W.2d at 863 (citing cases). Absent a bargaining process anticipating the harms that occurred, the ELD did not apply: "plaintiffs are not limited to remedies in contract or the UCC, but have a proper remedy in tort." *Id.* at 863.[90] *See also Gillis v. Wells Fargo Bank, N.A.*, No. 12-10734, 2013 WL 2250215, at *11 (E.D. Mich. May 22, 2013) (rejecting ELD where plaintiff "did not necessarily suffer only economic losses . . . . [and] this case does not involve the commercial sale of goods." (citations omitted)); *State Farm Fire & Cas. Co. v. Conair Corp.*, 833 F. Supp. 2d 713, 717, 720 (E.D. Mich. 2011) (claims "not based on mere disappointed economic expectations" that product "did

[90] The court acknowledged that "plaintiffs purchased their water from their local unit of government and thus there was a transaction for goods that would give rise to application of the UCC" but defendant "was not in any way related to this transaction in such a manner that it may be said that [it] was either directly or indirectly involved in the transaction." *Id*. at 863-64.

not work as expected" and fire damage not subject to negotiations "prior to this consumer purchase.").

Minnesota historically defined "economic loss" as "resulting from the failure of the product to perform to the level expected." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 108 (Minn. Ct. App. 1992).[91] Minnesota now has supplanted the judicially created ELD by Minn. Stat. Ann. § 604.101. The ELD "applies to claims only as stated" in the statute, § 604.101.5, which are confined to claims "by a buyer against a seller for harm caused by a defect in the goods sold or leased, or for a misrepresentation relating to the goods sold or leased." Minn. Stat. Ann. § 604.101.2. The statute does not apply to statutory misrepresentation, and allows common law misrepresentation (of a seller) "made intentionally or recklessly." Minn. Stat. Ann. § 604.101.4. The ELD does not apply to negligence (or any other claim not set out in the statute). In *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535, 538 (Minn. Ct. App. 2014), farmers sued a manufacturer that sold and recommended fertilizer based on analyses of soil types and field histories. *Id.* at 537. They alleged that the recommended fertilizer contained an insufficient level of nitrogen, resulting in yield loss. The trial court correctly held that plaintiffs did not assert a product defect claim barred by § 604.010, but also held that the negligence claim was barred by the common law ELD. Summary judgment was reversed because § 604.101 "exhaustively states the [ELD]," and "there is no residual common law [ELD]." *Id.* (quoting Minn. Stat. Ann. § 604.101 reporters' notes (West 2010) (citing 27 *Minnesota Practice, Products Liability Law* § 13.15)). "Because section 604.101 abrogates the common law and sets forth the full extent of the [ELD] as it applies to bar claims arising on or after August 1, 2000, the district

[91] *See also Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992) (plaintiffs "may sue in tort [if they] . . . are not parties to any commercial transaction . . . and allowing them to sue in tort does not undermine the basic commercial concerns of the U.C.C.").

court's holding as to the negligence claim was in error." *Id*. at 539.

Mississippi recognizes the ELD only in product liability cases. *East Miss. Elec. Power Ass'n v. Porcelain Prods. Co.*, 729 F. Supp. 512 (S.D. Miss. 1990); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170 (S.D. Miss. 1996); *see also State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 387 (Miss. Ct. App. 1999) (damage to product itself should be "pursued under a breach of warranty theory"). It "has not been extended" beyond that context. *Federal Ins. Co. v. Gen. Elec. Co*., No. 2:08cv156KS-MTP, 2009 WL 4728696, at *8 (S.D. Miss. Dec. 3, 2009).[92] In the *Rice* litigation, the court refused to apply the ELD to Mississippi plaintiffs. *In re Genetically Modified Rice Litig.*, 2009 WL 4801399, at *2.[93]

Missouri recognizes the contract-based version of the ELD. In *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. banc 1978), the Missouri Supreme Court refused tort recovery for a house with foundation problems, explaining that liability "for mere deterioration or loss of bargain" is contractual, being predicated "on the transaction of purchase," rather than "conduct of the builder." *Id.* at 881.[94] It relied on the same reasoning in the product-liability case of *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. banc 1986), involving

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[92] *Accord Lyndon Prop. Ins. Co. v. Duke Levy & Assocs.*, 475 F.3d 268, 274 (5th Cir. 2007) (ELD inapplicable "outside of the realm of products liability"); *Mississippi Phosphates Corp. v. Furnace & Tube Serv., Inc.*, No. 1107cv1140, 2008 WL 313770, at *1 (S.D. Miss. Feb. 1, 2008) (same); *Brasscorp v. Highside Chems., Inc.*, No. 02-cv-84, 2007 WL 1673539, at *2 (S.D. Miss. June 7, 2007) (same); *Photo Arts Imaging Prof'ls, LLC v. Best Buy Co*., No. 2:10-CV-284-KS-MTP, 2011 WL 5860704, at *4 (S.D. Miss. Nov. 22, 2011) (refusing ELD to claims not confined to defective product).

[93] It found that "plaintiffs and defendants do not have a contractual or purchaser-seller relationship, and plaintiffs cannot assert breach of warranty or contract claims against [the defendant]. In addition, the plaintiffs' damages are not to any property that was the subject of a contract, and they are not claiming damage to any property that is alleged to be defective. Rather, they claim market losses and damage to other property, including equipment, land, and rice." *Id.* at *2. Thus, the ELD did not apply. *Id.*

[94] While "negligence focus[es] on conduct and result," requiring actors to "use ordinary care and skill," home quality is variable and "substantially reflected in the price." *Id.* at 882. Failure "to meet some standard of quality" must be "defined by reference to that which the parties have agreed upon." *Id*. Warranty preserves "the right of the parties to make their own bargain as to economic risk." *Id.* at 881.

a crane whose counterweight broke and crushed the cab. This too was a type of risk that "parties to a purchase and sale contract should be allowed to allocate pursuant to the terms of the contract." Thus, "rules pertaining to contract restrictions on warranty liability should control." *Id.* at 902-03. In *Rice*, the court recognized that "Missouri applies the [ELD] to most strict liability cases" where the defective product injures itself, and "where the duty allegedly breached arises from a contract." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1016 (citing cases). "Missouri courts have rejected the [ELD], however, even in some cases where the parties had a contractual relationship, if the particular duty alleged to have been breached arose from the common law, as opposed to arising from the contract. *Id.* (citing cases). Plaintiffs "did not buy [GM rice] from Bayer . . . . Their damages are not to any property that was the subject of a contract, and they are not claiming damage to any property that is alleged to be defective." *Id.* at 1017. Moreover, they alleged damage to their own "equipment, land, and rice." Thus, the ELD did not apply. *Id.*

Other cases adhere to the contract-based justification for the ELD. This remains true of *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619, 628 (Mo. Ct. App. 2014), cited by Syngenta, arising out of a construction project. The owner sued an architect when the project failed. Defendant's duties were set out in its subcontract with the contractor. *Id.* at 625. Plaintiffs relied on such duties (which were contractually limited) and the court treated the claim as negligent performance barred by lack of privity. *Id.* at 626-28. It likewise defined the ELD as prohibiting "economic losses that are contractual in nature." *Id.* at 628. Missouri courts distinguish duties arising from contract and outside of contract.[95] Even when

[95] *E.g., Business Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 454 (Mo. Ct. App. 1994) (distinguishing claims involving "loss of bargain" from claims based on "common law duty" to "exercise ordinary and reasonable skill"); *Judy v. Ark. Log Homes, Inc.*, 923 S.W.2d 409, 421-22 (Mo. Ct. App. 1996) (finding *Crowder* cases "wholly inapplicable;" tort duty arose from foreseeability of harm).

there is a contract, Missouri permits tort recovery where there is an independent duty.[96]

Nebraska applies the ELD to preclude tort remedies "only . . . where either: (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties." *Lesiak v. Cent. Valley Ag. Co-op., Inc.*, 808 N.W.2d 67, 81 (Neb. 2012). "To that end," the ELD is expressly limited to "the products liability context . . . [w]here the damage done is only to the product itself, the buyer has experienced only a loss of the benefit of its bargain, which is the essence of a warranty action . . . [and] where the alleged breach is only of a contractual duty, and no independent tort duty exists." *Id*. at 82; *accord E3 Biofuels-Mead, LLC v. Skinner Tank Co.*, No. 8:06CV706, 2014 WL 351971, at *4 (D. Neb. Jan. 30, 2014) (same).

North Carolina's Supreme Court indicated that breach of contract "does not give rise to a tort action by the promisee against a promisor." *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 240 S.E.2d 345, 350 (N.C. 1978). Intermediate decisions limit the ELD to situations where the parties are in contractual privity.[97] North Carolina "repudiates the idea that the [ELD] prohibits recovery for any and all economic loss in tort," and has not expanded it "*in*

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[96] *E.g., Web Innovations & Tech. Servs., Inc. v. Bridges to Digital Excellence, Inc.*, No. 4:13CV507 CDP, 2014 WL 6607092, at *5-6 (E.D. Mo. Nov. 19, 2014) ("it cannot be said that that the parties' negotiations fairly accounted for the misrepresentation); *Elkhart Metal Fabricating, Inc. v. Martin*, No. 14–cv–00705, 2014 WL 2972709, at *2 (E.D. Mo. July 1, 2014) ("Missouri's iteration of the [ELD] prohibit[s] a plaintiff from seeking to recover in tort for economic losses that are contractual in nature . . . . [I]f the act done independent of the contract would result in a tort, it will continue to do so." (quotations and citations omitted)); *Hallmark Cards, Inc. v. Monitor Clipper Pt'rs, LLC*, 757 F. Supp. 2d 904, 918 n.7 (W.D. Mo. 2010) (ELD inapplicable; suit "[did] not arise from a contractual duty."); *Adbar Co. v. PCCA Missouri, LLC*, No. 4:06-CV-1689JCH, 2008 WL68858, at *9 (E.D. Mo. Jan. 4, 2008) (claims arose from duties outside lease and not barred by ELD).

[97] *See Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772 (N.C. Ct. App. 1998) ("[t]he rationale for the [ELD] is that the sale of goods is accomplished by contract" and parties may set rights and remedies "should the product prove to be defective"); *Lord*, 643 S.E.2d at 30; (ELD "encourages contracting parties to allocate risks . . . of faulty workmanship by the promisor."); *Hospira Inc. v. Alphagary Corp.*, 671 S.E.2d 7, 14 (N.C. Ct. App. 2009) (absent privity, the rationale for an ELD "is not advanced by barring a claim for negligence.").

the absence of a contract, or, more narrowly, *outside the products liability context*." *Lord*, 643 S.E.2d at 32 (emphasis added and citations omitted).

North Dakota applies the ELD to claims by a purchaser against the manufacturer of a defective product. *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591, 595 (N.D. 1984); *Coop. Power Ass'n v. Westinghouse Elec. Corp.*, 493 N.W.2d 661, 665 (N.D. 1992). The ELD protects "warranty agreements that are part of any product sale." *Clarys v. Ford Motor Co.*, 592 N.W.2d 573, 576 (N.D. 1999); *see also Leno v. K & L Homes, Inc.*, 803 N.W.2d 543, 550 (N.D. 2011) (loss resulting from defective product are recovered or warranty or contract").[98]

Ohio decisions sometimes use expansive pronouncements as to the ELD, *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2011), but Ohio's actual application of the ELD is of limited reach. The Ohio Supreme Court clarified that "[w]hen a duty is premised entirely upon the terms of a contract, a party may recover based upon breach of contract," but "[w]hen a duty in tort exists, a party may recover in tort." *Id.* at 705. The ELD is viewed as a safeguard against parties *to a contract* resorting to tort law to go beyond what was contemplated *in* the contract. *See id.* at 704 ("Tort law is not designed . . . to compensate parties for losses suffered as a result of a breach of duties *assumed only by agreement*. That type of compensation remains the particular province of the law of contracts." (citing cases; emphasis added and internal quotation marks omitted));[99] *see also Mulch Mfg., Inc. v. Advanced Polymer Solutions, LLC*, 947 F. Supp. 2d 841, 857 (S.D. Ohio 2013) (ELD did not bar tort claims that

[98] Syngenta cites *Dakota Gasification Co. v. Pascoe Bldg. Sys.*, 91 F.3d 1094, 1101 (8th Cir. 1996), Mem. at App. B-1, holding that because the damage was "reasonably foreseeable to the parties to this commercial transaction, contract law, and not tort law, must provide the remedy." *Id*. at 1101. This case precedes two of the cases cited above and involved a defective product, which is not alleged here.

[99] *Accord Carasalina, L.L.C. v. Smith Phillips & Assocs.*, No. 13AP-1027, 2014 WL 2573466, at *6 (Ohio Ct. App. June 5, 2014) (ELD precludes tort recovery for damages "within the contemplation of the parties when framing their agreement"); *Campbell v. Krupp*, 961 N.E.2d 205, 211 (Ohio Ct. App. 2011) (ELD does not bars tort claim if duty "did not arise solely from a contract.").

were "non-contractual.").

Oklahoma applies the ELD to defective product cases, which involve "the proper relationship between the [UCC] and manufacturers' products liability." *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 652 (Okla. 1990). When a product damages only itself, "[t]here is no need to extend manufacturers' product liability into an area already occupied by the UCC." *Id*. at 653; *accord Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, No. CIV-09-492-FHS, 2012 WL 2792452, at *3 (E.D. Okla. July 9, 2012) ("[d]amages to the product itself are recoverable under contract law in actions brought under the [UCC]").

South Dakota has declined to apply the ELD beyond commercial transactions, including where defendant had a duty independent of the contract. *See Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413, 421-22 (S.D. 2014) (noting that in formulating the ELD, in *City of Lennox v. Mitek Indust., Inc.*, 519 N.W.2d 330, 333 (S.D. 1994), the court cited Minnesota law, which had "declined to extend the [ELD] beyond commercial transactions").

Tennessee recognizes the ELD in product defect cases where "economic loss" arises when the product "is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 489 (Tenn. 2009). When a product defect injures only the product itself, remedies "should derive from the parties' agreements." *Id*. at 491; *see also Trinity Indus., Inc. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 173 (Tenn. Ct. App. 2001) ("breach of a contract for the sale of goods . . . is governed by the U.C.C."). "[G]overnance by the UCC . . . is a prerequisite to the application of the [ELD] and resulting preclusion of recovery in tort." *Corso Enters., Inc. v. Shop at Home Network, Inc.*, No. 3:04-0260, 2005 WL 2346986, at *6 n.7 (M.D. Tenn. Sept. 26, 2005). The ELD does not extend beyond a sale-of-goods context. *Ham*, 694 F. Supp. 2d at 922;

Pascarella v. Swift Transp. Co., 694 F. Supp. 2d 933, 946 (W.D. Tenn. 2010); *Copper Basin Fed. Credit Union v. Fiserv Solutions, Inc.*, No. E2012-02145-COA-R3CV, 2013 WL 3421916, at *5 (Tenn. Ct. App. July 3, 2013).[100]

Wisconsin defines "economic loss" as "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold," which "are meant to be addressed through the law of contract and warranties." *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201, 205 (Wis. 1999); *accord Below v. Norton*, 751 N.W.2d 351, 358 (Wis. 2008) (same).[101] "An injury is not 'economic' [for purposes of the ELD] simply because it is monetary." *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 724 N.W.2d 879, 887 (Wis. 2006). The Wisconsin Supreme Court "see[s] no reason why" the ELD should bar a tort claim "that does not depend on a contract in order to lie." *Id.*; *see also Walker v. Ranger Ins. Co.*, 711 N.W.2d 683, 687 (Wis. Ct. App. 2006) (ELD inapplicable where injury not the result of a defective product and no contract between parties); *Schuetta*, 2013 WL 6199248, at *5 (ELD inapplicable where plaintiff not claiming defective product but that defendant "acted deficiently").

[100] Oddly, Syngenta cites *Messer Griesheim Indus., Inc. v. Eastman Chem. Co.*, 194 S.W.3d 466 (Tenn. Ct. App. 2005), involving contaminated gas sold to a remote purchaser. The court held that the contaminated gas, "as the product placed in the stream of commerce by [defendant]," was "the product itself" and plaintiff was not required to establish privity to maintain its tort claim. *Id.* at 472.

[101] *Accord Wickenhauser v. Lehtinen*, 734 N.W.2d 855, 868 (Wis. 2007) (ELD based on premise that warranty law is best suited for dealing with loss in the commercial arena); *Schuetta v. Aurora Nat. Life Assur. Co.*, No. 13-CV-1007-JPS, 2013 WL 6199248, at *4 (E.D. Wis. Nov. 27, 2013) (ELD "prevents a contracting party from recovering purely 'economic losses' – or damages resulting from a product's failure to live up to expectations or to adequately perform its intended use – under tort law, when the claimed losses are associated with the contractual relationship").

3. Some states recognize the contract-based version and, in some circumstances, the broader version of the ELD.

Illinois has adopted the contract-based version of the ELD. *See Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982) (grain storage tank purchaser could not recover in tort from manufacturer for loss due to tank defects; defining economic loss as arising from product that "does not work for the general purposes for which it was manufactured and sold"); *see also S.A.I., Inc. v. Gen. Elec. Railcar Servs. Corp.*, 935 F. Supp. 1150, 1154-55 (D. Kan. 1996) (ELD in Illinois "has been construed as barring product liability claims that arise from a qualitative defect relating to the purchaser's disappointed expectations concerning the product's fitness to perform its intended function."). When the harm relates to the consumer's expectation that it is fit for ordinary use, "contract, rather than tort, law provides the appropriate set of rules for recovery." *Moorman*, 435 N.E.2d at 451. Courts have not applied Illinois' ELD where these rationales are absent.[102] Illinois also recognized a broader form ELD in *Chicago Flood*. *See, infra*, §§ IV.D-F.

Iowa adopted the broad form ELD in *Nebraska Innkeepers*, but does not apply it mechanically and takes a doctrinal, case-by-case approach in determining whether it applies. After *Nebraska Innkeepers*, the court applied the ELD in a series of product liability cases, invoking *East River*'s concern with separating tort from contract. *See Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 124-25 (Iowa 1988) (proper remedy in contract where damage "was the foreseeable result [of] a failure of the product to work properly" and loss related to "a consumer or user's

[102] *E.g., S.A.I.*, 935 F. Supp. at 1155 (no product defect, claim did not go to fitness or merchantability, and no allegation that product was "somehow unable to perform its intended job"); *County of Kane v. Shell Pipeline Co.*, No. 04 C 8014, 2005 WL 1026583, at *3 (W.D. Ill. April 6, 2005) (rejecting ELD where plaintiff did not seek relief "because it is dissatisfied with any defective product" and defendants' position "would expand the bounds of the doctrine beyond all reason."); *Nixon v. U.S.*, 916 F. Supp. 2d 855, 862 (N.D. Ill. 2013) (ELD inapplicable where duty arises outside contract, disputed activity "not the type . . . normally subject to contract," and "plaintiffs have no contract remedy").

disappointed expectations" in which he purchased). In *Ballard v. Amana Soc., Inc.*, 526 N.W.2d 558, 562 (Iowa 1995), plaintiffs who purchased contaminated corn feed sought recovery of the value of swine that died and profits lost from reduced reproductive abilities. The court allowed a strict liability claim. Unlike the damages in *Nelson* that were caused when the product failed to work, injuries to the swine were caused by toxins "peripheral to the sale" resulting in significant business interruption and strict liability was appropriate. *Id.* at 562. In *Van Sickle Const. Co. v. Wachovia Commercial Mortgage, Inc.*, 783 N.W.2d 684 (Iowa 2010), plaintiff purchased two vehicles at auction. When he did not receive title, he sued the bank. The court reviewed "the purposes of the [ELD] and the situations in which it has been applied," and found that the ELD did not apply to negligent misrepresentation. *Id*. at 692. "The rationale for this limitation on recovery is that '[p]urely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions.'" *Id.* (quoting *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 651 (Iowa Ct. App. 1996)). The court reviewed the history of ELD, beginning with *Nebraska Innkeepers*, recognizing that in later cases, it applied the ELD in strict products liability cases and more recently to a home buyer suing for repair costs. *Id.* (citing *Determan v. Johnson*, 613 N.W.2d 259, 264 (Iowa 2000)). The rationale there was that the buyer's claim "was based on her unfulfilled expectations [respecting] the quality of the home she purchased" and accordingly, her remedy was in contract. *Id.* The court explained that the ELD "was conceived to prevent litigants with contract claims from litigating them inappropriately as tort claims," *id.* at 693, and concluded that "the purposes of the [ELD] would not be served by applying it to negligent misrepresentation." *Id.* at 693.

In *Annett*, 801 N.W.2d 499, an employee of a trucking company used his company credit card at a gas station to obtain cash, saying falsely that he was using the card to purchase fuel.

The gas station, truck company and credit card company were linked through contracts under which fuel purchases were made. *Id.* at 502. Plaintiff assumed responsibility for unauthorized use of credit cards by its employees, barring a contract claim against the credit card company. *Id.* The court denied a tort claim against the gas station. It did not decide the case simply by saying that the loss was "purely economic" and did "not attempt to delineate the precise contours of the [ELD] in Iowa. *Id*. at 504. The court looked to policies behind the ELD, including preventing the "tortification of contract law," *id*. at 502, and determined, under the circumstances, that tort law "should not supplant a consensual network of contracts." *Id*. at 504.

In *Pitts v. Farm Bureau Life Ins. Co*., 818 N.E.2d 91 (Iowa 2012), the plaintiff alleged negligence of a life insurance agent in failing to effectuate her husband's intent to name her as principal beneficiary. The court reiterated that whether the ELD applies depends on whether the case has "characteristics that bring it within the scope of the [ELD]." *Id*. at 987 n.4. It further recognized that "[t]he features of this case may place it outside the scope of the [ELD]. First, there is no chain of contracts" as in *Annett*. There was a contract between decedent and agent, but wife "did not contract with [anyone]." Also, the wife's claim is not as remote as in *Nebraska Innkeepers* since agent's "negligence was the direct cause of the loss suffered by [wife]." *Id.* Ultimately, the court held that the agent owed a duty of care and allowed the tort claim.

Texas has identified two rationales for the ELD: to avoid indeterminate and disproportionate liability; and deference to contract law. *See LAN/STV v. Martin L. Eby Constr. Co.*, 435 S.W.3d 234, 240-41 (Tex. 2014) (tracing development of ELD from concerns regarding indeterminate liability to role of UCC). The *LAN/STV* case was the first time the high court squarely addressed and decided whether the ELD would bar tort claims between contractual

strangers outside products liability actions.[103] It did not apply the ELD as an absolute bar, but rather said that "while there is 'no general duty to avoid the unintentional infliction of economic loss', the duty may exist when the rationales . . . for limiting recovery are 'weak or absent.'" *Id.* at 241 (citing Restatement (Third) of Torts: Liability for Economic Harm § 1 and cmt. d (Tentative Draft No. 1, 2012)). The court emphasized that failure to analyze whether the ELD is justified in any particular situation had led to confusion within intermediate courts. *Id.* at 241-42, 242 n.32. It noted that "[i]t was less clear twenty years ago, and still is today, the extent to which Texas precludes recovery of economic damages in a negligence suit between contractual strangers." *Id.* at 243. Ultimately, it concluded that the contractor could have contracted for protection with the owner and barred tort relief against the architect. *Id.* at 249.

Earlier, the court had occasion to address the ELD's application among contractual strangers, but sidestepped the issue by determining that the intermediate court had otherwise erred. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011). The court did provide a thorough analysis of the ELD in Texas, but instead offered specific criticism of a broad-based rule precluding economic claims, *id.* at 415-19, stating that the [ELD] "does not swallow all claims between contractual and commercial strangers." *Id.* at 419. It explained that the issue is not whether the ELD should apply absent privity but whether it should apply in the particular situation at hand. *Id.* at 419. It further stated that blanket application of the ELD inappropriately expands the ELD outside contract cases where its application "does not lend itself to easy answers or broad pronouncements." *Id.* at 419. In sum, the Texas Supreme Court, while recognizing both forms of the ELD, has clearly stated that neither should be applied

[103] The issue was whether the ELD barred claims by a contractor against an architect, with whom it had no contractual relationship. The contractor sought recovery of increased project costs caused by negligent misrepresentations in architectural plans and specifications. 435 S.W.3d at 235, 246-49.

mechanically, but in accordance with their rationales in any given situation.

In the *Rice* litigation, the court (prior to *Sharyland* and *LAN/STV*) ruled three times that the Texas ELD did not apply. *In re Genetically Modified Rice Litig.*, 2010 WL 1049837 (E.D. Mo. Mar. 18, 2010); *In re Genetically Modified Rice Litig.*, 2010 WL 3927497 (E.D. Mo. Oct. 4, 2010); *In re Genetically Modified Rice Litig.*, 2011 WL 339168 (E.D. Mo. Feb. 1, 2011). The court rejected a "broad" version that "would bar recovery for economic losses in all torts." 2010 WL 1049837, at *3. While it focused on the contract-version ELD, the court was correct that the Texas high court would not mechanically apply the ELD.

C. The Contract-Based Version of the ELD Does Not Apply here.

1. The contract-form ELD does not apply to Producer Plaintiffs.

None of the scenarios in the cases applying the contract-form version of the ELD – or their rationales – is present here. Producers do not allege that they purchased Viptera or Duracade, or had contractual relationships with anyone relating to Viptera or Duracade. They do not allege that duties owed them by Syngenta arise from contract, that Syngenta promised services negligently performed, or that Syngenta's product failed to perform as intended. Syngenta sold Viptera (and Duracade) corn seed to non-Plaintiff Viptera/Duracade growers, who planted and harvested. There is no allegation that the seed failed to control insects or produce a crop. There is no allegation that it deteriorated over time or was unfit for its intended use. *Syngenta itself* describes Viptera as "non-defective." Mem. at 43. There is simply no alleged product "defect" over which a bargain might have been struck involving UCC warranties (by Viptera growers much less Plaintiffs), or implicating an ability to disclaim them.

There also is no allegation that Viptera/Duracade growers re-distributed seed to anyone. Syngenta contends that harvested Viptera corn is commingled (*see* Mem. at 52), but that is not a product Syngenta sells either – or a product any producer purchased. Syngenta does not contend

that Producer Plaintiffs purchased Viptera seed ***or*** harvested Viptera corn. Its arguments are focused entirely on commingling later in the supply chain. Mem. at 51-53.

According to Syngenta, the ELD bars relief for injury "from the failure of a commercial transaction to provide the results expected." Mem. at 52. But in the very case Syngenta cites, the "results expected" pertained to UCC fitness of a product supplied to the plaintiff. In *Corsica Coop. Ass'n v. Behlen Mfg. Co.*, 967 F. Supp. 382, 384 (D.S.D. 1997), a subcontractor supplied defective components used in constructing a grain storage building, which partially collapsed, injuring itself and the grain inside. The "first question" was "whether the [UCC] applie[d]." *Id.* at 384. It did, but warranty claims were time barred. The next question was whether there was damage to "other property" versus goods subject of the bargain between the parties. *Id*. at 385. Without comment on the correctness of the court's conclusion that grain inside the "defective building" was not "other property," *id*. at 385,[104] the case clearly concerns a plaintiff "disappointed [in its] expectation" that the product failed to perform as expected (and for which a UCC remedy might have applied). Producers are not claiming that Viptera malfunctioned.

Syngenta's arguments about privity are as nonsensical. As revealed in Syngenta's own cases, states applying the ELD to situations involving defective products in the absence of privity do so because *the purchaser* might have obtained a warranty from someone *upstream* in the supply chain,[105] and in other situations because there was a purchase by the plaintiff directly[106]

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[104] The court relied entirely on *Agristor Leasing v. Spindler*, 656 F. Supp. 653, 658 (D.S.D. 1987), in which third-party plaintiffs sought recovery for losses caused by a defective silo that was supposed to limit oxygen from reaching feed housed within it and prevent spoilage. The silo failed and the feed spoiled, which in turn caused reproductive and production problems with dairy cattle. The court held that because the losses stemmed from the silo's failure to perform its intended function, the loss was economic and the remedy "lies in the [UCC]." *Id.*

[105] Mem. at App. B (citing *Northwest Ark. Masonry, Inc. v. Summit Specialty Prods., Inc.*, 31 P.3d 982 (Kan. Ct. App. 2001); *Cincinnati Ins. Cos. v. Staggs & Fisher Consulting Eng'rs, Inc.*, No. 2008-CA-002395-MR, 2013 WL 1003543, at *1 (Ky. Ct. App. Mar. 15, 2013); *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845 (6th Cir. 2002); *Dakota*, 91 F.3d 1094; *Corporex*, 835 N.E.2d

and/or an arrangement of lateral contracts already in place under which the parties were operating that allocated a risk in advance.[107] As to remote purchasers, the ELD disallows a tort recovery "that will allow a purchaser to reach back up the product and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions compromising that chain." *Hininger v. Case Corp.*, 23 F.3d 124, 127 (5th Cir. 1994); *accord Daanen Gasification Co.*, 573 N.W.2d at 848 (allowing a purchaser to "reach all the way back through intervening transactions, contracts, and warranties to sue the original manufacturer in tort [when a product fails] . . . would grant . . . more than the benefit of the bargain to which it and the seller or manufacturer agreed and on which the purchase price was negotiated and paid" (citations omitted)).

In other cases, there were lateral contracts among all the players – including the defendant – under which everyone was operating. *See Indianapolis-Marion.*, 929 N.E.2d at 737 (construction industry "rel[ies] on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required – owner, architect, engineer, general contractor, subcontractor, materials supplier – and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects");[108] *Annett* 801 N.W.2d at 504-05 (ELD barred claim "on the theory that tort law should not supplant a consensual network of contracts" in which both defendant and plaintiff "contracted to assume

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701; *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84 (Tex. Ct. App. 2007); *City of Lennox*, 519 N.W.2d at 330; *Northwest Pub. Serv. v. Union Carbide Corp.*, 115 F. Supp. 2d 1164 (D.S.D. 2000); *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 844-45 (Wis. 1998)).

[106] Mem. at App. B (citing *Clark v. PFPP Ltd. P'ship*, 455 S.W.3d 283 (Tex. Ct. App. 2015)).

[107] Mem. at App. B (citing *Annett*, 801 N.W.2d 499; *Captiva*, 436 S.W.3d 619; *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652 (Wis. 2003)).

[108] While the Texas Supreme Court required such contracts in *LAN/STV*, it did so in a construction context, involving pre-existing industry expectations of lateral contracts. That is a far different context than the situation here.

certain risks of financial loss and had the ability to minimize those risks."). Here, there was no chain of contracts linking Syngenta Seeds – or any other Syngenta entity – with any producer either upstream of his own (non-Viptera) purchase or laterally within a system of contracts.[109]

Syngenta's arguments pertaining to the "integrated system" and "component part" analysis in product defect cases likewise is disingenuous. As explained in *East River*, when a purchaser is dissatisfied with a product that injures "only itself," the harm lies in what the purchaser bargained to receive and UCC remedies suffice. The question then becomes what constitutes the product itself. According to Syngenta, "there must be physical injury to property other than the property that is the subject of the transaction." Mem. at 51 (citing *Lexington Ins. Co. v. W. Roofing Co.*, 316 F. Supp. 2d 1142, 1147 (D. Kan. 2004)). That case, however, also involved a defective product (mesh screens) over downspouts that trapped debris after a heavy rainstorm, resulting in partial collapse of a roof. The court employed the *East River* ELD, preventing tort claims for the "buyer of a defective product . . . where the injury consists only of damage to the goods themselves." *Id.* at 1147. It considered the wire screens part of an "integrated "roof drainage system" and denied the claim. *Id.* at 1148-49. The *Lexington* case would likely be analyzed differently today,[110] but in any event, involved a scenario not present here. Syngenta does not assert that Producer Plaintiffs purchased anything to which an "integrated system" analysis can be tied.

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[109] As observed by one court: "[W]here parties are linked to each other by contract, the [ELD] may be invoked to avoid drowning contract law in a sea of tort." *Walker* 711 N.W.2d at 687 (citations omitted). "However, when no contractual relationship exists, it is equally important to prevent an allegedly damaged party from 'fall[ing] between the stools of tort and contract.'" *Id.*

[110] At that time, "[t]he Kansas Supreme Court ha[d] not addressed the issue of whether Kansas courts should apply the [ELD]." *Id*. at 1148 n.5. The Kansas Supreme Court has now done so and rejected invitations to expand the ELD beyond its original justifications. The type of damage is not the "litmus test" for whether the ELD applies, *Rinehart*, 305 P.3d at 629, and the inquiry is directed to whether the duty arises by contract or outside contract. *David*, 270 P.3d at 1114-15; *Rinehart*, 305 P.3d at 625.

Syngenta also contends that "'[w]hen an [alleged] defect in a component part damages the product into which that component is incorporated, economic losses to the product as a whole are not losses to 'other property.'" Mem. at 52 (quoting *Jorgensen Farms, Inc. v. Cnty. Pride Coop, Inc.*, 824 N.W.2d 410, 419 (S.D. 2012), which involved fertilizer contaminated with rye and third-party claims against the remote seller governed by the UCC).[111] Whatever else may be said about this decision, no Plaintiff here had the capability of making a warranty claim and are not alleging that Viptera was unfit for its intended purpose.[112]

The entire paradigm of the contract-based ELD is missing as Syngenta's own cases illustrate. Moreover, Syngenta's argument that Producer Plaintiffs should have sold their own grain to elevator operators like Bunge, or somehow bargained "for a guarantee from whomever purchased their corn that it would not be commingled with Viptera," Mem. at 53, relies on unabashed assumptions and a purely fictional view of how the supply chain operates.

Syngenta first assumes that producers should have known that Viptera corn would be commingled with their own corn downstream of their own transactions with third parties. Mem. at 52-53. Aside from that inappropriate assumption, the notion that producers should have searched out elevators and purchasers who were not taking Viptera corn is extraordinary, given that Syngenta sued Bunge to ***force it*** to accept Viptera corn. Syngenta also assumes that these

[111] Jorgensen Farms grew certified and registered winter wheat seed. It purchased the contaminated fertilizer from County Pride, which contaminated the wheat, which Jorgensen then could not sell as certified seed. County Pride brought third-party claims against several defendants, one of whom sold a chemical used in mixing the fertilizer. That transaction was governed by the UCC. *Id*. at 417. County Pride did not notify the seller of a breach, precluding warranty claims. *Id.* at 418. As to negligence, the court stated that "[i]n UCC cases, [it] has adopted the [ELD] which provides that 'economic losses are not recoverable under tort theories.'" *Id*. at 418 (quoting *Diamond Surface, Inc. v. State Cement Plant Comm'n*, 583 N.W.2d 155, 161 (S.D. 1998)). It held that the chemical "was a component part" of the fertilizer as well as the wheat (which County Pride did not produce but with regard to which it settled).

[112] To the extent Syngenta argues that this "component part" reasoning should be applied to the Non-Producers, none have made claims under South Dakota law.

third parties (who Syngenta further assumes all are grain elevators) would have entered into segregation contracts with individual farmers, even if the farmer had known to ask or had the power to demand. Syngenta assumes that such third parties would have *had the ability* to assure that Producers' corn was not commingled with Viptera corn, *i.e.*, had storage and transport systems that could be dedicated to non-Viptera corn and/or a test that could detect its presence. Such assumptions are inappropriate and incorrect.[113] Syngenta itself recognizes that corn is passed through the supply system in fungible form. Mem. at 2, 29, 52, 54-55. And the Complaint alleges that Syngenta should have provided a test *but did not*. PC ¶¶ 196-200. Finally, Syngenta is attempting to place the burden of risk stemming from China's rejection of U.S. corn on those least able to do anything about it. Producers here are not sellers of organic or other specialty corn for which they get a premium from specialty purchasers. As Syngenta well knows, the commodity corn system is not set up that way. *See* PC ¶¶ 191-92, 269; NC ¶¶ 138-39, 216. Syngenta is proposing an obligation on non-Viptera farmers to somehow secure contracts downstream from the sale of their own harvest in order to ensure segregation and channeling by *everyone else*[114] in a supply chain *that has never done so*. That proposition is contrary to any rational view of the ELD.

2. The contract-form ELD does not apply to Non-Producer Plaintiffs.

Syngenta contends that the ELD should bar Non-Producers' claims because: (1) Viptera grain was a "component" or "integrated part" of commingled corn they purchased; (2) a "buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally recognizes;" and (3) Non-Producers are claiming that the goods they bought "failed to perform to the level

[113] *See StarLink*, 212 F. Supp. 2d at 834 ("Elevators, storage and transportation facilities are generally not equipped to test and segregate corn varieties.").

[114] *See, e.g.*, PC ¶ 220 ("'Channeling' can only work if ***all*** grain handlers and others in the supply chain engaged in that endeavor." (emphasis added)).

expected." Mem. at 54. The states whose laws are relevant to Non-Producer Plaintiffs are Minnesota (Rail Transfer), Mississippi (Express Grain), and Louisiana (Winnsboro).[115] Notably, Syngenta cites no case from these states[116] that speaks to the first question: does the ELD apply at all? The answer is no for the reasons discussed below. In addition, Non-Producers, just as Producer Plaintiffs, have alleged damage to their own property, removing this case from application of the ELD even in its broadest formulation. *See, infra*, § IV.F.

As already explained, Minnesota's ELD is entirely statutory. Minn. Stat. Ann. § 604.101; Minn. Stat. Ann. § 604.101.5; *Ptacek*, 844 N.W.2d at 538. Other than common law misrepresentation claims (asserted by Trans Coastal), it applies to claims "for harm caused *by a defect* in the goods sold." Minn. Stat. Ann. § 604.101.2 (emphasis added); *see also* Minn. Stat. Ann. § 604.101.3 (setting out when a buyer may bring a "product defect tort claim").[117] Neither Producers nor Non-Producer Plaintiffs have alleged a product defect. They do not allege that Viptera seed was defectively designed or manufactured, or that Syngenta's instructions or warnings on safe use were inadequate.[118] They do not allege that Viptera seed was unfit for a particular purpose required by a particular buyer (Minn. Stat. Ann. § 336.2-315), was unmerchantable (Minn. Stat. Ann. § 336.2-314), or failed express warranties (Minn. Stat. Ann. § 336.2-313). There is no alleged product defect, as Syngenta concedes. Mem. at 42.

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[115] Trans Coastal's claim of negligent misrepresentation might be governed by either Minnesota or California law. *See, infra*, § X.B. No other Non-Producer has asserted that claim.

[116] Syngenta cites Illinois, New Jersey, South Dakota, and Wisconsin cases. *See* Mem. at 53-56.

[117] A buyer may bring a "product defect tort claim" if a "defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property," in which case the buyer may recover loss for, e.g., "diminution in value of the other tangible personal property or real property" including costs of repair, replacement and restoration, and "business interruption losses." Minn. Stat. Ann. § 604.101.3(1)-(2).

[118] *See* Miss. Code. Ann. § 11-1-63(a)(i)-(iii) (product liability claims in Mississippi involving products of unsafe design or manufacture, or failure to warn of information needed for product's safe use); 20A2 Brent A. Olson, Minn. Prac.: Business Law Deskbook § 33:5 (same).

In Mississippi, the ELD applies only in product liability cases, and has not been extended beyond that context. *Federal Ins. Co.*, 2009 WL 4728696, at *8*; Lyndon Prop.*, 475 F.3d at 274; *Mississippi Phosphates*, 2008 WL 313770, at *1; *Brasscorp*, 2007 WL 1673539, at *2; *In re Genetically Modified Rice Litig.*, 2009 WL 4801399, at *2. Again, no Plaintiff is making such claims. All of Syngenta's arguments revolving around defective products (disappointed expectations, component parts and integrated products) are surplusage. There is no allegation of a defective product and the ELDs of Minnesota and Mississippi do not apply.

Disregarding inapplicability of the ELD in the first instance, Syngenta argues that Non-Producers "could have protected against commingling in their contracts for purchasing corn – including by seeking warranties that the corn was Viptera free." Mem. at 55. To the extent Syngenta is talking about UCC warranties (as seems to be the case based on cases it cites),[119] Non-Producers are not asserting UCC-type (or any other type) of defect. Syngenta also suggests that exporters could have protected themselves in contracts with Chinese purchasers by specifying "what will or won't be tested." Mem. at 55 (quoting Syngenta's Ex. F). This argument impermissibly injects evidentiary arguments that are outside the scope of the Complaints and again assumes that it *was possible* to test for the presence of MIR162, which is contrary to the Complaint. *See* NC ¶¶ 143-44, 146, 240; *see also Operating Eng'rs Local 101 Pension Fund*, 2013 WL 5409116, at *2. And cases Syngenta cites implicate contracts upstream,

[119] *See City of Lennox*, 519 N.W.2d at 333 (generally, recovery for economic loss is "limited to the . . . UCC."); *Wasau Tile, Inc. v. Country Concrete Corp*., 593 N.W.2d 445, 461 (Wis. 1999) ("economic loss" arises when product "does not work for the general purposes for which it was manufactured and sold." (citations omitted)); *Int'l Flavors & Fragrances, Inc. v. McCormick & Co.*, 575 F. Supp. 2d 654, 659 (D.N.J. 2008) ("rights and duties of a buyer and seller are determined by . . . the U.C.C."); *Dixie-Portland Flour Mills, Inc. v. Nation Enters., Inc.*, 613 F. Supp. 985, 988 (N.D. Ill. 1985) (if nature of defect is qualitative, UCC provides remedy). Other cases on which Syngenta relies involve service contracts rather than a product (*Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 248 (Ill. 1987)) or claims of strict liability (*Wasau Title*), neither of which are asserted here.

not downstream, in the supply chain.[120] Even the possibility of upstream contracting assumes that sellers could themselves have tested for the presence of Viptera in order to represent that the corn was "Viptera free," which they did not. *Id*. Any suggestion that Non-Producers could have refused to take Viptera grain also ignores allegations that Syngenta was doing all it could to prevent that very thing from happening, *see, e.g.*, NC ¶¶ 182-90, including the lawsuit against Bunge, *id.* at ¶ 172. Any suggestion that Non-Producers could have obtained a contract from any seller to "address the risk," Mem. at 56, that China would not approve Viptera is outlandish. Syngenta was the only party capable of addressing that risk. There is no allegation that anyone other than Syngenta had knowledge about the actual sufficiency or status of its application to China. And Syngenta misrepresented to Non-Producers like everyone else that approval was soon expected. *See* NC ¶¶ 197, 219. Syngenta's ELD arguments fail.

D. The minority, broader-form ELD does not apply.

A minority of courts has applied the ELD outside its contract-based justification when a defendant damages something (*e.g.*, a bridge or roadway), in which the plaintiff has neither a possessory nor ownership interest. Syngenta cites *Chicago Flood* and *Nebraska Innkeepers* as "exemplar" cases. Mem. at 17. Such situations comprise their own class of cases raising their own policy considerations and concerns, reflecting a policy-driven limit on ordinary tort principles. *See StarLink* 212 F. Supp. 2d at 840 ("there are really some different policy issues driving the doctrine in access cases").[121] This ELD has not been adopted in other states and in

[120] *See City of Lennox*, 519 N.W.2d 330 (defective trusses supplied by subcontractor); *Jorgensen*, 824 N.W.2d 410 (faulty screens supplied to plaintiff by roofer); *Daanen*, 573 N.W.2d at 843-44 (plaintiff purchased rock crushing equipment from distributor, which purchased from defendant manufacturer, which provided warranty to distributor not passed on to plaintiff).

[121] These "access" cases were cited in *StarLink*, 212 F. Supp. 2d at 840, prompting the court to say that "the [ELD] has grown beyond its original freedom-of-contract based policy justifications." *Id*. at 842. But this observation is not true in the majority of states. *See, supra*, § IV.B. The *StarLink* court was addressing the law of Illinois, for which it cited *Chicago Flood*, and Wisconsin, for which it cited

any event, its policy rationales are inapplicable here.

In *Nebraska Innkeepers*, businesses and individuals sued the contractor and seller of defective steel used in constructing a bridge. 345 N.W.2d at 125. The steel cracked, causing closure of the bridge, which impaired access of patrons to their businesses, who had no ownership interest in the bridge. *Id.* The court denied their negligence claim, confining its analysis to cases in which the defendant "negligently caused the closing of a public bridge or river." *Id.* at 128. The central policy concern was "open[ing] the door to virtually limitless suits, often of a highly speculative and remote nature." *Id.* at 127.[122] In *Chicago Flood*, a dredging company breached a tunnel wall, flooding from the Chicago River ensued, causing evacuation and road closures. As in *Nebraska Innkeepers*, plaintiffs did not own the tunnel, and used the roadways under privilege no different than any other member of the public. The court disallowed a negligence claim in order to prevent "open-ended" tort liability. 680 N.E.2d at 274.

Northridge Co. v. W.R. Grace & Co., 471 N.W.2d 179 (Wis. 1991), for the proposition that "plaintiffs cannot rely on harm to property belonging to other people to show a non-economic injury." *StarLink*, 212 F. Supp. 2d at 841. In fact *Northridge* holds nothing of the kind. There, plaintiffs sued the supplier of a fireproofing material used in the construction of shopping centers that contained asbestos, which plaintiffs alleged contaminated the buildings, required remediation and depressed their sale price. *Id.* at 181. The court defined "economic loss" as occasioned by a product that "does not work for the general purposes for which it was manufactured." *Id.* Plaintiffs alleged that the fireproofing was hazardous, not functionally deficient, and also damaged their property, which the court found supported their tort claims. *Id*. at 186; *see also id*. at 187 n.15 ("plaintiffs have alleged physical harm to property rather than solely economic loss"). There was no question about who owned the property. In addition and since 2002 when *StarLink* was decided, the Wisconsin Supreme Court has been very clear that the ELD does not apply to a tort "distinct from any contract allegations." *Brew City*, 724 N.W.2d at 888. The court in *Sample* addressed the law of Illinois and Iowa, both having "access" cases. *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088 (E.D. Mo. 2003). Since *Sample* was decided, the Iowa Supreme Court also has spoken clearly that the ELD is ***not*** applied when the reasons for its existence are weak or absent. In *Annett*, two dissenting judges explained that *Nebraska Innkeepers* was really about foreseeability and cases in which "economic damages resulting from damage to the bridge [were] too remote to allow a recovery." 801 N.W.2d at 508. The majority spoke more in terms of duty, which turns on the circumstances of each case, and said that only in "some circumstances" does the ELD deny a duty to "protect another from 'pure economic loss.'" *Id.* at 506 n.3.

[122] The court also dismissed a public nuisance claim because plaintiffs did demonstrate "special damages." *Id*. at 130. Here, Plaintiffs do not assert public nuisance but private nuisance, which has always protected a plaintiff's right to use and enjoy his ***own*** property.

In such cases, concerns are that: (1) the connection between injury and negligence is too remote or tenuous; (2) liability would be "open-ended" or indeterminate;[123] and (3) liability would be "far out of proportion" to defendant's culpability. *See Chicago Flood*, 680 N.E.2d at 274 (liability too "open-ended" and "far out of proportion" with defendant's culpability); *Leadfree Enters., Inc. v. U.S. Steel Corp.*, 711 F.2d 805, 807 (7th Cir. 1983) (injury "too remote" or "wholly out of proportion" to culpability);[124] *Petitions of Kinsman Transit Co.*, 388 F.2d 821, 824-25 (2d Cir. 1968) (damages "too tenuous and remote"); *Gen. Foods Corp. v. United States*, 448 F. Supp. 111, 114 (D. Md. 1978) (tort recovery for disruption to plaintiff's usual route to manufacturing plant when vessel collided with bridge would invoke "open-ended liability").

Such concerns are not present here. First, all Plaintiffs have alleged damage to their own property. This distinction separates this case from "pure economic loss" and puts it outside the ELD even in its broadest form. *See, infra*, § IV.F. Second, Plaintiffs are not only a discrete identifiable class, but the very persons Syngenta knew would be harmed. Third, the injury was not a "remote" or unlikely consequence of Syngenta's conduct, but actually foreseen. Fourth, Syngenta was not merely careless. It was grossly irresponsible and engaged in active misfeasance over an extended time period. Liability here is very proportionate to culpability.

Although not cited in Syngenta's brief, *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (cited in *Nebraska Innkeepers* and *LAN/STV*) is oft cited as the seminal "pure

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[123] Concerns over "open-ended liability also have been expressed as to strict (non-fault) liability (*East River*, 476 U.S. at 874) and product performance over time. *See Moorman*, 435 N.E.2d at 453 (allowing tort theories would "make a manufacturer the guarantor that all of its products would continue to perform satisfactorily throughout their reasonably productive life" and "encroach upon" UCC sales provisions). Neither concern applies here where Plaintiffs do not assert product defect claims.

[124] The Seventh Circuit relied on *Hartridge v. State Farm Mut. Auto. Ins. Co.*, 271 N.W.2d 598, 602 (Wis. 1978), which was not decided under the ELD rubric, but rather on whether Wisconsin would recognize a claim for negligent interference with an employment contract (making clear that intentional interference is actionable). Only Trans Coastal asserts a negligent interference claim, and Wisconsin law does not apply thereto.

economic loss" decision. There, plaintiffs were time-charterers of a vessel owned by, and in the possession of, a third party. While the vessel was docked for a scheduled inspection, the defendant (who contracted with the owner to inspect and service the vessel) carelessly damaged the propeller, requiring repairs and delaying the vessel's return to service. Plaintiffs sustained lost profits because of the delay, but they had no possessory or proprietary right in the vessel. *Id.* at 308-09. The court held that "justice does not permit the [defendant] to be charged with the full value of the loss of use unless there is someone who has a claim to it as against the [defendant]." *Id.* at 309. It explained that a "tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong." *Id.*

As recognized in *Rice*, one "purpose of the [pure economic loss] rule is to prevent the tortfeasor from being held liable, not only to the victim, but to everyone who has a contract with the victim when the tortfeasor was unaware of the contract, or in other words, to 'all people for all damages.'" *In re Genetically Modified Rice Litig.*, 2010 WL 2326036, at *3 n.6 (discussing *Robins*; quoting *PPG*, 447 So. 2d at 1061). But Plaintiffs "are not seeking to recover because of damage to the property of someone with whom they have a contract; rather, they seek to recover for their own losses that resulted directly from [Syngenta's] acts." *Id.* Nor should this rule be applied without reference to the facts and circumstances. *Id.* The policy rationales animating a broad ELD are simply not present here.[125] At minimum, this Court should not determine these

[125] Under the Restatement (Third)'s formulation, economic loss without property damage is not foreclosed absent contractual protection, and a duty can be recognized without liability indeterminate and disproportionate to the defendants' culpability. Restatement (Third) of Torts: Liab. for Econ. Harm § 1 cmt. c (T.D. No. 1 2012). Plaintiffs do not have contracts with Syngenta, so "protection by contract" from premature commercialization is unavailable. *Id.* at cmt. c(2). In addition, "the set of potential plaintiffs is compact, and the size of potential liability is clear and proportionate to the defendant's culpability." *Id.* at cmt. e. The harm is not remote but occurred to the very persons Syngenta knew would be harmed.

issues on a motion to dismiss but upon evidence needed to inform its judgment.

E. Louisiana's duty-risk analysis does not bar Plaintiffs' claims.

Louisiana has its own analysis, which Syngenta does not substantively discuss, let alone demonstrate as preclusive as a matter of law. *See, supra*, § IV.B.1. Without prejudice to their ability to further address this issue, Plaintiffs point to the analogous *Rice* litigation, in which the court denied defendants' summary judgment motions under the duty/risk analysis. Ease of association considers "the foreseeability of the harm and whether policy considerations indicate that the duty was intended "to protect the particular plaintiff against the particular harm." *In re Genetically Modified Rice Litig.*, 2011 WL 5024548, at *3 (citing cases). The court found the injury foreseeable, and that the duty Bayer breached (to prevent escape of its GM rice) was meant to prevent harm to plaintiffs.[126] *Id.* at *3-4. It also found that Bayer's duty was at least in part meant to prevent the harm alleged (harm to the EU rice market). *Id.* at *4.[127] All Plaintiffs here allege that their injuries were actually foreseen by Syngenta, and that Syngenta's duties were intended to prevent the injuries they suffered. *See* NC ¶¶ 275-77; *see* also PC ¶¶ 320-22. The duty-risk analysis supports their claims.

F. All Plaintiffs suffered damage to their own property.

As noted, Syngenta misapplies the "other property" analysis used in product defect cases, Mem. at 51-52, 54-55, where the question is whether the defective product plaintiff purchased

[126] The court found that non-producers "are an integral part of the U.S. and global rice markets and they, in turn, are heavily dependent on the other actors in these markets. If LL Rice escaped, it would naturally affect [non-producers] . . . and any disruption to the rice market would affect these companies' operations." *In re Genetically Modified Rice Litig.*, 2011 WL 5024548, at *4. As to producers, it found that "[i]f LL Rice escaped, the first individuals to be affected would naturally be rice farmers, whose fields would be contaminated with Bayer's [GM] rice." *In re Genetically Modified Rice Litig.*, 2010 WL 2326036, at *3.

[127] This duty was partially reflected in the Plant Protection Act, 7 U.S.C. § 7701, *et seq.* Here, Viptera (and Duracade) have been deregulated; nevertheless, there was a well understood risk of premature commercialization and the precise kind of harm that happened.

injured only itself or property "other" than itself. *See East River*, 476 U.S. at 867, 872 (product liability cases involve instances where "the defective product damages other property;" in UCC context, [d]amage to a product itself is most naturally understood as a warranty claim"). Plaintiffs do not allege that they purchased a defective product in the first place, so the "other property" analysis is irrelevant.[128]

Syngenta's argument that Plaintiffs have not alleged property damage, *e.g.*, Mem. at 48-56, misfires since the minority-view property damage distinctions simply do not exist in this case.[129] In addition, Plaintiffs plainly have alleged damage to *their own* property, taking this case outside situations like *Chicago Flood*, *Nebraska Innkeepers*, and *Robins*. Producers allege that Syngenta's "pervasive contamination of the U.S. corn supply" caused "physical harm" to their own "corn, harvested corn, equipment, storage facilities, and land." PC ¶ 319. Non-Producers allege "physical harm to [their] . . . equipment, storage facilities, and land." NC ¶

[128] In *StarLink*, plaintiffs asserted a product defect claim, precipitating the court's "component part" ("other" property concept) analysis regarding the seed containing GM trait. 212 F. Supp. 2d at 841. Here, Plaintiffs do not assert they purchased a defective product and Illinois' contract-based *Moorman* ELD is inapplicable. *See Nixon v. United States*, 916 F. Supp. 2d 855, 861 (N.D. Ill. 2013) (*Moorman* does not apply "[w]here a duty arises outside of [a] contract." (quoting *Neumann v. Carlson Envtl., Inc.*, 429 F. Supp. 2d 946, 952 (N.D. Ill. 2006) and citing cases)); *Golf v. Henderson*, 876 N.E.2d 105, 113 (Ill. App. Ct. 2007) ("The *Moorman* doctrine . . . does not apply when a duty arises that is extracontractual."); *FDIC v. Miller*, 781 F. Supp. 1271, 1277 (N.D. Ill. 1991) ("*Moorman* does not stand simply for the proposition that 'economic losses are not recoverable in tort. . . . Rather, the doctrine is meant to insure that claims which are grounded solely in the breach of contractual duties should be pursued in contract."); *City of Oakbrook Terrace v. Hinsdale Sanitary Dist.*, 527 N.E.2d 70, 74-75 (Ill. App. Ct. 1988) ("prerequisite to the application of the *Moorman* doctrine is that plaintiff's damages arise from a defeated expectation in defendants' product, which has not been shown here").

[129] *See, e.g., Stinnes Corp. v. Kerr-McGee Coal Corp.*, 722 N.E.2d 1167, 1174 (Ill. App. Ct. 1999) (ELD inapplicable to claim that plaintiff was forced to settle due to spoliation of evidence, distinguishing *Moorman* involving defective product); *Metro. Water Reclamation Dist. of Greater Chicago v. Terra Found. for Am. Art*, 13 N.E.3d 44, 61 (Ill. App. Ct. 2014) *appeal denied*, 20 N.E.3d 1255 (Ill. 2014) (the *Chicago Flood* policy behind ELD "was to avoid the open-ended economic consequences of a single negligent act, such as the sudden flood occurrence at issue;" such concern not present in case involving "an on-going, continuous, and intentional interference with easement rights").

274.[130] This takes the case outside the ELD under any rationale. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1016; *In re Genetically Modified Rice Litig.*, 2011 WL 5024548, at *5-6; *In re Genetically Modified Rice Litig.*, 2009 WL 4801399, at *2; *Schafer*, 385 S.W.3d at 832-33; *StarLink*, 212 F. Supp. 2d at 842-43.[131] Unquestionably, Plaintiffs' land, facilities, and equipment are property "other than" any defective product, even had they alleged one.

In *Chicago Flood*, the court allowed recovery to plaintiffs who lost perishable inventory as a result of interrupted electrical service caused by the flooding. While continuity of electrical service was considered a "commercial expectation," Mem. at 52, plaintiff's own property was not. 680 N.E.2d at 276.[132] Iowa and Texas also distinguish between "pure" economic loss and damage to a plaintiff's own property.[133] In *Manning v. Int'l. Harvester Co.*, 381 N.W.2d 376 (Iowa Ct. App. 1985), for example, a planter was fitted with a seed drum with fewer holes than

[130] Syngenta's insistence that allegations of pervasive contamination is "decoupled" from injury ignores, among other things, that equipment and storage facilities can contaminate corn passing through it, making it unsaleable in markets where unapproved. *See* NC ¶ 141.

[131] Even under *StarLink*, allegations of damage to plaintiffs' own crops and harvested corn were sufficient to survive dismissal. 212 F. Supp. 2d at 842-43. Syngenta states that "[u]nder most standard contract formats for the sale of corn, title passes to the grain elevator upon delivery." Mem. at 50 n.78. This is a bald factual assumption inappropriate on a motion to dismiss and in any case, erroneous. *See id.* at 842 n.11 ("plaintiffs retain ownership rights to [commingled] corn stored [at grain elevators]. Each contributing farmer owns a pro rata share of the entire, now tainted, supply.").

[132] Syngenta also cites *Donovan v. Cnty. of Lake*, 951 N.E.2d 1256 (Ill. App. Ct. 2011) for this "commercial expectation" language. Mem. at 50. There, a county, which supplied water services under contract with the subdivision, negligently operated and maintained the system, requiring its replacement (the costs of which were to be paid via revenue bonds, repayable by water service customers). Plaintiffs sought to liken their claims to a loss of inventory damage allowed in *Chicago Flood*. The court, however, likened the water services to an expectation of continuous electrical service. *Id.* at 1265. Here, no Plaintiff alleges disruption to a utility and all have alleged damage to their own property, taking the case outside the ELD. *E.g.*, *Bywater v. Wells Fargo Bank, N.A.*, No. 13 C 4415, 2014 WL 1256103, at *6 (N.D. Ill. Mar. 24, 2014) (damage to property in trespass action "does not qualify as economic loss"); *Lyons v. State Farm Fire & Cas. Co.*, 811 N.E.2d 718, 725 (Ill. App. Ct. 2004) (damage to property caused by building levees was injury to land; complaint did "not seek solely economic damages," and court need not consider whether any exception to ELD applied).

[133] *See, e.g.*, *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 88 (Iowa 1984) (ELD inapplicable; in contrast to "merchant-plaintiffs indirectly affected by the closing of a defective bridge," plaintiffs asserted injury to their own property).

ordered, decreasing the farmer's yield. The court distinguished "between pure economic loss" and "property damage," with the "reason for the distinction" kept in mind. *Id.* at 377. Plaintiff was unlike those in *Nebraska Innkeepers* "only tenuously connected to the cause of action . . . [since] plaintiff owned the crop . . . [that was] not as large as it should have been. Simply because the damage is measured in terms of potential sale . . . does not automatically mean that the damage is economic . . . the damage suffered by the plaintiff to his crop was property damage and not the indirect purely economic damage of the type condemned in [*Nebraska Innkeepers*]." *Id.* at 378-79. In *Jo Ann Howard & Assocs., P.C. v. Cassity*, No. 4:09CV01252 ERW, 2014 WL 7408884 (E.D. Mo. Dec. 31, 2014), life and health insurance guaranty associations (assigned or subrogated to claims of funeral homes and consumers of pre-need funeral contracts) sued various defendants for harm arising out of a Ponzi scheme. Plaintiffs asserted that a trust company was negligent in allowing the scheme to succeed. *Id.* at *2. The court rejected the ELD under Iowa law because consumers and funeral homes could not have sued for breach of contract and the harm was "not purely economic." *Id.* at *9.[134] In *Sharyland*, the Texas Supreme Court made clear that the ELD does not bar all tort claims absent physical harm and, in the same breadth, said it need not explore the contours of that issue where a water supply company's cost of repair claim implicitly recognized damage to the water system, finding even threatened harm sufficient for a negligence claim. 354 S.W.3d at 707.

Plaintiffs have alleged damage to their own property. Syngenta's further argument that there was no harm because Viptera was "fully approved" by the USDA, Mem. at 50, is as

[134] This is the same court that previously decided *Sample*, on which Syngenta heavily relies. There, the court ***denied*** Monsanto's motion to dismiss based on allegations of property damage via cross-pollination and commingling. 283 F. Supp. 2d at 1091, 1092. At summary judgment, however, plaintiffs' counsel expressly ***disclaimed*** contamination of plaintiffs' property. *Id.* at 1091, 1094. The *JoAnn Howard* court also recognized that in Iowa, "pure economic loss" is one "unrelated to injury to the…property of the plaintiff." 2014 WL 7408884, at *8. But there was injury to "property" in the form of life insurance benefits intended to fund pre-need contracts. *Id*. at *1.

disingenuous here as elsewhere, beginning with its exceedingly inappropriate characterization of Plaintiffs' harm as "hypothetical." Mem. at 50. It did not escape Plaintiffs attention that Viptera was deregulated by the USDA when making their allegations, *see* PC at 2; NC at 2, but that has nothing to do with whether they have alleged property damage or suffered injury in this case.

V. FIFRA DOES NOT PREEMPT PLAINTIFFS' CLAIMS.

As Syngenta acknowledges, FIFRA governs warnings provided on labels and packaging of certain agricultural products. But the Supreme Court has held that only claims for fraud or failure to warn that would impose a labeling or packaging obligation broader than or inconsistent with that provided under FIFRA are preempted. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453-54 (2005). The Court further noted that FIFRA does not preempt common-law claims for negligence where a verdict in a plaintiffs' favor would not impose any requirement on the manufacturer's labels. *Id.* at 444 (common law rules such as negligence do not "require[] that manufacturers label or package their products in any particular way").

Plaintiffs do not assert a direct failure to warn claim, nor have they made *any* claim that the label on the bags of Viptera seed were inaccurate. Indeed, Plaintiffs did not even grow Viptera seed and there is no allegation that they ever saw the bag's label. Plaintiffs' claims are not tied to Viptera labels and FIFRA has no application. What Syngenta refers to as a "failure to warn" claim is actually just a sub-bullet point in a laundry list of ways Syngenta failed to act in a reasonable manner, which is not tied to any labeling. *See* PC ¶¶ 417, 442, 467, 501, 513, 525, 545, 557, 573, 585, 596, 606, 645, 662, 685, 699, 715, 723, 742, 789, 805, 825, 837, 862, 880; NC ¶ 418. Syngenta's argument fails.

VI. PLAINTIFFS PROPERLY ASSERT CLAIMS BASED ON DURACADE.

Syngenta argues that Plaintiffs "cannot show" that Syngenta's conduct with respect to Duracade was the proximate cause of their injuries. Mem. at 57. Plaintiffs need not "show"

proximate cause at this stage. It is a jury question. *See, supra*, § III. The Complaints clearly allege that Syngenta's decision to launch Duracade, which contained MIR162 and Event 5307 (the latter still not approved by China), along with continued sales of Viptera, prolonged "the economic harm." PC at 4 & ¶¶ 296-323; NC at 4 & ¶¶ 251-78. Plaintiffs also allege that those irresponsible actions "ensured that the economic losses to farmers and others in the industry would continue to grow." PC at 4; NC at 4. Syngenta's conduct with respect to both Viptera and Duracade "directly caused and contributed to cause significant economic harm to farmers and other participants in the corn industry" and that it directly and proximately caused harm to Plaintiffs. *See, e.g.*, PC ¶¶ 320-23; 417-18; 430-32; 442-43; 455-57; 467-68. These allegations are more than sufficient to allege causation and Syngenta's argument should be rejected.

VII. PLAINTIFFS SUFFICIENTLY ALLEGE CLAIMS FOR TRESPASS.

In states where Plaintiffs have plead trespass to chattels, a trespass is "committed" by "intentionally . . . intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217.[135] Liability attaches if "the chattel is impaired as to its condition,

[135] The Restatement has been cited with approval or employed in the vast majority of the 22 states at issue, with only one exception. *Holt v. Macy's Retail Holdings, Inc.*, 719 F. Supp. 2d 903, 914 (W.D. Tenn. 2010); *McLeodUSA Telecomms. Servs., Inc. v. Qwest Corp.*, 469 F. Supp. 2d 677, 703-04 (N.D. Iowa 2007); *MCI WorldCom Network Servs., Inc. v. W.M. Brode Co.*, 411 F. Supp. 2d 804, 810 (N.D. Ohio 2006); *Terrell v. Rowsey*, 647 N.E.2d 662, 666 (Ind. Ct. App. 1995); *Poff v. Hayes*, 763 So. 2d 234, 238 (Ala. 2000); *Ark. La. Gas Co. v. Cent. Utils. Constructors, Inc.*, 643 S.W.2d 566, 567 (Ark. 1982); *Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.*, 363 P.2d 175, 178 (Colo. 1961); *Ingram Trucking, Inc. v. Allen*, 372 S.W.3d 870, 872 (Ky. Ct. App. 2012); *Mackie v. Bolloré S.A.*, No. 286461, 2010 WL 673295, at *4 (Mich. Ct. App. Feb. 25, 2010); *Mayo Clinic v. Elkin*, Civ. No. 09-322 (DKD/JJK), 2010 WL 760728, at *5 n.12 (D. Minn. Mar. 4, 2010); *McDowell v. Davis*, 235 S.E.2d 896, 900 (N.C. Ct. App. 1977), *abrogated on other grounds, Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85 (N.C. 1990); *Sagebrush Res., LLC v. Peterson*, 841 N.W.2d 705, 712-13 (N.D. 2014); *Woodis v. Okla. Gas & Elec. Co.*, 704 P.2d 483, 485 (Okla. 1984); *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981); *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1229-33 (N.D. Ill. 2005); *ACI Worldwide Corp. v. MasterCard Techns., LLC*, No. 8:14CV31, 2014 WL 7409750, at *9-10 (D. Neb. Dec. 31, 2014). The one exception, Louisiana, employs the civil code action termed "damage to movables." *MCI Commc'ns Servs., Inc. v. Hagan*, 74 So. 3d 1148, 1154-55 (La. 2011) (citing La. Civ. Code art. 2315(A) (1999)); *see* PC ¶¶ 589-93; NC ¶¶ 410-15. Syngenta does not address that claim, and its motion should be denied as to that count.

quality, or value, or . . . harm is caused to some . . . thing in which the possessor has a legally protected interest." *Id.* § 218. Plaintiffs have alleged these elements

A. Plaintiffs allege "intermeddling" by Syngenta.

Syngenta argues that it did not personally plant or commingle Viptera with other corn, Mem. at 58-59, but that is not required. An action for trespass lies "irrespective of whether the intermeddling was the direct or indirect result of an act done by the actor." Restatement (Second) of Torts § 217 cmt. d. *Sotelo*, 384 F. Supp. 2d at 1223-24, is illustrative. There, plaintiff's computer was burdened with "pop-up ads" appearing through spyware. *Id.* Defendant secretly installed spyware on plaintiff's computer by hiding it in "downloadable games," while another defendant created the pop-up ads displayed through the spyware. *Id.* Defendants argued, like Syngenta, that they did not personally contact plaintiff's chattel. *Id*. at 1231. The court, however, held that they "intentionally placed or caused to be placed advertisements through [s]pyware that unlawfully inferred with plaintiff's use of his computer and his [i]nternet connection. This is sufficient to satisfy the intent element of plaintiff's trespass to personal property claim." *Id.* at 1232. Here, Syngenta created and released GM seed, knowing to a substantial certainty that it would be planted, grown, and released upon the chattels of others. PC ¶¶ 430-31; NC ¶¶ 411-12. This is sufficient, but there is more. Syngenta's own actions increased the likelihood that its GM seed would come into contact with Plaintiffs' chattels via, *e.g.*,: misrepresentations regarding the status of Chinese approval, PC ¶¶ 143-78, 205, 208, 232-84; NC ¶¶ 74-77, 90-125, 179-231; encouraging growers to plant Viptera "side-by-side" with other corn and not warn their neighbors, PC ¶¶ 201, 203; NC ¶¶ 148, 150; and suing Bunge and pressuring other grain handlers to accept Viptera, PC ¶¶ 223-45; NC ¶¶ 171-95. Syngenta's own

conduct is alleged as the intermeddling force.[136] Syngenta also says it is a mere seller of Viptera seeds whose involvement ceased at the point of sale, Mem. at 57-60, so as to fit within the cases it cites. *Id.*[137] But Syngenta itself planted Viptera, PC ¶ 69; NC ¶ 15, and intermeddled both before *and after* the point of sale. PC ¶¶ 69, 167, 295; NC ¶¶ 15, 114, 250. Syngenta's motion should be denied

B. Plaintiffs allege intent.

Syngenta argues that intent to harm Plaintiffs' chattels is a necessary element Plaintiffs cannot plead intent by "incanting" that Syngenta knew its actions would cause intermeddling "to a substantial certainty." Mem. at 59. But that is exactly what the Restatement permits. *See* Restatement (Second) of Torts § 217 cmt. c (intent present when act is done for purpose of intermeddling ***or*** "with knowledge that such an intermeddling will, to a substantial certainty, result from the act"). Unquestionably, Plaintiffs have alleged that Syngenta intended the acts that Plaintiffs allege caused Viptera to come into contact with Plaintiff's chattels. PC ¶¶ 430, 455, 506, 538, 550, 566, 578, 590, 600, 611, 655, 677, 693, 730, 755, 794, 818, 830, 850, 867,

[136] Here, as elsewhere, Syngenta argues that Non-Producers cannot state a claim because commingling was the result their "*own actions*." Mem. at 60 (emphasis in original). Again, Syngenta simply misrepresents and ignores allegations in the Complaint as discussed above.

[137] In some cases, defendant's involvement stopped at the point of sale. *Ward v. N.E. Texas Farmers Co-Op Elevator*, 909 S.W.2d 143, 151 (Tex. Ct. App. 1995) *abrogated by Envtl. Processing Sys., L.C. v. FPL Farming, Ltd*, 457 S.W.3d 414 (Tex. 2015). In another case, defendant neither sold the fungicide, nor was involved in its application. *Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 94 (D. D.C. 2010). In *City of Bloomington, Indiana v. Westinghouse Elec. Co.*, 891 F.2d 611, 615 (7th Cir. 1989) (interpreting Indiana law), defendant's chemical was improperly dumped onto plaintiff's property. The same was true in *Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575, 1583-84 (S.D. Ga. 1992) (interpreting inapplicable Georgia law). In *Wisconsin Power & Light Co. v. Columbia County*, 87 N.W.2d 279 (Wis. 1958), a county moved earth to build a highway, which caused the ground underneath a utility's power line tower to shift, thus, damaging the tower. There was no allegation that the utility knew its actions would affect the power-line tower. *Id*. at 282-83. The same cannot be said for Syngenta, who knew to a substantial certainty its actions would cause contamination of Plaintiffs' corn.

885; NC ¶ 411.[138] And Plaintiffs allege that Syngenta knew "to a substantial certainty" that intermeddling would result. PC ¶¶ 431, 456, 507, 539, 551, 567, 579, 591, 601, 612, 656, 678, 694, 731, 756, 795, 819, 831, 851, 868, 886; NC ¶ 412; *see also, e.g.*, PC ¶¶ 187-88, 268-70; NC ¶¶ 134-35, 214-17. Syngenta also argues that Plaintiffs do not allege it acted "with reference" to Plaintiffs' corn. Mem. at 59. But they do: "Syngenta knew its conduct would bring [Viptera and/or Duracade] into contact with [Plaintiffs'] corn through contamination in fields and/or [in] grain elevators and other modes of storage and transport." PC ¶¶ 431, 456, 507, 539, 551, 567, 579, 591, 601, 612, 656, 678, 694, 731, 756, 795, 819, 831, 851, 886; NC ¶ 412. Syngenta may disagree, but a motion to dismiss is not the appropriate vehicle for a factual argument.

C. Plaintiffs allege possession.

Syngenta's contention that Plaintiffs have not pled that it contaminated "their" corn, Mem. at 60, is just wrong. Plaintiffs allege that Syngenta's actions caused contact with corn in which they "had possession and/or possessory rights." PC ¶¶ 319, 430, 455, 494, 506, 538, 550, 566, 578, 590, 600, 611, 655, 677, 693, 730, 755, 794, 818, 830, 850, 867, 885; NC ¶ 411; NC ¶ 274. Syngenta also asserts that commingling in grain elevators could not contaminate corn in

[138] *See* Restatement (Second) of Torts § 218 cmt. j ("It is immaterial that the harm so caused was neither intended by the actor nor the result of his negligent or reckless conduct while trespassing."); *W. T. Ratliff Co. v. Henley*, 405 So. 2d 141, 146 (Ala. 1981) (trespass requires knowledge that an act will cause a trespass, but does not require "the intent to actually trespass."); *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 603 (Colo. Ct. App. 2007) ("trespass requires only an intent to do the act that itself constitutes, or inevitably causes, the intrusion." (quotation marks omitted)); *Robinson v. Cameron*, No. CA2014-09-191, 2015 WL 1774358, at *2 (Ohio Ct. App. Apr. 20, 2015) (trespass requires knowledge that acts are "substantially certain to cause a particular result, even if the actor does not desire that result."); *Craig v. City of Hobart*, 2010 WL 680857, at *2-3 (W.D. Okla. Feb. 24, 2010) ("Trespass is considered an intentional tort because it is required that there be an intent to do the act that results in the trespass" (quotation marks omitted)); *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at *3 (Tenn. Ct. App. May 27, 2014) (intent to commit act that causes trespass is the necessary intent); *Sotelo*, 384 F. Supp. 2d at 1232 ("An intentional act is a required element of a trespass to personal property claim, but a plaintiff need not allege an intent to violate the law."); *Mountain States Tel. & Tel. Co. v. Vowell Const. Co.*, 341 S.W.2d 148, 150 (Tex. 1960) (intent to commit act sufficient without intent to violate property rights).

which a producer had possessory interest because "under most standard contracts, once a farmer has sold his corn and delivered it to an elevator, he no longer owns the corn – and he certainly lacks possession." Mem. at 60. There is no allegation allowing such inference, even were such an inference in Syngenta's favor appropriate. *See*, *supra*, n.131. Plaintiffs have pled possession and Syngenta's extra-complaint arguments fail.

D. Plaintiffs allege impairment.

Finally, Syngenta argues Plaintiffs' chattels were not "actual[ly] damaged" because Viptera is considered "yellow corn" by the USDA. Mem. at 61.[139] First, Viptera is a seed product, not harvested "yellow corn." Second, impairment *to value* is enough. *See* Restatement (Second) of Torts § 218(b).[140] Plaintiffs allege impairment to value. PC ¶¶ 432, 457, 508, 540, 552, 568, 580, 592, 602, 613, 657, 679, 695, 732, 757, 796, 820, 832, 852, 887; NC ¶¶ 238-44, 251-332. In any case, Plaintiffs allege contamination of crops in fields and elevators, which is "physical damage." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1016; *In re Genetically Modified Rice Litig.*, 2009 WL 4801399, at *2; *StarLink*, 212 F. Supp. 2d at 841-43; *Schafer*, 385 S.W.3d at 832-33.

VIII. PRODUCERS SUFFICIENTLY ALLEGE CLAIMS FOR PRIVATE NUISANCE.

A. Producer Plaintiffs state claims for private nuisance.

Producers allege valid claims for private nuisance, just like plaintiffs in other cases involving GM contamination. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1019; *StarLink*, 212 F. Supp. 2d at 844-47. Private nuisance is interference with use or enjoyment of

[139] Syngenta's reliance on the Canadian *Hoffman* decisions is as irrelevant here as elsewhere for the same reasons, and the plaintiffs in that case did not bring a trespass-to-chattels claim.

[140] *See also CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (value of property "diminished even though it [was] not physically damaged by defendants' conduct.").

property.[141] "[T]he different ways and combination of ways in which the interest in the use or enjoyment of land may be invaded are infinitely variable." *Vogel*, 548 N.W.2d at 834 (quoting Prosser, *supra*, § 87, at 619). Producers allege that Syngenta, "[b]y contaminating the U.S. corn supply . . . substantially and unreasonably interfered with [Plaintiffs'] quiet use and enjoyment of their land and/or property interests." PC ¶ 436; *see also* PC ¶¶ 461, 562, 617-18, 650, 689, 736, 749, 800, 856, 873, 891.

B. Syngenta's nuisance arguments are meritless.

1. Producers allege "substantial participation."

Syngenta first insists that it did not "substantially participate[] in carrying on the activity that amounted to the alleged nuisance" because it did not "control the conduct of corn growers or, later still, grain handlers at the time of any alleged cross-pollination or commingling." Mem. at 62. This argument fails. Producers allege that Syngenta substantially participated by prematurely commercializing Viptera, and thereafter taking numerous steps to ensure the contamination. *See, e.g.*, PC ¶¶ 178, 190, 201, 212, 219, 223, 307, 322.

Syngenta's other argument also fails. Any question turning on the level of control exercised by third parties is a fact-intensive inquiry inappropriate at this stage. But Syngenta acknowledges that "substantial[] participat[ion]" in carrying on a nuisance-causing activity – not exclusive control of that activity – gives rise to liability. *See* Mem. at 62 (citing Restatement (Second) of Torts § 834 (1979)). A defendant whose actions make a nuisance "substantially

[141] *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523, 529 (Ala. 1979); *Osborne v. Power*, 890 S.W.2d 570, 572 (Ark. 1994); *Vickridge First & Second Addition Homeowners Ass'n, Inc. v. Catholic Diocese of Wichita*, 510 P.2d 1296, 1302 (Kan. 1973); *Schmidt v. Village of Mapleview*, 196 N.W.2d 626, 628 (Minn. 1972); *T.K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 953 (Miss. 1992); *Hall v. Phillips*, 436 N.W.2d 139, 145 (Neb. 1989); *Kent v. Humphries*, 281 S.E.2d 43, 45 (N.C. 1981); *Rassier v. Houim*, 488 N.W.2d 635, 636 (N.D. 1992); *Banford v. Aldrich Chem. Co., Inc.*, 932 N.E.2d 313, 317 (Ohio 2010); *Oakley v. Simmons*, 799 S.W.2d 669, 671 (Tenn. Ct. App. 1990); *Barnes v. Mathis*, 353 S.W.3d 760, 763 (Tex. 2011); *Vogel v. Grant-Lafayette Elec. Co-op*, 548 N.W.2d 829, 832 (Wis. 1996).

certain" to occur is liable even if the nuisance does not occur until after it relinquishes possession of the cause of the nuisance. *See id.*, cmt. e, ill. 2. *StarLink* expressly rejected the idea that seed manufacturers are insulated merely because "they were no longer in control of the seeds once they were sold to farmers," 212 F. Supp. 2d at 845, recognizing that nuisance based on contamination of crops "is much closer to mainstream nuisance doctrine than either the asbestos or gun cases," *id.* at 846.[142]

Syngenta relies on decisions applying Michigan, Virgin Islands, Illinois, Indiana, and Georgia law. None are applicable here. Mem. at 62.[143] Those decisions in any event are inapposite. All involved suits against a manufacturer or installer when a third party spilled a chemical or otherwise allowed it to be released.[144] Once again, these cases deal with mishandling or misuse of a product not alleged here. And in none of these cases did the manufacturer participate in the third party's mishandling. *E.g.*, *City of Bloomington*, 891 F.2d at 614 ("[Defendant] made every effort to have Westinghouse dispose of the chemicals safely."). Here, not only was Viptera seed not mishandled, but Syngenta engaged in and encouraged planting, growing, and harvesting in a manner making contamination virtually certain. PC ¶¶ 201, 203.

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[142] *Accord Phillips v. Garfield Hts.*, 620 N.E. 2d 86, 90 (Ohio Ct. App. 1992) (reversing directed verdict on nuisance claim even though defendant established that it lacked control over the source of the nuisance); *Houston & T.C.R. Co. v. Lackey*, 33 S.W. 768, 769 (Tex. Ct. App. 1896) ("The general rule is that all parties who participate in creating a nuisance are liable for not only the immediate consequences, but for all that may naturally and proximately follow."); *Dorman v. Ames*, 12 Minn. 451, 456-57 (1867) (defendant liable for nuisance even though it abandoned control over the cause of the nuisance).

[143] Applicable laws are Alabama, Arkansas, Kansas, Minnesota, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Tennessee, Texas, and Wisconsin.

[144] *See* Mem. at 62 (citing *Cloverleaf Car Co. v. Philips Petroleum Corp.*, 540 N.W.2d 297, 300-01 (Mich. Ct. App. 1995); *L'Henri, Inc. v. Vulcan Materials Co.*, No. 2006-177, 2010 WL 924259, at *6 (D.V.I. Mar. 11, 2010); *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002); *City of Bloomington, Ind.*, 891 F.2d at 614; *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995); *Jordan*, 805 F. Supp. at 1583).

2. Regulatory approval is immaterial.

Syngenta argues that contamination of the U.S. corn supply is not an "unreasonable" interference, again advancing its mantra of USDA deregulation. Mem. at 62.[145] Again, the USDA does not regulate activities after deregulation. And again, activity need not be unlawful to be a nuisance. *See, e.g.*, *Krueger v. Mitchell*, 332 N.W.2d 733, 741 (Wis. 1983) ("It is well established that a business or activity may constitute a private nuisance even though it is operating in conformity with the law.").[146] Syngenta cites nothing to the contrary.[147]

3. Corn farming is not "especially sensitive."

Syngenta also argues that Producers are somehow alleging an "especially sensitive" use of their land to "satisfy Chinese standards for international imports." Mem. at 63. Producers allege no such thing. And Syngenta's recurrent reliance on *Hoffman* continues to be wholly misplaced. As Syngenta's own parenthetical recounts, the organic canola farmers there were

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[145] Syngenta disregards allegations that it failed to comply with industry standards. PC ¶¶ 155-78. Even compliance with such standards would not insulate it. *See, e.g.*, *Jost v. Dairyland Power Coop*, 172 N.W.2d 647, 650 (Wis. 1969); *accord Phillips*, 620 N.E.2d at 90 (citing non-compliance with industry standard in reversing directed verdict).

[146] *Accord* Ala. Code § 6-5-120 ("The fact that the act done may otherwise be lawful does not keep it from being a nuisance."); *Higgs v. Anderson*, 685 S.W.2d 521, 523 (Ark. Ct. App. 1985) (barking dogs were a nuisance); *North Nat'l Gas Co. v. L.D. Drilling, Inc.*, No. 08-1405, 2011 WL 691621, at *5 (D. Kan. Feb. 15, 2011) (nuisance even where invading conduct "is itself a lawful activity."); *Brede v. Minn. Crushed Stone Co.*, 173 N.W. 805, 808 (Minn. 1919) ("[P]ermission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance."); *T.K. Stanley*, 614 So. 2d at 953 (lawful business may constitute a nuisance); *Botsch v. Leigh Land Co.*, 239 N.W.2d 481, 485 (Neb. 1976) (same)); *Hooks v. Int'l Speedways, Inc.*, 140 S.E.2d 387, 391 (N.C. 1965) (legitimate business may be a nuisance); *Messer v. City of Dickinson*, 3 N.W.2d 241, 246 (N.D. 1942) (legislatively authorized activity may be a nuisance); *Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439, 445 (S.D. Ohio 1989) (activity may be nuisance even if authorized by law); *Zollinger v. Carter*, 837 S.W.2d 613, 615 (Tenn Ct. App. 1992) (municipal approval does not bar nuisance); *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 895 (5th Cir. 2004) ("lawful business or other activity may become a nuisance" (applying Texas law and quotation marks omitted)).

[147] Syngenta attempts to distinguish *StarLink* because the GM corn there was not approved for human consumption, Mem. at 64, but this is a red herring for the reasons addressed. Strangely, Syngenta also quibbles that *StarLink* involved allegations of cross-pollination, while Producers here also allege cross-pollination. And while federal regulations were considered in *StarLink*'s duty analysis, Plaintiffs here have alleged facts giving rise to a common law duty as discussed above.

asserting that the contamination deprived them of "premium organic price." Mem. at 63 (quoting *Hoffman I*). Producers here do not allege that they expected, or were deprived of, a premium, based on Chinese standards or otherwise.

4. Producers allege interference with use and enjoyment.

Syngenta next argues that nuisance requires "an interference with [producer's] real properties, not generally asserting that harvested corn was commingled in a grain elevator and that the price of corn dropped as a result." Mem. at 64. Wrong again. Producers allege that Syngenta's actions caused interference with use and enjoyment of their property by depressing the value of the corn they grew. *See StarLink*, 212 F. Supp. 2d at 847 (plaintiffs "alleged that they are unable to enjoy the profits of their land [selling food corn]"). They also allege contamination of their *own fields and crops.* PC ¶ 319. Syngenta continues to disregard this allegation. And the cases it cites are inapposite for that reason.[148] Syngenta also disregards applicable law holding that nuisance can arise in the absence of physical harm (the nuisance being of use and enjoyment of property),[149] but Producers have alleged that nonetheless.[150]

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[148] *See* Mem. at 64 n.90 (citing *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791 (Tex. Ct. App. 2009) (visitor lacked sufficient occupancy interest to sue for nuisance); *Hutchens v. MP Realty Group-Sheffield Square Apartments*, 654 N.E.2d 35, 38 (Ind. Ct. App. 1995) (guest had "no proprietary interest"); *Culwell v. Abbott Constr. Co., Inc*., 506 P.2d 1191, 1196 (Kan. 1973) (visitor not injured in relation to a right "enjoyed by reason of his ownership")); *accord* Restatement (Second) of Torts § 821E ("possessors of the land" and "owners of easements and profits in the land" may assert private nuisance).

[149] *See Williams v. King*, 860 So. 2d 847, 851 (Miss. Ct. App. 2003) (private nuisance does not require "actual physical invasion."); *accord Borland*, 369 So. 2d at 529-30; *Osborne*, 890 S.W.2d at 572; *Wendinger v. Forest Farms, Inc*., 662 N.W.2d 546, 554 (Minn. Ct. App. 2003); *Johnson v. Knox Cnty. P'ship*, 728 N.W.2d 101, 109 (Neb. 2007); *Hooks*, 140 S.E.2d at 391-92; *City of Minot v. Freelander*, 368 N.W.2d 514, 517 (N.D. 1985); *Christensen v. Hilltop Sportsman Club, Inc*., 573 N.E.2d 1183, 1186 (Ohio Ct. App. 1990); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 365 (Tenn. 2002); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 615 (Tex. Ct. App. 2001); *Vogel*, 548 N.W.2d at 834.

[150] Syngenta cites *Anderson v. State Department of Natural Resources*, 693 N.W.2d 181 (Minn. 2005), involving harm to bees which, unlike crops, are never attached to land.

IX. PLAINTIFFS SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE.[151]

Producers in the following states assert tortious interference: (1) Alabama; (2) Arkansas; (3) Indiana; (4) Missouri; (5) North Dakota; (6) Oklahoma; and (7) Tennessee. Syngenta advances four arguments, each of which fails under the law of the applicable jurisdictions.

A. Plaintiffs allege a valid business expectancy.

In arguing that Producers fail to plead a "valid" business expectancy, Syngenta cites Washington and Minnesota law (neither at issue here) for the proposition that they must plead "the identity" of each specific "third-party" with whom they had a relationship. Mem. at 66. However, that is not the law in the seven relevant states. Alabama, Arkansas, Tennessee, and Indiana require interference with "ongoing business relationships" with "an identifiable class of third-parties."[152] For example, in *Baptist Health v. Murphy*, 373 S.W.3d 269 (Ark. 2010), cardiologists alleged that a hospital's privileging policies interfered with their business expectancy in ongoing relationships with patients. *Id*. at 282. The hospital argued, like Syngenta, that plaintiffs failed to identify "a specific contract" that was interfered with in the complaint. *Id*. The Arkansas Supreme Court held that plaintiffs were only required to show that their reasonable expectations in ongoing relationships were disrupted as result of the hospital's interference. *Id.* at 283-84. The other relevant states, Missouri, North Dakota, and Oklahoma,

[151] Non-Producers did not plead an action for tortious interference, although Trans Coastal pleaded negligent interference. *See, infra*, § X.C.

[152] *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 15 (Ala. 2009) (ongoing business relationship sufficient); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002) (identifiable class of third persons sufficient); *see also Baker v. Tremco Inc.*, 890 N.E.2d 73, 86 (Ind. Ct. App. 2008) *transfer granted, opinion vacated*, 915 N.E.2d 981 (Ind. 2009) (table) and *opinion aff'd in part, vacated in part on other grounds*, 917 N.E.2d 650, 653 n.1 (Ind. 2009) (summarily affirming the claim for tortious interference).

require interference with a reasonably expected economic advantage.[153] For example, Missouri's Supreme Court held that a plaintiff's expectation of obtaining credit was disrupted when a retailer reported false and negative information to credit agencies. *Bell v. May Dep't Stores Co.*, 6 S.W.3d 871, 876 (Mo. banc 1999). It was not material that plaintiff had not yet applied for credit with any particular company. *Id*. at 877-78.

Producers allege disruption of ongoing relationships with an identifiable class of third parties (corn buyers) and an expected economic interest in usual, uninterrupted commodity trade. *See, e.g.*, PC ¶¶ 422, 447, 530, 667, 761, 810, 842. They allege a valid business expectancy.

B. Producers allege intent.

Syngenta cites Wisconsin and Kansas law (again, neither of which are at issue)[154] for the proposition that the Producers must allege that they acted with the specific "purpose to interfere with the contract or prospective relationship" in order to adequately plead intent. Mem. at 67. However, six of the seven jurisdictions at issue require only that "the defendant must . . . have known that [interference] was substantially certain to be produced by his conduct." *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 215 S.W.3d 596, 606 (Ark. 2005) (quoting *City Nat'l*

[153] *See also Batton v. Mashburn*, No. CIV-14-651-R, 2015 WL 461598, at *5 (W.D. Okla. Feb. 3, 2015) (valid business expectancy involves "some type of reasonable expectation of profit." (quotation marks omitted)); *Pifer v. McDermott*, 836 N.W.2d 432, 441 (N.D. 2013) (expectation in gift sufficient).

[154] Syngenta also cites a 2006 intermediate appellate decision suggesting that Oklahoma requires proof of a specific "purpose" to interfere. Mem. at 67. However, in a 2009 decision, the Oklahoma Supreme Court noted that interference, whether it occurs in connection with a contract or a business relationship, only requires showing the defendant was "substantially certain that his actions would interfere." *Wilspec Technologies, Inc. v. DunAn Holding Grp., Co.*, 204 P.3d 69, 74 n.1-5 (Okla. 2009). The Oklahoma Supreme Court noted that the Oklahoma Uniform Jury Instructions provide that "substantial certainty" is the intent standard for both tortious interference with contract and tortious interference with business relationships. *See id*. at 74 n.5 (quoting Okla. U. J. Instr. Civ. § 24.1 (2nd ed. 2014) (noting that courts may substitute "business relationship" for "contract" when instructing the jury on interference with business relationships); *see also* Okla. U. J. Instr. Civ. 24.2 (2nd ed. 2014) (actions are intentional if defendant "either desired [to interfere] or was "substantially certain his actions would interfere"); *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1188 (10th Cir. 2009) (interpreting Oklahoma law and noting "the standard for interference with contract or business relations is the same.").

Bank of Fort Smith v. Unique Structures, 929 F.2d 1308 (8th Cir. 1991)).[155] In Tennessee, a plaintiff may prevail by showing "improper means" regardless of whether defendant acted with specific intent to interfere with its business relationships. *Constr. Enter., Inc. v. Waterstone at Panama City Apartments, LLC*, No. 3:10-00711, 2011 WL 4431824, at *4 (M.D. Tenn. Sept. 22, 2011). Syngenta knew to a substantial certainty that its actions would result in disruption of Plaintiffs' business expectancy. Producers also allege improper means as discussed below.

Syngenta also seems to argue that tortious interference only applies when defendant and plaintiff were "competitors." Mem. at 68. Syngenta cites no authority limiting tortious interference to claims among competitors, and any argument that it had no incentive to interfere with producer's business not only raises a fact issue, but is contrary to allegations in the Complaint. Syngenta had every incentive – profit. *See* PC ¶¶ 81, 266, 317, 321.

C. Producers allege improper means/wrongful conduct.

Syngenta contends that its conduct was not improper or wrongful, or stated differently, was "justified" as a matter of law because Viptera was "U.S.-approved." Mem. at 69. Again, USDA deregulation is immaterial to Syngenta's post-deregulation conduct, and did not give Syngenta license to act wrongfully.

In Alabama, wrongfulness or "lack of justification" is not an element of tortious

[155] *Accord ANR W. Coal Dev. Co. v. Basin Elec. Power Coop.*, 276 F.3d 957, 972 (8th Cir. 2002) (citing *Peterson v. Zerr*, 477 N.W.2d 230, 234 (N.D. 1991) (intent shown when actor "knows that the interference is certain or substantially certain to occur"); *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1270 (M.D. Ala. 2001) ("[I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional." (quotation marks omitted)); *Drake v. Dickey*, 2 N.E.3d 30, 39 (Ind. Ct. App. 2013) (intent "may be demonstrated by showing either that [defendant] specifically intended to interfere . . . or that it acted for another purpose but knew that the interference was certain or substantially certain to occur."); *Bell*, 6 S.W.3d at 879 (defendant had "the requisite intent if it knew interference was certain or substantially certain to occur . . . even if its express purpose was not to interfere."); *Wilspec Techs., Inc.*, 204 P.3d at 74 n.5 (interference intentional if defendant "substantially certain that his actions would interfere").

interference; instead, justification is an affirmative defense. *Century 21 Acad. Realty, Inc. v. Breland*, 571 So. 2d 296, 298 (Ala. 1990). Arkansas and Oklahoma examine the: (1) nature of the actor's conduct; (2) actor's motive; (3) interests of the one with whom the actor's conduct interferes; (4) interests sought to be advanced by the actor; (5) social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) proximity or remoteness of the actor's conduct to the interference; and (7) relations between the parties. *See Vowell v. Fairfield Bay Cmty. Club, Inc.*, 58 S.W.3d 324, 329 (Ark. 2001) (citing Restatement (Second) of Torts § 767); *Wilspec Tech., Inc.*, 204 P.3d at 74 n.6 (citing same). "[T]he real question is whether the actor's conduct was fair and reasonable under the circumstances." *Hayes v. Advanced Towing Servs., Inc.*, 40 S.W.3d 800, 805 (Ark. Ct. App. 2001) (citing Restatement (Second) of Torts § 767 cmt. j). For all the reasons discussed, these factors favor Producers' claim. At a minimum, they are not amenable to decision on a motion to dismiss.

Tennessee, Missouri, Indiana, and North Dakota employ a similar fact-intensive approach (sometimes termed "illegality" or "unlawfulness") and recognize that violations of statutes or common law obligations may establish wrongful conduct. *See Trau-Med*, 71 S.W.3d at 701 n.5 (variety of activity may be improper means); *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117, 126 (Mo. Ct. App. 2010) (misrepresentation); *Meridian Fin. Advisors, Ltd. v. Pence*, 763 F. Supp. 2d 1046, 1063 (S.D. Ind. 2011) (sufficiently wrongful conduct, such as breach of fiduciary duty, can satisfy requirement); *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 478 F. Supp. 2d 1076, 1089 (S.D. Ind. 2007) (misrepresentation); *Miles Distrib., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 453 (7th Cir. 2007) (antitrust violation); *United States v. FKW, Inc.*, 997 F. Supp. 1143, 1153 (S.D. Ind. 1998) (violation of Federal False Claims Act); *Moffett v. Gene B. Glick Co.*, 604 F. Supp. 229, 239 (N.D. Ind. 1984) (violation of statute, invasion of

privacy, infliction of emotional distress); *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707, 721 (N.D. 2001) (false statements). Producers allege violation of the Lanham Act, misrepresentations, and violations of numerous other civilly imposed obligations, such as trespass. PC ¶¶ 126, 131, 136, 139, 143, 146-47, 150, 240-70, 271, 272-84, 375-92. Producers have thus stated a claim.

D. Termination of a relationship is not required.

Syngenta cites Ohio law (not at issue) for the proposition that termination of a relationship is required. Mem. at 70.[156] Syngenta is mistaken. Under the law of the seven jurisdictions at issue, Producers need not allege termination or prevention of a relationship with a third-party. Instead, they may establish interference if Syngenta's interference: (1) made a relationship with a third-party more expensive or burdensome;[157] *or* (2) terminated an expected

[156] Syngenta also relies upon a decision from the Eighth Circuit Court of Appeals for the proposition that termination of a business relationship is required. Mem. at 70. However, the Eighth Circuit's decision, which was decided under Arkansas law, relied primarily upon holdings from other jurisdictions not at issue (Illinois, Florida, and the Ninth Circuit interpreting California law) and ignored the two relevant Arkansas Supreme Court decisions. In the first, the Arkansas Supreme Court held that disruption of the plaintiff's expectation in "a stream of dues" was sufficient to support a finding of interference with business expectancy. *Vowell*, 58 S.W.3d at 329. In the second, the Arkansas Supreme Court affirmed liability when the defendant prevented the plaintiff from performing contractual obligations. *United Bilt Homes, Inc. v. Sampson*, 832 S.W.2d 502, 504 (Ark. 1992). The *United Bilt* court held "no actual repudiation of contract is necessary for liability, and it is enough that the contract performance is partly or wholly prevented, or made less valuable, or more burdensome by the defendant's unjustified conduct." *United Bilt*, 832 S.W.2d at 504 (quoting, Prosser, *supra*, § 129, at 991). The Arkansas Model Jury Instruction on tortious interference provides that either "disruption ***or*** termination" of the expectancy will support liability, and the comments to that instruction note the *United Bilt* decision. Ark. Model J. Instr. Civ. § 403 (2015).

[157] *White Sands*, 32 So. 3d at 17 (plaintiff "need not 'establish that but for' the interference it would have been awarded a contract."); *Niemeyer v. U.S. Fid. & Guar. Co.*, 789 P.2d 1318, 1321 (Okla. 1990) (holding plaintiff stated a claim for tortious interference "with business" when liability insurer gave false information to plaintiff's UIM carrier, thus resulting in lower settlement offer from UIM carrier); *Wilspec*, 204 P.3d at 73 (claim only requires a showing that interference made "plaintiff's performance more oppressive."); *Stebbins v. Edwards*, 224 P. 714, 714-716 (Okla. 1924) (plaintiff stated claim for interference with his business where defendants made false statements causing a disruption in plaintiffs' sales and ability to obtain credit); *Columbus Med. Servs. Org., LLC v. Liberty Healthcare Corp.*, 911 N.E.2d 85, 92 (Ind. Ct. App. 2009) (tortious interference with business relationship where defendant caused "detrimental consequences" to plaintiff).

economic advantage.[158] Producers allege that Syngenta's actions burdened relationships and terminated their economic advantage in corn freely exportable on the global market. *See, e.g.*, PC ¶¶ 299-361, 421-28. Again, Syngenta's argument fails.

X. TRANS COASTAL'S INDIVIDUAL CLAIMS SHOULD NOT BE DISMISSED.

A. Trans Coastal has sufficiently pleaded fraudulent misrepresentation.

1. The claim is pleaded with sufficient particularity.

In accordance with Rule 9(b), Trans Coastal has made very specific allegations identifying what false statements were made, by whom (Charles Lee and Michael Mack) and/or in what form. NC ¶¶ 197, 222-23, 225-27. It also alleges the date on which two of these statements were made – August 17, 2011, and April 18, 2012. In regard to the Bio-Safety Certificate Request Form ("Request Form"), Trans Coastal has alleged that Syngenta distributed this form in an effort to mislead Producers and Non-Producers, including Trans Coastal.[159] *See* NC ¶¶ 226-27 ("Syngenta continued its deception regarding the status of approval from China throughout 2012."). The Complaint also identifies the means by which the statements were communicated – a letter to resellers, conference call, and a form to be used by exporters.

"Rule 9(b)'s purpose is 'to afford defendant fair notice of plaintiff's claims and the

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[158] *Carlson v. Roetzel & Andress*, No. 3:07-cv-33, 2008 WL 873647, at *13 (D. N.D. Mar. 27, 2008) (interpreting North Dakota law and holding "plaintiff must show he would have obtained the economic benefit in the absence of the interference"); *Bell*, 6 S.W.3d at 876 (termination of expectancy of obtaining credit sufficient).

[159] To the extent the Court finds that Trans Coastal has not provided sufficient details to support its fraud claim (and, if Rule 9(b) were to apply, negligent misrepresentation), Trans Coastal requests leave to amend to more fully allege the contents of and circumstances of the distribution of, and Trans Coastal's reliance upon, the Request Form. In particular, Trans Coastal would allege that, in the Request Form, Syngenta represented that MIR162 had already been approved for import into China and that the Chinese Ministry of Agriculture had provided BioSafety Certificates to Syngenta for use in importing MIR162. Trans Coastal relied on the Request Form at least on or about August 13, 2014, if not earlier, by filling it out and checking the box marked "MIR162" Corn Product, to request the associated Bio-Safety Certificate. A copy of the filled-in Request Form was annexed to Plaintiff Trans Coastal's original Complaint in *Trans Coastal Supply Co. v. Syngenta AG, et al.*, as transferred to this Court, No. 2:14-cv-02637, ECF Nos. 1-3, filed September 12, 2014.

factual ground upon which they are based.'" *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (citations omitted). Thus, a complaint alleging fraud must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Tal*, 453 F.3d at 1263 (citations omitted). Still, "[t]he requirements of Rule 9(b) must be read in conjunction with the principles of Rule 8, which calls for pleadings to be "simple, concise, and direct, . . . and to be construed as to do substantial justice," so as to effectuate the purposes of both rules. *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (citations omitted). Given its detail, Syngenta simply cannot claim it lacks fair notice or the factual basis of Trans Coastal's claim. *See id.* at 1253 ("the Complaint gives each defendant notice of what he is charged with. No more is required by Rule 9(b).").[160]

Syngenta also claims that two of the alleged statements, the Lee letter and the Mack conference call statement, are not actionable because they were predictions of future events. Not so. Lee told re-sellers in August of 2011 that Syngenta expected to receive approval in March 2012. NC ¶ 197. This statement purports to describe Syngenta's then-present expectation and was false when made, for Syngenta had no such expectation when Lee represented that it did. The same is true of Mack's April 18, 2012 statement that Syngenta expected approval within days. *Id.* ¶ 222. In at least July 2011, Syngenta knew the opposite was true and that approval was *not* forthcoming on the timetable Syngenta represented. *See, e.g., id.* at ¶¶ 205 (Syngenta

[160] Syngenta cites *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918 (7th Cir. 1992), which is inapplicable because "Uni*Quality's allegations . . . d[id] not even mention any misrepresentations, much less any specifics about those misrepresentations." *Id.* at 923. *Hedges v. Allstate Vehicle & Prop. Ins. Co.*, No. 14-1269-JWL, 2014 WL 5465306, at *4 (D. Kan. Oct. 28, 2014) is similarly distinguishable, as the plaintiff failed to make clear whether his insurer's alleged omissions occurred before or after he executed his insurance agreement, a significant distinction for the validity of the claim. In any event, the issue before this Court is the sufficiency of the allegations of this Complaint. As demonstrated, they are sufficiently detailed to satisfy Rule 9(b).

employee email that Viptera "would not receive import approval from China 'for a few years yet.'"), 206 (Syngenta employee email stating that Syngenta would not receive approval for MIR162 until 2014); *see also* ¶¶ 186, 200. The Complaint further alleges that Syngenta's application for Viptera approval was not complete until November 9, 2011, when Syngenta submitted field trial and safety test results. *Id.* at ¶ 207. At that point, Syngenta well knew that approval could not be obtained by March 2012.

2. Syngenta's false statements were directed at re-sellers and exporters.

Syngenta also claims that Trans Coastal failed to allege that the statements were addressed to it. Again untrue. To begin with, the representations on the Request Form were directed specifically at exporters to China; they are the parties who would need to provide such certificates to the Chinese government. NC ¶¶ 226, 427. The August 2011 letter was addressed to *resellers* of corn and corn products. NC ¶ 197. Trans Coastal is in the business of reselling corn and corn products to Chinese customers. *Id.* at ¶ 347. The very purpose of the letter was to assure resellers across the industry that they could expect Chinese approval for exports into that country by the end of March 2012. *Id.* at ¶ 197. Finally, Syngenta's statements on its earning conference call were addressed to the grain industry as a whole, of which Trans Coastal is a part. Indeed, Trans Coastal was among those "stakeholders," affected by Syngenta's business. NC ¶ 54. That Trans Coastal did no business directly with Syngenta is beside the point. Trans Coastal and other exporters were among the direct and intended recipients of Syngenta's misrepresentations about the status of Chinese acceptance of Viptera.

3. Allegations of reliance are adequate.

The Complaint also adequately alleges that Trans Coastal relied on Syngenta's misrepresentations to its detriment. *See* NC ¶¶ 444-45. It also alleges that "employees in Trans Coastal's California branch office contacted Syngenta representatives to request BioSafety

Certificates, which are needed for importation of corn and DDGS into China" and that the Form "circulated by Syngenta employees to grain handlers and resellers, including . . . Trans Coastal, misrepresents the approval and import certification of MIR162." *Id.* at ¶ 427.

Syngenta relies on a single case, *Dloogatch v. Brincat*, 920 N.E.2d 1161 (Ill. App. Ct. 2009), for its contention that allegations of reliance are insufficient, but the specificity required by Rule 9(b) is governed by federal, not state, law.[161] The Complaint provides sufficient detail about Trans Coastal's actions in reliance on Syngenta's misrepresentations that MIR162 was about to be (or had been) approved in China – specifically, entering into contracts to ship DDGS to China – to provide Syngenta "fair notice of [the] claims and the factual ground upon which [they] are based." *See Koch*, 203 F.3d at 1236; *see also* NC ¶¶ 328-31, 347, 351-55. Indeed, specific details of a plaintiff's reliance are not among the elements the Tenth Circuit requires under Rule 9(b). *See Tal*, 453 F.3d at 1263 (complaint must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." (citations omitted)).

4. Allegations of fraud by omission are adequate.

Syngenta next argues that Trans Coastal may not base its fraud claims on omission of information already known to it. Mem. at 82. Syngenta ignores alleged omissions that Trans Coastal could not possibly have known about, specifically, the sufficiency of its approval request to China and that it would not have import approval during the time frames alleged. NC ¶ 444. Syngenta does not claim that Trans Coastal was aware of these facts. These omissions are

[161] Even assuming that Illinois law provides the rule of decision for this claim, *but see, infra*, § I, *Dloogatch* is distinguishable. There, plaintiffs, holders of securities, had neither purchased nor sold in reliance on defendants' fraud. They nonetheless sought to recover apparently on the theory that the fraud induced them *not* to sell (*i.e.*, not to act). In that context, the court found the complaint gave "no insight into facts that plaintiffs would ever be able to prove supporting that claim." 920 N.E.2d at 1168. Here, Trans Coastal could prove facts to support its claim that it took affirmative action, entering into contracts to ship corn and DDGS to China, because it believed that the product would be accepted for importation.

sufficient to support Trans Coastal's fraud claim, separate and apart from the affirmative misrepresentations discussed above.

Finally, Syngenta claims that Trans Coastal has not alleged that Syngenta had a duty to speak. Mem. at 82. This is wrong. First, Syngenta itself repeatedly recognized its relationship with stakeholders and its duties towards them. *See* NC ¶¶ 54-62. Syngenta's own launch policy required it to identify key importing nations and obtain their approval before commercializing. *Id.* at ¶ 59. Syngenta assumed a duty to provide its stakeholders with accurate information about the status of approval in "key importing nations," such as China. Even if not, the information Syngenta failed to disclose was necessary to make the representations in the Request Form and elsewhere not misleading. *See Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 398 (7th Cir. 2009) ("duty to disclose may arise under Illinois law if the defendant makes an affirmative statement that it passes off as the whole truth while omitting material facts that render the statement a misleading 'half-truth.'"); *accord Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 688 (Minn. Ct. App. 2010); *Los Angeles Memorial Coliseum Comm'n v. Insomniac, Inc.*, 182 Cal. Rep. 888, 909-10 (Cal. Ct. App. 2015).[162] Syngenta's omissions are actionable because the statements it made gave rise to a duty to tell the whole truth.

B. The claim for negligent misrepresentation should not be dismissed.

Trans Coastal's claim for negligent misrepresentation also has sufficient particularity, even if Rule 9(b) applies, and is not barred by the ELD. *See, infra,* § X.B.2-3. Syngenta's argument is predicated on the contention that the claim is governed by Illinois law, but this choice-of-law analysis is superficial and flawed. A correct choice-of-law analysis requires

[162] Although, as discussed below, the Court cannot complete the relevant choice-of-law analysis for the negligent misrepresentation (and in particular, whether the ELD applies), Illinois law (on which Syngenta relies), Minnesota, and California law are the same: all recognize that a duty to speak may arise where the omitted information is necessary to make other statements not misleading.

factual development not possible on the face of the Complaint. Either California or Minnesota law may govern this claim, and the claim is not barred by the ELD of those states; accordingly, this Court should deny the motion to dismiss this claim.

1. Choice of law cannot be resolved on the face of the Complaint.

Syngenta says that Trans Coastal's claim should be governed by Illinois law because it has its principal place of business there, citing no choice-of-law authority for that conclusion.[163] Because Trans Coastal's claims were originally filed in the Central District of Illinois, this Court applies the choice-of-law rules that would have been applied by the court in Illinois. *See Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (transferee court applies state law applicable had there been no change); *see also In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 1375011, at *5 (S.D. Ill. Apr. 12, 2011) (addressing choice-of-law rule claims in multi-district litigation).

Illinois follows the Restatement (Second) of Conflicts of Laws and uses the "most significant relationship" test. *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 585 (N.D. Ill. 2008), *aff'd*, 612 F.3d 932 (7th Cir. 2010) (citing *Esser v. McIntyre*, 661 N.E.2d 1138, 1141 (Ill. 1996)). That test considers: "(1) where the injury occurred; (2) where the injury-causing conduct occurred; (3) domicile of the parties; and (4) where the relationship of the parties is centered." *Esser*, 661 N.E.2d at 1141. The court "must look at the contacts of the jurisdictions under these four factors and evaluates them "in light of the policies underlying the laws of those jurisdictions." *Id*. Principal place of business is but one factor and is not dispositive.

Trans Coastal purchased corn and corn products in various states for export to China. It

[163] As to Plaintiffs who do not dispute Syngenta's choice-of-law analysis, it is appropriate for the Court to apply the law on which the parties agree. *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 1001 (10th Cir. 2007) (applying law on which parties agreed "although it is far from clear that would be our conclusion if we conducted a proper choice-of-law analysis"); *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 831 n.4 (10th Cir. 2005) (applying state law upon which the parties agreed).

shipped its products from California, where it maintains an office, and entered into numerous transactions there. The Restatement recognizes that for certain kinds of torts, a simplistic focus on the "place of injury" is insufficient.[164] The Court cannot determine how to balance the relevant factors because the Complaint does not contain sufficient detail to determine where the misrepresentations were made, where they were received, or where Trans Coastal suffered injury. The location of Trans Coastal's injury is especially difficult to pinpoint at this stage and Trans Coastal was not required to plead around an affirmative defense, such as the ELD.[165] Trans Coastal operates primarily in Illinois and California, but its business, by definition, involves trade across the U.S. and internationally. Syngenta's U.S. operations are headquartered in Minnesota. But because the Court lacks developed information about the other contacts, it is not yet in a position to "evaluate those contacts in light of the policies underlying the laws of those jurisdictions," as required by *Esser*. There are at least three possible jurisdictions whose law might apply, depending on facts developed in discovery: Illinois, Minnesota, and California. As discussed below, the latter two would not apply the ELD. Syngenta cannot demonstrate that Trans Coastal fails to state a claim, because it cannot establish, on the face of the Complaint, that either law will ultimately apply.[166]

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[164] "In part, because of the difficulties involved in its location, the place of loss does not play so important a role in the determination of the law governing actions for fraud and misrepresentation . . . as does the place of injury in the case of injuries to persons or to tangible things. The place where the defendant made his false representations, on the other hand, is as important a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Restatement (Second) of Torts § 148, cmt. c; *see also id.* at § 145, cmt f (discussing role of location of defendant's conduct in economic torts).

[165] *See Jones v. Bock*, 549 U.S. 199, 214-15 (2007); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012); *Indep. Trust Corp. v. Stewart Info. Services Corp.*, 665 F.3d 930, 935 (7th Cir. 2012); *Joyce v. Armstrong Teasdale LLP*, 635 F.3d 364 (8th Cir. 2011).

[166] *See Snyder v. Farnum Cos., Inc.*, 792 F. Supp. 2d 712, 721 (D.N.J. 2011) (choice-of-law inquiry may be premature on motion to dismiss); *In re Samsung DLP Television Class Action Litig.*, No. 07-2141

2. California law would not apply the ELD.

California "eschew[s] overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care." *J'Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979). The California Supreme Court has held that "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." *Id*. at 64; *see also Zamora v. Shell Oil Co.*, 63 Cal. Rptr. 2d 762, 766 (Cal. Ct. App. 1997) (*J'Aire* "sets forth a limited exception to the general rule that economic loss alone is insufficient to state a negligence cause of action"). To determine whether economic losses may be recovered for negligence, courts examine: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm, (3) the degree of certainty that plaintiff suffered injury, (4) the closeness of the connection between defendant's conduct and the injury suffered, (5) moral blame attached to defendant's conduct and (6) the policy of preventing future harm. *J'Aire*, 598 P.2d at 63 (citations omitted).[167] These factors, especially the first four, "essentially help identify whether there is an unusual degree of foreseeability of the particular injury the plaintiff has suffered." *Ott v. Alfa-Laval Agri, Inc.*, 37 Cal. Rptr. 2d 790, 798 (Cal. Ct. App. 1995). The Complaint here alleges facts showing "an unusual degree of foreseeability of the particular injury the plaintiff has suffered." NC ¶¶ 46-62; *see, e.g., Cisco Sys., Inc. v.*

(GEB), 2009 WL 3584352, *3 (D.N.J. Oct. 27, 2009) (because choice-of-law inquiry is "fact intensive, it can be inappropriate or impossible for a court to conduct that analysis at the motion to dismiss stage when little or no discovery has taken place"); *Arfons v. E. I. Du Pont De Nemours & Co.*, 261 F.2d 434, 435 (2d Cir. 1958) (reversing dismissal where "conceivable that the plaintiff may be able to establish that the Connecticut choice of law rule would require us to look to the law of Ohio").

[167] *See, e.g., Corona v. Sony Pictures Entm't, Inc.*, No. 14-9600, 2015 WL 3916744, at *5 (C.D. Cal. June 15, 2015) (denying motion to dismiss based on allegations taking claim outside ELD); *Fields v. Wise Media, LLC*, No. 12-5160, 2013 WL 5340490, at *3 (N.D. Cal. Sept. 24, 2013) (plaintiffs sufficiently pled a negligence claim considering *J'Aire* factors).

STMicroelectronics, Inc., No. 14-3236, 2014 WL 7387962, at *4 (N.D. Cal. Dec. 29, 2014) (ELD did not bar recovery against manufacturer who agreed to provide assistance in identifying and correcting problem, which "made the possibility of resulting harm reasonably foreseeable"). As discussed extensively, the harm was not merely foreseeable but foreseen by Syngenta. And allowing Syngenta to escape liability for its tortious conduct would be contrary to California's policy because it would allow Syngenta to reap all the benefits of premature commercialization while shouldering none of the burdens of doing so. The California ELD does not apply.

3. Minnesota law would not apply the ELD.

Minnesota's ELD also does not apply. As explained above, it is entirely statutory. Minn. Stat. § 604.101.5; *Ptacek*, 844 N.W.2d at 538-39. To come within the ELD, a misrepresentation claim must be "by a buyer against a seller . . . for a misrepresentation relating to the goods sold." Minn. Stat. Ann. § 604.101.2. Trans Coastal is not a "buyer" of any "goods" for which Syngenta is a "seller." It contracted to sell DDGS, a corn product, to buyers in China. NC ¶¶ 349-55. Syngenta does not sell DDGS, or even *corn*. Thus, Trans Coastal is not a "buyer" of Syngenta's goods. The Viptera seed sold by Syngenta cannot reasonably be viewed as a "component" of the DDGS that Trans Coastal purchased – at least, not on a motion to dismiss with no factual record to support such a contention. Thus, even if this Court could determine, on the face of the Complaint, that Minnesota law applies, it could not determine, without a more developed record, that Minnesota's ELD would apply.

C. Trans Coastal has adequately alleged negligent interference.

California law requires four elements for negligent interference with prospective economic relations, and all of them are met.[168] First, Trans Coastal alleges that economic relationships existed between it and its customers in China, each of which contained a reasonably probable future economic benefit or advantage to Plaintiff. NC ¶¶ 423-24, 429. Second, it alleges that Syngenta knew of the existence of these relationships and was aware or should have been aware that if it did not act with due care, its actions would interfere with these relationships and cause Trans Coastal to lose in whole or in part the probable future economic benefits or advantages thereof. *Id*. at ¶ 425. Third, it alleges that Syngenta was negligent. *Id*. at ¶¶ 426-32. Finally, Syngenta's negligence caused damage to Trans Coastal in that its relationships were actually interfered with or disrupted and Trans Coastal lost in whole or in part the economic benefits or advantage reasonably expected. *Id*. ¶¶ 433-35.

Syngenta's two challenges fail. First, it argues that Trans Coastal has not alleged that Syngenta's conduct was "independently wrongful." Mem. at 70-71. This is not so. It alleges throughout the Complaint that Syngenta wrongfully violated the Lanham Act, was negligent and breached a duty of care to stakeholders, including Trans Coastal,[169] and made specific, identified misrepresentations. NC ¶¶ 430-32; *see also* ¶¶ 416-27. All are wrongful conduct independent of

[168] The elements are: (1) an economic relationship between plaintiff and a third party containing a reasonably probable future economic benefit or advantage to plaintiff; (2) defendant knew of the existence of the relationship and was aware or would have been aware that if it did not act with due care its actions would interfere with this relationship causing plaintiff to lose in whole or in part the probable future benefit or advantage; (3) defendant was negligent; and (4) such negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected. *Young v. Fluorotronics, Inc*., No. 10CV976-WQH-BGS, 2010 WL 4569996, *6 (S.D. Cal. Nov. 3, 2010). Syngenta does not dispute that California law applies to this claim.

[169] Even if Trans Coastal's negligence claims are barred by the ELD, and they are not, Syngenta's negligence would still constitute independently wrongful conduct sufficient to support Trans Coastal's claim for negligent interference. The issue for the negligent interference claim is the wrongfulness of Syngenta's conduct, not the nature of the damages suffered as a result.

any interference with Trans Coastal's prospective economic relations and satisfy that requirement. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 45 Cal. Rptr. 2d 436, 457-60 (Cal. 1995) (Mosk, J. concurring) ("the tort may be satisfied by . . . interference with prospective economic advantage by independently tortious means"); *see also Young*, 2010 WL 4569996, at *5 ("[A]n act is independently wrongful if . . . proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"); *Korea Supply Co. v. Lockheed Martin Corp.*, 131 Cal. Rptr. 2d 29, 49 (Cal. 2003) (same).

Second, Syngenta argues that it did not owe Syngenta a duty of care. Syngenta cites *Biakanja v. Irving*, 320 P.2d 16 (Cal. Ct. App. 1958) in support of its argument that there is no special relationship between Trans Coastal and Syngenta. In *Biakanja*, however, the court found that plaintiff should be allowed recovery despite an absence of privity. 320 P.2d at 18. *See also Glanzer v. Shepard*, 135 N.E. 275, 275-76 (N.Y. 1922) (purchaser who overpaid vendor in reliance on erroneous certificate furnished by public weigher could recover from weigher because purchaser's use of the certificate was the "end and aim" of the transaction). Similarly, Tran Coastal, a reseller of corn, arranged for exportation and sale of corn in reliance on an erroneous Request Form furnished by Syngenta. *See* NC ¶ 427. Just as in *Glanzer*, Trans Coastal's use of the certificate was the "end and aim" of the transaction. And at this stage, Trans Coastal need only plead these facts sufficiently to survive a motion to dismiss.

Trans Coastal's allegations also are sufficient to meet the policy-focused factors set forth in *Biakanja*. *See* 320 P.2d at 19. Syngenta's actions and misrepresentations, both independently and together, induced Trans Coastal's confidence in China's acceptance of MIR162-containing corn. Syngenta's own internal communications show that it foresaw that harm would result if approval did not occur. NC ¶ 152. Trans Coastal has suffered certain damages, including but

not limited to those set forth in its Rule 26 disclosures, and Syngenta made direct misrepresentations to Trans Coastal triggering Trans Coastal to export corn products. Finally, on a moral and future policy front, Syngenta placed its own profit margin goals above the livelihood of corn growers, handlers, and exporters. *See also J'Aire*, 598 P.2d at 63.

Trans Coastal's claim survives Syngenta's challenges and adequately alleges the required elements under California law.

XI. PLAINTIFFS SUFFICIENTLY ALLEGE CLAIMS UNDER THE LANHAM ACT.

Plaintiffs allege that Syngenta made misrepresentations in its Deregulation Petition and in public statements regarding the status and timing of Chinese approval of MIR162, thus violating the false advertising provisions of the Lanham Act, 151 U.S.C. § 1125(a) (the "Act"). PC ¶¶ 377-92; NC ¶¶ 372-87. The "deregulation" misrepresentations include statements that deregulation should not cause an adverse impact upon export markets, that Syngenta would communicate stewardship requirements "using a wide ranging grower education program," that MIR162 could and would be channeled away from markets yet to approve MIR162, and that regulatory filings were already in progress in China. SOF §§ A, E.[170] Later, in furtherance of a campaign to sell more Viptera, Syngenta's Lee, on August 17, 2011, sent a letter containing misrepresentations, and Mack, in April 2012, stated publicly that approval would occur within a matter of days. *Id.* Syngenta also publicly distributed its Bio-Safety Certificate Forms and its "Plant with Confidence Fact Sheet." *Id.*, § E.

Plaintiffs have both Article III ("Art. III") and statutory standing under *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), and Syngenta's misrepresentations are actionable commercial advertising or promotion. In *Lexmark*, the

[170] The false statements in the Deregulation Petition appear at PC ¶ 378(a-b); NC ¶ 373(a-b).

Supreme Court developed the "appropriate analytical framework for determining a party's standing to maintain an action for false advertising;" plaintiffs within the Act's zone of interests and claiming injury proximately caused by a violation have standing. *Id.* at 1385, 1388, 1390.

A. Plaintiffs' damages are fairly traceable and proximately caused.

Syngenta's Art. III argument fails. Plaintiffs did plead facts sufficient to support a conclusion that their injuries are "fairly traceable" to Syngenta's misrepresentations.[171] Because Syngenta makes the same argument with regard to the proximate cause element, Mem. at 73, Plaintiffs satisfy that standard as well.[172]

Here, each of Syngenta's misrepresentations was an important part of efforts to commercialize and increase Viptera seed sales, and Plaintiffs' damages are fairly traceable to Syngenta and those misrepresentations. Syngenta's acts and omissions resulted in pervasive contamination of the U.S. corn supply. Its misrepresentations are directly traceable to commercialization by misleading stakeholders in the face of knowledge that the contamination would occur. Had Syngenta not misrepresented (1) the impact upon export markets, (2) Syngenta's intention and ability to channel MIR162 away from non-approving countries, and (3) the status and timing of China's approval of MIR162, contamination and, therefore, damage to Plaintiffs would not have occurred. Accordingly, Plaintiffs' damages are fairly traceable to

[171] Art. III standing provides the irreducible constitutional minimum for standing, and requires: (1) an injury in fact, that is either actual or imminent; (2) with a causal connection "fairly traceable" to the challenged action of the defendant; and (3) likely to be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Syngenta only challenges the second requirement: that a causal connection exists that is fairly traceable to defendants' actions. Mem. at 72.

[172] The Lee letter is another "statement[] indicating that approval from China for MIR162 corn was expected at times when Syngenta knew it was not." PC ¶ 378(e); NC ¶ 373(e). The BioSafety Certificate Request Form and the "Plant With Confidence Fact Sheet," are examples of "marketing material published on the internet," as alleged in PC ¶ 378(d); ¶ 373(d). And Mack's statements fall under Plaintiffs' allegations that false statements were made "[t]o the press and to investment analysts on quarterly conference calls." PC ¶ 378(c); NC ¶ 373(c).

Syngenta's misrepresentations.[173]

Syngenta's proximate cause argument fares no better. Contrary to Syngenta's assertion, Mem. at 73, Plaintiffs have made detailed, non-conclusory allegations regarding causation that do not involve an "attenuated chain of causation." *See, supra*, §§ III, XI.A. And, as previously addressed, causation is a fact question. *See Marten Transport, Ltd.*, 2015 WL 363995, at *4. In *Marten*, this Court followed *Lexmark* in a close parallel to this case. *Id.* at *4 n.1. The parties in *Lexmark* were not direct competitors and the "causal chain" linking the injuries to the false advertising contained more than a single link. *See id.* Similar facts are before the Court; a similar result should follow.

Proximate cause is "controlled by the nature of the statutory cause of action" at issue. *Lexmark*, 134 S. Ct. at 1390. The very nature of the Act contemplates intervening (but foreseeable) steps will exist between the violating act and the resulting harm. *Id.* at 1394. While inducing consumers to switch their spending habits may present the "classic Lanham Act false-advertising claim," *Lexmark* states that this is not the only type of actionable injury. *Id.* at 1393. As *Lexmark* demonstrates, when parties operate within an especially integrated marketplace, false advertisement can have broader direct effects, even against non-competitors. *See, e.g., id.* at 1394; *Underground Solutions, Inc. v. Palermo*, No. 13-C-8407, 2014 WL 4703925, at *9 (N.D. Ill. Sept. 22, 2014) (finding industry-specific types of promotion that can result in commercial injury to non-direct-competitors).

[173] Syngenta attempts to cloak a proximate cause argument as one regarding Art. III standing, Mem. at 73, but that argument fails. Syngenta's own cases show that standing exists here. Unlike the plaintiff in *Hutchinson v. Pfeil*, 211 F.3d 515 (10th Cir. 2000), who could not prove the existence of the work of art in which he claimed a right and thus had no protectable interest under either Art. III or the Act, Plaintiffs have suffered real losses. The plaintiff in *Maine Springs, LLC v. Nestlé Waters North America, Inc.*, No. 2:14-cv-00321, 2015 WL 1241571 (D. Me. Mar. 18, 2015), had not even entered the bottled water market, and alleged that its harm flowed from causes other than false advertising. And in *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 333 (5th Cir. 2002), the plaintiff failed to show that his income decline was not the result of part-time employment and work on a fly fishing show.

Lexmark and its progeny recognize that modern markets produce competitive relationships more fluid than previously seen. *See Lexmark*, 134 S. Ct. at 1391 ("[A] plaintiff can be directly injured by a misrepresentation even where 'a third party, and not the plaintiff, . . . relied on' it." (quoting *Bridge v. Phoenix Bond & Indem'y Co.*, 553 U.S. 639, 656 (2008)). Courts now focus on the type of harm claimed, and the causal link between the false advertising alleged. Presently, Plaintiffs claim commercial injury, and allege that Syngenta caused that injury by false advertisements, meeting the requirement for a claim. False advertising – even from a non-direct competitor – that results in commercial harm creates a claim under the Act. *See Educational Impact, Inc. v. Danielson*, No. 14-937 (FLW/LHG), 2015 WL 381332, at *14 (D.N.J. Jan. 28, 2015).

Plaintiffs' injuries flowed from premature commercialization of MIR162 without adequate stewardship programs and the marketing of MIR162 seed products through misrepresentations regarding the timing and importance of Chinese approval. Consumer reliance upon Syngenta's false representations created a poorly-guarded marketplace for a commodity Syngenta knew it could not segregate, contaminated the market and risked Chinese rejection that, in fact, *directly resulted* in the loss of the Chinese export market. Accordingly, even though Syngenta's original aim may have been to gain a competitive edge, Syngenta's actions nonetheless directly damaged Plaintiffs. *See Educational Impact*, 2015 WL 381332, at *13-14 ("[A]lthough DGLLC is not in direct competition with EI, the claims made on its website, if shown to be false, likely have the effect of limiting EI's sales. Under current law, this allegation is sufficient to state a claim under the Lanham Act.").

B. Plaintiffs are within the zone of interests protected by the Lanham Act.

Syngenta asserts that Producers fall outside the Act's zone of interests because they are not in a "competitive relationship" with Syngenta, and Non-Producers are merely secondary

consumers not protected under the Act. The first reason does not constitute a requirement for standing for a false advertising claim, and the second is factually incorrect.

1. A competitive relationship is not required.

To show standing "a plaintiff must allege an injury to a commercial interest in reputation or sales." *Lexmark*, 134 S. Ct. at 1390. The Court had the opportunity to require "competition" between plaintiff and defendant but explicitly did not. *Id.* at 1391-93. Noting that the tort of unfair competition itself is "understood not to be limited to actions between competitors," the Court found it "a mistake to infer that because the Lanham Act treats false advertising as a form of unfair competition, it can protect *only* the false-advertiser's direct competitors." *Id.* at 1392 (emphasis in original; quotation marks and citation omitted). Syngenta posits that *Lexmark* nevertheless requires the parties to have a "fundamentally competitive relationship."[174] *See* Mem. at 74. However, that language does not appear in *Lexmark*. Instead, *Lexmark disregarded the kind of relationship* between the parties, *i.e.*, whether competitors, and *focused solely on the kind of injury* suffered by the plaintiff, *i.e.*, whether commercial. *See id.* at 1390-91, 1393 ("lost sales and damage to its business reputation – are injuries to precisely the sorts of commercial interests the Act protects").

Even if harm to a plaintiff's "competitive position" were required, Mem. at 74, it need

[174] This is contrary to Syngenta's prior position that competition is not the criteria for the Act's zone of interest. *See* Letter from Appellant Syngenta Seeds Regarding Notice of Recent Decision, *Syngenta Seeds, Inc. v. Bunge N. Am.*, No. 13-1391 (8th Cir. Mar. 26, 2014), *appeal from* No. 5:11-CV-04074-MWB (N.D. Iowa 2013) (district court had dismissed Syngenta's Lanham Act claim against Bunge, a non-producer similarly situated to some of the Non-Producers in this litigation, for its efforts to publicize that it would not purchase grain grown from MIR162 for lack of standing due to lack of competitive relationship; then Syngenta urged the Eighth Circuit to reverse this decision because *Lexmark* "explicitly rejects this requirement." Notably, Syngenta also understood that allegations of damages flowing from misrepresentations sufficiently meet the test of standing).

not be against the defendant. *Id.* at 1392.[175] In a post-*Lexmark* decision, the Court expressly used the term "competitor" to indicate "*all those within the class* of persons and entities protected by the Lanham Act," showing the term encompasses a wide variety of commercial actors, not just those having a directly "competitive relationship." *See POM Wonderful LLC v. Coca–Cola Co.*, 134 S. Ct. 2228, 2234 (2014) (emphasis added). Since *Lexmark* and *POM*, district courts have denied motions to dismiss false advertising claims between non-competitors, holding the alleged harm met *Lexmark*'s standing requirement.[176]

Syngenta has defined the scope of commercial actors who are tied to and affected by its business due to the integrated nature of the commodity markets. It labels them "stakeholders" and includes in that group growers (*i.e.*, producers), and industry (*i.e.*, non-producers). Similar to *Lexmark*, the injuries alleged by Plaintiffs arise from the adverse effect Syngenta's misrepresentations have had on their positions in the corn market as a result of the reductions in the demand, and price paid, for U.S. corn or corn byproducts such as DDGs. *See* SOF § F.

2. Plaintiffs' injuries are commercial, not consumer.

Lexmark defined the zone of interests for false advertising to be those claims related to commercial injuries, while excluding claims for consumer injuries. 134 S. Ct. at 1390, 1393. Contrary to Syngenta's argument, neither Producers nor Non-Producers are consumers.

Producers did not purchase Syngenta's GM seed. *See* PC ¶¶ 12-63, 362. Non-Producers

[175] The Court noted that the degree of competition or lack thereof between the parties could affect the proof of the proximate cause prong of standing, but it does not otherwise take a commercial actor out of the requisite zone of interests. *See Lexmark*, 134 S. Ct. at 1392.

[176] *E.g.*, *Luxul Tech. Inc. v. Nectarlux, LLC*, No. 14-CV-03656-LHK, 2015 WL 352048, at *6 (N.D. Cal. Jan. 26, 2015) (LED manufacturer versus market consultants); *Int'l Found. of Employee Benefit Plans, Inc. v. Cottrell*, No. WDQ-14-1269, 2015 WL 127839, at *2-3 (D. Md. Jan. 7, 2015) (certifying body versus individual counselor); *Underground Solutions, Inc.*, 2014 WL 4703925, at *9 (pipe manufacturer versus spokesperson); *Marten Transport*, 2015 WL 363995, at *3 (motor carrier versus job website operator).

purchased corn, or DDG byproducts, not seed, and without regard to the seed from which the corn was grown. These facts readily distinguish this case from false advertising cases dismissed due to impermissible consumer injury claims.[177] And once again, it is the *kind of injury* alleged, not the classification of a party as a *kind or degree of market participant* that determines whether it meets the requisite zone of interests. *Lexmark* established a class of persons and entities who may invoke the Act: those "who may suffer an injury to a commercial interest in sales or business reputation proximately caused by [a] defendant's misrepresentations." *POM*, 134 S. Ct. at 2234 (quoting *Lexmark*, 134 S. Ct. at 1393). If a plaintiff meets the criteria of that class and asserts a commercial injury, then by definition it does not assert a consumer interest.

Finally, if any question exists whether Plaintiffs' asserted interests and injuries are consumer or commercial, that is a fact question this Court cannot resolve on a motion to dismiss. To attempt to unravel market interests and then characterize injury requires a development of facts and presentation of evidence not yet ripe.

C. Syngenta's false statements are actionable.

The Complaint meets the requirement of "commercial advertising or promotion" within the meaning of the Act. The Tenth Circuit has set out a four part test for determining this element:

> (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the

[177] *See, e.g., Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686 (2d Cir. 1971) (plaintiffs purchased defendant's ski weekend travel package); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163 (3d Cir. 1993) (plaintiffs purchased defendants' rust protection policies and gasoline for their cars); *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278 (4th Cir. 2004) (plaintiff was organization representing consumers who purchased defendant's crab cakes); *Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995) (plaintiffs purchased defendant's light bulbs); s*ee also Pain Ctr. of Se. Ind., LLC v. Origin Healthcare Solutions LLC*, No. 1:13-cv-001133-RLY-DKL, 2014 WL 6750042, at *10-11 (S.D. Ind. Dec. 1, 2014) (plaintiffs purchased defendant's software and support services).

> representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000) (quoting *Gordon & Breach Science Publishers, S.A. v. Am. Institute of Physics*, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994)).[178] In *Lexmark*, the Supreme Court replaced the second prong of the test with its "zone of interests" requirement. *Lexmark*, 134 S. Ct. at 1391; *see also* Mem. at 76 n.103.

Syngenta recognizes that Plaintiffs plead at least five statements as "commercial advertising and promotion," but claims that none meets the requirements. *See* Mem. at 75-76. As to two of these, the "Plant With Confidence" Fact Sheet and the Lee August 17, 2011 letter, Syngenta offers no argument under any of the prongs of the *Gordon* and *Proctor & Gamble* test other than its competitor standing argument previously addressed. Syngenta does, however, independently argue in a footnote, Mem. at 78 n.105, that the Lee letter is not actionable by its use of the word "anticipate[d]." Similarly, Syngenta argues, in addition to challenges under *Gordon* and *Procter & Gamble* (addressed below), that Mack's statements were qualified by the word "expect[ed]." Syngenta's cases, however, stand in sharp contrast with the character of both statements quoted in the Complaints.[179] As discussed, both statements are statements of fact –

[178] *See also Garland Co. v. Ecology Roof Sys. Corp.*, 895 F. Supp. 274, 279 (D. Kan. 1995) (the heart of "commercial advertising or promotion" under the Act is a notion of "public dissemination of information" (citing *Medical Graphics Corp. v. SensorMedics Corp.*, 872 F. Supp. 643 (D. Minn. 1994)); *American Needle & Novelty, Inc. v. Drew Pearson Mktg, Inc.*, 820 F. Supp. 1072 (N.D. Ill. 1993) (same)).

[179] *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 235 (5th Cir. 2014), cited by Syngenta, states in passing that "[p]redictions of future events are . . . non-actionable expressions of opinion," but the statement at issue in that case related to scientific testing and no "prediction" was at issue. A case cited within *Eastman*, however, demonstrates the scope of the concept. In *Presidio Enterprises, Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986), statements like "the greatest adventure-survival movie of all time," "your blockbuster for the summer of '78," and "this will be the most 'want-to-see' movie of the year" were not statements of fact but mere predictions and puffery. Similarly, in *Coastal Abstract Service, Inc. v. First American Title Ins. Co.*, an assertion that plaintiff was too small to handle an individual's business was vague and subjective, not specific and empirical. 173 F.3d 725, 731 (9th Cir. 1999). Here, Syngenta stated its expectations when it objectively knew otherwise. As the Supreme Court has explained (in addressing the Securities Act § 11's prohibition against false statements

Syngenta's present expectation – when Syngenta actually expected otherwise. SOF §§ A, E.

For the misrepresentations in the Deregulation Petition, Mack's statements, and the Bio-Safety Certificates Form, Syngenta offers a grab bag of arguments ostensibly arising under the third and fourth prongs of the *Gordon* test, none of which hold up. Fundamentally, these two prongs – purpose and breadth of dissemination – "are fact-intensive inquiries not suitable for resolution in a motion to dismiss." *VIP Prods., LLC v. Kong Co., LLC*, No. CV 10-0998-PHX-DGC, 2011 WL 98992, at *3 (D. Ariz. Jan. 12, 2011).[180]

1. The Deregulation Petition was commercial.

Although Syngenta claims that statements to governmental regulators, such as the USDA, are not intended to influence consumer choice and were not disseminated sufficiently to the relevant purchasing public (the third and fourth elements of *Gordon* and *Proctor & Gamble*), one of the cases Syngenta cites actually holds otherwise. In *Caldon, Inc. v. Advanced Measurement & Analytics Group, Inc.*, 515 F. Supp. 2d 565, 578 (W.D. Pa. 2007), the court held that representations to the Nuclear Regulatory Commission ("NRC") were actionable because they were also made generally to the industry. Similarly, Syngenta's statements in its Deregulation Petition were made for public dissemination. Syngenta itself asserts that the USDA has no authority to consider financial impacts. PC ¶ 128; NC ¶ 75. For what other purpose were the statements made? Answer: to facilitate, promote, and induce the commercial sale of Syngenta's

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of fact), a statement expressing belief "explicitly affirms" that the "speaker actually holds the stated belief." *Omnicare Inc. v. Laborers Dist. Council Const. Indus. Pen. Fund.*, 135 S. Ct. 1318, 1326 (2015); *see also id.* (quoting Prosser, *supra*, § 109, at 755 ("[A]n expression of opinion is itself always a statement of . . . the fact of the belief, the existing state of mind, of the one who asserts it")).

[180] *See also Proctor & Gamble*, 222 F.3d at 1273 n.9 (summary judgment granted by trial court could not be supported by new argument regarding extent of distribution when message only circulated among a "'few distributors on a private voicemail system'" because the argument "is not a pure matter of law the resolution of which is certain . . . but rather involves a difficult factual determination as to the number and identity of those individuals reached by the subject message."); *Coastal Abstract Serv.*, 173 F.3d at 734-36 (fourth prong of *Gordon* properly submitted to jury under nature-of-market instruction and rejecting defendants' argument that no promotion existed as a matter of law).

products. SOF §§ D, E. The other cases cited by Syngenta, Mem. at 77-78, stand in contrast to what Plaintiffs allege here and are distinguishable. Unlike *Presby Environmental, Inc. v. Advanced Drainage Systems, Inc.*, No. 13-cv-355-LM, 2014 WL 4955666, at *9 (D.N.H. Sept. 30, 2014), Plaintiffs do not allege that the USDA merely functioned as a gate keeper, but rather, that Syngenta made its statements knowing and intending that they would be available to stakeholders. And the plaintiff in *Neonatal Product Group, Inc. v. Shields*, asserted only two (isolated) private communications, one of which was only "vaguely-described." No. 13-CV-2601, 2014 WL 6685477, at *12-13 (D. Kan. Nov. 26, 2014). Here, Plaintiffs assert detailed misrepresentations made within a commercial context, published to the USDA *and* the public.

2. Mack's statement was commercial.

Michael Mack's statement that Syngenta expected approval for China "quite frankly within the matter of a couple of days" was commercial advertising and promotion – it had a commercial purpose and was widely disseminated within the industry. Syngenta claims that the statement was made to investors and analysts but offers no support for this blanket assertion. Further, Plaintiffs do not make that allegation.

Rather, Mack's statement was part of the ongoing campaign orchestrated to mislead the public about the status of approval in China. SOF §§ A, E. This campaign was clearly designed to influence buyers and sellers in the corn market and falsely assure that they could grow and trade in corn without fear of Chinese rejection. *Id.* This Court recognized in *Garland* that "the term ['promotion'] carries with it the idea of an organized campaign or, perhaps, communications to a number of potential customers and it appears to be an unlikely term for Congress to have employed if it had intended to include isolated communications within the Act's purview." *Garland*, 895 F. Supp. at 276; *see also Sigma Dynamics, Inc. v. E. Piphany, Inc.*, No. C 04-0569 MJJ, 2004 WL 2648370, at *3 (N.D. Cal. June 25, 2004) (recognizing that

the "[s]tatements made during an earnings conference call . . . may have an incidental effect of promoting goods to customers."). For this reason, this case is distinguishable from *Tercica, Inc. v. Insmed Inc.*, No. C 05-5027 SBA, 2006 WL 1626930 (N.D. Cal. June 9, 2006), cited by Syngenta. There, *all* of the misleading statements were alleged to have been made to existing or potential investors, not consumers. *Id.* at *18. Here, Mack's statement is but one example of the "campaign" of false or misleading commercial advertising and promotion. SOF §§ A, E.

Syngenta also claims that Mack's statements do not qualify as commercial because Plaintiffs have not sufficiently pleaded that they reached the public. This is nonsense: Plaintiffs provided the URL address for the website where the transcript of Mack's comments is publicly available. PC ¶ 171; NC ¶ 118. Syngenta relies on *Sigma Dynamics* and *Tercica* to argue that statements during earnings calls do not sufficiently reach the public, but in 2004 and 2006, when those cases were decided, conference call transcripts were not as readily available to the public as they are now. Indeed, no indication exists in either case that transcripts were available on the internet. Syngenta's remaining authority, *Neonatal Products Group, Inc.*, is simply inapplicable, as it involves an email sent to a single individual. *See* 2014 WL 6685477, at *12.

3. The Bio-Safety Certificates Form was commercial.

Syngenta argues that because the Bio-Safety Certificates Form was only provided to grain exporters and resellers, not Syngenta's customers, it cannot constitute commercial advertising under the Act. This is another example of Syngenta attempting to supply facts not alleged. Plaintiffs allege that the Form was distributed, PC ¶ 279; NC ¶ 226, but do not identify all those to whom it was distributed or by what means. Trans Coastal alleges that it was distributed to grain exporters and resellers, NC ¶ 427, but does not characterize this group as exclusive. To whom and how distribution took place is a matter of discovery, inappropriate for consideration at this stage. *See VIP Products*, 2011 WL 98992, at *3. Moreover, Syngenta

ignores allegations that the Form was part of Syngenta's plan to induce sales of Viptera seed. SOF §§ A, E; *see* PC ¶¶ 279-80; NC ¶¶ 226-27. Consistent with Plaintiffs' allegations, such actions would have had the inescapable effect of inducing further sales of Viptera seed.

Syngenta's other arguments – that the form was "simply a vehicle for requesting export certificates" and "Syngenta never claimed to have Chinese export approval in response to anyone who submitted the Form," raise matters contrary to Plaintiffs' Complaints wherein they allege that Syngenta represented in the Form that Viptera could be exported to China.[181] Mem. at 77. Accordingly, Syngenta's motion to dismiss the Lanham Act claims should be denied.

XII. PLAINTIFFS PROPERLY ALLEGE CONSUMER PROTECTION CLAIMS

Syngenta offers one sentence to argue that Plaintiffs' consumer claims lack proximate cause, citing one Colorado case recognizing the need for "a causal link," and deferring to its common law arguments. Mem. at 83. It cites no authority equating the Colorado "causal link" standard to common law proximate cause. It also ignores Plaintiffs' other statutory claims.[182] Syngenta's failure to cite relevant authority is fatal. *See Litton v. Maverick Paper Co.*, 354 F. Supp. 2d 1209, 1218 (D. Kan. 2005). Syngenta's independent state-specific arguments also fail.

[181] *See* PC ¶¶ 378-79; NC ¶¶ 373-74. Moreover, if the Court were to determine otherwise, Plaintiffs request leave to amend to allege the contents of the Form. A copy of the Form was annexed to Plaintiff Trans Coastal's Original Complaint in *Trans Coastal Supply Company, Inc. v. Syngenta AG*, as transferred to this Court, No. 2:14-cv-02637, ECF No. 1, filed September 12, 2014, and amended allegations would refer to a blank copy of the Form and note that it shows Syngenta's language on the Form itself which states that "Biosafety Certificates for the following transgenic event(s) *were issued to* Syngenta Seeds" and lists "MIR162" as a "Corn Product" with an issued Biosafety Certificate; and that "[t]he requested Biosafety Certificates *will be provided* to Recipient to assist Recipient in obtaining required authorization for shipments containing the above marked Corn Product(s) into China." (emphasis added).

[182] Minnesota, for example, recognizes relaxed causation. *Group Health Plan, Inc. v. Phillip Morris Inc.*, 621 N.W.2d 2, 14 (Minn. 2001) (statute does not "require a strict showing of direct causation, as would be required at common law.").

A. Minnesota Consumer Protection Claims.

Plaintiffs' Minnesota Unfair Trade Practices Act ("MUTPA") (Minn. Stat. § 325D.13) and Prevention of Consumer Fraud Act ("MCFA") (Minn. Stat. § 325F.69) claims are proper.

1. The claims apply to nationwide and non-resident state classes.

Syngenta contends that Plaintiffs' Minnesota class claims fail insofar as they are brought by non-Minnesota residents. Plaintiffs' allegations, however, support class claims involving non-Minnesota residents under Minnesota law, which comport with constitutional concerns and are appropriate under applicable choice-of-law rules.

Minnesota law supports application of these claims to non-Minnesota residents. The Minnesota Attorney General has stated, and Minnesota courts have accepted, that "the [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 Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309(PAM/JGL), 2004 WL 909741, at *6 (D. Minn. Apr. 28, 2004) (emphasis added); *see also id.* (declining to decertify nationwide class based on Minnesota consumer protection statutes).[183] Multiple cases have applied Minnesota consumer protection statutes to non-residents where conduct occurred in or was connected to Minnesota. *Id.* at *5 (conduct occurred in or emanated from Minnesota), *see Maher v. Sempris LLC*, No. 13-2022 ADM/JJK, 2014 WL 4749186 at *3, 6 (D. Minn. Spt. 24, 2014) (Minnesota company developed sales scheme); *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) (Minnesota company developed marketing materials and

[183] The same reasoning applies to other Minnesota consumer protection statutes, including the MUTPA. *Cf.* Restatement (Second) of Conflict of Laws § 145 cmt. f (1971) ("the place of injury does not play so important a role for choice-of-law purposes in the case of false advertising . . . . Instead the principal location of the defendant's conduct is the contact that will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from false advertising.")

policies in Minnesota).

Plaintiffs' allegations support significant actionable conduct occurring in or emanating from Minnesota attributable to all Defendants. Syngenta Seeds has its principal place of business in Minnesota and "develops, produces, and sells" products including Viptera and Duracade corn seed. PC ¶ 69; NC ¶ 15. It sold and marketed Viptera and Duracade corn seed. PC ¶¶ 69, 167, 295; NC ¶¶ 15, 114, 250. It was a party to stewardship agreements for these seeds. PC ¶¶ 211-17, 303-04; NC ¶¶ 158-64, 258-59. It is reasonable to infer that significant conduct related to these activities occurred in Minnesota. Syngenta Seeds did not act alone, but "in a collective manner and/or as joint venturers" with the other Defendants. PC ¶ 80; NC ¶ 27.

Syngenta argues that Plaintiffs do not allege Syngenta Seeds "was the central source of the allegedly deceptive conduct," but cites no authority for such a test. The stewardship agreements and practices of Syngenta Seeds form one basis for Plaintiffs' claim. PC ¶ 395; NC ¶ 373. They are also supported by conduct and representations by other Defendants, all of which occurred in the course of a collective enterprise involving sales and marketing practices for a Minnesota company. *Id.* Such activity is sufficient. *Maher*, 2014 WL 4749186, at *3, 6; *Mooney*, 244 F.R.D. at 535. Sufficient conduct in, related to or emanating from Minnesota exists for application of the MUTPA and MCFA under Minnesota law.

For the same reasons, no constitutional impediment exists to applying Minnesota law to claims involving non-residents. Constitutional concerns create "modest restrictions" requiring only a "'significant contact or significant aggregation of contacts'" with the state whose law is being applied. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Consideration of the "expectation of the parties" also is appropriate. *Id.* at 822. Syngenta's argument that Plaintiffs have not alleged the "nerve center"

of its activity as Minnesota is a red herring. That is not the test under *Allstate* or *Shutts*. The allegation that Syngenta AG exercised a high degree of control does not reduce Minnesota contacts or relieve Syngenta Defendants of liability for their actions related to Minnesota.

Minnesota also has significant contacts to the claims asserted by each member of the putative classes. Syngenta's claims that all representations were made "to others" misstates Plaintiffs' allegations. Mem. at 87. Plaintiffs allege widely disseminated statements to the government, the public, the press and through the internet. PC ¶ 395; NC ¶ 373. Syngenta Seeds, the entity that sold the GM seed, is a Minnesota company and it is reasonably inferable that its marketing and stewardship practices (in which the other Defendants were collectively involved) occurred in and/or emanated from Minnesota. It should be no surprise that Minnesota law would apply. *Mooney*, 244 F.R.D. at 535. It is also reasonable to infer that Plaintiffs would expect the law of Minnesota, where the company whose product was being so widely marketed is located, would apply. *See id.*

Choice-of-law analysis also supports application of the MUTPA and MCFA to non-residents. For states applying the "most significant relationship" test,[184] Minnesota law controls. Here, there is a Defendant with its principal place of business in Minnesota, together with others pursuant to a collective effort and/or joint venture, engaged in unfair and deceptive conduct occurring in or emanating from Minnesota for the benefit of a Minnesota company. For claims involving false statements, the place of the wrongful conduct weighs more heavily than the place of injury occurred. *See* Restatement (Second) of Conflict of Laws § 145 cmt. f (1971).

[184] Louisiana uses a similar test and compels the same result for application of these consumer protection statutes. *See* La. Civ. Code Art. 3515, 3542; *accord* Mem. at 18 n.42. *Kreger v. Gen. Steel Corp.*, No. 07-575, 2010 WL 2902773, at *13 (E.D. La. July 19, 2010) is inapposite. *See* Mem. at 88 n.113. The choice-of-law statutes cited there are specific to common-law torts and "loss distribution and financial products," such as insurance. 2010 WL 2902773, at *13.

For actions filed in states applying Minnesota "*Leflar*" factors, Minnesota law controls for reasons discussed at length in *Mooney*, 244 F.R.D. at 535-37. It is predictable that the false and misleading statements made in a collective effort centered in Minnesota to benefit a Minnesota company would be actionable under Minnesota law. *Id*. at 536. Minnesota has sufficient connection to and interest in the facts and issues being litigated. *Id*. And the governmental-interest factor weighs in favor of Minnesota because of its interest in regulating conduct within its borders and because other states' interests in applying their own laws "is not so strong as to prevent their citizens from benefitting from Minnesota's willingness to provide statutory and common law remedies for fraudulent conduct emanating from Minnesota." *Id*. at 537. The other factors – simplification of the judicial task and the better rule of law – do not factor heavily or are neutral. *Id*. at 536-37.

Even if the Court harbors doubt about whether Minnesota's statutes could apply to nationwide (or non-resident) classes, dismissal would be premature since at a minimum, the Minnesota claims would apply to Minnesota Plaintiffs. Discovery is needed to clarify the relationship between defendants and conduct in Minnesota. *Maher*, 2014 WL 4749186, at *6. Syngenta's key cases were decided no earlier than class certification, on a developed factual record presumably after discovery. *E.g., In re St. Jude Med., Inc.*, 425 F.3d 1116 (8th Cir. 2005) (class certification decision); *Cruz v. Lawson Software, Inc.*, Civ. No. 08-5900, 2010 WL 890038, at *7 (D. Minn. Jan. 5, 2010) (motion for class certification); *see also Shutts*, 472 U.S. 797 (reviewing litigation-generated facts). Even *Mooney*, which Syngenta tries in vain to distinguish, related to class certification.

Syngenta's request for dismissal is contrary to the general rule that a ruling on class certification should normally be based on "'more information than the complaint itself affords.'"

Doctor v. Seaboard Coast Line R.R. Co., 540 F.2d 699, 707 (4th Cir. 1976). Courts routinely deny motions to dismiss class claims on contention that certification is precluded as a matter of law. *E.g., In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 616 (N.D. Cal. 2007) (expressing skepticism about class definitions but denying motion to dismiss because "plaintiffs should at least be given the opportunity to make the case for certification based on appropriate discovery"); *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991). Dismissal upon a preliminary choice-of-law assessment would be particularly inappropriate, given the fact-specific nature of the constitutional and choice-of-law inquiries. *See Leisman v. Archway Med., Inc.*, 53 F. Supp. 3d 1144, 1148 (E.D. Mo. 2014) ("such analysis is better suited for a motion for summary judgment"); *Broin & Assoc., Inc. v. Genecor Int'l, Inc.*, 232 F.R.D. 335, 339 (D.S.D. 2005) (declining choice-of-law determination on motion to dismiss); *see also Cruz*, 2010 WL 890038, *9 (declining choice-of-law determination at class certification).

2. Plaintiffs' claims are not barred because Syngenta "sold to merchants."

Syngenta's argument that the MUTPA and MCFA do not apply because only merchants directly purchased its seed is legally and factually incorrect. These statutes are "very broadly construed to enhance consumer protection." *Group Health Plan, Inc.*, 621 N.W.2d at 10 (quoting *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996)). "[A]ny person" may pursue an action "as long as the plaintiff alleges an injury by conduct that violates one or more substantive [consumer protection] statutes."[185] *Id.* at 11. Syngenta asserts that non-purchasers cannot recover if the product was directly purchased by only merchants. Mem. at 89 (citing *Pugh v. Westreich*, No. A04-657, 2005 WL 14922, at *3 (Minn. Ct. App. 2005)).

[185] Both the Private AG Statute and the MUTA separately authorize private actions whereby "any person" may sue for damages. Minn. Stat. §§ 8.31, subd. 3a, 325D.15.

Syngenta drastically misreads *Pugh*. The relevant question is not who purchased from a defendant, but whether defendant's conduct violated the statutes and caused injury. In *Pugh*, the relevant conduct was a limited transaction in which defendants allegedly defrauded a merchant, to the injury of the plaintiff. 2005 WL 14922, at *3. Conduct exclusively between merchants does not support MUTPA or MCFA claims and, therefore, the *Group Health* standard was not met. The result in *Pugh* was a function of the nature of the *conduct* in that case, not the purchaser.[186] Plaintiffs, on the other hand, allege widely disseminated representations and statements directed toward *the public* violating the MUTPA and MCFA. *See* PC ¶¶ 394-400; NC ¶¶ 389-95. The conduct alleged supports valid claims regardless of whether Syngenta sold only to merchants. *See Kinetic*, 672 F. Supp. 2d at 946 (third-party payor's claims against medical device manufacturer not dismissed even though manufacturer "sold [to] physicians or hospitals" where "misrepresentations and omissions were made to the public at large.").

Even if Syngenta's standard were correct (it is not), dismissal is improper because Viptera purchasers are not merchants merely because they purchase corn seed, grow corn and sell corn. Mem. at 89-90.[187] "[O]nly 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." *Securian Fin. Group, Inc. v. Wells Fargo Bank N.A.*, No. 11-2957 (DWF/HB), 2014 WL 6911100, at *6 (D. Minn. Dec. 8, 2014) (emphasis added). The *specific good* at issue here is not corn, but GM corn seed, specifically GM seed with traits not approved

[186] Under Syngenta's strained reading, a party engaging in egregious deception of consumers would be immune from the MUTPA and MCFA simply by selling only to distributors. This prospect has been rejected. *See Kinetic Co. v. Medtronic, Inc.*, 672 F. Supp. 2d 933, 941 (D. Minn. 2009) ("[Defendant] cannot be protected against its own harm by marketing its products through intermediaries.").

[187] Plaintiffs are not Viptera purchasers. *See, e.g.*, PC ¶¶ 12-63, 362.

for export to a key market.[188] Plaintiffs do not allege that Viptera purchasers resell seed or otherwise deal in GM seed sufficiently to be merchants. And they allege that Syngenta—not growers—had special knowledge regarding Viptera import approvals, channeling requirements and possible trade disruptions. PC ¶¶ 401-04; NC ¶¶ 396-99.

3. Plaintiffs' claims benefit the public.

Plaintiffs' claims benefit the public.[189] Syngenta flatly misstates that a public benefit will "only" be found where "the plaintiff seeks relief primarily aimed at altering the defendant's conduct" and "typically requires seeking injunctive relief." Mem. at 90 (citing *Buetow v. A.L.S. Enters., Inc.*, 888 F. Supp. 2d 956, 961 (D. Minn. 2012)). *Buetow* does not state a public benefit is found exclusively in such circumstances. *Id*. at 961. Moreover, *Beutow*'s focus on relief is based on federal decisions. *Id.* The Minnesota Supreme Court has not adopted that standard, but focuses on impact on the "public at large." *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 330 (Minn. 2003); *see In re Levaquin Prods. Liab. Litig.*, 752 F. Supp. 2d 1071, 1078 (D. Minn. 2010) (where federal courts focus on relief, "the Minnesota Supreme Court is as much if not more concerned with the *degree* to which the defendants' alleged misrepresentations affect the public"). Nor does the Minnesota Supreme Court require injunctive relief. *Levaquin*, 752 F. Supp. 2d at 1078 (no indication of injunctive relief in *Collins*); *see ADT Security Servs. Inc. v.*

[188] Farmers are not necessarily "merchants" regarding every matter touching on farming. *Untiedt v. Grand Labs., Inc.*, No. C4-94-772, 1994 WL 714308, at *3 (Minn. Ct. App. Dec. 27, 1994) (dairy farmer not merchant regarding cow vaccine); *Minnesota Forest Prods., Inc. v. Ligna Machinery, Inc.*, 17 F. Supp. 2d 892, 905 (D. Minn. 1998) ("not all large, sophisticated purchasers are necessarily merchants in good of the kind they buy" (citation omitted)). Syngenta's cases are fact-specific and do not support a blanket rule that farmers are merchants for all purposes. *Tisdell v. ValAdCo*, No. C0-01-2054, 2002 WL 31368336, at *10 (Minn. Ct. App. Oct. 16, 2002) (farmers "not consumers within the context of these transactions"); *Huntting Elev. Co. v. Biwer*, No. C9-98-548, 1998 WL 747170, at *2 (Minn. Ct. App. Oct. 27, 1998) ("producer was not a consumer" for purposes of that "the grain transaction.").

[189] The public benefit requirement exists only in actions pursued through the private right of action in the Private AG statute (Minn. Stat. § 8.31, subd. 3a). *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). No such requirement exists under the MUTPA's private right of action. Minn. Stat. § 325D.15. If the Court determines these claims do not benefit the public, the MUTPA claim nonetheless survives.

Swenson, 687 F. Supp. 2d 884, 891-92 (D. Minn. 2009) (injunctive relief not required).

Plaintiffs' action benefits the public and involves public misrepresentations. PC ¶ 413; NC ¶ 408; *see also Collins*, 655 N.W.2d at 330. It seeks class recovery. *In re Nat'l Arb. Forum Trade Pracs. Litig.*, 704 F. Supp. 2d 832, 839 (D. Minn. 2010) (public benefit in class monetary relief even where Attorney General already stopped activity). It will clarify the "duties and liabilities" for GM developers and hold them responsible for injuries caused by "irresponsible and intentional acts." PC ¶ 413; NC ¶ 408; *see also Kinetic Co.*, 672 F. Supp. 2d at 946 (placing costs and expense where "it ought to be borne" may benefit public).

B. Colorado Consumer Protection Act ("CCPA").

Syngenta's challenges only class treatment of CCPA claims.[190] Mem. at 91 (citing *Martinez v. Nash Finch Co.*, 886 F. Supp. 2d 1212, 1219 (D. Colo. 2012)). This argument is premature. Plaintiffs have not moved for class certification and only their individual claims are before the Court. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) (unnamed putative class members not parties). Regardless, *Martinez* incorrectly interpreted the remedies provision of the CCPA, which provides for statutory *or* actual damages "[e]xcept in a class action." Col. Rev. Stat. § 6-1-113(2). The private right of action provision of the CCPA, however, does not preclude class actions. *Id.* at § 6-1-113(1). Correctly interpreted, the remedy provision provides only that plaintiffs may not obtain *statutory* damages through a class. It does not implicate class recovery of actual damages. *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 278 (Col. Ct. App. 1993) (statute "does not preclude class members from bringing an action for actual damages"). Another federal court examining the plain language of the statute

[190] Syngenta does not challenge, and there is no basis to dismiss, Plaintiffs' individual CCPA claims.

and *Robinson* correctly rejected Syngenta's interpretation.[191] That court also held "that the [CCPA] does not preclude class actions for actual damages." *In re OnStar Contract Litig.*, 600 F. Supp. 2d 861, 874 (E.D. Mich. 2009). This Court should follow Colorado state court precedent and the better reasoned federal court decision. "Had the Colorado legislature intended to preclude class actions for monetary damages, it could have done so. It did not." *Id.*

C. Illinois Consumer Fraud and Deception Practices Act ("ICFA").

Producers have ICFA standing. Syngenta's contrary argument rests on a misstated test. Mem. at 91. A consumer nexus exists where a defendant's conduct is either: (1) addressed to the market generally; or (2) otherwise implicates consumer protection concerns. *Bank One Milwaukee v. Sanchez*, 783 N.E.2d 217, 221 (Ill. App. Ct. 2003) (citation omitted); *see Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012). Syngenta fails to address the "market generally" standard. It also wrongly applies a test developed to determine whether "consumer protection concerns" are implicated where "a claim under the [ICFA] is premised upon a breach of contract" as the sole test for a finding a "consumer nexus." *See Brody v. Finch Univ. of Health Sciences/Chicago Med. Sch.*, 698 N.E.2d 257, 269 (Ill. App. Ct. 1998).

Plaintiffs allege a consumer nexus. They allege that Syngenta's acts were addressed to the entire market for its product, meeting the "market generally" standard. PC ¶ 519(a). Plaintiffs also allege conduct otherwise implicating consumer protection concerns, which are generally found where there is "an implication of public . . . welfare issues." *Credit Ins. Consultants, Inc. v. Gerling Global Reins. Corp. of Am.*, 210 F. Supp. 2d 980, 985 (N.D. Ill. 2002). Syngenta impacted the public welfare by, among other things, putting export markets at risk, causing unwanted commingling, causing trespasses to chattels, violating stewardship

[191] *Martinez* acknowledged that the CCPA section providing a private cause of action "contains no text limiting the ability of a plaintiff class to bring [a class] claim." 886 F. Supp. 2d at 1218.

obligations, and causing injury to Illinois corn Producers. PC ¶¶ 514-19.

Syngenta's factual arguments are incorrect. Plaintiffs allege harm to consumers because consumers of Syngenta's product are corn farmers, not consumers of corn. *See* Mem. at 91 (citing *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004)). *Williams* stands only for the proposition that where an input is sold as a part of a finished product, the manufacturer is not a consumer. *Id*. at 572 (action related to "components suppliers").[192] Viptera growers are consumers, and they were also injured. PC ¶ 517. That is a consumer nexus and this action benefits the public at large. *See, supra*, § XII.A.3. Moreover, Plaintiffs seek punitive damages, "designed as a punishment and as a warning and example to deter the defendant and others from committing similar offenses in the future." *Heldenbrand v. Roadmaster Corp.*, 660 N.E.2d 1354, 1360 (Ill. App. Ct. 1996). Syngenta's suggestion that Plaintiffs' decreased prices benefitted harvested-corn consumers, Mem. at 91, is unfounded. First, it is outside the scope of the Complaints. Second, it is equally inferable that buyer prices increased due to costs created by Syngenta's disruption of the corn market.

Deregulation of MIR162 does not immunize Syngenta.[193] The question is whether the "action or transaction ***at issue*** is 'specifically authorized by laws administered' by the regulatory body." *Price*, 848 N.E.2d at 36 (emphasis added and citations omitted). At issue is not Syngenta's ability to sell GM corn, but how it unfairly carried out commercialization. *See*

[192] Plaintiffs do not allege that growers resold seed either directly or as a component. Where a product is used in the course of business, but not physically passed on in a finished product, the business is the consumer. *Lefebvre Intergraphics, Inc. v. Sanden Machine Ltd.*, 946 F. Supp. 1358, 1369 (N.D. Ill. 1996) (commercial printer is consumer of printing press); *AGFA Corp. v. Wagner Printing Co.*, No. 02C2400, 2002 WL 1559663, at *2 (N.D. Ill. July 10, 2002) (printer is consumer of film, plates and proofing).

[193] Compliance with federal law is not a shield from ICFA liability. *Price v. Phillip Morris, Inc.*, 848 N.E.2d 1, 40 (Ill. 2005); *Zapka v. Coca-Cola Co.*, No. 99C8238, 2001 WL 1558276, at *5 (N.D. Ill. Dec. 5, 2001).

Zapka, 2001 WL 1558276, at *5 (relevant conduct not the *labeling* of Diet Coke but the *marketing* of Diet Coke). Syngenta attempts to twist the holding in *Price*, and the deregulation process in general. In *Price*, the court held that where a federal regulatory agency approved the use of specific, descriptive marketing terms, the manufacturer cannot later be held liable for using those terms. *Price*, 848 N.E.2d at 49-50. There is no allegation here that a government agency issued any direction on to how, when or even if Viptera should be commercialized. The action ***at issue***, how Syngenta would commercialize MIR162 corn, is not "'specifically authorized by laws administered' by the regulatory body." *Id.* at 36.

D. Nebraska Consumer Protection Act ("NCPA").

Syngenta say Plaintiffs lack standing because they are not purchasers. Mem. at 93. But the Nebraska Supreme Court has "conclude[d] that the [NCPA] allows *any person* who is injured by a violation of [the NCPA] which *directly or indirectly affects the people of Nebraska*" to bring a civil action to recover damages. *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 37 (Neb. 2004) (emphasis added). *Kanne v. Visa USA, Inc.* 723 N.W.2d 293 (Neb. 2006) did not alter *Arthur* or create a purchase requirement for unfair practices claims. *Kanne* only recognized an "analytically distinct" standing requirement for *antitrust claims* under the NCPA.[194] *Id*. at 300. Plaintiffs allege no antitrust claim and need not allege a purchase. They sufficiently allege injury from unfair acts affecting the Nebraska public. *See e.g.*, PC ¶¶ 360-61, 699-711.

Syngenta's claim that it is exempt because it was *formerly* regulated again sweeps too broadly and lacks support. Plaintiffs allege five unfair and deceptive acts Syngenta voluntarily

[194] *Kanne* adopted the "direct-injury doctrine" applicable in federal antitrust actions as stated in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), as an additional bar to remote or derivative antitrust claims. 723 N.W.2d at 301-02. Even if applicable to unfair practice claims, which *Kanne* did not hold and Syngenta has not argued, Plaintiffs have standing. Plaintiffs claim direct injury due to Syngenta's actions, not derivative claims based upon injuries suffered by another and passed along to Plaintiffs. *See id.* at 298-99, 302; *see also* PC ¶¶ 360-61, 701-11.

engaged in *after* Viptera was deregulated. PC ¶ 699. Again, there is no allegation of regulation on the specific acts supporting Plaintiff's claims at the time they occurred.[195] *See Hage v. Gen. Servs. Bureau*, 306 F. Supp. 2d 883, 890 (D. Neb. 2003).[196] Plaintiffs dispute that NCPA exceptions are broader than federal preemption. Mem. at 94 (quoting *In re Conagra*, 908 F. Supp. 2d at 1104). *Conagra* cites no decision supporting this conclusion and Nebraska will likely look to Washington, which has a nearly identical statute. *See Kuntzelman v. Avco Fin. Servs. of Neb., Inc.*, 291 N.W.2d 705, 707 (Neb. 1980) ("[O]ur Act and the Washington Act are practically identical in scope and wording, particularly with reference to the exemption provision. Therefore, the decisions of the Washington courts interpreting that state's exemption provision are helpful and instructive."). The Washington Supreme Court has held that conduct not preempted by federal regulation is subject to its statutes under an exception similar to Nebraska's statute. *Vogt v. Seattle-First Nat'l. Bank*, 817 P.2d 1364, 1371 (Wash. 1991).[197]

E. North Carolina Unfair and Deceptive Trade Practices Act ("NCUTPA")

The NCUTPA "provides standing to *any person* who suffers any injury, as well as for any business injury." *See Walker v. Fleetwood Homes of N.C., Inc.*, 653 S.E.2d 393, 397 (N.C. 2007) (citation omitted); N.C. Gen. Stat. § 75-16. The NCUTPA applies to "unfair or deceptive

[195] To the extent Syngenta looks to FIFRA regarding its failure to warn of contamination, nothing in Plaintiffs' allegation suggests that such warning was a label requirement. PC ¶ 699.

[196] Syngenta argues that indirect regulation is sufficient, but that standard was articulated where a regulator had continuing supervision obligations. *Wrede v. Exchange Bank of Gibbon*, 531 N.W.2d 523, 530 (Neb. 1995); *see also Hydroflo Corp. v. First Nat'l Bank of Omaha*, 394 N.W.2d 615, 622 (Neb. 1984). *In re Conagra Foods Inc.*, 908 F. Supp. 2d 1090, 1104 (C.D. Cal. 2012), also cited by Syngenta, involved continuing regulation as well.

[197] *Kuntzelman* also noted that the regulated activities are "subject to monitoring and regulation" even after regulatory approval is obtained. 291 N.W.2d at 707 (citing *State v. Reader's Digest Ass'n*, 501 P.2d 290, 303 (Wash. 1972)).

acts . . . *in or affecting commerce*." N.C. Gen. Stat. § 75-1.1(a) (emphasis added).[198] Syngenta incorrectly argues that businesses must be (or potentially be) competitors, or engage in commercial dealings with one another. Mem. at 94. The proper inquiry is not the relationship between the parties, "but rather whether the defendant's allegedly deceptive acts *affected* commerce." *J.M. Westall & Co, Inc. v. Windswept View of Asheville, Inc.*, 387 S.E.2d 67, 69 (N.C. Ct. App. 1990); *see also HAJMM Co.*, 403 S.E.2d at 492 ("plaintiff's status as a business partnership does not remove it from [NCUTPA] protection" and it may pursue a claim as long as "defendants' conduct was 'in or affecting commerce'"). Syngenta's conduct was indisputably "in commerce" and certainly "affected commerce." Plaintiffs' lack of Viptera or Duracade purchases does not carry the implication Syngenta suggests. Mem. at 94 (citing *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999)). Plaintiffs are corn seed purchasers to whom Syngenta's unfair and deceptive conduct was directed.[199] Nor is a purported lack of harm on the consuming public a barrier. Mem. at 94-95. "North Carolina courts have restricted the Act only to ensure that challenged activities affect consumers *or commerce*." *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 419 (E.D. Pa. 2010); *see Bhatti v. Buckland*, 400 S.E.2d 440, 444 (N.C. 1991) ("the transaction at issue was indisputably a commercial land transaction that affected commerce in the broad sense."). Here, as discussed throughout, Plaintiffs have alleged that very harm.

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[198] "Commerce" includes "all business activities." N.C. Gen. Stat. § 75.1-1(b). "'Business activities'" are "the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 493 (N.C. 1991).

[199] Plaintiffs reject Syngenta's contention that unfair or deceptive conduct involving misrepresentations requires actual reliance. Such a requirement is contrary to holdings of the North Carolina Supreme Court. *See Winston Realty Co. v. G.H.G., Inc.*, 331 S.E.2d 677, 680 (N.C. 1985) (rejecting application of contributory negligence defense to NCUTPA claims because "the actor's conduct is of sole relevance" and noting that a plaintiff "need only show that an act or practice possessed the tendency or capacity to mislead, or created a likelihood of deception, in order to prevail.").

F. North Dakota Unlawful Sales or Advertising Practices Act ("NDCC").

Syngenta claims Plaintiffs' NDCC claims require deceptive acts made in connection with the sale of merchandise and that the deceptive statements must be made to consumers. Both arguments fail to provide any basis for dismissing Plaintiffs' NDCC claims.

Under the NDCC, it is unlawful to use "any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the *sale* or *advertisement* of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby." N.D. Cent. Code § 51-15-02 (emphasis added). Plaintiffs allege detailed misrepresentations that form the basis of their claim, PC ¶¶ 771-80, including that Syngenta "distributed misleading written advertisements and promotional materials to the public for the purpose of inducing sales" *Id.* at ¶ 774. These allegations are sufficient. *E.g., DJ Coleman, Inc. v. Nufarm Ams., Inc.*, 693 F. Supp. 2d 1055, 1077 (D.N.D. 2010) (false webpage ads that herbicide was safe for use on sunflowers sufficient to withstand a motion to dismiss). Syngenta misquotes *Thimjon Farms P'ship v. First Int'l Bank & Trust*, 837 N.W.2d 327, 338 (N.D. 2013) to imply a statement must be made to consumers.[200] "Person" is not limited to a "consumer" or "consumer transactions" under the NDCC. *See Jorgenson v. Agway, Inc.*, 627 N.W.2d 391, 394 (N.D. 2001) (definition of "person" manifests legislative intent that the NDCC applies to farmers who purchase seeds for a commercial purpose). Plaintiffs' allegations fall within the scope of the NDCC.

CONCLUSION

For all the reasons stated, Syngenta's motion should be denied.

[200] *Thimjon* stands for the unremarkable proposition that statements made by a bank to a third party that do not involve the sale or advertisement of any merchandise cannot form the basis of a NDCC claim.

Date: July 19, 2015

Respectfully Submitted by:

/s/ Patrick J. Stueve
Patrick J. Stueve—KS Bar #13847
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
Telephone: (816) 714-7100
stueve@stuevesiegel.com

CO-LEAD COUNSEL AND LIAISON COUNSEL FOR PLAINTIFFS

Don M. Downing
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, MO 63101
Telephone: (314) 241-5620
ddowning@grgpc.com

CO-LEAD COUNSEL FOR PLAINTIFFS AND INTERIM RULE 23 CLASS COUNSEL

William B. Chaney
GRAY REED & MCGRAW, P.C.
1601 Elm Street, Suite 4600
Dallas, TX 75201
Telephone: (469) 320-6031
wchaney@grayreed.com

Scott Powell
HARE WYNN NEWELL & NEWTON
2025 3rd Ave. North, Suite 800
Birmingham, AL 35203
Telephone: (205) 328-5330
scott@hwnn.com

CO-LEAD COUNSEL FOR PLAINTIFFS

Jayne Conroy
SIMMONS HANLY CONROY LLC
112 Madison Ave 7th Floor
New York, New York 10016
Tel: 212 784 6400
Fax: 212-213-5949
jconroy@simmonsfirm.com

Christopher M. Ellis #6274872IL
BOLEN ROBINSON & ELLIS LLP
202 S. Franklin St., 2nd Floor
Decatur, IL 62523
Tel: 217-429-4296
Fax: 219-329-0034
cellis@brelaw.com

Richard M. Paul
PAUL MCINNES LLP
601 Walnut, Suite 300
Kansas City, Missouri 64106
Tel: 816-984-8100
Fax: 816-984-8101
richard@paulmcinnes.com

Robert K. Shelquist #21310X
LOCKRIDGE GRINDAL NAUEN PLLP
100 Washington Ave. South, Suite 2200
Minneapolis, MN 55401
Tel: 612-339-6900
Fax: 612-339-0981
rkshelquist@locklaw.com

Stephen A. Weiss
SEEGER WEISS LLP
77 Water Street
New York, New York 10004
Tel: 212-584-0700
Fax: 212-584-0799
sweiss@seegerweiss.com

Scott E. Poynter
EMERSON POYNTER LLP
1301 Scott Street
Little Rock, AR 72202
Tel: 501-907-2555
Fax: 501-907-2556
scott@emersonpoynter.com

Thomas V. Bender
WALTERS BENDER STROHBEHN & VAUGHAN, P.C.
2500 City Center Square
1100 Main Street
Kansas City, MO 64105
Tel: 816-421-6620
Fax: 816-421-4747
tbender@wbsvlaw.com

PLAINTIFFS' EXECUTIVE COMMITTEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 19, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Patrick J. Stueve
Co-Lead Counsel and Liaison Counsel for Plaintiffs

APPENDIX A

IMPROPER ALLEGED FACTS, INFERENCES AND DOCUMENTS CONTAINED IN OR REFERENCED BY SYNGENTA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
1.	"In the summer of 2013, a bumper corn crop depressed prices dramatically, causing the very losses Plaintiffs seek to recover in this case." Mem. at 1.	Not alleged in Complaints. The allegation that the alleged bumper corn crop caused the "very losses Plaintiffs seek to recover" is directly contradicted by the Complaints, which seek the losses caused by the loss of the Chinese export market for U.S. corn due to the discovery of MIR162 in U.S. corn shipments. *See* PC ¶¶ 324-61 and 5; NC ¶¶ 279-332 and 5.
2.	"Faced with its own corn glut, China decided in November to turn away U.S. corn shipments on the claimed basis that they contained corn grown from Syngenta's genetically modified ("GM") corn seed called Viptera." Mem. at 1.	Not alleged in Complaints. The inference that China turned away U.S. corn shipments based upon "its own corn glut" is contrary to the allegations and reasonable inferences therefrom in Plaintiffs' favor. *See e.g.*, PC ¶¶ 296-97 and 3; NC ¶¶ 251-252 and 3.
3.	"It was also well known in the industry that China had not yet approved Viptera." Mem. at 1.	Not alleged in Complaints. Contrary to allegations and reasonable inferences therefrom that Syngenta misled the industry, including farmers, as to Viptera's approval status. *See, e.g.*, PC at 4 and ¶¶ 240-80; NC at 4 and ¶¶ 187-227.
4.	"They concluded it was in their economic interest to try to meet the special standards of the Chinese export market." Mem. at 1-2.	Not alleged in Complaints.
5.	"Others—including the Non-Producer Plaintiffs—took a different approach. Based on the "costs" involved to test for and segregate Viptera, NC ¶ 296, they chose to accept Viptera for what, by law, it was: fungible U.S. "yellow corn" as defined by the USDA." Mem. at 2.	Not alleged in Complaints. Contrary to allegations and reasonable inferences therefrom that Syngenta decided not to provide test kits or other test methods to farmers or grain handlers despite its representation in its own launch policy that it would do so. PC ¶¶ 197-99; NC ¶¶ 144-46. Syngenta also mischaracterizes NC ¶ 296, which reads as follows: "Grain elevators test

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
		and grade corn for weight, moisture content and foreign materials. Grain elevators are not equipped to test and segregate corn for genetic traits due to the costs associated with such a time-consuming process. Many grain elevators are not equipped to test for the MIR162 trait in corn."
6.	"They bought Viptera corn without distinction and mixed it with the other corn in their facilities." Mem. at 2.	Not alleged in Complaints.
7.	"Then, knowing that China had not approved Viptera for import, and seeking to profit from record-high prices driven by corn shortages in 2011 and 2012, they shipped it to China anyway." Mem. at 2.	Not alleged in Complaints and contrary to allegations and reasonable inferences therefrom that Syngenta misled the industry regarding Viptera's approval status. *See* 3, *supra*.
8.	"That approach to commingling and shipping Viptera to China worked fine for two years until the bumper crop of 2013 pushed down prices by 34% between July and October." Mem. at 2.	Not alleged in Complaints and contrary to allegations and reasonable inferences therefrom that Syngenta misled the industry regarding Viptera's approval status. *See* 3, *supra*.
9.	"Plaintiffs' convoluted theory of causation winds its way through a host of actions taken by others *after* Syngenta relinquished control of its Viptera seed, including farmers who planted the seed (allowing cross-pollination); grain elevators that bought and mixed corn without distinguishing for Viptera (and then shipped it to China knowing that it likely contained Viptera); and Chinese officials who conveniently invoked Viptera as the reason for turning away U.S. corn after the price of corn had dropped by over 30% (thus giving Chinese buyers a way out of expensive contracts)." Mem. at 2.	No allegation in Complaints that Syngenta relinquished control of seed after sale, and contrary to the allegations that Syngenta represented to the USDA that it would maintain control after sale through a "wide ranging grower education campaign" and channeling and "stewardship agreements" which "will include a term requiring growers to divert this product away from export markets (*i.e.* channeling) where the trait has not yet received regulatory approval for import." PC ¶ 131; NC ¶ 78. No allegation in Complaints that any farmers planted the seed to allow cross-pollination (but there is an allegation that Syngenta encouraged them to do so). PC ¶¶ 201-02; NC ¶¶ 148-49. No allegation in Complaints that grain elevators shipped corn to China knowing that it likely contained Viptera. Not alleged in Complaints that Chinese officials "conveniently" invoked

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
		Viptera as the reason for turning away U.S. Corn, and contrary to allegations and reasonable inferences therefrom that China rejected U.S. corn shipments due to MIR162 contamination.
10.	"And the last step in the chain turns on Plaintiffs' speculation that China's actions lowered the price of U.S. corn." Mem. at 2.	Not alleged in the Complaints, and contrary to allegations that under the basic laws of supply and demand, China's reduced demand for U.S. corn necessarily resulted in U.S. corn farmers receiving a lower price than they otherwise would have received. *See* PC ¶¶ 324-61 and 5; NC ¶¶ 279-327 and 5.
11.	"Imposing such a duty would also squarely undermine the policy behind the U.S. regulatory framework, under which, once approved by the USDA, the EPA, and the FDA, GM crops are treated exactly the same as non-GM crops—an approach that has fostered such widespread acceptance that GM varieties now make up 93% of U.S. corn production." Mem. at 3.	Not alleged in Complaints.
12.	"Plaintiffs' claimed injuries consist solely of disappointed economic expectations in not receiving the price Plaintiffs had hoped for when selling corn." Mem. at 4.	Contrary to the allegations of the Complaints alleging the following: "Syngenta's acts and omissions have resulted 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 [plaintiffs'] corn, harvested corn, equipment, storage facilities, and land." PC ¶ 319; NC ¶ 274.
13.	"Plaintiffs' complaints hinge on the premise that genetically modified crops must be segregated from those that are not . . ." Mem. at 5.	Not alleged in Complaints and contrary to allegations and reasonable inferences therefrom that Plaintiffs' Complaints are based upon, among many other things set forth in detail in the Complaints, the following: (1) prematurely commercializing Viptera and Duracade on a widespread basis without reasonable or adequate safeguards;

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
		(2) instituting a careless and ineffective "stewardship" program; (3) failing to enforce or effectively monitor its stewardship program; (4) selling Viptera and/or Duracade to thousands of corn farmers with knowledge that they lacked the mechanisms, experience, ability and/or competence to effectively isolate or "channel" those products; (5) failing to adequately warn and instruct farmers on the dangers of contamination by MIR162 and at least the substantial risk that growing Viptera® would lead to loss of the Chinese market; (6) distributing misleading information about the importance of the Chinese market; and (7) distributing misleading information regarding the timing of China's approval of Viptera and/or Duracade. PC at ¶ 417; NC at ¶ 418.
14.	"The United States Department of Agriculture ("USDA") defines genetic engineering as 'a precise and predictable method used to introduce new traits into plants and animals by moving genetic elements from one or more organisms into another.'" Mem. at 5.	Not alleged in the Complaints, not contained in statute or regulation. Not subject to judicial notice. *See Operating Engineers Local 101 Pension Fund v. Al Muehlberger Concrete Const., Inc.*, No. 13-0250-JAR-DJW, 2013 WL 5409116, at *2 (D. Kan. Sept. 26, 2013) (declining to take judicial notice of copies of website printouts from governmental agencies because such documents are "not reliable"). Moreover, "[j]udicially noticed documents 'may only be considered to show their contents, not to prove the truth of matters asserted therein.'" *Id.* at *2 (quoting *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006)). The USDA policy statements and website documents Syngenta cites are offered for the truth of the matter asserted therein and do not meet the standard for judicial notice.
15.	"The government has recognized that the use of this biotechnology "has resulted in benefits to farmers, producers, and consumers" by "mak[ing] both insect pest control and weed management safer and	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
	easier while safeguarding crops against disease," including "allow[ing] for a significant reduction" in the use of pesticides." Mem. at 5.	
16.	"The benefits of biotechnology have prompted a dramatic increase in the use of GM seeds over the past two decades." Mem. at 5.	Not alleged in Complaints.
17.	"For some crops, such as corn, this has translated into near-universal usage across the United States." Mem. at 5.	Not alleged in Complaints.
18.	"Today, GM corn makes up 93% of all corn planted in the United States." Mem. at 5.	Not alleged in Complaints.
19.	"The use of GM technology has also produced corresponding increases in crop yields." Mem. at 5.	Not alleged in Complaints. Not subject to judicial notice. *See* 14, *supra*.
20.	"As the USDA has explained, biotechnology can help 'keep pace with demands for food while reducing production costs.'" Mem. at 6.	Not alleged in Complaints. Not subject to judicial notice. *See* 14, *supra*.
21.	"For these reasons, the U.S. Government long ago weighed the benefits of GM crops and adopted the policy of treating approved GM products the same as conventionally bred crops." Mem. at 6.	Not alleged in Complaints. Not subject to judicial notice. *See* 14, *supra*.
22.	"Syngenta has developed, manufactured, and sold GM seeds for decades, and its advances include two corn seed traits called MIR162 and Event 5307." Mem. at 6.	Not alleged in Complaints.
23.	"Each trait protects corn crops from insects and pests, thus increasing crop yields and reducing the need for pesticides." Mem. at 6.	Not alleged in Complaints.

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
24.	"MIR162 was incorporated into Syngenta's Viptera corn seed, making it resistant to above-ground pests like Lepidoptera (caterpillars)." Mem. at 6.	Not alleged in Complaints.
25.	"Several years after Viptera was approved and launched, Syngenta developed Event 5307, which controls pests like rootworm and is found in a corn seed product called Duracade." Mem. at 6.	Not alleged in Complaints.
26.	"According to the complaints, Syngenta began testing MIR162 in 1999 through field trials approved by the USDA." Mem. at 7.	Complaints do not allege the field trials were "approved by the USDA."
27.	"Syngenta conducted field testing in accordance with the USDA's strict "'performance standards'" for field testing to ensure that MIR162 did not enter the environment or food or feed supplies while it was still regulated." PC ¶ 119; NC ¶ 66. Mem. at 7.	Complaints do not allege that Syngenta concluded field testing "in accordance with" the USDA's performance standards.
28.	"In the process, the USDA considered and rejected alternatives to deregulation, including partial deregulation that would impose geographic restrictions on where Viptera could be planted." Mem. at 7.	Not alleged in the Complaints and not subject to judicial notice. *See* 14, *supra*
29.	"As a result, the USDA's unrestricted approval made Viptera, just like every other U.S.-approved GM corn product, a lawful and integral part of the U.S. corn supply under the USDA's broad definition of 'yellow corn.'" Mem. at 7-8.	Not alleged in Complaints. Cited regulation does not suggest anything about whether Vipera corn seed, as distinguished from harvested corn, is "yellow corn."
30.	"When Syngenta later developed Event 5307 for its Duracade corn product, Syngenta followed the same process." Mem. at 8.	Not alleged in the Complaints.

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
31.	"According to the complaints, Syngenta conducted 'at least 101 field trials' between 2005 and 2011, again in accordance with the USDA's strict field-testing regulations, with no allegations that Event 5307 entered the corn supply before it was approved." Mem. at 8.	Complaints do not allege the field trials for Event 5307 were "in accordance with the USDA's strict field-testing regulations."
32.	"In late 2009, Syngenta decided to begin commercialization upon achieving full deregulation of MIR162 from U.S. regulators and import approval in the markets identified by BIO." Mem. at 10.	Not alleged in Complaints. Contrary to allegations and reasonable inferences therefrom that "commercialization," under the BIO policy and industry convention, "means that first planting of seed for the production of a crop or crop product" (PC ¶ 101; NC ¶ 48) and that Viptera was first planted, and therefore first commercialized, in 2011. PC at 3; NC at 3.
33.	"It is undisputed that, consistent with the BIO Policy, Syngenta obtained approval from the United States, Canada, and Japan before Viptera was launched—the very countries that BIO had identified at the time." Mem. at 10-11.	Not alleged in Complaints.
34.	"Indeed, even before the first commercial planting began in 2011, many additional foreign countries, including Brazil, Korea, Taiwan, the Philippines, and Mexico, had approved Viptera for import as well." Mem. at 11.	Not alleged in Complaints.
35.	"Syngenta applied for import approval from China as soon as it was permitted to do so in March 2010." PC ¶ 139; NC ¶ 86. Mem. at 11.	Not alleged in Complaints that Syngenta applied for import approval from China "as soon as it was permitted to do so." Also not subject to judicial notice. *See* 14, *supra*.
36.	"At the time Syngenta launched Viptera in the United States in 2010, about one-third of 1% of annual U.S. corn production was exported to China." Mem. at 11.	Not alleged in Complaints. Contrary to allegations in Complaints that Syngenta commercialized Viptera in 2011, and the importance of China as an export market for U.S. corn at that time (PC at 3 and ¶¶ 114, 152-65, 325, 340; NC at 3 and ¶¶ 61, 99-112, 280, 306) and Syngenta's own employees

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		stating in January 2011 that "China has moved from an insignificant importer of U.S. corn to the second most important market for U.S. corn." PC ¶ 161; NC ¶ 108.
37.	"The grain industry (the companies best positioned to implement stewardship given that they actually handle the grain to be shipped abroad) has also made self-interested suggestions about 'appropriate' stewardship practices." Mem. at 12.	Not alleged in Complaints that the grain industry made "self-interested suggestions about 'appropriate' stewardship practices." Also contrary to allegations and reasonable inferences therefrom that Syngenta was best positioned to implement stewardship and that it represented to the U.S. Government that it would do so. *See, e.g.*, PC ¶ 131; NC ¶ 78.
38.	"Plaintiffs allege that the farmers planting Viptera did so in a way that permitted cross-pollination with neighboring fields." Mem. at 13.	Not alleged in the Complaints, but the Complaints do allege that Syngenta encouraged farmers to do so. PC ¶¶ 201-02; NC ¶¶ 148-49.
39.	"At the time [2010], it was well known that China had not yet approved Viptera for import." Mem. at 13.	Not alleged in Complaints. Contrary to allegations and reasonable inferences therefrom that Syngenta misled the industry, including farmers, as to Viptera's approval status. *See e.g.*, PC at 4, ¶¶ 240-80; NC at 4, ¶¶ 187-227.
40.	"Based on the information available in the market, a few grain elevators and exporters, including Bunge, decided to protect what they viewed as their economic best interests by simply refusing to accept Viptera." Mem. at 13.	Not alleged in the Complaints, except that Bunge refused to accept Viptera.
41.	"Unlike Bunge and others, *see* NC ¶ 178, many other grain elevators and exporters, including the Non-Producer Plaintiffs here, decided to accept and handle Viptera corn without distinction from non-Viptera corn." Mem. at 14.	Not alleged in the Complaints.
42.	"They did not refuse Viptera corn (like Bunge and others) or ask for any contractual assurance from growers about the seed they had used." Mem. at 14.	Not alleged in Complaints.

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43.	"They decided not to test for Viptera or to try to segregate Viptera to make sure that their corn complied with Chinese standards." Mem. at 14.	Not alleged in the Complaints. Contrary to the allegations and reasonable inferences therefrom that Syngenta decided not to make test kits or other test methods available to grain handlers and farmers despite its representation in its own launch policy that it would do so. PC ¶¶ 197-99; NC ¶¶ 144-46.
44.	"As Plaintiffs put it, they made the economic assessment that the 'costs' were not worth it." NC ¶ 296. Mem. at 14.	Not alleged in the Complaints and contrary to the allegations that it was Syngenta that made the determination not to provide the test kits or other test materials available despite the fact that it represented in its own launch policy that it would do so and that they would cost only one dollar each. PC ¶ 199; NC ¶ 146. Syngenta also mischaracterizes NC ¶ 296 which reads: "Grain elevators test and grade corn for weight, moisture content, and foreign materials. Grain elevators are not equipped to test and segregate corn for genetic traits due to the costs associated with such a time-consuming process. Many grain elevators are not equipped to test for the MIR162 trait in corn."
45.	"[T]he Chinese market accounted for only about one-third of 1% of U.S. corn production when Viptera was launched in the U.S." Mem. at 14.	Not alleged in the Complaints and contrary to the allegations and reasonable inferences therefrom. *See* 36, *supra*.
46.	"During this time, Syngenta kept market analysts and its investors updated on the status of Chinese approval." Mem. at 14.	Not alleged in the Complaints. Contrary to the allegations and reasonable inferences therefrom that Syngenta misled market analysts and others on the status of Chinese approval. *See* 3, *supra*.
47.	"If anything, Mr. Mack's statement about the uncertainty of predicting the Chinese regulatory process was prescient." Mem. at 15.	Not alleged in the Complaints. Contrary to the allegations and reasonable inferences therefrom that Syngenta mislead market analysts and others on the status of Chinese approval. *See* 3, *supra*.

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48.	"While Plaintiffs allege that China had a functioning regulatory system when Syngenta applied for import approval in 2010, *see* PC ¶ 140; NC ¶ 87, as it turned out, it was anything but functional—a fact that Syngenta could not have known given the opacity of the Chinese regulatory system." Mem. at 15.	Not alleged in the Complaints that the Chinese regulatory system "was anything but functional" or that Syngenta could not have known that. Contrary to the allegations and reasonable inferences therefrom that the Chinese regulatory system was functional, that Syngenta's own executive Charles Lee admitted under oath that it was functional (PC ¶ 140; NC ¶ 87), that Syngenta represented to the U.S. government that it was functional (PC ¶ 129; NC ¶ 76) and that Syngenta well understood the reasons for the time period required for approval were its own incomplete applications, its failure to provide a testing method, its decision to seek cultivation approval as well as import approval and other factors within Syngenta's control. PC ¶¶ 146-48, 254-64; NC ¶¶ 93-95, 201-11.
49.	"Under Chinese law, the application for Viptera should have been addressed within 270 days." Mem. at 15.	Not alleged in the Complaints. Contrary to allegations that approval typically takes 2-3 year (PC ¶ 147; NC ¶ 94) and that Syngenta was fully aware that approval would take much longer than 270 days even before it delayed the process through its own incomplete applications and other problems it caused. PC ¶¶ 146-48, 254-64; NC ¶¶ 93-95, 201-11.
50.	"In December 2012, the U.S. Trade Representative acknowledged China's 'apparent slow-down in issuing approvals' for biotechnology products." Mem. at 15.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
51.	"Indeed, due in part to public backlash in China over GM products and outstanding trade disputes between the U.S. and China concerning a variety of products, the Ministry of Agriculture did not approve a single application for importing new GM crops from June 2013 until December 11, 2014 (when Viptera was approved)." Mem. at 15.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.

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52.	"For two years, the Non-Producer Plaintiffs' approach to buying corn without testing for Viptera from growers, commingling it with other corn, and exporting it to China proceeded without incident." Mem. at 15.	Not alleged in the Complaints. Contrary to allegations and reasonable inferences therefrom that Syngenta decided not to make test kits or other test methods available to grain handlers and farmers despite its representation in its own launch policy that it would do so." PC ¶¶ 197-99; NC ¶¶ 144-46.
53.	"As the 2013/2014 corn season approached, however, USDA analysts projected a 'record' U.S. corn crop and significantly '[l]ower prices' as a result of higher production, moderately higher use, and record global supplies.'" Mem. at 15-16.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
54.	"Corn futures reflected the same expectations." Mem. at 16.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
55.	"That year's bumper corn crop was a record U.S. corn harvest (after several years of decreasing production) and the world's largest corn harvest in more than 50 years." Mem. at 16.	Not alleged in Complaints. Not subject to judicial notice. *See* 14, *supra*.
56.	"As predicted, U.S. corn prices dropped significantly in 2013, decreasing from $7.04 per bushel in February to $4.63 per bushel in October." Mem. at 16.	Not alleged in Complaints.
57.	"After that 34% price drop, China abruptly 'started testing for' the presence of MIR162 and began rejecting shipments of U.S. corn. [PC] ¶ 347; [NC] ¶ 313." Mem. at 16.	Not alleged in Complaints that China "abruptly" started testing at any point in time, or that China started testing for the presence of MIR162 following any drop in corn prices.
58.	"By rejecting these shipments, the Chinese government gave Chinese buyers a way out of millions of dollars of corn contracts that had been locked in at higher prices before the bumper crop, exactly as the U.S. Grains Council had predicted." *See* NC ¶ 241. Mem. at 16.	Not alleged in Complaints and contrary to the allegations and inferences therefrom contained in ¶ 241 of the Non-Producer Complaint, which states: "The uncertainty associated with the possibility that a shipment might test positive for MIR162 when tested in China caused Chinese customers to walk away from their contracts for U.S. corn and

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		DDGS and added a great deal of uncertainty to the market. Not surprisingly, prices for corn and DDGS fell."
59.	"But China also allegedly went further, deciding to effectively ban *all* U.S. corn imports and abruptly changing its policies to block imports of a different U.S. product, Distiller's Dried Grains with Solubles (DDGS)." *See* PC ¶ 347; NC ¶ 313. Mem. at 16.	Not alleged in Complaints that China "abruptly' changed its policies at any time.
60.	"Following China's actions, grain elevators and exporters—the same ones that made no effort to turn away Viptera corn and no effort to protect themselves contractually in their agreements with Chinese buyers as the Grains Council had recommended—sued Syngenta, later followed by the Producer Plaintiffs here." Mem. at 16.	Not alleged in the Complaints.
61.	"Thus, Duracade did not enter the U.S. corn supply until months after China began rejecting shipments of corn from the U.S." Mem. at 16.	Not alleged in the Complaints.
62.	"*First*, it makes no sense as a practical matter to impose a duty on a GM seed manufacturer like Syngenta to control the conduct of all those in the corn harvesting, grain processing, and grain-distribution businesses, because seed manufacturers simply do not have control over those third parties." Mem. at 28.	Not alleged in the Complaints and contrary to the allegations and reasonable inferences therefrom that Syngenta represented to the USDA that it would maintain control after sale through a "wide ranging grower education campaign" and channeling and "stewardship agreements" which "will include a term requiring growers to divert this product away from expert markets (*i.e.* channeling) where the grain has not yet received regulatory approval for import." PC ¶ 131; NC ¶ 78.
63.	"Here, as in the pharmaceutical, cell-phone, and gun cases, the manufacturer (Syngenta) has no authority to control how independent third parties downstream	Not alleged in the Complaints and contrary to the allegations and reasonable inferences therefrom. *See* 62, *supra*, and PC ¶ 131; NC ¶ 78.

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	handle corn and the resulting corn grain—especially including county elevators, terminal elevators, and exporters." Mem. at 28.	
64.	"It is apparent on the face of the complaints that Syngenta has neither the authority nor the expertise to tell those parties how to reorganize their own facilities to enable segregation of different types of corn." Mem. at 28.	Not alleged in the Complaints and contrary to the Complaints' allegations and reasonable inferences therefrom.
65.	"Those third parties, including the Non-Producers themselves, are in the best position to devise and implement any such system." Mem. at 28.	Not alleged in the Complaints and contrary to the allegations and reasonable inferences therefrom. *See* 62, *supra*, and PC ¶ 131; NC ¶ 78.
66.	"Precisely for that reason, in the context of *organic* corn (another specialty product), the USDA 'relies on *organic certifiers* and *producers*'—not GM manufacturers—'to determine preventative practices that most effectively avoid contact with GMOs on an organic operation.'" Mem. at 29.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
67.	"It 'has always been the responsibility of organic operations' to protect their products' special identity by 'manag[ing] the potential contact of organic products with other substances not approved for use in organic production systems.'" Mem. at 29.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
68.	"In fact, the USDA has expressly announced its view that parallel logic dictates that those who want to deal in corn free from approved GM traits should bear the burden of implementing the necessary safeguards to enable them to do so: 'conventional growers, similar to organic growers who desire to minimize cross pollination from G[M] corn into their plantings, have the same basic	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*. Contrary to the allegations and reasonable inferences therefrom that Syngenta represented to the USDA it would and could bear the burden of implementing necessary safeguards, including a "wide ranging grower education campaign" and channeling and "stewardship agreements" which will include a term requiring growers to divert this product away

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	options for avoiding pollination from other corn.' Indeed, in response to comments filed during numerous deregulation proceedings for GM traits (including Duracade), the USDA has repeatedly addressed concerns that a GM trait has not yet been approved in desired export markets by placing the onus on grain elevators and grain buyers, not GM manufacturers, to avoid the risk of rejection in export markets. When international acceptance of a specific event has not been attained, ***US elevators and grain buyers*** may either refuse to purchase the grain, or may require that it be diverted to elevators that are solely designated as sources for domestic grain sale." Mem. at 30.	from export markets (*i.e.*, channeling) where the grain has not yet received regulatory approval for import." PC ¶ 131; NC ¶ 78.
69.	"The Non-Producers could have taken steps to keep Viptera corn out of their elevators if they wanted to." Mem. at 30.	Not alleged in the Complaints, and contrary to allegations in the Complaints and reasonable inferences therefrom that Syngenta did not make testing methods for detecting MIR162 available. PC ¶¶ 197-99; NC ¶¶ 144-46.
70.	"They could have refused to accept Viptera, just as they allege that Bunge did." *See* NC ¶ 170. Mem. at 30-31.	Not alleged in the Complaints, and contrary to allegations in the Complaints and reasonable inferences therefrom that Syngenta did not make testing methods for detecting MIR162 available. PC ¶¶ 197-99; NC ¶¶ 144-46.
71.	"But Plaintiffs chose not to do so, and the law does not impose a duty on Syngenta to police their conduct to protect their ability to export a specialized subsegment of U.S. corn production." Mem. at 31.	Not alleged in the Complaints, and contrary to allegations and reasonable inferences therefrom that Syngenta did not make testing methods for defecting MIR162 available. PC ¶¶ 197-99; NC ¶¶ 144-46.
72.	"The supposed causal chain linking Syngenta's action (lawfully selling a U.S.-approved product in the United States beginning in 2010) to Plaintiffs' injury (a supposed drop in the price of corn after	Not alleged in the Complaints, and contrary to the allegation that commercialization of Viptera began in 2011. *See* 32, 36, *supra*.

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	China rejected corn shipments in November 2013) . . ." Mem. at 31.	
73.	"It includes at least the following events: (1) farmers bought Viptera seed and planted it in a way that allegedly permitted cross-pollination; (2) some grain elevators decided to buy corn without making any distinction as to Viptera—they neither tested for Viptera nor sought to turn Viptera corn away; (3) some grain elevators then decided to mix all the corn together; (4) the grain elevators and exporters decided to ship corn to China without attempting to test for Viptera before shipment; (5) after tacitly accepting shipments without testing for Viptera for three years—and after keeping the application for approval of Viptera pending for more than three years (in violation of Chinese law)—China decided to effectively ban *all* U.S. corn imports (including abruptly changing its policies to block imports of U.S. DDGS as well)—a decision conveniently timed to follow shortly after a worldwide glut of corn had depressed corn prices by over 34%, *see supra* note 39; and (6) China's actions (as opposed to record-high corn harvests) supposedly lowered the market price of U.S. corn." Mem. at 31-32.	Not alleged in the Complaints, and contrary to the allegations and reasonable inferences therefrom. *See* 13, 14, *supra*.
74.	"The speculative nature of any such harm is only further compounded here, because Plaintiffs' causal chain would be severed entirely if (as commentators have argued) China actually blocked U.S. corn shipments for trade reasons unrelated to Viptera." Mem. at 32.	Not alleged in the Complaints.

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75.	Citing Letter from J. Schaaf, President of U.S. Grains Council, to Secretary T. Vilsack USDA (July 27, 2014) (stating that China's actions "seem[] clearly to be overtly protectionist and incompatible with China's obligations as a member of the WTO") . . . " Mem. at 32, n. 64.	Not alleged in Complaints. Contrary to allegations and reasonable inferences therefrom that China rejected U.S. corn shipments after it was found to be contaminated with MIR162. PC at 3; NC at 3.
76.	"But the impossibility of securing adequate discovery into the decisional process of a third party not before the Court—and a foreign sovereign like China no less—would likely deprive Syngenta of any chance at a fair ruling on Plaintiffs' claims." Mem. at 32-33.	Not alleged in the Complaints.
77.	"For example, at least six Congresses have considered and failed to enact bills that would have made a 'biotech company [] liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering.'" Mem. at 34-35 and Appendix A1.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
78.	"Similarly, California eliminated part of a bill that would have made 'the manufacturer of a genetically engineered plant . . . liable to any producer, grain, and seed cleaner, handler, or processor injured by the release of that plant into California.'" Assem. Bill 984, 2005 Leg., Reg. Sess. (Cal. 2005). Mem. at 35.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
79.	"New York, Nebraska, Minnesota, Massachusetts, Montana, North Dakota, Oregon, West Virginia, and Vermont have all considered and refused to enact similar bills." Mem. at 35.	Not alleged in the Complaints. Not subject to judicial notice. *See* 14, *supra*.
80.	"The complaints themselves make clear that Plaintiffs are sophisticated industry players who were well aware that cross-pollination and commingling can occur,	Not alleged in the Complaints. Contrary to the allegations in the Complaints and reasonable inferences therefrom that Producer Plaintiffs are primarily farmers and that

	Defendants' Alleged Fact or Inference	Plaintiffs' Objections
	that China had not approved Viptera, and that Syngenta was not attempting to force the rest of the growing and distribution chain to isolate Viptera." Mem. at 40.	Syngenta misled the industry including farmers, as to the approval status of Viptera. PC ¶¶ 240-80 and 4; NC ¶¶ 187-227 and 4.
81.	"Given that China imported *only about one-third of 1%* of U.S. corn production when Viptera was launched, *see supra* note 23, Plaintiffs' theory would mean giving such a biotechnology filibuster to every country that imported a comparable percentage of any given crop." Mem. at 42.	Not alleged in the Complaints and contrary to the Complaints' allegations and reasonable inferences therefrom that Syngenta commercialized Viptera in 2011, and the importance of China as an export market for U.S. corn at the time (PC at 3 and ¶¶ 114, 152-65, 325, 340; NC at 3 and ¶¶ 61, 99-112, 280, 306) and Syngenta's own employees stating in January, 2011 that "China has moved from an insignificant importer of U.S. corn to the second most important market for U.S. corn." PC ¶ 161; NC ¶ 108.
82.	"At the time Viptera was commercialized, moreover, it is a matter of public record that exports to China accounted for only about one-third of 1% of U.S. corn production. *See supra* note 23." Mem. at 45.	Not alleged in the Complaints and contrary to the Complaints' allegations and reasonable inferences therefrom that Syngenta commercialized Viptera in 2011, and the importance of China as an export market for U.S. corn at the time (PC at 3 and ¶¶ 114, 152-65, 325, 340; NC at 3 and ¶¶ 61, 99-112, 280, 306) and Syngenta's own employees stating in January, 2011 that "China has moved from an insignificant importer of U.S. corn to the second most important market for U.S. corn." PC ¶ 161; NC ¶ 108.
83.	"As explained below, neither the Producers nor the Non-Producers has alleged any facts showing specific injury to property that qualifies for this exception." Mem. at 48.	Contrary to Complaints' allegations: "Syngenta's acts and omissions have resulted 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 [plaintiffs'] corn, harvested corn, equipment, storage facilities, and land." PC ¶ 319; NC ¶ 274.
84.	"They do not specifically allege that *their* corn was physically harmed by Viptera." Mem. at 48.	*See* 83, *supra*.

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85.	"Because the Producers base their claims of injury on the same theory of market-wide price effects from a foreign boycott, and not specific injury to *their* corn, the analysis from *Sample* equally applies here and the Producers' claims are barred by the economic loss doctrine." Mem. at 49.	*See* 83, *supra*.
86.	"Thus, Viptera corn could be sold in the U.S. at the same price and in the same way as all other fungible corn." Mem. at 50.	Not alleged in the Complaints. Contrary to allegations in the Complaints and reasonable inferences therefrom that Viptera corn was rejected by Bunge and other elevators. PC ¶ 223; NC ¶ 170.
87.	"Under most standard contract formats for the sale of corn, title passes to the grain elevator upon delivery." Mem. at 50, n.78.	Not alleged in the Complaints.
88.	"The fact that any alleged commingling took place in connection with the Producers' sale of the corn also highlights another factor placing the Producers' claims at the heart of the economic loss rule: Producers had an opportunity to contract around the risk of commingling." Mem. at 52-53.	Not alleged in the Complaints. Contrary to allegations in the Complaints and reasonable inferences therefrom that Syngenta actively misled the industry, including Producers as to the approval status of Viptera. PC at 4, ¶¶ 240-80; NC at 4, ¶¶ 187-227.
89.	"Plaintiffs seek to impose state-law requirements that labels must warn of potential economic loss due to trade disruptions, which is quite plainly 'in addition to or different from' FIFRA's requirement that the label need only contain a warning 'adequate to protect health and the environment.' 7 U.S.C. § 136(1)(G)." Mem. at 56-57.	Not alleged or sought in the Complaints.
90.	"As an initial matter, Plaintiffs do not allege actions *by Syngenta*—and certainly not *intentional* actions—that 'intermeddled' with their chattels. They make general allegations about cross-pollination and commingling of corn that	Contrary to Complaints' allegations and reasonable inferences from those allegations. *See, e.g.*, PC ¶ 550; NC ¶ 411 (Syngenta "intentionally intermeddled" with and brought Viptera and/or Duracade into contact with non-Viptera/Duracade corn in which

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	resulted in Viptera corn coming into contact with other corn. But it was not *Syngenta's* actions that accomplished any such crosspollination or commingling several steps down the distribution chain." Mem. at 58.	Producer Plaintiffs and some Non-Producer Plaintiffs "had possession and/or possessory rights."); PC ¶ 319; NC ¶ 274 ("Syngenta's acts and omissions have resulted in the pervasive contamination of the U.S. corn supply . . .").
91.	"Producers do not even clearly allege that Viptera physically came into contact with (and intermeddled with) *their* corn." Mem. at 60.	*See* 90, *supra*.
92.	"And to the extent they point to commingling, as explained above, *see supra* Part III.A.2, under most standard contracts, once a farmer has sold his corn and delivered it to an elevator, he no longer owns the corn—and he certainly lacks possession." Mem. at 60.	Not alleged in the Complaints.
93.	"Out of six defendants, only one is a Minnesota corporation, *see* PC ¶ 69, and as explained below, Plaintiffs do not allege that the Minnesota entity (Syngenta Seeds) was the central source of the allegedly deceptive practices here." Mem. at 85.	Contrary to Complaints' allegations and reasonable inferences therefrom. *See* PC ¶ 80; NC ¶ 27 (alleging that all Syngenta defendants "acted in concert pursuant to agreements or other arrangements to act in a collective manner and/or as joint venturers regarding the actions and events" in the complaints.").